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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

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Sandra M. Faubion,

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CV 09-8076-PCT-DGC

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Plaintiff,

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**ORDER**

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vs.

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United States of America,

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Defendant.

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Defendant United States of America has filed a Rule 12(b)(1) motion to dismiss two causes of action asserted in Plaintiff Faubion’s amended complaint. Dkt. #11. Faubion opposes the motion and asks the Court to postpone it as a premature motion for summary judgment. Dkt. #14. The government filed a response to Faubion’s motion to continue on November 30, 2009 (Dkt. #16), but Faubion has filed no reply. Neither party has requested oral argument. For reasons that follow, the Court will grant the government’s motion and will deny Faubion’s motion to continue.

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**I. Background.**

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On February 4, 2002, the Internal Revenue Service filed a tax lien on several real estate lots located in Spirit Lake, Idaho. Dkt. #5 at 4. The lien was against “Direct Reach, Inc., as nominee/transferee/alter ego of Sandra M. Faubion.” *Id.* at 5. After the lien was filed, Faubion was allegedly bombarded with a “phalanx of collection letters, revenue agents and inconsistent positions.” *Id.* at 5. In early March of 2002, she filed a request for a collection due process hearing regarding the lien. Dkt. #11-1.

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1 On May 21, 2007, Faubion filed an administrative claim pursuant to 26 U.S.C. § 7432  
2 and § 7433 “for actual direct economic damages for negligence in assessment of tax penalties  
3 and unauthorized collection actions” that related to the lien of February 4, 2002, but received  
4 no meaningful response. Dkt. #5 at 3. She also filed claims for tax refunds for the years  
5 1998, 1999, 2002, and 2003. *Id.* at 4. Faubion alleges that the IRS collected “approximately  
6 \$127,004.33” from the sale of the Spirit Lake properties, but that these collections were never  
7 properly credited to her, and that the IRS never informed her of the exact amounts collected  
8 or credited. *Id.* at 5-6.

9 Faubion filed the present litigation on May 7, 2009 against Nancy Olson, the United  
10 States, and the IRS, asserting claims for “negligence in assessment of tax penalties and  
11 unauthorized collection actions.” Dkt. #1 at 3. On October 1, 2009, Faubion stipulated to  
12 dismiss all Defendants in the lawsuit other than the United States. Dkt. #8.

13 Faubion’s current amended complaint against the United States appears to raise three  
14 causes of action: (1) a refund claim pursuant to 26 U.S.C. § 7722; (2) a wrongful levy claim  
15 pursuant to 26 U.S.C. § 7432; and (3) a civil damages claim for unauthorized collection  
16 actions by the IRS pursuant to 26 U.S.C. § 7433. Dkt. #5. The United States seeks dismissal  
17 of the claims under sections 7432 and 7433 on the ground that this Court lacks subject matter  
18 jurisdiction over them.<sup>1</sup>

## 19 **II. Legal standard.**

20 “The party asserting jurisdiction has the burden of proving all jurisdictional facts.”  
21 *Indus. Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th Cir. 1990) (citing *McNutt v.*  
22 *Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). In effect, courts presume a lack  
23 of jurisdiction until the plaintiff proves otherwise. *See Kokkonen v. Guardian Life Ins. Co.*  
24 *of Am.*, 114 S. Ct. 1673, 1675 (1994); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d  
25 1221, 1225 (9th Cir. 1989). The defense of lack of subject matter jurisdiction may be raised

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27 <sup>1</sup> Faubion attempts to recharacterize the United States’ motion as a Rule 12(b)(6)  
28 motion for dismissal, and cites case law interpreting Rule 12(b)(6). Dkt. #12 at 2-3. The  
motion, however, is brought under Rule 12(b)(1).

1 at any time. *See* Fed. R. Civ. P. 12(h)(3). A Rule 12(b)(1) motion to dismiss “for lack of  
2 subject matter jurisdiction may either attack the allegations of the complaint or may be made  
3 as a ‘speaking motion’ attacking the existence of subject matter jurisdiction in fact.”  
4 *Thornhill Publ’g Co. v. Gen. Tel. & Elecs.*, 594 F.2d 730, 733 (9th Cir. 1979); *see Federal*  
5 *Civil Procedure Before Trial* § 9:78, at 9-18.

6 In resolving a motion under Rule 12(b)(1), the Court is not limited to the allegations  
7 in the pleadings if the “jurisdictional issue is separable from the merits the case.” *Roberts*  
8 *v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987); *see Greene v. United States*, 207 F.  
9 Supp. 2d 1113, 1119 (E.D. Cal. 2002) (citing *Trentacosta v. Frontier Pac. Aircraft Indus.*,  
10 813 F.2d 1553, 1558 (9th Cir. 1987)). “The court may view evidence outside the record, and  
11 no presumptive truthfulness is due to the complaint’s allegations that bear on the subject  
12 matter [jurisdiction] of the court.” *Greene*, 207 F. Supp. 2d at 1119 (citing *Augustine v.*  
13 *United States*, 704 F.2d 1074, 1077 (9th Cir. 1983)); *see Roberts*, 812 F.2d at 1177; *Valdez*,  
14 837 F. Supp. at 1067. Indeed, courts generally are “free to hear evidence regarding  
15 jurisdiction and to rule on that issue prior to trial, resolving factual disputes where  
16 necessary.” *Augustine*, 704 F.2d at 1077. Unless the Court holds an evidentiary hearing,  
17 however, “disputes in the facts pertinent to subject matter are viewed in the light most  
18 favorable to the opposing party.” *Greene*, 207 F. Supp. 2d at 1119 (citing *Dreier v. U.S.*, 106  
19 F.3d 844, 847 (9th Cir. 1996)).

### 20 **III. 26 U.S.C. § 7432 and § 7433.**

21 Statutes of limitations for claims against the United States limit this Court’s  
22 jurisdiction. *United States v. Dalm*, 494 U.S. 596, 608 (1990). As a result, if the statute of  
23 limitations has run on Faubion’s claims under 26 U.S.C. § 7432 and §7433, this Court has  
24 no jurisdiction and they must be dismissed. *Id.*; *Yuen v. United States*, 825 F.2d 244, 245  
25 (9th Cir.1987).

26 Pursuant to Treasury Regulation § 301.7432-1(I), any action under 26 U.S.C. § 7432  
27 must be brought within two years of accrual. The limitations period is the same for an action  
28 brought under 26 U.S.C. § 7433. 26 U.S.C. § 7433(d)(3). A cause of action under either

1 statute accrues when the taxpayer has had a reasonable opportunity to discover all essential  
2 elements of a possible cause of action. Treas. Reg. § 301.7432-1(i)(2); *Wise v. C.I.R.*, 168  
3 F. Supp. 2d 649, 653 (S.D. Tex. 2001).

4 The United States argues that Faubion’s claims under both statutes accrued in March  
5 of 2002, or, at the latest, in 2004, because Faubion had a reasonable opportunity to discover  
6 all essential elements of a possible cause of action by those dates. The United States points  
7 to her request for a due process hearing in March of 2002 as evidence that “Plaintiff had  
8 notice of the liens and challenged them.” Dkt. #11 at 7. The United States also points to her  
9 position as President of Direct Reach, Inc., which would have allowed her to know of the  
10 sales of the Spirit Lake properties when they occurred in 2004. Dkt. #15 at 6.

11 As to the claim under 26 U.S.C. § 7432, in which she asserts that the lien against her  
12 was filed illegally and without due process, Faubion clearly knew of this alleged wrong in  
13 March of 2002 when she requested a collection due process hearing. Dkt. #11-1 at 8.  
14 Faubion had sufficient facts to discover that she had a cause of action under 26 U.S.C.  
15 § 7432. See *Long v. United States*, 604 F. Supp. 2d 119 (D. D.C. 2009) (holding that the  
16 statute of limitations began to run when homeowners first learned of liens at closing of their  
17 home); *Milby v. United States*, 172 F. Supp. 2d 606 (W.D. Pa. 2001) (holding that limitations  
18 period began to run when Plaintiff wrote a letter to the purchaser, demanding that the  
19 purchaser vacate).

20 Faubion claims under 26 U.S.C. § 7433 that the United States employed unfair  
21 collection practices. The only unfair practices Faubion identifies in her complaint are that,  
22 as soon as the lien was filed in 2002, “the Defendants bombarded [her] with a phalanx of  
23 collection letters, revenue officers, revenue agents and inconsistent positions.” Dkt. #5 at 5.  
24 Faubion thus knew in 2002 that the United States was using these practices. *Id.*

25 Because this is a Rule 12(b)(1) motion and the Court has not held an evidentiary  
26 hearing, the Court must construe all facts in the light most favorable to Faubion. *Greene*, 207  
27 F. Supp. 2d at 1119. The material facts, however, are not in dispute. Faubion does not  
28 dispute that she knew of the lien, the sale of the Spirit Lake properties, or the payments to

1 the IRS of the proceeds from the sale by 2004. Evidence provided by the United States  
2 clearly shows that by the time Faubion filed the collection due process letter, she had  
3 sufficient information to file a claim under 26 U.S.C. § 7432 and § 7433. Faubion asserts  
4 that her information was not sufficient, but provides no legal authority for that position. She  
5 contends that because newer “assessments were made by the IRS as late as September 3,  
6 2007,” she could not have known all the necessary elements of her cause of action in 2002.  
7 Dkt. #12 at 2. Faubion cites no legal authority for her contention that the date a statute of  
8 limitations begins to run changes when a later assessment is filed. Moreover, the later  
9 assessment in this case appears to relate only to Faubion’s cause of action for a refund under  
10 26 U.S.C. § 7722 – a cause of action that the United States has not moved to dismiss.

11 Faubion also argues that she did not know, and still does not know, all the essential  
12 elements of a cause of action because the IRS has not disclosed the amounts at issue or the  
13 “full extent of the illegal collection.” *Id.* at 2. The lack of this information did not prevent  
14 Faubion from recognizing her claims and asserting them in this lawsuit.

15 The Court concludes that the statute of limitations has expired. The Court therefore  
16 lacks jurisdiction over the claims under 26 U.S.C. § 7432 and § 7433.<sup>2</sup>

17 **IV. Faubion’s motion to continue.**

18 Faubion attempts to characterize Defendant’s motion as a premature motion for  
19 summary judgment. As noted above, however, the motion clearly is brought under Rule  
20 12(b)(1). This Court has authority when ruling on such a motion to “view evidence outside  
21 the record.” *Greene*, 207 F. Supp. 2d at 1119 (citing *Augustine*, 704 F.2d at 1077). The  
22 motion to continue will be denied.

23 **IT IS ORDERED:**

- 24 1. Defendant’s motion to dismiss the claims under 26 U.S.C. §§ 7432 and 7433  
25 (Dkt. #11) is **granted**.

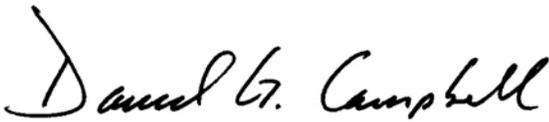
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27 <sup>2</sup> Faubion argues that this Court has jurisdiction under the Administrative Procedure  
28 Act. Dkt. #12 at 3. This argument, however, relates to her refund claim under 26 U.S.C.  
§ 7722, which Defendant is not challenging in the motion to dismiss.

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2. Plaintiff's motion to continue (Dkt. # 14) is **denied**.

DATED this 12th day of January, 2010.



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David G. Campbell  
United States District Judge