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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8 Michael Don Greene,

No. CV-14-08021-PHX-JAT

9
10 Plaintiff,

ORDER

11 v.

12 United States of America,

13
14 Defendants.
15

16 Pending before the Court is Defendant United States of America's (the "United
17 States") Motion to Dismiss (Doc. 13). The Court now rules on this Motion.

18 **I. MOTION TO DISMISS**

19 The United States moves to dismiss Mr. Greene's complaint for lack of subject
20 matter jurisdiction pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(1).

21 **A. Background**

22 Mr. Greene and his former wife ("the Greens") filed a joint 1990 tax return on or
23 about March of 1991. (Doc. 1 at 2). The joint return was a 1040 tax return which
24 reflected an adjusted gross income ("AGI") of \$74,714.42, a taxable income of
25 \$44,968.00, and withholding credits of \$9,803.76. *Id.* The Greens reported a tax liability
26 of \$8,450.00 in the 1040 return, and received a refund of \$934.00. (Doc. 13-1 at 3). Mr.
27 Greene also filed a corporate return for the 1990 taxes of his 100% personally-owned
28 corporation, MDG Inc. (Doc. 1 at 2).

1 In 1992, the Internal Revenue Service (“IRS”) opened an examination of the
2 Greenes’ 1990 tax returns. (Doc. 1 at 2). The IRS completed its examination of the 1990
3 tax returns in 1997. *Id.* After the examination, IRS account records reflected the Greenes’
4 1990 AGI as -\$493,879.58 with a taxable income of \$0.00. *Id.* The 1990 IRS examination
5 work-papers also alleged unreported income of \$888,496.75 to MDG Inc. *Id.* at 3. The
6 IRS issued a Statutory Notice of Deficiency reflecting a deficiency of \$269,830.00, a
7 fraud penalty of \$191,939.00, and an accuracy penalty of \$2,782.00. (Doc. 13-1 at 4).

8 The IRS determined that Mrs. Greene was not liable for the entire tax liability
9 resulting from the 1990 Notice of Deficiency. (Doc. 13-1 at 4). Thus, the IRS assessed
10 taxes on two separate accounts: one Joint Master File account, and one separate Non-
11 Master File account (“NMF 1”) for Mr. Greene individually. *Id.* at 4–5. An amount of
12 approximately \$202,000.00 was assessed to the Joint Master File account of Mr. and Mrs.
13 Greene. *Id.* at 5. The remaining portion of the deficiency, approximately \$350,000.00,
14 was assessed to the separate NMF 1 account under Mr. Greene’s name only. *Id.* After the
15 IRS applied the assessment to the Joint Master File account, the IRS granted Mrs. Greene
16 innocent spouse relief from the joint and several liability. *Id.* The full liability of the Joint
17 Master File was then transferred to a second separate Non-Master File account (“NMF
18 2”) against Mr. Greene only. *Id.* Thus, the liability shown on the Joint Master File
19 account was reduced to \$0.00. *Id.* After Mrs. Greene received innocent spouse relief,
20 “Mr. Greene’s liability was tracked in the two separate assessment files, NMF 1 and
21 NMF 2.” *Id.*

22 In 2012, the United States and Mr. Greene settled a refund suit for Mr. Greene’s
23 1995 tax year. (Doc. 13-1 at 6). “The liability tracked in NMF 2 was paid in full” when
24 \$170,124.00 of the settlement amount was offset against Mr. Greene’s 1990 tax liability.
25 (Doc. 17 at 5). Meanwhile, NMF 1 has an outstanding balance of \$761,101.46 with more
26 interest accruing daily. (Doc. 13-1 at 6).

27 Mr. Greene filed the instant suit seeking a refund for the \$170,124.00 offset
28 against NMF 2. (Doc. 1 at 5).

1 **B. Legal Standard**

2 **1. Rule 12(b)(1)**

3 Rule 12(b)(1) “allows litigants to seek the dismissal of an action from federal
4 court for lack of subject matter jurisdiction.” *Tosco Corp. v. Cmty. for a Better Env’t*,
5 236 F.3d 495, 499 (9th Cir. 2001) *abrogated by Hertz Corp. v. Friend*, 559 U.S. 77
6 (2010). “The party asserting jurisdiction has the burden of proving all jurisdictional
7 facts.” *Indus. Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th Cir. 1990) (citing
8 *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)).

9 An allegation of lack of subject matter jurisdiction may be raised at any time by
10 the parties or the court. Fed. R. Civ. P. 12(h)(3). A Rule 12(b)(1) motion to dismiss “for
11 lack of subject matter jurisdiction may either attack the allegations of the complaint or
12 may be made as a ‘speaking motion’ attacking the existence of subject matter jurisdiction
13 in fact.” *Thornhill Publ’g Co. v. Gen. Tel. & Elecs.*, 594 F.2d 730, 733 (9th Cir. 1979). In
14 resolving a “speaking motion” or “factual attack” under Rule 12(b)(1), the court is not
15 limited to the allegations in the pleadings if the jurisdictional issue is separable from the
16 merits of the case. *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). Instead,
17 the court may view evidence outside the record, and no presumptive truthfulness is due to
18 the complaint’s allegations that bear on the subject matter jurisdiction of the court.
19 *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983). Indeed, “the district
20 court is ordinarily free to hear evidence regarding jurisdiction and to rule on that issue
21 prior to trial, resolving factual disputes where necessary.” *Id.* However, if the court
22 resolves a Rule 12(b)(1) motion on declarations alone, without an evidentiary hearing, it
23 must accept the complaint’s factual allegations as true. *McLachlan v. Bell*, 261 F.3d 908,
24 909 (9th Cir. 2001).

25 **2. Sovereign Immunity, 26 U.S.C. § 7422, and 28 U.S.C. § 1346**

26 “Sovereign immunity limits a federal court’s subject matter jurisdiction over
27 actions brought against a sovereign.” *Alvarado v. Table Mountain Rancheria*, 509 F.3d
28 1008, 1015 (9th Cir. 2007) (citing *Vacek v. U.S. Postal Serv.*, 447 F.3d 1248, 1250 (9th

1 Cir. 2006)). To maintain an action against the United States, “[a] waiver of the Federal
2 Government’s sovereign immunity must be unequivocally expressed in statutory text, and
3 will not be implied.” *Lane v. Pena*, 518 U.S. 187, 192 (1996) (citation omitted).

4 District courts have original jurisdiction over an action “against the United States
5 for the recovery of any internal-revenue tax alleged to have been erroneously or illegally
6 assessed or collected, or any penalty claimed to have been collected without authority or
7 any sum alleged to have been excessive or in any manner wrongfully collected under the
8 internal-revenue laws.” 28 U.S.C. § 1346(a)(1). This statute “must be read in conformity
9 with other statutory provisions which qualify a taxpayer’s right to bring a refund suit
10 upon compliance with certain conditions.” *United States v. Dalm*, 494 U.S. 596, 601
11 (1990). The relevant qualifying provision for the case at hand is 26 U.S.C. § 7422(a).

12 This provision limits the right to bring suit under § 1346(a)(1) by not allowing
13 suits

14 “in any court for the recovery of any internal revenue tax alleged to have
15 been erroneously or illegally assessed or collected, or of any penalty
16 claimed to have been collected without authority, or of any sum alleged to
17 have been excessive or in any manner wrongfully collected, until a claim
for refund or credit has been duly filed with the Secretary, according to the
provisions of law in that regard, and the regulations of the Secretary
established in pursuance thereof.”

18 26 U.S.C. § 7422(a). Along with the statutory provisions, the Supreme Court introduced
19 other requirements which qualify a taxpayer’s right to bring a refund suit. Particularly,
20 the Supreme Court set forth a full-payment requirement in *Flora*. *Flora v. United States*,
21 357 U.S. 63, 72 (1958) [hereinafter *Flora I*].

22 **3. The Full-Payment Requirement**

23 **a. The *Flora* Standard — Generally**

24 A district court has jurisdiction under 28 U.S.C. 1346(a)(1) of a suit by a taxpayer
25 for the refund of income tax payments if the taxpayer has paid the full amount of the
26 assessment. *Flora v. United States*, 362 U.S. 145, 146 (1960) [hereinafter *Flora II*]
27 (“Reargument has not changed our view that this language reflects an understanding that
28 full payment of the tax was a prerequisite to suit.”); *Thomas v. United States*, 755 F.2d

1 728, 729 (9th Cir. 1985) (“Ordinarily, there is no jurisdiction in the district courts over
2 suits for the refund of penalty amounts paid until the taxpayer has paid the *full amount* of
3 the contested penalty assessment”).

4 **b. The *Flora* Standard — The “Assessment”**

5 In *Flora II*, the Supreme Court provided some guidance as to what constitutes an
6 “assessment” for jurisdictional purposes under § 1346(a)(1). See *Flora II*, 362 U.S. at
7 149. In its analysis of the statute’s language, the Court concluded “that the phrase ‘any
8 internal-revenue tax’ can readily be construed to refer to payment of the entire amount of
9 assessment.” *Id.*

10 The Court also relied heavily on “carefully considered dictum” in a previous
11 decision, *Cheatham. Flora I*, 357 U.S. at 68 (citing *Cheatham v. United States*, 92 U.S.
12 85 (1875)). The Court determined that § 1346(a)(1) was “not designed to effect any
13 change relevant to the Cheatham rule” and the “language in opinions . . . after Cheatham
14 is consistent with the Cheatham statement.” *Flora II*, 362 U.S. at 155–56.

15 **i. The *Cheatham* Opinion Regarding “Assessments”**

16 In *Cheatham*, the plaintiff paid money to the defendant which was assessed as
17 income tax in 1865. *Cheatham*, 92 U.S. 85, 85 (1875). The plaintiff appealed from this
18 assessment to the Commissioner of Internal Revenue. *Id.* In 1867, the Commissioner
19 rendered a decision to set aside the assessment and directed an assessor to make a new
20 one. *Id.* The Supreme Court recognized the second assessment as “an entirely new and
21 distinct assessment.” *Id.* at 87. The Court reasoned that the new assessment was distinct
22 because it was made by new rules and the commissioner set aside the original without
23 modification. *Id.* Because the assessment was “new and distinct”, the Court stated that
24 “plaintiffs had an undoubted right to appeal” from this assessment. *Id.*

25 **ii. The *Maryland Casualty* Opinion Regarding**
26 **“Assessments”**

27 Though the Supreme Court did not need to reference it directly in either *Flora*
28 decision, its opinion in *Maryland Casualty Co. v. United States*, 251 U.S. 342, 354

1 (1920) demonstrates a limit to what constitutes a separate assessment for a tax refund
2 claim. In *Maryland Casualty*, the Commissioner of Internal Revenue filed amended
3 returns. *Maryland Casualty Co. v. United States*, 251 U.S. 342, 354 (1920). The returns
4 were “denominated ‘amended returns,’ and . . . in each case the purpose and effect of
5 them was to increase the payment which the claimant was required to make under the law
6 and the payments made on the original returns were credited on the amounts computed as
7 due on the returns as amended.” *Id.* The Supreme Court found *Cheatham* inapplicable,
8 rejecting the argument that the amended returns constituted new assessments. *Id.* The
9 Court also rejected the argument that the amendments were based upon a different
10 principle from the original returns. *Id.* Because the amendments were not new
11 assessments, the Court stated that the amendments did not “release the claimant from its
12 entire failure to observe the statutory requirement.” *Id.*

13 **iii. Internal Revenue Service References Regarding**
14 **“Assessments”**

15 The IRS provides multiple references applicable to resolving the jurisdictional
16 issue in the instant case. Particularly, the IRS provides references applicable to
17 determining whether Mr. Greene has paid the full amount of the assessment.

18 Section 34.1.1.2 of the Internal Revenue Manual provides “[t]axpayers may
19 challenge the validity of the Service’s tax determination by paying the disputed tax and
20 commencing a suit for a refund.”¹ The manual goes on to provide that “it may be
21 necessary for the Service to assert a counterclaim against the taxpayer for any unpaid tax
22 liability that should be made part of the lawsuit.” *Id.*

23 The IRS Transaction Pocket Guide also provides some background directly
24 applicable to the instant case. Specifically, it states “[u]nlike the Master File, where all
25 assessments for the same tax period are posted to one account, a [Non-Master File]
26 account is established for each assessment. Therefore, the [Non-Master File] taxpayer

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28 ¹ Internal Revenue Manual § 34.1.1.2 (2004) (citing 26 U.S.C. § 7422 and 28
U.S.C. § 1346)

1 may have several accounts for the same tax period.”²

2 **C. Analysis**

3 The United States moves to dismiss Mr. Greene’s claim for lack of subject matter
4 jurisdiction. (Doc. 13). Particularly, the United States contends that the District Court
5 does not have subject matter jurisdiction because of Mr. Greene’s alleged failure to
6 satisfy I.R.C § 7422 and *Flora*. (Doc. 13-1 at 6). The United States argues that *Flora*
7 requires Mr. Greene to pay the full taxes, interests, and penalties in both the NMF 1
8 account and the NMF 2 account for the 1990 tax year prior to bringing suit. *Id.* at 7. In
9 response, Mr. Greene contends that *Flora* only requires full payment of the NMF 2
10 account liability because he only brought a refund suit for that amount. (Doc. 15 at 6).

11 *Flora* clearly requires full payment of the assessment as a prerequisite to suit. *See*
12 *Flora II*, 362 U.S. at 149. However, whether Mr. Greene’s settlement, which paid the
13 NMF 2 account liability in full, satisfies the full-payment requirement is at issue here.
14 Similar to the Supreme Court’s approach in *Flora*, the Court now considers the carefully
15 considered dictum in *Cheatham* and *Maryland Casualty* to resolve the assessment issue
16 in the instant case.

17 In *Cheatham*, the Commissioner of Internal Revenue set aside an original
18 assessment and directed another assessment to be made by the assessor for the same tax
19 year. *Cheatham*, 92 U.S. 85, 85 (1875). Furthermore, the Commissioner in *Cheatham* did
20 not modify the original assessment. *Id.* at 87. The assessments in *Cheatham* were
21 considered “new and distinct.” *Id.* In the instant case, the IRS initially assessed the 1990
22 taxes on two separate accounts. (Doc. 13-1 at 5). The IRS set aside an original assessment
23 for which only Mr. Greene was held liable in the NMF 1 account. *Id.* A second
24 assessment was later made against Mr. Greene and placed into the NMF 2 account. *Id.*
25 The two accounts were created by the IRS to separately track Mr. Greene’s liability. *Id.*

26 In *Maryland Casualty*, the Commissioner of Internal Revenue filed amended
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28 ² Internal Revenue Service, Department of the Treasury, Transaction Pocket
Guide, Doc. 10978 (Rev. 12-99)

1 returns which were specifically denominated “amended returns.” *Maryland Casualty*, 251
2 U.S. at 354. Furthermore, the amended returns were created with the purpose and effect
3 of increasing the payments necessary on the original returns. *Id.* In the instant case, the
4 IRS tracked Mr. Greene’s liability in separate “assessment files,” the NMF 1 account and
5 the NMF 2 account. (Doc. 13-1 at 5). The IRS assessed the NMF 2 account liability
6 against Mr. Greene individually as a result of his ex-wife’s innocent spouse relief from
7 their joint liability. *Id.* Thus, the Court is persuaded that NMF 2 was not created with the
8 purpose and effect of increasing the payment required under NMF 1.

9 The IRS created multiple Non-Master File accounts in the instant dispute.
10 (Doc. 13-1 at 5). Pursuant to the language in the IRS guidebook, a Non-Master File
11 account is established for each assessment and the taxpayer may have several accounts
12 for the same tax period.³

13 Based on the specific alleged facts in the instant case, the Court finds the NMF 1
14 and NMF 2 accounts to be sufficiently separate assessments for jurisdictional purposes.
15 Because NMF 2 is the only assessment at issue in this case and the 2012 settlement paid
16 the NMF 2 liability in full, the *Flora* full payment requirement is satisfied. The full-
17 payment requirement was the only disputed prerequisite to I.R.C. § 7422 in this case. In
18 light of 28 U.S.C. § 1346(a)(1) and I.R.C. § 7422, and because all of the prerequisites for
19 suit for a tax refund under I.R.C. § 7422 are satisfied, the United States statutorily waived
20 its sovereign immunity in this case.

21 In sum, the Court finds the alleged facts sufficient to give it subject matter
22 jurisdiction over the NMF 2 tax refund overpayment claim. Therefore, the Court denies
23 the United States’ motion to dismiss for lack of subject matter jurisdiction.

24 **II. CONCLUSION**

25 Based on the foregoing,

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27 ³ Internal Revenue Service, Department of the Treasury, Transaction Pocket
28 Guide, Doc. 10978 (Rev. 12-99)

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IT IS ORDERED that United States' Motion to Dismiss (Doc. 13) is DENIED.
Dated this 24th day of November, 2014.



James A. Teilborg
Senior United States District Judge