

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

-----oo0oo-----

UNITED STATES OF AMERICA,  
Plaintiff,  
  
v.  
  
DANIEL L. KIDWELL,  
Defendant.

CIV. NO. 2:16-433 WBS EFB  
MEMORANDUM AND ORDER RE: MOTION  
FOR SUMMARY JUDGMENT

-----oo0oo-----

The United States brought this action against defendant Daniel L. Kidwell, arising out of defendant's failure to fully pay federal taxes assessed against him. The United States now moves for summary judgment against Kidwell pursuant to Federal Rule of Civil Procedure 56. (Pl.'s Mot. (Docket No. 12-1).)

I. Factual and Procedural History

This case arises out of defendant's failure to fully pay his self-reported employment tax liabilities for the tax

1 periods ending on September 30, 2004, and December 31, 2004.  
2 During the applicable time, defendant owned and operated Kidwell  
3 Glass, and he employed several people through this business.  
4 Defendant was required to file Form 941, Employer's Quarterly  
5 Federal Tax Return, for the periods at issue.

6 A Form 941 for the period ending September 30, 2004,  
7 was filed on April 4, 2005, and a Form 941 for the period ending  
8 December 31, 2004, was filed on January 31, 2005.<sup>1</sup> (Stevko  
9 Decl., Ex. 1 ("Sept. 30 Form 4340") at 1; Ex. 2 ("Dec. 31 Form  
10 4340") at 1 (Docket No. 12-4).) Based on the amounts reported in  
11 the Forms 941, the IRS assessed employment tax liabilities  
12 against defendant on March 28, 2005, and May 23, 2005. (Sept. 30  
13 Form 4340 at 1; Dec. 31 Form 4340 at 1.) As of January 9, 2017,  
14 defendant has an outstanding tax balance of \$96,532.44.<sup>2</sup> (See  
15 Swain Decl., Exs. E-F (Docket No. 12-6).)

16 The United States initiated this action on March 1,  
17 2016, seeking to reduce defendant's remaining federal tax  
18 assessment to judgment. (Docket No. 1.) In his Answer,  
19 defendant alleges that the statute of limitations bars the United  
20 States' recovery. (Answer ¶ 17 (Docket No. 5).) The United  
21 States now moves for summary judgment. (Pl.'s Mot.)

## 22 II. Legal Standard

23 Summary judgment is proper "if the movant shows that

---

24 <sup>1</sup> Accountant Linda Kendall and Kidwell Glass's business  
25 secretary Lorraine Silvera prepared all tax forms. (Luoma Decl.,  
26 Ex. A ("Kidwell Dep.") 30:7-31:22 (Docket No. 13-3).)

27 <sup>2</sup> The total amount includes an assessed tax liability and  
28 accrued, but unassessed, penalties and interest. (See Swain  
Decl. ¶ 24 (Docket No. 12-5).)

1 there is no genuine dispute as to any material fact and the  
2 movant is entitled to judgment as a matter of law." Fed. R. Civ.  
3 P. 56(a). A material fact is one that could affect the outcome  
4 of the suit, and a genuine issue is one that could permit a  
5 reasonable jury to enter a verdict in the non-moving party's  
6 favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248  
7 (1986). The party moving for summary judgment bears the initial  
8 burden of establishing the absence of a genuine issue of material  
9 fact and can satisfy this burden by presenting evidence that  
10 negates an essential element of the non-moving party's case.  
11 Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

12 Alternatively, the movant can demonstrate that the non-moving  
13 party cannot produce evidence to support an essential element  
14 upon which it will bear the burden of proof at trial. Id.

15           Once the moving party meets its initial burden, the  
16 burden shifts to the non-moving party to "designate 'specific  
17 facts showing that there is a genuine issue for trial.'" Id. at  
18 324 (quoting then-Fed. R. Civ. P. 56(e)). The non-moving party  
19 must "do more than simply show that there is some metaphysical  
20 doubt as to the material facts." Matsushita Elec. Indus. Co. v.  
21 Zenith Radio Corp., 475 U.S. 574, 586 (1986). "The mere  
22 existence of a scintilla of evidence . . . will be insufficient;  
23 there must be evidence on which the jury could reasonably find  
24 for the [non-moving party]." Anderson, 477 U.S. at 252.

25           In deciding a summary judgment motion, the court must  
26 view the evidence in the light most favorable to the non-moving  
27 party and draw all justifiable inferences in its favor. Id. at  
28 255. "Credibility determinations, the weighing of the evidence,

1 and the drawing of legitimate inferences from the facts are jury  
2 functions, not those of a judge . . . ruling on a motion for  
3 summary judgment . . . .” Id.

4 III. Discussion

5 A. Reducing Tax Liabilities to Judgment

6 The United States first moves for summary judgment on  
7 its sole claim to reduce defendant’s tax liabilities to judgment.  
8 “In an action to collect tax, the government bears the initial  
9 burden of proof. The government, however, may satisfy this  
10 initial burden by introducing into evidence its assessment of  
11 taxes due” and providing a “minimal factual foundation” for the  
12 assessment. Oliver v. United States, 921 F.2d 916, 919-20 (9th  
13 Cir. 1990); see United States v. Janis, 428 U.S. 433, 440-41  
14 (1976); Genry v. United States, 962 F.2d 555, 557 (6th Cir.  
15 1992).

16 The United States submits IRS Certificates of  
17 Assessments and Payments (“Forms 4340”) as proof that the United  
18 States assessed taxes against defendant. A Form 4340 is  
19 “probative evidence in and of itself and, ‘in the absence of  
20 contrary evidence, is sufficient to establish that notices and  
21 assessments were properly made.’” Hansen v. United States, 7  
22 F.3d 137, 138 (9th Cir. 1993) (quoting Hughes v. United States,  
23 953 F.2d 531, 535 (9th Cir. 1992)); see United States v. Wright,  
24 Civ. No. 2:94-1183 EJM GGH, 1994 WL 715870, at \*7-8 (E.D. Cal.  
25 Oct. 25, 1994) (finding Form 4340 satisfied the government’s  
26 burden at summary judgment of the defendant’s tax liability  
27 amount); see also United States v. Scharringhausen, 226 F.R.D.  
28 406, 411 (S.D. Cal. 2005) (“Forms 4340 are admissible as self-

1 authenticating official records." (citing Hughes, 953 F.2d at  
2 540)).

3 Here, the Form 4340 for the tax period ending September  
4 30, 2004, indicates an assessed tax liability of \$32,239.26.  
5 (Sept. 30 Form 4340 at 4.) The Form 4340 for the tax period  
6 ending December 31, 2004, indicates an assessed tax liability of  
7 \$24,115.94. (Dec. 31 Form 4340 at 4.) Defendant thus has a  
8 total assessed tax liability of \$56,355.20. Defendant admits  
9 that he owned a business subject to employment tax, he had  
10 employment tax liability, and he did not pay all of his  
11 employment tax liability for these periods. (See Answer ¶ 5;  
12 Stevko Decl., Ex. 4 2:15-18.) Thus, the United States has  
13 established its prima facie case through its presentation of  
14 Forms 4340 and minimal evidentiary foundation. See Hardy v.  
15 Comm'r, 181 F.3d 1002, 1005 (9th Cir. 1999).

16 Defendant is also liable for interest and penalties  
17 accruing on his tax liabilities. Mandatory interest accrues on  
18 federal employment tax liabilities until the taxpayer pays the  
19 liability in full. See 26 U.S.C. §§ 6601(a), 6621, 6622(a); 28  
20 U.S.C. § 1961(c); Purer v. United States, 872 F.2d 277, 277 (9th  
21 Cir. 1989) ("[I]nterest on tax deficiencies [is] to be determined  
22 by reference to a floating rate and compounded daily.").  
23 Therefore, the government is entitled to judgment for defendant's  
24 assessed liability on the Forms 4340 and any previously  
25 unassessed statutory additions that have accrued after the  
26 assessments. See United States v. Saruvin, 507 F.3d 811, 816  
27 (4th Cir. 2007) ("Although establishing the amount of tax  
28 liability is a matter of evidence, the amount of interest accrued

1 on such tax liability is a matter of law.”).

2 As of January 9, 2017, defendant has an outstanding  
3 balance, including statutory unassessed interest and penalties,  
4 of \$54,773.81 for the tax period ending September 30, 2004, and  
5 an outstanding balance of \$41,758.63 for the tax period ending  
6 December 31, 2004. (See Swain Decl., Exs. E-F (Docket No. 12-  
7 6).) This is a total tax liability balance of \$96,532.44.  
8 Defendant does not dispute the accuracy of this amount. Because  
9 the United States proved the amount of tax assessment defendant  
10 owes, the court must grant the government’s request to reduce  
11 defendant’s tax liability to judgment unless the statute of  
12 limitations bars the suit.

13 B. Statute of Limitations

14 Plaintiff next moves for summary judgment on  
15 defendant’s sole affirmative defense that plaintiff did not file  
16 this action within the applicable statute of limitations.

17 Section 6502(a) of the Internal Revenue Code provides  
18 that the statute of limitations for collection of a tax is ten  
19 years after the assessment of the tax. 26 U.S.C. § 6502(a). The  
20 ten year statute of limitations period is “suspended for the  
21 period during which the [IRS] is prohibited . . . from making a  
22 levy.” Id. § 6331(i)(5). The IRS cannot levy a tax while an  
23 offer-in-compromise is pending and for thirty days after any  
24 rejection or appeal of the rejection. Id. § 6331(k)(1). “[A]n  
25 offer is pending beginning on the date the [IRS] accepts such  
26 offer for processing.” Id. Thus, the statute of limitations  
27 tolls while an offer-in-compromise is pending and for thirty days  
28 after any rejection of the offer by the IRS. See id. §§

1 6331(i)(5), (k)(1), 6502(a).

2 IRS assessment documents, such as Form 4340, "are  
3 normally entitled to a presumption of correctness." Palmer v.  
4 IRS, 116 F.3d 1309, 1312 (9th Cir. 1997). According to the Forms  
5 4340, an offer-in-compromise was pending on December 21, 2006,  
6 and was "rejected, returned, [and] terminated" on December 7,  
7 2007. (Sept. 30 Form 4340 at 2; Dec. 31 Form 4340 at 2.) The  
8 offer was pending for a total of 351 days. (See Swain Decl. ¶  
9 9.) After the tolling the statute of limitations for 351 days  
10 plus 30 days from denial of the offer to compromise, 26 U.S.C. §  
11 6331(k)(1), the United States had to file suit within 11 years  
12 and 16 days of the tax assessment.

13 The tax for the period ending on September 30, 2004,  
14 was assessed on May 23, 2005. (Sept. 30 Form 4340 at 1.) The  
15 tolled statute of limitations for that period expired on June 8,  
16 2016. The tax for the period ending December 31, 2004, was  
17 assessed on March 28, 2005. (Dec. 30 Form 4340 at 1.) The  
18 tolled statute of limitations for that period expired on April  
19 13, 2016. The United States filed suit on March 1, 2016, which  
20 is within the statute of limitations for both periods at issue.  
21 (See Compl.)

22 Defendant argues that there is a triable issue of  
23 material fact as to whether he submitted an offer-in-compromise.  
24 However, all of the deposition testimony that defendant points to  
25 states that defendant and his agents could not recall whether  
26 defendant submitted an offer-in-compromise. Defendant testified  
27 that he did not handle the taxes for the business, he "would only  
28 be guessing" whether an offer-in-compromise was filed, and it was

1 "a possibility" that his accountant filed an offer for him.  
2 (Kidwell Dep. 64:17-65:21.) Defendant's accountant, Ms. Kendall,  
3 stated that she "didn't even remember [they] did an offer for  
4 [defendant]." (See Luoma Decl., Ex. B 52:5-8 (Docket No. 13-3).)  
5 Defendant's business secretary, when asked whether she was aware  
6 that defendant made an offer-in-compromise, admitted that she was  
7 not the person who was corresponding with the IRS and was "not  
8 aware of an Offer in Compromise that [Ms. Kendall] would have  
9 made." (Id., Ex. C 48:6-49:10.)

10 One's "lack of memory concerning . . . offers-in-  
11 compromise does not create an issue of fact precluding summary  
12 judgment." United States v. Resnick, No. 10 CV 3976, 2012 WL  
13 1080221, at \*3 (N.D. Ill. Mar. 29, 2012) (holding taxpayer could  
14 only controvert evidence of an offer-in-compromise in IRS  
15 documents if there is "some evidentiary support for that  
16 denial"). Defendant's only certain statements regarding the  
17 offer-in-compromise are his admissions that "[a]n offer in  
18 compromise was filed with the [IRS] for some periods." (Stevko  
19 Decl., Ex. 4 2:25-3:2; see also Stevko Decl. 2, Ex. 1 2:5-14  
20 (Docket No. 14-2) (defendant's initial disclosures discussing  
21 persons with knowledge of an offer-in-compromise).) The  
22 uncertain statements by defendant and his agents, without more,  
23 are insufficient to overcome the presumptive correctness of the  
24 offer-in-compromise dates on the Forms 4340.

25 Defendant further argues that the United States  
26 committed spoliation because it destroyed files associated with  
27 defendant's case and cannot produce the original offer-in-  
28

1 compromise letters.<sup>3</sup> (Def.'s Opp'n 5:25-6:12 (Docket No. 13);  
2 see Luoma Decl., Ex. F.) Defendant cites to no authority  
3 indicating that the government must provide the original offer-  
4 in-compromise letter to prove the dates an offer-in-compromise  
5 was pending or denied. To the contrary, several courts have  
6 recognized that the offer-in-compromise dates listed on a Form  
7 4340 are presumptively correct and are evidence that an offer-in-  
8 compromise was actually pending on those dates. See United  
9 States v. Meehan, 530 Fed. App'x 155, 156 (3d Cir. 2013) (holding  
10 offer-in-compromise dates on Form 4340 established that an offer-  
11 in-compromise was pending on those dates); United States v.  
12 Sullivan, Civ. No. 2:12-CV-72, 2013 WL 709222, at \*5 n.7 (D. Vt.  
13 Feb. 27, 2013) ("Just as [Form 4340] is ascribed presumptive  
14 validity, the dates of the . . . offers-in-compromise found in  
15 the IRS 4340 forms are also presumed correct."); cf. United  
16 States v. Capriotti, Civ. No. 1:11-847 SAB, 2013 WL 1563214, at  
17 \*11-12 (E.D. Cal. Apr. 12, 2013) (finding the dates listed on  
18 Form 4340 were sufficient to establish that the assessment was  
19 made within the limitations period). Defendant puts forth no  
20 evidence suggesting the Forms 4340 are incorrect. Thus, the  
21 dates on the Forms 4340 are presumed correct and defendant's  
22 spoliation argument fails.

23 Defendant includes a related argument--that the offer-  
24 in-compromise was actually for a tax liability owed by Ms.  
25 Silvera and not for defendant's tax liability, and thus the

---

26 <sup>3</sup> Neither party disputes that the IRS destroyed the  
27 administrative files for the periods of September 30, 2004, and  
28 December 31, 2004, according to the IRS's standard Records  
Retention Schedules. (See Luoma Decl., Ex. F.)

1 statute of limitations never tolled. For the court to draw this  
2 inference, it would need to assume that the IRS erroneously  
3 entered the offer-in-compromise into the wrong person's IRS file,  
4 listed the wrong dates that the offer was pending and terminated,  
5 and erroneously entered the offer for a different type of tax  
6 liability. For example, the government received Ms. Silvera's  
7 offer-in-compromise on July 17, 2006, and the offer was pending  
8 on August 3, 2006. (See Luoma Decl., Ex. E at 1, 4.) This was  
9 over four months before the offer-in-compromise at issue in  
10 defendant's case was pending. (See Sept. 30 Form 4340; Dec. 31  
11 Form 4340.) The record does not sufficiently support defendant's  
12 assertion that the offer-in-compromise on the Forms 4340 is  
13 actually attributable to Ms. Silvera as to overcome the  
14 presumptive validity of the dates on the Forms 4340. See  
15 Sullivan, 2013 WL 709222, at \*5 n.7. Thus, this argument fails.

16 Defendant lastly argues that the IRS placed his  
17 liabilities into "currently not collectible" status, which  
18 prevents the statute of limitations from tolling. Defendant has  
19 put forth no evidence indicating if, or when, the IRS placed him  
20 into currently not collectible status. Further, currently not  
21 collectible status does not prevent a party from also submitting  
22 an offer of compromise. Doubt as to the collectability of the  
23 full amount of tax liability is one of the IRS's listed grounds  
24 for compromise. See 26 C.F.R. § 301.7122-1(b)(2).

25 Because the Forms 4340 list the dates that there was a  
26 pending offer-in-compromise and defendant has not created a  
27 triable issue of material fact as to the tolling or expiration of  
28 the statute of limitations, the United States filed this action

1 before the statute of limitations expired. Accordingly, the  
2 court must grant plaintiff's motion for summary judgment as to  
3 defendant's statute of limitations affirmative defense.

4 IT IS THEREFORE ORDERED that plaintiff United States'  
5 motion for summary judgment be, and the same hereby is, GRANTED.

6 Judgment shall be entered against defendant in the  
7 amount of \$96,532.44 plus any associated penalties, fines, and  
8 interest that will continue to accrue daily from January 9, 2017,  
9 until paid in full.

10 Dated: February 22, 2017

  
11 **WILLIAM B. SHUBB**  
12 **UNITED STATES DISTRICT JUDGE**

13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28