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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

**JOSEPH GARY BAXTER AND PATRICIA
MARY BAXTER,**

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

Case No. 15-cv-02138-YGR

**ORDER GRANTING MOTION TO DISMISS
WITH LEAVE TO AMEND**

Re: Dkt. No. 15

Plaintiffs Joseph Baxter and Patricia Baxter (“Baxters” or “plaintiffs”) bring this action against the United States of America, the Internal Revenue Service (“IRS”), John Koskinen in his capacity as Commissioner of the IRS, and William Hannon in his capacity as Director of the IRS’s National Research Program (“NRP”) (collectively, “defendants”), challenging defendants’ use of the NRP to audit plaintiffs as an invalid and unconstitutional exercise of the IRS’s authority. Based thereon, plaintiffs seek declaratory and injunctive relief to prohibit the IRS from continuing the NRP audit, compensatory and special damages, and attorney’s fees.

Currently pending before the Court is defendants’ motion to dismiss the complaint (Dkt. No. 15) for lack of subject matter jurisdiction under Rule 12(b)(1), and for failure to state a claim under Rule 12(b)(6). Having carefully considered the papers submitted and the pleadings in this action, for the reasons stated on the record on February 2, 2016, and for the reasons highlighted below, the Court **GRANTS** defendants’ motion **WITH LEAVE TO AMEND**.

I. BACKGROUND

The IRS randomly chose the Baxters as participants for a NRP audit for the 2011 tax year. (Dkt. No. 1, “Compl.” ¶ 22.) NRP audits are entirely random and conducted for the purpose of developing a statistical database for the IRS. (*Id.* ¶ 31.) Instead of being focused on particular portions of a tax return, NRP audits are intended to be exhaustive and address all aspects of a taxpayer’s return. (*Id.* ¶ 32.) NRP audits require an in-depth examination of all books and

1 records. (*Id.* ¶ 34.) Because the Baxters are “elderly individuals of frail health,” the complaint
2 alleges that their “health is placed at risk by NRP audits.” (*Id.* ¶ 8.)

3 Plaintiffs further allege NRP audit techniques are in violation of the IRS’s audit authority
4 as provided in the Internal Revenue Code, 26 U.S.C. § 7602(e), and constitute violations of their
5 rights to due process, privacy, and to be free from cruel and unusual punishment. (*Id.* ¶ 17.)

6 **II. MOTION TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1)**

7 **A. Legal Standard**

8 A motion to dismiss pursuant to Rule 12(b)(1) is a challenge to the court’s subject matter
9 jurisdiction. “Federal courts are courts of limited jurisdiction,” and it is “presumed that a cause
10 lies outside this limited jurisdiction.” *Kokkonen v. Guardian Life Ins.Co. of Am.*, 511 U.S. 375,
11 377 (1994). The party invoking the jurisdiction of the federal court bears the burden of
12 establishing that the court has the requisite subject matter jurisdiction to grant the relief requested.
13 *Id.* A challenge pursuant to Rule 12(b)(1) may be facial or factual. *See White v. Lee*, 227 F.3d
14 1214, 1242 (9th Cir.2000). In a facial attack, the jurisdictional challenge is confined to the
15 allegations pled in the complaint. *See Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004).
16 The challenger asserts that the allegations in the complaint are insufficient “on their face” to
17 invoke federal jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir.2004).
18 To resolve this challenge, the court assumes the allegations in the complaint are true and draws all
19 reasonable inferences in favor of the party opposing dismissal. *See Wolfe*, 392 F.3d at 362.

20 **B. Analysis**

21 To establish subject matter jurisdiction in an action against the United States, plaintiffs
22 must show both (1) a waiver of sovereign immunity, and (2) “statutory authority vesting a district
23 court with subject matter jurisdiction.” *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008,
24 1016 (9th Cir. 2007). Defendants argue that the first requirement is not met here, *i.e.* that
25 plaintiffs have not established that the United States waived sovereign immunity such that
26 plaintiffs may bring their claims against the sovereign. Alternatively, should the Court find a valid
27 waiver of immunity, defendants argue that the Anti-Injunction Act (“AIA”), 26 U.S.C. section
28 7421(a), operates as a specific jurisdictional bar to plaintiffs’ claims for injunctive relief.

1 First, with respect to a valid waiver of sovereign immunity, plaintiffs argue they can
2 proceed under the waiver of sovereign immunity found in the Administrative Procedure Act
3 (“APA”), 5 U.S.C. section 702, which allows a person “suffering legal wrong because of an
4 agency action, or adversely affected or aggrieved by an agency action” to bring a claim against the
5 United States in federal court. 5 U.S.C. § 702. In opposition, defendants argue that the APA’s
6 waiver of sovereign immunity does not extend to challenges of agency action which are not
7 “final,” as required by 5 U.S.C. section 704. *See Gallo Cattle Co. v. U.S. Dept. of Agriculture*,
8 159 F.3d 1194, 1198 (9th Cir. 1998) (“the APA’s waiver of sovereign immunity contains several
9 limitations...[including] § 704, which provides that only ‘[a]gency action made reviewable by
10 statute and final agency action for which there is no other adequate remedy in a court, are subject
11 to judicial review’”).¹ Agency action is final if it marks the consummation of the agency’s
12 decision-making process, and the action is one by which plaintiffs’ rights or obligations have been
13 determined, or from which legal consequences will flow. *Bennett v. Spear*, 520 U.S. 154, 177-78
14 (1997).² The Court finds that plaintiffs have not properly alleged a challenge to a final agency
15 action here, where the IRS initiated an investigation but has not yet determined tax liabilities.³

16 Second, the AIA provides that “no suit for the purpose of restraining the assessment or
17 collection of any tax shall be maintained in any court by any person.” 26 U.S.C. § 7421(a).
18 Where the AIA bars a suit, the court lacks jurisdiction to hear the claim or to grant the relief
19 requested. *Church of Scientology of California v. United States*, 920 F.2d 1481, 1485 (9th Cir.
20

21 ¹ Conflicting Ninth Circuit authority holds the APA’s waiver of sovereign immunity “was
22 clearly intended to cover the full spectrum of agency conduct,” and should not be limited by the
23 APA’s definition of “agency action” in Section 704. *The Presbyterian Church (U.S.A.) v. United*
24 *States*, 870 F.2d 518, 526 (9th Cir. 1989). One district court has resolved the conflict between
25 *Gallo Cattle and Presbyterian Church* by concluding that Section 704’s finality requirement only
26 limits the APA’s waiver of sovereign immunity where the claims are brought under the APA.
27 *Valentini v. Shinseki*, 860 F.Supp.2d 1079, 1102 (C.D.Cal. 2012). As discussed in Section III.B.,
28 *infra*, plaintiffs have not yet clearly stated whether all of their claims are brought pursuant to the
APA. Without further clarity in the pleadings, the Court cannot yet resolve this apparent conflict.

² *See also* discussion of “final agency action” in Section III.B., *infra*.

³ Plaintiffs’ proposed amendments to the complaint (*see* Dkt. No. 20) are not sufficient to
cure the defect. Labeling an IRS determination as “final” does not make it so under Section 704.
The question of whether it so qualifies, for jurisdictional purposes, is a question of a law.

1 1990). Here, the gravamen of plaintiffs’ complaint challenges the assessment of taxes vis-à-vis
2 the NRP audit. The Court therefore finds the AIA also bars plaintiffs’ claims for injunctive relief
3 as currently pled. The complaint alleges no plausible distinction between the NRP audit at issue
4 and the “assessment or collection of any tax.” 26 U.S.C. § 7421(a).

5 **III. MOTION TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)**

6 **A. Legal Standard**

7 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims alleged in
8 the complaint. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1199-1200 (9th Cir. 2003). “Dismissal can be
9 based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a
10 cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).
11 All allegations of material fact are taken as true and construed in the light most favorable to the
12 plaintiff. *Johnson v. Lucent Techs., Inc.*, 653 F.3d 1000, 1010 (9th Cir. 2011). To survive a
13 motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a
14 claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting
15 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

16 In the absence of subject matter jurisdiction over plaintiffs’ claims, the Court cannot reach
17 the legal or factual sufficiency of the complaint under Rule 12(b)(6). *See Moore v. Maricopa*
18 *Cnty. Sheriff’s Office*, 657 F.3d 890, (9th Cir. 2011) (“a district court must first determine whether
19 it has jurisdiction before it can decide whether a complaint states a claim”). Because plaintiffs are
20 given leave to amend, however, the Court provides the following overview of the complaint’s
21 pleading deficiencies as guidance.

22 **B. Overview**

23 Plaintiffs move to dismiss under Rule 12(b)(6) on two grounds, arguing (1) plaintiffs’ APA
24 challenges fail as a matter of law, and (2) plaintiffs cannot bring *Bivens* actions for monetary
25 damages against defendants Koskinen and Hannon (the “individual defendants”).

26 As an initial matter, the Court notes that plaintiffs have not clearly identified whether they
27 bring all non-monetary claims under the APA. While the complaint cites and references the APA
28 at length, only Count Three is specifically brought under the APA. (*See Compl.* ¶¶ 66-75.) To the

1 extent plaintiffs seek injunctive and declaratory relief under the APA, plaintiffs would still be
2 required to challenge a “final agency action” as is required under Section 704. *See F.T.C. v.*
3 *Standard Oil Co. of California*, 449 U.S. 232, 243 (1980) (FTC’s issuance of complaint is not a
4 “final agency action” under the APA because it “had no legal force or practical effect upon
5 [plaintiff’s] daily business other than the disruptions that accompany any major litigation”);
6 *Veldhoen v. U.S. Coast Guard*, 35 F.3d 222, 225 (5th Cir. 1994) (“An agency’s initiation of an
7 investigation does not constitute final agency action.”). Also, there must be a finding that no
8 “other adequate remed[ies] in a court” available to plaintiffs. 5 U.S.C. § 704. However,
9 defendants proffer such remedies as including: (i) a motion to quash a summons, *see* 26 U.S.C. §
10 7609(b), to the extent plaintiffs challenge the government’s authority to issue summonses under
11 the NRP pursuant to 26 U.S.C. 7602(e); (ii) a petition the Tax Court for a redetermination of the
12 deficiency, *see* 26 U.S.C. § 6213(a), should the audit result in a notice of deficiency; and (iii) suit
13 for a refund in the Court of Federal Claims, *see* 26 U.S.C. § 4722, should the audit result in a
14 notice of deficiency. 5 U.S.C. § 704.

15 Further, to the extent *Bivens* claims might be contemplated against the individual
16 defendants, the Ninth Circuit has held that no *Bivens* action may be implied to challenge IRS
17 conduct connected to an audit. *Adams v. Johnson*, 355 F.3d 1179, 1188 (9th Cir. 2004)
18 (“plaintiffs may not pursue a *Bivens* action with complaints about the IRS’s audits, assessments,
19 and collection” of taxes); *see Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 396-97 (1971).

20 **IV. CONCLUSION**

21 Based on the foregoing, defendants’ motion to dismiss is **GRANTED**. While the Court
22 allows leave to amend, it is not clear how plaintiffs can state claims to effectively stop or
23 otherwise impact the ongoing audit, notwithstanding the inconvenience and apparent anxiety it
24 causes.

25 Plaintiffs shall file an amended complaint to address the issues as stated herein and on the
26 record at the hearing no later than **March 7, 2016**. The amended complaint must clearly identify
27 *as to each claim for relief*: (1) a waiver of sovereign immunity, where applicable, (2) the
28 jurisdictional basis for this Court to adjudicate the claim, and (3) the legal basis for the claim.

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IT IS SO ORDERED.

Dated: February 8, 2016


YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE