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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

MARCO T. ORDONEZ,  
  
Plaintiff,  
  
v.  
  
U.S. DEPARTMENT OF THE  
TREASURY; and INTERNAL  
REVENUE SERVICE,  
  
Defendants.

Civil 11cv2340-CAB (NLS)  
No.

**ORDER GRANTING MOTION TO  
DISMISS WITH PREJUDICE**

**[Doc. No. 13]**

Plaintiff, a state prisoner proceeding *pro se*, filed this action on October 6, 2011, then filed an Amended Complaint on February 6, 2012. [Doc. No. 7.] On April 18, 2012, defendant United States of America filed a motion to dismiss the Amended Complaint. [Doc. No. 13.] On June 18, 2012, plaintiff filed an opposition to the motion. [Doc. No. 17.] On June 25, 2012, defendant filed a reply to the opposition. [Doc. No. 18.] The Court deems the matter suitable for submission without oral argument pursuant to Civil Local Rule 7.1(d)(1). After reviewing the submissions of the parties, the Court hereby **GRANTS WITH PREJUDICE** the motion to dismiss.

I. Allegations of Amended Complaint

The Amended Complaint is entitled “Complaint for: Erroneously denied tax refund.” [Doc. No. 7 at 1.] In it, plaintiff alleges that he is a prisoner at Calipatria State Prison and works in the prison as a Program Services Clerk for \$.032 per hour.

1 [Doc. No. 7 at 2, 4.] Plaintiff alleges he received compensation in the amount of  
2 \$8,946.00 for tax year 2006, and reported this on a Form 1040EZ. [Doc. No. 7 at 1.]  
3 Plaintiff also alleges that he provided a Form 4852 (a substitute for a form W-2) with the  
4 Form 1040EX. *Id.* Plaintiff alleges that the State of California does not issue W-2s to  
5 prison inmates. [Doc. No. 7 at 2.]

6 Plaintiff alleges that after he submitted his Form 1040Z, he received a  
7 letter from the IRS requesting proof of wages. *Id.* Plaintiff claims that he responded by  
8 producing a copy of certain periodic pay statements. *Id.* On March 2, 2010, Plaintiff  
9 alleges he received a letter from the IRS informing him that his claim for refund was  
10 disallowed. Plaintiff alleges he appealed that decision by filing a Form 1040X on March  
11 29, 2010. Plaintiff alleges the IRS denied his claim in August of 2010 and the IRS  
12 denied his second appeal on November 2, 2010. *Id.*

13 Plaintiff requests a declaratory judgment that: (1) affirms his and other  
14 similarly situated prisoners status as common law employees under I.R.C. § 3121(d)(2);  
15 (2) declares that a person in his position is in compliance with the law and not  
16 committing fraud by filing a tax return; (3) that services and property received by a  
17 prisoner are part of gross income under I.R.C. § 61; and (4) to recognize the legitimacy  
18 of his tax refunds and all other legitimate claims submitted by the incarcerated. [Doc.  
19 No. 7 at 5-6.] Additionally, plaintiff seeks compensatory damages of \$1,000,000.00 for  
20 alleged emotional and psychological damage caused by the denial of his tax claims as  
21 well as \$1,000,000.00 in punitive damages for violations of his rights under the eighth  
22 and fourteenth amendments to the constitution. [Doc. No. 7 at 6-7.]

## 23 II. Discussion

### 24 1. Legal Standard.

25 The plaintiff bears the burden of establishing subject matter jurisdiction  
26 and trial courts will presume a lack of jurisdiction until the plaintiff proves otherwise.  
27 *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994); *Ass'n of*  
28 *American Medical Colleges v. U.S.*, 217 F.3d 770, 778 (9th Cir.2000); *Sun Microsystems*

1 *Inc. v. Hynix Semiconductor Inc.*, 2007 WL 1056783, \*2 (N.D.Cal.2007). A  
2 jurisdictional challenge under Rule 12(b)(1) may be made either on the face of the  
3 pleadings or by presenting extrinsic evidence. *Warren v. Fox Family Worldwide, Inc.*,  
4 328 F.3d 1136, 1139 (9th Cir.2003). “In a facial attack, the challenger asserts that the  
5 allegations contained in a complaint are insufficient on their face to invoke federal  
6 jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the  
7 allegations that, by themselves, would otherwise invoke federal jurisdiction.” *See Safe*  
8 *Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir.2004) (noting that an attack  
9 was factual where a defendant challenged plaintiff’s contention that grass residue  
10 constitutes solid waste under RCRA). Here, defendant asserts a facial attack [Doc. No.  
11 13-1 at 3]. Therefore, the Court must accept the complaint’s allegations as true. *Safe Air*  
12 *for Everyone*, 373 F.3d at 1039.

13 2. Claim for tax refund.

14           The gravamen of plaintiff’s complaint appears to be a claim for a tax  
15 refund. The United States, as a sovereign entity, is immune from suit except when it  
16 consents to be sued. *United States v. Dalm*, 494 U.S. 596, 608 (1990); *United States v.*  
17 *Mitchell*, 445 U.S. 535, 538 (1980). It is the plaintiff’s burden to establish the jurisdiction  
18 of the court, and thus, plaintiff must show a waiver of sovereign immunity. *See McNutt*  
19 *v. General Motors Acceptance Corp.*, 298 U.S. 178, 188 (1936).

20           Plaintiff fails to show that the United States has waived immunity from  
21 suit here. Section 7422(a) of the Internal Revenue Code provides that “[n]o suit or  
22 proceeding can be maintained in any court for the recovery of any internal revenue tax  
23 alleged to have been erroneously or illegally assessed or collected ... until a claim for  
24 refund or credit has been duly filed with the Secretary.” 26 U.S.C. § 7422(a).  
25 Furthermore, in order for a district court to have jurisdiction over a suit for the refund of  
26 taxes, the taxpayer must first have paid the assessment, or a divisible portion thereof, for  
27 which relief is sought. See 26 U.S.C. §§ 7422(a), 6532(a); *Thomas v. United States*, 755  
28 F.2d 728, 729 (9th Cir.1985); *Flora v. United States*, 362 U.S. 145 (1960).

1 Here, plaintiff fails to allege what amount of tax Plaintiff owed for the  
2 2006 tax year or the amount of tax he was assessed for that year. [Doc. No. 7 at 2-5.]  
3 More importantly, plaintiff does not allege that he fully paid whatever amount of tax he  
4 was assessed (if any). Full payment of the assessed amount of taxes is a legal  
5 prerequisite to a suit for refund. *See* I.R.C. § 7422; *Flora*, 362 U.S. at 150-151. Without  
6 an allegation of full payment, plaintiff's Amended Complaint fails to establish that  
7 subject matter jurisdiction exists for a suit for refund. *See Del Elmer; Zachay v.*  
8 *Metzger*, 967 F.Supp. 398, 405 (S.D. Cal. 1997)(where plaintiff has failed to allege  
9 jurisdictional prerequisites for a refund suit, the Court lacks subject matter jurisdiction).  
10 In his opposition, plaintiff admits that he does not, and apparently cannot, allege full  
11 payment of the assessed tax. [Doc. No. 17 at 5.] Therefore, the defendant's motion to  
12 dismiss this claim is GRANTED without leave to amend.

### 13 3. Declaratory Relief Claims.

14 Plaintiff also seeks declaratory relief on behalf of himself and others  
15 similarly situated<sup>1</sup> with regard to federal taxes. However, declaratory relief with respect  
16 to federal taxes is barred by 28 U.S.C. § 2201. Section 2201(a) states in relevant part:

17 In a case of actual controversy within its jurisdiction,  
18 *except with respect to Federal taxes ... any court of the*  
19 *United States, upon the filing of an appropriate pleading,*  
*may declare the rights and other legal relations of any*  
*interested party seeking such declaration.....*

20 28 U.S.C. § 2201 (emphasis added).

21 The language of the Declaratory Judgment Act withdraws jurisdiction  
22 from federal courts over any suit seeking a declaratory judgment with respect to federal  
23 taxes, whether or not the suit would have the effect of restraining the assessment or  
24 collection of federal taxes. *Alexander v. "Americans United" Inc.*, 416 U.S. 752, 759 n.

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26 <sup>1</sup> To the extent plaintiff purports to represent others "similarly situated," such claims are also  
27 barred. Although a non-attorney may appear in propria persona in his own behalf, that privilege is  
28 personal to him. *McShane v. United States*, 366 F.2d 286, 288 (9th Cir.1966). He has no authority to  
appear as an attorney for others than himself. *Russell v. United States*, 308 F.2d 78, 79 (9th Cir.1962);  
*Collins v. O'Brien*, 208 F.2d 44, 45 (D.C.Cir.1953), *cert. denied*, 347 U.S. 944, 74 S.Ct. 640, 98 L.Ed.  
1092 (1954).

1 10 (1974); *Hutchinson v. United States*, 677 F.2d 1322, 1326 (9th Cir.1982).

2 Accordingly, this Court lacks subject matter jurisdiction over plaintiff's  
3 claim for a declaratory judgment with respect to his federal tax liabilities and the tax  
4 collection activities taken against him. Therefore, the defendant's motion to dismiss this  
5 claim is **GRANTED** without leave to amend.

6 4. Claims for compensatory damages for emotional and psychological damage.

7 In addition to declaratory relief, plaintiff seeks damages for "the  
8 emotional and psychological damage produced by the irreparable financial harm" caused  
9 by the denial of his tax claims. [Doc. No. 7 at 6.] However, such claims are also barred  
10 for lack of subject matter jurisdiction. "The Federal Government cannot be sued without  
11 its consent." *United States v. Navajo Nation*, 556 U.S. 287, 289 (2009). Where the  
12 United States has not consented to suit, the Court lacks jurisdiction over the subject  
13 matter of the action and dismissal is required. *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458  
14 (9th Cir.1985). A court strictly construes waivers of sovereign immunity, which must be  
15 unequivocally expressed in the statutory text; to show that the government is liable for  
16 awards of monetary damages, the waiver of sovereign immunity must extend  
17 unambiguously to such monetary claims. *Oklevueha Native Am. Church of Hawaii, Inc.*  
18 *v. Holder*, 676 F.3d 829, 840 (9th Cir.2012).

19 The Federal Tort Claims Act ("FTCA") is the exclusive remedy for a  
20 claim against the United States for money damages for injury or loss of property or  
21 personal injury or death caused by the negligent or wrongful act or omission of any  
22 employee of the Government while acting within the scope of his office or employment.  
23 28 U.S.C. § 2679(b)(1). Even though the FTCA provides certain remedies to sue the  
24 federal government and its employees, it has limitations and exceptions. First, a  
25 prerequisite to the waiver of sovereign immunity under the FTCA requires the claimant  
26 to present an administrative claim to the appropriate Federal agency first and to have his  
27 claim finally denied by the agency. 28 U.S.C. § 2675. If this is not done, a plaintiff's  
28 claim is premature. *Meridian Int'l Logistics, Inc. v. United States*, 939 F.2d 740, 743 (9th

1 Cir.1991). In this case, there is no record before the Court that indicates plaintiff filed  
2 such a claim, and the claim had been denied. Second, the FTCA does not extend to any  
3 “claim arising in respect of the assessment or collection of any tax ....” 28 U.S.C. §  
4 2680(c); *Morris v. United States*, 521 F.2d 872, 874 (9th Cir.1975). Here, plaintiff’s  
5 claims arise out of an alleged failure to provide a tax refund, and thus, the FTCA does  
6 not apply. In addition, Plaintiff has failed to cite any other statutory authority that waives  
7 the United States' sovereign immunity in this case. Therefore, the defendant’s motion to  
8 dismiss the claims for compensatory damages for emotional and psychological damages  
9 is GRANTED without leave to amend.

10 5. Punitive damages.

11 Plaintiff also seeks punitive damages for the federal defendant’s  
12 “malicious and deliberate indifference and callous disregard of federal tax regulations  
13 and applicable law.” [Doc. No. 7 at 6.] In doing so, plaintiff does not allege any waiver  
14 of sovereign immunity. The United States cannot be sued for punitive damages unless  
15 Congress explicitly authorizes such liability. *Missouri Pacific Railroad Co. v. Ault*, 256  
16 U.S. 554 (1921); *Kasprik v. United States*, 87 F.3d 462, 465 (11th Cir. 1996). Sovereign  
17 immunity has not been waived with respect to punitive damages. Therefore, the motion  
18 to dismiss the claim for punitive damages is GRANTED without leave to amend.

19 6. Constitutional claims.

20 Plaintiff alleges that he is entitled to damages based upon vague  
21 allegations that his rights under the eighth and fourteenth amendments of the constitution  
22 have been violated. [Doc. No. 7 at 7.] To the extent plaintiff is purporting to state a  
23 claim under 42 U.S.C. § 1983, plaintiff has failed to establish a waiver of sovereign  
24 immunity. The United States is a sovereign, and may not be sued for money damages  
25 without its consent. *United States v. Testan*, 424 U.S. 392, 399 (1976).<sup>2</sup> The United  
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27 <sup>2</sup> In his opposition, plaintiff requests leave to substitute the IRS and the Treasury Department for  
28 the United States. [Doc. No. 17 at 1.] However, a suit for damages against a federal agency or federal  
employees in their official capacity is essentially a suit against the United States and is also barred by  
sovereign immunity absent statutory consent. *Gilbert v. DaGrossa*, 756 F.2d 1455, 1460 & n. 6 (9th

1 States has not waived its sovereign immunity for actions seeking damages for  
2 constitutional violations. *See Holloman v. Watt*, 708 F.2d 1399, 1401–02 (9th Cir.1983)  
3 (rejecting claimant's argument that sovereign immunity did not apply to his due process  
4 claim for damages when the federal defendants were being sued in their official capacity  
5 only); *Arnsberg v. United States*, 757 F.2d 971, 980 (9th Cir.1984) (holding plaintiff's  
6 damages claim for violation of his Fourth Amendment rights against the United States  
7 was barred by sovereign immunity). “Where a suit has not been consented to by the  
8 United States, dismissal of the action is required.” *Gilbert*, 756 F.2d at 1458. Therefore,  
9 defendant’s motion to dismiss plaintiff’s claims for damages for alleged constitutional  
10 violations is GRANTED without leave to amend.

11 III. Conclusion

12 For the foregoing reasons, Defendant’s motion to dismiss is **GRANTED**  
13 **WITH PREJUDICE**. The Clerk of the Court shall **TERMINATE** the action.

14  
15 DATED: June 24, 2013

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18 **CATHY ANN BENCIVENGO**  
United States District Judge

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Cir.1985).