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**THE DISTRICT COURT OF GUAM**

<p>JAYDEEN C. DELA CRUZ,</p> <p style="text-align: center;">Petitioner,</p> <p style="text-align: center;">vs.</p> <p>DIRECTOR, DEPARTMENT OF REVENUE AND TAXATION,</p> <p style="text-align: center;">Respondent.</p>
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CIVIL CASE NO. 16-00029

**DECISION AND ORDER**

Before the court are the following motions: (1) Petitioner’s Application to Proceed without Prepaying Fees or Costs (“Application”) (ECF No. 3); and (2) Respondent’s Motion to Dismiss Pursuant to FED. R. CIV. P. 12(b)(1) (ECF No. 5). Based upon her Application, it appears that Petitioner is qualified to proceed in forma pauperis, without paying the necessary fees, since she has stated in her Application that she has no income.<sup>1</sup> However, for the reasons stated herein, Respondent’s Motion to Dismiss is **GRANTED**,<sup>2</sup> and the case is hereby **DISMISSED**.

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<sup>1</sup> Although Petitioner stated in her Application that she has “0” income, she also stated that she has received income from various sources. See Application, ECF No. 3, at 1.

<sup>2</sup> Included in Respondent’s Motion to Dismiss is a request for litigation costs award. This request is hereby **DENIED**.

1           **I. Factual and Procedural Background**

2           On April 8, 2016, Petitioner Jaydeen C. Dela Cruz (“Dela Cruz”) filed a Petition in a Tax  
3 Case. See ECF No. 1. Therein, Dela Cruz alleges the following against Respondent Department  
4 of Revenue and Taxation (“DRT”): (1) Notice of Deficiency; (2) Notice of Determination  
5 Concerning Collection Action; (3) Notice of Determination Concerning Worker Classification;  
6 and (4) Notice of Determination Concerning Request for Relief from Joint and Several Liability.  
7 Id. at 1. Dela Cruz further alleges that the “deficiencies (or liabilities) as determined by DRT are  
8 in income taxes for the calendar year(s) 1980-present, in the amount of \$580,000 of which  
9 \$4,200,000,000.00 million [sic], is in dispute.” Id. at 2.

10           On May 23, 2016, DRT filed a Motion to Dismiss Pursuant to FED. R. CIV. P. 12(b)(1).  
11 See ECF No. 5. Therein, DRT moves the court to dismiss the petition for lack of subject matter  
12 jurisdiction. DRT also moves the court for reasonable litigation costs. Dela Cruz has not filed a  
13 response to DRT’s motion to dismiss.<sup>3</sup>

14           **II. Discussion**

15                   **a. Lack of Subject Matter Jurisdiction**

16           Federal Rule of Civil Procedure 12(b)(1) provides that a court may dismiss a complaint  
17 for lack of subject matter jurisdiction. FED. R. CIV. P. 12(b)(1). A jurisdictional challenge under  
18 Rule 12(b)(1) may be facial or factual. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004).

19           “In a facial attack, the challenger asserts that the allegations contained in a complaint are  
20 insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the  
21 challenger disputes the truth of the allegations that, by themselves, would otherwise invoke  
22 federal jurisdiction.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2016).

23           If the motion is a facial attack, the court must accept all facts pled in the complaint as true

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<sup>3</sup> Pursuant to Civil Local Rule 7(f), Dela Cruz had 21 days to file an opposition to DRT’s motion. The deadline for such filing has since expired.

1 and draw all reasonable inferences in favor of the plaintiff. Wolfe, 392 F.3d at 362. When a  
2 defendant factually challenges the plaintiff's assertion of jurisdiction, a court does not presume  
3 the truthfulness of the plaintiff's allegations and may consider evidence extrinsic to the complaint  
4 “without converting the motion to dismiss into a motion for summary judgment.” See Safe Air  
5 for Everyone, 373 F.3d at 1039 (citations omitted). “[T]he party opposing the motion must  
6 furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter  
7 jurisdiction.” Savage v. Glendale Union High School, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003).

8 In this case, DRT asserts that this court lacks subject matter jurisdiction because as a Tax  
9 Court, “[a] valid notice of deficiency and a timely petition are essential to the Tax Court’s  
10 deficiency jurisdiction,” citing Pietanza v. Commissioner, 92 T.C. 729, 735 (1989), and in this  
11 case, neither one exists. See ECF No. 6, at 4. DRT asserts that it had never issued a notice of  
12 deficiency or any notices of determinations to Dela Cruz. Id. at 5.

13 Because this is a factual attack, the court can consider the declaration of DRT’s Tax  
14 Enforcement Programs Administrator Herbert S. Fukada. See Safe Air for Everyone, 373 F.3d at  
15 1039. The declaration states that Dela Cruz “was never selected for audit by the Guam  
16 Department of Revenue and Taxation. As such, she does not have any outstanding tax liabilities  
17 owed to the Department and the Department has not instituted any collection procedures against  
18 the Petitioner.” See Decl., ECF No. 7, at 2, ¶ 4. Further, DRT “has never issued to Ms. Dela Cruz  
19 a notice of deficiency, a notice of determination concerning collection action, a notice of  
20 determination concerning worker classification, or a notice of determination concerning  
21 Petitioner’s request for relief from joint and several liability.” Id. at ¶ 5.

22 Dela Cruz has failed to respond to the instant motion and has failed to furnish affidavits  
23 or other evidence to show that a notice of deficiency or any notices of determinations were  
24 issued to her. In her Petition, Dela Cruz indicated that she enclosed a “copy of the Determination

1 or Notice DRT issued to” her. See ECF No. 1, at 3. However, there was no copy enclosed or filed  
2 with her Petition or under the instant case, Civil Case No. 16-00029. The law is well established  
3 that for this court to have jurisdiction, “there must be a valid notice of deficiency[.]”Pietanza, 92  
4 T.C. at 735. None was issued here.<sup>4</sup> Accordingly, the court hereby **GRANTS** Respondent’s  
5 motion to dismiss.<sup>5</sup>

6 **b. Litigation Costs Award**

7 DRT argues that it should be awarded litigation costs pursuant to 26 U.S.C. §7430(a),  
8 including attorney’s fees. See ECF No. 6, at 6. DRT notes that the “Organic Act of Guam  
9 provides that the income tax laws in force in the United States of America and those which may  
10 thereafter be enacted shall be held to be likewise in force on Guam. Under section 1421i(e) of the  
11 Organic Act, the Government of Guam is given the authority and provisions for mirroring the  
12 Internal Revenue Code, substituting ‘Guam’ for the ‘United States’ . . .” Id. at 6 n.1.

13 Section 7430(a) of Title 26 of the United States Code provides that “[i]n any  
14 administrative or court proceeding which is brought by or against the United States in connection  
15 with the determination, collection, or refund of any tax, interest, or penalty under this title, the  
16 prevailing party may be awarded a judgment or a settlement for—(1) reasonable administrative  
17 costs incurred in connection with such administrative proceeding within the Internal Revenue  
18 Service, and (2) reasonable litigation costs incurred in connection with such court proceeding.”  
19 26 U.S.C. §7430(a).

20 “Prevailing party” is defined as “any party in any proceeding to which subsection (a)  
21 applies (other than the United States or any creditor of the taxpayer involved) . . .” 26 U.S.C.

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23 <sup>4</sup> Any amendments to the Complaint would be futile given that there is no notice of deficiency or any notices of  
24 determinations issued by DRT against Dela Cruz. See *Rodriguez v. Steck*, 795 F.3d 1187, 1188 (9th Cir. 2015);  
*Akhtar v. Mesa*, 698 F.3d 1202, 1212-13 (9th Cir. 2012).

<sup>5</sup> The court need not address the other arguments raised by Respondent.

1 §7430(c)(4). As such, the United States is not considered a prevailing party and therefore is not  
2 entitled to any administrative or litigation costs pursuant to 26 U.S.C. 7430(a). The same analysis  
3 applies if this court were to substitute the term “Guam” for “United States.” Guam would not be  
4 considered a prevailing party pursuant to 26 U.S.C. §7430(c)(4).

5 Accordingly, DRT’s request for litigation costs, including attorney’s fees is hereby  
6 **DENIED.**

7 **III. Conclusion**

8 Based on the foregoing, the court hereby **GRANTS** Respondent DRT’s motion to  
9 dismiss, and **DENIES** Respondent DRT’s request for litigation costs.

10 **SO ORDERED.**



11 /s/ Frances M. Tydingco-Gatewood  
12 Chief Judge  
13 Dated: Mar 29, 2017  
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