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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. 16-00035

**DECISION AND ORDER**

Before the court is Respondent’s Motion to Dismiss Pursuant to FED. R. CIV. P. 12(b)(1). See ECF No. 7. For the reasons stated herein, Respondent’s Motion to Dismiss is **GRANTED**,<sup>1</sup> and the case is hereby **DISMISSED**.

**I. Factual and Procedural Background**

On May 2, 2016, Petitioner Jaydeen C. Dela Cruz (“Dela Cruz”) filed a Petition in a Tax Case. See ECF No. 1. Therein, Dela Cruz alleges the following against Respondent Department of Revenue and Taxation (“DRT”): (1) Notice of Deficiency; (2) Notice of Determination Concerning Collection Action; (3) Notice of Determination Concerning Worker Classification; and (4) Notice of Determination Concerning Request for Relief from Joint and Several Liability.

<sup>1</sup> Included in Respondent’s Motion to Dismiss is a request for litigation costs award. This request is hereby **DENIED**.

1 Id. at 1. Dela Cruz further alleges that the “deficiencies (or liabilities) as determined by DRT are  
2 in income taxes for the calendar year(s) 1998-1999, in the amount of \$500,000 of which 980  
3 million, is in dispute.” Id. at 2. Dela Cruz also alleges years “present”, in the amounts of “1,400  
4 Billion” and “27 Trillion” are in dispute. Id.

5 On June 21, 2016, DRT filed a Motion to Dismiss Pursuant to FED. R. CIV. P. 12(b)(1).  
6 See ECF No. 7. Therein, DRT moves the court to dismiss the petition for lack of subject matter  
7 jurisdiction. DRT also moves the court for reasonable litigation costs. Dela Cruz has not filed a  
8 response to DRT’s motion to dismiss.<sup>2</sup>

## 9 **II. Discussion**

### 10 **a. Lack of Subject Matter Jurisdiction**

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

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

18 If the motion is a facial attack, the court must accept all facts pled in the complaint as true  
19 and draw all reasonable inferences in favor of the plaintiff. *Wolfe*, 392 F.3d at 362. When a  
20 defendant factually challenges the plaintiff’s assertion of jurisdiction, a court does not presume  
21 the truthfulness of the plaintiff’s allegations and may consider evidence extrinsic to the complaint  
22 “without converting the motion to dismiss into a motion for summary judgment.” See *Safe Air*  
23 *for Everyone*, 373 F.3d at 1039 (citations omitted). “[T]he party opposing the motion must

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24 <sup>2</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 furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter  
2 jurisdiction.” *Savage v. Glendale Union High School*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003).

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

8 Because this is a factual attack, the court can consider the declaration of DRT’s Tax  
9 Enforcement Programs Administrator Herbert S. Fukada. See *Safe Air for Everyone*, 373 F.3d at  
10 1039. The declaration states that Dela Cruz “was never selected for audit by the Guam  
11 Department of Revenue and Taxation. As such, she does not have any outstanding tax liabilities  
12 owed to the Department and the Department has not instituted any collection procedures against  
13 the Petitioner.” See Decl., ECF No. 5, at 2, ¶ 4. Further, DRT “has never issued to Ms. Dela Cruz  
14 a notice of deficiency, a notice of determination concerning collection action, a notice of  
15 determination concerning worker classification, or a notice of determination concerning  
16 Petitioner’s request for relief from joint and several liability.” *Id.* at ¶ 5.

17 Dela Cruz has failed to respond to the instant motion and has failed to furnish affidavits  
18 or other evidence to show that a notice of deficiency or any notices of determinations were  
19 issued to her. The law is well established that for this court to have jurisdiction, “there must be a  
20 valid notice of deficiency[.]” *Pietanza*, 92 T.C. at 735. None was issued here.<sup>3</sup> Accordingly, the  
21 court hereby **GRANTS** Respondent’s motion to dismiss.<sup>4</sup>

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22  
23 <sup>3</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>4</sup> The court need not address the other arguments raised by Respondent.

1                   **b. Litigation Costs Award**

2                   DRT argues that it should be awarded litigation costs pursuant to 26 U.S.C. §7430(a),  
3 including attorney’s fees. See ECF No. 4, at 6. DRT notes that the “Organic Act of Guam  
4 provides that the income tax laws in force in the United States of America and those which may  
5 thereafter be enacted shall be held to be likewise in force on Guam. Under section 1421i(e) of the  
6 Organic Act, the Government of Guam is given the authority and provisions for mirroring the  
7 Internal Revenue Code, substituting ‘Guam’ for the ‘United States’ . . .” Id. at 6 n.1.

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

15                   “Prevailing party” is defined as “any party in any proceeding to which subsection (a)  
16 applies (other than the United States or any creditor of the taxpayer involved) . . .” 26 U.S.C.  
17 §7430(c)(4). As such, the United States is not considered a prevailing party and therefore is not  
18 entitled to any administrative or litigation costs pursuant to 26 U.S.C. 7430(a). The same analysis  
19 applies if this court were to substitute the term “Guam” for “United States.” Guam would not be  
20 considered a prevailing party pursuant to 26 U.S.C. §7430(c)(4).

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

23                   **III. Conclusion**

24                   Based on the foregoing, the court hereby **GRANTS** Respondent DRT’s motion to

1 dismiss, and **DENIES** Respondent DRT's request for litigation costs.

2 **SO ORDERED.**



3 /s/ Frances M. Tydingco-Gatewood  
4 Chief Judge  
5 Dated: Mar 29, 2017

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