

APPENDICES

APPENDIX A

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NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

THOMAS A. FORREST, JAMIE W. FORREST,
Plaintiffs-Appellants

v.

UNITED STATES,
Defendant-Appellee

2020-1923

Appeal from the United States Court of Federal Claims
in No. 1:19-cv-00110-DAT, Judge David A. Tapp.

Decided: July 8, 2022

THOMAS FORREST, Virginia Beach, VA, pro se.

JAMIE W. FORREST, Virginia Beach, VA, pro se.

ELISSA HART-MAHAN, Tax Division, United States Department of Justice, Washington, DC, for defendant-appellee. Also represented by BRUCE R. ELLISEN, RICHARD E. ZUCKERMAN.

Before REYNA, CHEN, and STARK, *Circuit Judges*.

PER CURIAM.

Pro se Appellants Thomas and Jamie Forrest appeal the United States Court of Federal Claims' dismissal of their lawsuit seeking refunds for taxes paid for the 1997 tax year. The Court of Federal Claims dismissed their case for lack of subject-matter jurisdiction because it determined that the Forrests failed to file a timely tax refund claim with the Internal Revenue Service for the 1997 tax year. We affirm.

BACKGROUND

Thomas Forrest served in the U.S. Navy. In 1997, he separated from active duty and received a separation payment of \$45,877, of which \$12,845.57 was withheld for tax purposes.¹ App'x 1. Subsequently, Mr. Forrest joined the Navy Reserves for several years, after which he re-joined active duty with the Navy. App'x 2.

On April 30, 2015, Mr. Forrest retired from active duty and became eligible for retirement payments. *Id.* Because service members cannot receive both separation and retirement pay for the same period of service, the Defense Finance and Accounting Service determined that the *gross* pre-tax amount of Mr. Forrest's 1997 separation payment would be deducted from his retirement payments, even though he had dutifully paid income taxes on that amount in 1997. *Id.*; see 10 U.S.C. § 1174(h)(1). Thus, on May 20, 2016, the Forrests filed an amended 1997 tax return seeking to exclude the separation payment as taxable income and to obtain a refund of \$12,838 based on taxes previously paid. App'x 2; S. App'x 67–68. On January 31, 2017, the IRS denied the claim, after which the Forrests initiated this tax refund action in the Court of Federal Claims,

¹ Although not material to the outcome on appeal, the record shows that Forrest received a tax refund of \$1,767.50 for the 1997 tax year. See App'x 2.

seeking to recover \$12,838 in overpaid taxes for the 1997 tax year. *Id.*

The government moved to dismiss the Forrests' complaint under Court of Federal Claims Rule 12(b)(1) for lack of subject-matter jurisdiction, on the basis that a tax refund request was not timely filed with the IRS prior to the bringing of the action. App'x 1. The Court of Federal Claims granted the motion and dismissed the action for lack of subject-matter jurisdiction, pursuant to 26 U.S.C. §§ 6511(a) and 7422(a). App'x 8. The Forrests appeal the Court of Federal Claims' dismissal. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

STANDARD OF REVIEW

We review the Court of Federal Claims' legal conclusions de novo and its factual findings for clear error. *Casitas Mun. Water Dist. v. United States*, 708 F.3d 1340, 1351 (Fed. Cir. 2013) (citing *Est. of Hage v. United States*, 687 F.3d 1281, 1285 (Fed. Cir. 2012)). Whether the Court of Federal Claims properly dismissed an action for lack of jurisdiction is a question of law, which we review de novo. *Walby v. United States*, 957 F.3d 1295, 1298 (Fed. Cir. 2020).

DISCUSSION

A taxpayer can bring a tax refund action against the government only after filing a timely refund claim with the IRS. 26 U.S.C. § 7422(a); *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 4–5 (2008) (citing *United States v. Dalm*, 494 U.S. 596, 609–10 (1990)). To be considered timely, a refund claim must ordinarily be filed with the IRS “within 3 years from the time the return was filed or 2 years from the time the tax was paid,” whichever is longer. 26 U.S.C. § 6511(a). The Supreme Court has held that these time limits are jurisdictional and not subject to any equitable tolling. *Dalm*, 494 U.S. at 609; *United States v. Brockamp*, 519 U.S. 347, 354 (1997).

Here, the record shows that the Forrests timely filed joint income tax returns for the 1997 tax year on April 11, 1998, and the taxes withheld from their income were deemed paid as of April 15, 1998. S. App'x 18, 23–25, 44. The record also shows that the Forrests first sought a tax refund for the 1997 tax year on May 20, 2016, when they filed an amended 1997 tax return with the IRS. S. App'x 42–43, 67–68. Because their request fell well outside the time limits set forth in 26 U.S.C. § 6511(a), the Court of Federal Claims correctly dismissed this action for lack of subject-matter jurisdiction, pursuant to 26 U.S.C. § 7422(a).

The arguments raised by the Forrests on appeal do not change this conclusion. The focus of their appeal is that 26 U.S.C. § 6511(a) and 10 U.S.C. § 1174(h)(1), in combination, result in an unfair result for veterans like Mr. Forrest who dutifully paid taxes on a separation payment only to learn years later that they must pay back the gross separation payment before receiving retirement pay. Like the Court of Federal Claims, we are sympathetic to the Forrests' situation; however, we adhere to Supreme Court precedent that the time limits of § 6511(a) are jurisdictional and not subject to tolling for equitable reasons.

We lastly note that, insofar as the Forrests purport to challenge § 1174(h)(1)'s requirement to recoup the gross amount of Mr. Forrest's separation pay, that requirement is not at issue in this appeal. Rather, the sole issue presented is whether there exists any exception to the limitations requirements of § 6511(a) for someone in the Forrests' situation, which there is not.

CONCLUSION

We hold that the Forrests failed to establish the timely filing of a tax refund claim for the 1997 tax year, which is a prerequisite for bringing their tax refund action.

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26 U.S.C. §§ 6511(a), 7422(a). The Court of Federal Claims properly dismissed this action.

AFFIRMED

COSTS

No costs.

APPENDIX B

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In the United States Court of Federal Claims

No. 19-110T

Filed: March 24, 2020

THOMAS A. FORREST and
JAMIE W. FORREST,

Plaintiffs,

v.

UNITED STATES,

Defendant.

Thomas A. Forrest and Jamie W. Forrest, pro se, for Plaintiffs.

Jennifer Spriggs, Trial Attorney, Court of Federal Claims Section, Tax Division, with whom were G. Robson Stewart, David Pincus, and Richard Zuckerman, U.S. Department of Justice, Washington, D.C., for Defendant.

MEMORANDUM OPINION

TAPP, Judge.

In this tax refund suit, Plaintiffs, Thomas A. and Jamie W. Forrest (collectively, the "Forrests"), allege that Mr. Forrest's separation pay, which he received after retiring from active duty service in the United States Navy (the "Navy"), was taxed twice: once in 1997 after Mr. Forrest separated from active duty, and again in 2016 after Mr. Forrest separated from the Navy Reserves. (See Compl. at 1). The Forrests seek a refund of \$12,838.00. (Compl. at 4). On October 3, 2019, the United States filed a Motion to Dismiss for lack of jurisdiction, pursuant to RCFC 12(b)(1). (Def.'s Mot., ECF No. 13). On December 13, 2019, the Forrests, proceeding *pro se*, filed their response. (Pls.' Resp., ECF No. 19). On January 30, 2020, the United States filed its reply. (Def.'s Reply, ECF No. 23). This matter is now fully briefed and ripe for decision. For the reasons set forth below, the Court **GRANTS** the United States' motion to dismiss.

I. Background

The facts are undisputed. Mr. Forrest separated from active duty service in the Navy on February 28, 1997. (Compl., Ex. 2-1).¹ Upon discharge, Mr. Forrest received \$45,877.00 in gross separation pay, which was taxed at a rate of 28%, resulting in a withholding of \$12,845.57.

¹ For clarity, citations to the Exhibits are referenced as they appear at the bottom of each original Exhibit rather than sequentially as they are numbered at the top of Exhibit.

II. Standard of Review

The burden of establishing the Court's subject matter jurisdiction rests with the plaintiff. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). "Subject-matter jurisdiction may be challenged at any time by the parties or by the court sua sponte." *Folden v. United States*, 379 F.3d 1344, 1354 (Fed. Cir. 2004) (citing *Fanning, Phillips & Molnar v. West*, 160 F.3d 717, 720 (Fed. Cir. 1998)). When faced with a motion to dismiss, pursuant to RCFC 12(b)(1), the court must assume that all undisputed facts alleged in the complaint are true and must draw all reasonable inferences in the plaintiff's favor. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); see also *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995).

A *pro se* plaintiff's pleadings are generally held to "less stringent standards" than those of a professional lawyer. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). However, the Court cannot extend this leniency to relieve plaintiffs of their jurisdictional burden. *Kelley v. Sec'y, U.S. Dep't of Labor*, 812 F.2d 1378, 1380 (Fed. Cir. 1987). Whether a court has jurisdiction is a threshold matter in every case. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). "If the Court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action." RCFC 12(h)(3).

III. Analysis

This Court's jurisdiction is delimited by the Tucker Act, 28 U.S.C. § 1491. The Tucker Act limits this Court's jurisdiction to suits "against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon and express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a). Generally, "[a] taxpayer seeking a refund of taxes erroneously or unlawfully assessed or collected may bring an action against the Government either in United States district court or in the United States Court of Federal Claims." *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 4 (2008) (citing 28 U.S.C. § 1346(a)(1) and *EC Term of Years Trust v. United States*, 550 U.S. 429 (2007)).³ Tax refund suits are subject to compliance with the provisions of the Internal Revenue Code, including time limitations. *Clintwood Elkhorn Mining Co.*, 553 U.S. at 4 (citations omitted).

Among other requirements, the Internal Revenue Code requires that claims for tax refunds must first be filed with the Secretary of the Treasury. *RadioShack Corp. v. United States*, 566 F.3d 1358, 1360 (Fed. Cir. 2009) ("[I]n the context of tax refund suits, the [Supreme] Court

³ Section 1346 of Title 28 of the United States Code provides:

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of: (1) [a]ny civil action against the United States for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws....

§ 6511 limitations period might be tolled for policy reasons or by application of other statutory provisions, the Court respectfully disagrees.⁵

The Forrests contend that the provisions of 26 U.S.C. §§ 1311–1314 apply. (*See* Pls.’ Resp. at 14–15). “These provisions, in specified circumstances, ‘permit a taxpayer who has been required to pay inconsistent taxes to seek a refund of a tax the recovery of which is otherwise barred by [I.R.C.] ... 6511(a).’” *Stephens v. United States*, 884 F.3d 1151, 1155 (Fed. Cir. 2018) (quoting *Dalm*, 494 U.S. at 610). The *Stephens* court explained the purpose and limits of §§ 1311–1314:

In general, mitigation allows a taxpayer or the IRS to “correct errors otherwise barred by the statute of limitations” when all requirements in the mitigation provisions are met. The primary purpose of the mitigation provisions is to prevent the inconsistent treatment of items that result in a windfall to either the taxpayer or the Service. However, Congress did not intend by [the mitigation provisions] to provide relief for inequities in all situations in which just claims are precluded by statutes of limitations.

884 F.3d at 1158 (citations and internal quotations omitted); *see also Allred v. United States*, 689 Fed. Appx. 392, 397 (6th Cir. 2017) (Noting that though mitigation provisions are meant to allay effects of “unfair results” which may result in connection with tax refunds, “Congress did not intend by [the provisions] to provide relief in all situations in which just claims are precluded by statutes of limitations.”) (quoting *Olin Mathieson Chemical Corp. v. United States*, 265 F.2d 293, 296 (7th Cir. 1959)). This may well be one of the situations in which a just claim is nevertheless barred.

Mitigation is permitted only when three requirements are met: (1) there must be a determination of tax liability as defined in § 1313(a)(1)–(4); (2) the determination must fall within a final disposition by the Secretary on a disallowed refund claim except where a suit has been filed before expiration of the time for instituting a suit under § 1313(a)(2); and (3) depending on which circumstance of adjustment is found, either an inconsistent position must be maintained by the party against whom mitigation will operate under § 1311(b)(1), or the correction of the error must not have been barred at the time the party for whom mitigation will operate first maintained its position under § 1311(b)(2). *Stephens*, 884 F.3d at 1157 (quoting *Longiotti v. United States*, 819 F.2d 65, 68 (4th Cir. 1987)). The Forrests have not satisfied any of these elements.

⁵ The Forrests concede that exceptions contained within 26 U.S.C. § 6511 are not met. (Pls.’ Resp., at 12). The Court agrees. Section 6511(d)(6) applies to certain ERISA related claims. Section 6511(d)(8) concerns those circumstances when retirement pay is reduced as a result of disability award.

There are only four types of “determinations” that can satisfy the first requirement for mitigation.⁶ *Id.* Of those four, only one—a final disposition by the IRS on a disallowed refund claim—even remotely applies. The IRS’s May 26, 2017 letter, however, cannot be a “final determination” because “such a determination could only come at the end of the instant litigation, which was initiated to challenge the IRS’s decision.” *Stephens*, 884 F.3d at 1159.

Even if the Forrests had met the first requirement of mitigation, which they have not, they do not satisfy any of the seven “circumstances of adjustment” described in § 1312(1)–(7). While the Forrests suggest that § 1312(1) (double inclusion of an item of gross income) and § 1312(4) (double disallowance of a deduction or credit) apply, neither section affords the Forrests a basis for relief. The former provision, § 1312(1), does not apply because the Forrests cannot show that they erroneously included as gross income the separation payment received in the 1997 tax year. The latter provision, § 1312(4), is expressly limited by § 1311(b)(2)(b), which provides that determinations relating to disallowances or credits are not available if the refund was barred by any law at the time the taxpayer first claimed entitlement to the refund before the Tax Court or the IRS. 26 U.S.C. § 1311(b)(2)(B). Since the Forrests’ tax refund claim was first presented in 2016, it was already barred by the limitations period of § 6511. *See Stephens*, 884 F.3d at 1160. For these reasons, the mitigation provisions of 26 U.S.C. §§ 1311–1314 do not apply.

Finally, the Forrests argue that had Congress been aware of the “consequential impact on the thousands of retired veterans who are unable to obtain a legitimate refund claim,” it may have created a saving exception to § 6511. (Pls.’ Resp. at 11). However, this matter is not within the limited purview of the Court. *See Rotiske v. Klemm*, 140 S.Ct. 355, 360–61 (2019) (“It is a fundamental principle of statutory interpretation that ‘absent provision[s] cannot be supplied by the courts.’”) (quoting A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 94 (2012)). “To supply omissions transcends the judicial function,” as this would be “not a construction of a statute, but, in effect, an enlargement of it by the court.” *Nichols v. United States*, 136 S.Ct. 1113, 1119 (2016) (quoting *Iselin v. United States*, 270 U.S. 245, 251 (1926)).

Statutes of limitations “must be strictly adhered to by the judiciary.” *Kavanagh v. Noble*, 332 U.S. 535, 539 (1947); *see also John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133–35 (2008). The limitations period for filing tax refund claims established in § 6511 is not subject to equitable tolling, *United States v. Brockamp*, 519 U.S. 347, 354 (1997), and the Court cannot use whatever limited equity powers it possesses to rewrite a statutory scheme to award relief to which Congress has not assented. Thus, while the Court is sympathetic to the Forrests’ situation, the United States’ motion to dismiss must be granted.

⁶ These “determinations” are: (1) a final decision by a court of competent jurisdiction; (2) a closing agreement under I.R.C. § 7121; (3) a final administrative ruling on a refund claim (unless suit is timely instituted on the claim); and (4) a mitigation agreement between the IRS and the taxpayers. *Stephens*, 884 F.3d at 1157.

IV. Conclusion

Because the Forrests' claim for a tax refund arising from tax year 1997 is time-barred, this Court lacks subject matter jurisdiction to hear the Forrests' claim. Therefore, the Court hereby **GRANTS** the United States' motion to dismiss pursuant to RCFC 12(b)(1).

The Clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

David A. Tapp
DAVID A. TAPP, Judge

APPENDIX C

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TITLE 10—ARMED FORCES

§ 1174. Separation pay upon involuntary discharge or release from active duty

(h) COORDINATION WITH RETIRED OR RETAINER PAY AND DISABILITY COMPENSATION.—

(1) A member who has received separation pay under this section, or separation pay, severance pay, or readjustment pay under any other provision of law, based on service in the armed forces, and who later qualifies for retired or retainer pay under this title or title 14 shall have deducted from each payment of such retired or retainer pay an amount, in such schedule of monthly installments as the Secretary of Defense shall specify, taking into account the financial ability of the member to pay and avoiding the imposition of undue financial hardship on the member and member's dependents, until the total amount deducted is equal to the total amount of separation pay, severance pay, and readjustment pay so paid.

TITLE 26—INTERNAL REVENUE CODE

§ 6511. Limitations on credit or refund

(a) PERIOD OF LIMITATION ON FILING CLAIM

Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.