

## APPENDIX TABLE OF CONTENTS

	Page
1. United States Court of Appeals for the Ninth Circuit Memorandum filed January 25, 2023 .....	App. 1
2. United States District Court for the Northern District Order filed November 22, 2021 .....	App. 3
3. United States District Court for the Northern District Order filed November 22, 2021 .....	App. 24
4. United States District Court for the Northern District Judgment filed November 22, 2021.....	App. 25
5. Letter 570 with wet signature from Internal Revenue Service (IRS) Planning and Special Programs (PSP) accepting refund claim sent January 31, 2019 .....	App. 26
6. Letter from Internal Revenue Service Taxpayer Advocate Service (TAS) confirming receipt of request for taxpayer assistance order and for assistance February 24, 2016.....	App. 28
7. Letter from Internal Revenue Service Taxpayer Advocate Service confirming receipt of IRS form 1040x and request for assistance May 12, 2016.....	App. 30
8. United States District Court of Appeals for the Ninth Circuit ruling denying rehearing filed May 5, 2023 .....	App. 32
9. Petitioner's tax year 2012 tax transcript...	App. 33

## APPENDIX TABLE OF CONTENTS—Continued

	Page
10. IRS examiner for petitioner's 2012 return Lulu Nicozi witness authorization memo- randum .....	App. 39
11. Declaration of Lulu Nicozi .....	App. 42
12. Partial deposition transcript for Lulu Nicozi, August 31, 2021 .....	App. 56

**NOT FOR PUBLICATION**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

<p>PHYLLIS CARR, Plaintiff-Appellant, v. UNITED STATES INTERNAL REVENUE SERVICE; CHARLES P. RETTIG, in his official capacity as Commissioner of Internal Revenue; MIN JIE MA; UNITED STATES OF AMERICA, Defendants-Appellees.</p>	<p>No. 21-17100 D.C. No. 3:20-cv-00744-WHO MEMORANDUM* (Filed Jan. 25, 2023)</p>
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Appeal from the United States District Court  
for the Northern District of California  
William Horsley Orrick, District Judge, Presiding

Submitted January 18, 2023\*\*

Before: GRABER, PAEZ, and NGUYEN, Circuit Judges.

Phyllis Carr appeals pro se the district court's judgment in her action under 26 U.S.C. § 7422 seeking a tax refund from the IRS for tax year 2012. We have

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

## App. 2

jurisdiction under 28 U.S.C. § 1291. We review de novo. *Big Sandy Rancheria Enterprises v. Bonta*, 1 F.4th 710, 719 (9th Cir. 2021) (dismissal for lack of subject matter jurisdiction); *Hamby v. Hammond*, 821 F.3d 1085, 1090 (9th Cir. 2016) (cross motions for summary judgment). We affirm.

The district court properly granted summary judgment to defendants because Carr failed to raise a genuine dispute of material fact as to whether she timely filed a formal administrative refund claim or adequately provided the IRS notice of an informal claim. *See Dunn & Black, P.S. v. United States*, 492 F.3d 1084, 1088-89 (9th Cir. 2007) (stating that a district court is divested of jurisdiction if taxpayer fails to file a formal administrative refund claim); *United States v. Kales*, 314 U.S. 186, 194 (1941) (stating that notice of an informal claim must fairly advise the IRS “of the nature of the taxpayer’s claim”).

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

**AFFIRMED.**

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

PHYLLIS CARR,  
Plaintiff,  
v.  
UNITED STATES OF  
AMERICA,  
Defendant.

Case No.  
20-cv-00744-WHO  
**ORDER GRANTING  
DEFENDANT'S  
MOTION FOR  
SUMMARY  
JUDGMENT AND  
DISMISSING CASE  
FOR LACK OF  
SUBJECT MATTER  
JURISDICTION**

(Filed Nov. 22, 2021)

Re: Dkt. Nos.  
48, 65, 75, 79, 81

Pro se plaintiff Phyllis Carr filed suit against defendant United States, arguing that she is entitled to a refund for taxes that she allegedly overpaid in 2012. Both parties have filed motions seeking summary judgment in their favor. On this record, I find that I lack subject matter jurisdiction over Carr's claim because she sought a tax abatement rather than a refund. And if a refund claim had been involved, Carr failed to produce any evidence that showed the amount to which she was entitled or that rebutted the United States' evidence that she was not owed a refund because she did not overpay her taxes. For those reasons,

## App. 4

I GRANT the government's motion and DENY Carr's. Judgment shall be entered accordingly.

### **BACKGROUND**

Carr's complaint seeks a refund for her purported overpayment of federal income taxes for the 2012 tax year. *See* Second Am. Compl. ("SAC") [Dkt. No. 26] ¶¶ 11-30, 53. She filed her tax return for 2012 via a Form 1040 in October 2013. *Id.* at ¶¶ 11, 25. Based on the information reported, the IRS assessed \$46,314.01 against Carr. U.S. Mot. for Summ. J. ("U.S. MSJ") [Dkt. No. 65] 7:6-7. The IRS applied a \$12,842.01 overpayment from 2010 to Carr's 2012 tax account, but Carr made no other payments toward her 2012 tax liability. *Id.* at 7:7-9.

On or around February 20, 2015, Carr filed an amended tax return for 2012 via a Form 1040X. *Id.* at 7:13. After reviewing Carr's case, the IRS abated \$28,724 in tax, \$5,108.01 in failure to pay tax penalty, and \$1,753.29 in interest. *Id.* at 7:19-21. In April 2016, the IRS sent Carr a letter stating that it had reviewed adjustments to her 2012 tax liability and would make reductions. *See* U.S. Oppo. to Mot. for Summ. J. ("U.S. Oppo.") [Dkt. No. 61] Ex. 10. The letter also stated in part:

The Internal Revenue Code has no provision for filing income tax abatement claims. If you don't agree with our determination you can, after paying the additional tax due, file an amended return or a claim for refund. If you

## App. 5

file a claim or amended return, you should do so within 3 years from the date your return was filed or 2 years from the time the tax was paid, whichever is later.

*Id.* The IRS then issued Carr a refund of \$2,014.41.<sup>1</sup> See Carr Mot. for Summ. J. (“Carr MSJ”) [Dkt. 42] 11:15; U.S. Oppo. at 7:21-24.

At some point, Carr objected to the amount of the refund and “sought relief through the Office of the Taxpayer Advocate Service.” Carr Reply [Dkt. No. 67] 2:23. She relied on two representatives: Michael Ferguson, a certified public accountant, and Gregory Harper, Carr’s husband who has “over 40 years of experience in [f]ederal and [s]tate taxation.”<sup>2</sup> Carr Oppo. to U.S. MSJ (“Carr Oppo.”) [Dkt. No. 77] 4 n.5; Carr Reply, Harper Decl. ¶¶ 2-3, 11. After a lengthy back-and-forth between Carr’s representatives and the IRS, Carr received another letter from the IRS dated January 31, 2019, which read in part:

We’re pleased to tell you that we’ve accepted your claim for the tax year shown above. We’ll change your account to show your claim and send a refund to you if you owe no other amounts the law requires us to collect. We’ll include any interest we owe you.

*See Carr Reply, Ex. J.*

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<sup>1</sup> According to the exhibit cited in the Nicozi declaration, an IRS account transcript for Carr’s 2012 tax year, these adjustments were made in June 2016. *See U.S. Oppo.*, Ex. 5.

<sup>2</sup> Ferguson died sometime in 2021. *See Dkt. No. 49* at 2.

## App. 6

On January 31, 2020, Carr filed this suit, alleging in part that the IRS had refused to pay any refund in violation of Section 7422 of the Internal Revenue Code. *See* Dkt. No. 1. Carr argues that the January 31, 2019, letter shows that the IRS accepted her claim for a refund and that she is owed \$18,005. Carr Reply at 1:21-2:14; Carr MSJ at 7:8. The IRS contends that the letter was sent in error, and that Carr submitted a request for an abatement, not a refund, because she had an outstanding liability when she filed the Form 1040X. *See* U.S. MSJ at 7:13-16, 24:4. Carr responds that her Form 1040X showed no taxes owed. Carr MSJ at 7:9.

Although Carr filed other claims related to the 2010 and 2011 tax years, I dismissed those, as the 2010 claim required resolution via the 2012 claim, and Carr did not appear to dispute the underlying liability for the 2011 tax year. *See* Dkt. No. 34. Only the 2012 claim is at issue now. *See id*; Carr MSJ at 7:6-8.

Carr filed a motion for summary judgment on July 1, 2021. Dkt. No. 42. The United States filed its own motion for summary judgment on September 15, 2021. Dkt. No. 65. I heard arguments from both parties on November 10, 2021.<sup>3</sup>

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<sup>3</sup> Carr also filed three administrative motions before the November 10, 2021, hearing: a Motion to Strike a surreply from the United States and the testimony of a witness, a Motion for Relief to change the scheduling order and for leave to respond to the surreply, and a Motion for Leave to file her own surreply. *See* Dkt. Nos. 75, 79, 81. Because I granted the United States leave to file the surreply and because there was no good cause appearing to permit Carr to file any surreply, these motions are DENIED.

## **LEGAL STANDARD**

### **I. SUBJECT MATTER JURISDICTION**

Subject matter jurisdiction concerns the court's statutory or constitutional authority to adjudicate a case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). "Federal courts are courts of limited jurisdiction," and it is "presumed that a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. of Am.*, 511 U.S. 375, 377 (1994). The party invoking the jurisdiction of the federal court bears the burden of establishing that the court has jurisdiction to grant the requested relief. *See id.* Objections to subject matter jurisdiction may be raised at any time. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011).

### **II. SUMMARY JUDGMENT**

Summary judgment on a claim or defense is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In order to prevail, a party moving for summary judgment must show the absence of a genuine issue of material fact with respect to an essential element of the non-moving party's claim, or to a defense on which the non-moving party will bear the burden of persuasion at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this showing, the burden then shifts to the party opposing summary judgment to identify "specific facts showing that there

is a genuine issue for trial.” *Id.* at 324. The party opposing summary judgment must then present affirmative evidence from which a jury could return a verdict in that party’s favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986).

On summary judgment, the court draws all reasonable factual inferences in favor of the non-movant. *Id.* at 255. In deciding a motion for summary judgment, “[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.” *Id.* However, conclusory and speculative testimony does not raise genuine issues of fact and is insufficient to defeat summary judgment. *See Thornhill Publ’g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

## DISCUSSION

### I. SUBJECT MATTER JURISDICTION

District courts have jurisdiction over tax refund suits, though the scope of that jurisdiction is limited. *See* 28 U.S.C. § 1346(a)(1); *United States v. Dalm*, 494 U.S. 596, 601 (1990) (noting that Section 1346(a)(1) “must be read in conformity with other statutory provisions,” including Internal Revenue Code Sections 7422(a) and 6511(a)). Under Section 7422(a), “[n]o suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax . . . until a claim for refund or credit has been duly filed” with the IRS, according to applicable law and regulations. *See* I.R.C. § 7422(a).

## App. 9

For a claim to be “duly filed,” it must comport with the timing requirements of Section 6511(a). If a return is filed, the taxpayer must file any claim for credit or refund of an overpayment within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever expires later. I.R.C. § 6511(a). If the taxpayer did not file a return, any claim for credit or refund must be filed within 2 years from the time the tax was paid. *Id.* Additionally, the Supreme Court has held that Section 1346(a)(1) “requires full payment of the assessment before an income tax refund suit can be maintained in a Federal District Court.” *Flora v. United States*, 362 U.S. 145, 177 (1960).

If a refund claim is not duly filed, “a notice fairly advising the Commissioner of the nature of the taxpayer’s claim . . . will nevertheless be treated as a claim where formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory period.” *United States v. Kales*, 314 U.S. 186, 194 (1941). “This is especially the case where such a claim has not misled the Commissioner and he has accepted and treated it as such.” *Id.*

There is a “fundamental difference” between a tax refund and an abatement, and between claims seeking either. *See Nasharr v. United States*, 105 Fed. Cl. 114, 120 (2012). Under Internal Revenue Code Section 6404(a), the IRS is “authorized to abate the unpaid portion of the assessment of any tax or liability” that: “(1) is excessive in amount, or (2) is assessed after the expiration of the period of limitation properly applicable thereto, or (3) is erroneously or illegally assessed.”

## App. 10

Though the case law is sparse, some courts have held that the permissive nature of Section 6404 prevents taxpayers from seeking judicial review of abatements. *See, e.g., Poretto v. Usry*, 295 F.2d. 499, 501 (5th Cir. 1961) (“Section 6404 does not impose a duty . . . to abate improper assessments, thereby providing a basis for a taxpayer’s summary action challenging the . . . refusal to abate an allegedly incorrect assessment.”); *Etheridge v. United States*, 300 F.2d 906, 909 (D.C. Cir. 1962) (noting that the court was unaware of any statute allowing the government to be sued for the abatement of an unpaid tax assessment); *Kang v. Shulman*, No. AW-09-1561, 2010 WL 11556596, at \*2 (D. Md. May 20, 2010) (finding that “there is no cause of action for abatement under any Internal Revenue Code provision” and that the IRS’s discretion under Section 6404 “is not subject to judicial review.”). This reading aligns with the Supreme Court’s holding that the Tax Court “provides the exclusive forum for judicial review of a refusal to abate interest” under another provision of Section 6404: Section 6404(e)(1). *Hinck v. United States*, 550 U.S. 501, 503 (2007).

If a taxpayer filed a Form 1040, she must file any claim for a refund on a Form 1040X. Treas. Reg. § 301.6402-3(a)(2). Limited case law suggests that if a taxpayer seeking a refund files a Form 1040X with an outstanding tax liability, it is instead a claim for abatement. *Martti v. United States*, 121 Fed. Cl. 87, 100 (2015) (holding that “because the tax had not been paid . . . prior to the date plaintiff filed the Forms 1040X,

there was no tax for plaintiff to claim he was entitled to have refunded.”).

#### **A. Formal Claim**

The United States argues that Carr’s 2012 Form 1040X was not a duly filed claim for a refund, as she had an outstanding tax liability when it was filed. *See* U.S. MSJ at 12:24, 13:15-14:6. Instead, it asserts that it was not until the IRS examined Carr’s 2012 Form 1040X and made the adjustments that she had no outstanding balance for her 2012 tax liability. *See id.* at 14:7-10 (citing U.S. Oppo., Nicozi Decl. ¶ 31). Therefore, the United States contends that Carr’s Form 1040X was actually a claim for abatement that is not subject to my jurisdiction. *Id.* at 14:4-6.

Although the United States argued this both in its opposition to Carr’s motion for summary judgment and in its own motion for summary judgment, Carr devotes little time to it. She asserts that after she filed her claim for a refund with the IRS, she could “bring an action against the Government . . . in United States District Court.” Carr Oppo. at 9:21-23. “Once the claim was accepted and the case closed jurisdiction was proper.” *Id.* at 9:24-25. Carr cites Section 7422(a) and one case in support. But that case is not helpful; it does not mention Form 1040X or claims for abatement. *See id.* It involves the time limit for claims seeking refunds of taxes assessed under the Export Clause of the Constitution. *See United States v. Clintwood Elkhorn*

## App. 12

*Mining Co.*, 553 U.S. 1 (2008).<sup>4</sup> Additionally, Carr does not cite any authority challenging the United States' characterization of her 2012 Form 1040X as a claim for an abatement rather than a refund. *See generally* Carr Oppo., Carr Reply.

Carr asserts that she had no outstanding tax liability at the time she filed her Form 1040X because the "2012 amended return showed no taxes owed" and that she "did not then and, does not currently owe any taxes" to the IRS. *See* Carr Oppo. at 3:17-19. This lacks evidentiary support beyond Carr's declaration. *See* Carr Oppo., Carr Decl. ¶ 16 ("I have not and do not currently owe any Federal or State income taxes."). Conversely, the United States has proffered evidence that Carr had an outstanding tax liability when she filed the Form 1040X, including a declaration from a tax specialist who examined Carr's case and an account transcript of Carr's 2012 tax year. *See* U.S. Oppo., Nicozi Decl. at ¶¶ 26-32; Ex. 5.

Based on the evidence showing that Carr had an outstanding tax liability at the time she submitted her Form 1040X, I find that she did not duly file a claim for a refund. The facts are similar to those in *Martti*,

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<sup>4</sup> Carr later asserts that it is "undisputed [that] refund claims are brought in US District Court" and that "[j]urisdiction clearly exists." Carr Oppo. at 10:24-11:3. She cites *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), which focuses on a party's burden on summary judgment and is not on point. The issue here is not whether a federal court has jurisdiction over a valid refund claim, but whether Carr has filed one or, instead, a claim for abatement.

## App. 13

where the court held that the plaintiff's Forms 1040X "could not have been claims for refund on the date they were filed" because the plaintiff had an outstanding tax liability at the time. *See Martti*, 121 Fed. Cl. at 100. I agree with the *Martti* court's logic that "there was no tax for plaintiff to claim he was entitled to have refunded."

This reading is supported by laws that govern refund claims. Section 6511(a) refers to a "claim for credit or refund of an *overpayment* of any tax." I.R.C. § 6511(a) (emphasis added). The language of the relevant Treasury Regulation is similar, discussing the need to file a Form 1040X "[i]n the case of an *overpayment* of income taxes." *See* Treas. Reg. § 301.6402-3(a)(2) (emphasis added). If a taxpayer has not paid their tax liability, there is nothing for them to recover. Conversely, the language of Section 6404(a) makes clear that abatements involve the "*unpaid portion* of the assessment of any tax or liability." *See* I.R.C. § 6404(a) (emphasis added).

Had Carr filed another Form 1040X after her 2012 tax liability was satisfied and before filing this suit, it would have been a duly filed claim. But as Carr conceded during oral argument, she did not file a second Form 1040X. Without additional facts or case law suggesting otherwise, I find that because Carr had an outstanding tax liability when she filed her Form 1040X in February 2015, it constituted a request for an abatement rather than a claim for a refund.

## **B. Informal Claim**

To the extent that Carr asserts that she made an informal claim for a tax refund, that argument also fails. *Kales* set forth two foundational questions in assessing informal refund claims. First, did the IRS have notice “fairly advising” it of the nature of the taxpayer’s claim? *See Kales*, 314 U.S. at 194. Second, were the informal claim’s defects remedied by a later-filed formal claim? *See id; see also Kaffenberger v. United States*, 314 F.3d 944, 955 (8th Cir. 2003).<sup>5</sup>

The initial question is a close call. Carr contends that she put the IRS on notice of her claim by filing her amended return and challenging the subsequent audit. *See Carr* MSJ at 13:19-14:6. Carr argues that a taxpayer “need only set forth facts” in a refund claim sufficient to allow the IRS to “make intelligent review” of the claim. *See id.* at 14:8-12. In support, she cites Treasury Regulation 301.6402-2(b)(1), which requires that a refund claim “set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof.” *See Carr* MSJ at 14:11-12. Carr further cites the January 31, 2019, letter as proof that the IRS accepted this claim for refund. *See id.* at 9:15-16.

The United States challenges any argument of an informal claim, first by asserting that Carr’s Form

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<sup>5</sup> The Ninth Circuit has cited *Kaffenberger* in asserting that informal refund claims must be followed by a formal claim. *See, e.g., Waltner v. United States*, No. 20-16475, 2021 WL 4310800, at \*1 (9th Cir. Sept. 22, 2021).

## App. 15

1040X and subsequent correspondence with the IRS “fail[ed] to adequately apprise the IRS” of her request. *See U.S. MSJ* at 14:26-28. The United States proffers IRS records that refer to Carr’s case as an “abatement claim.” *See id.* at 15:8-10. The case history report repeatedly describes Carr’s claim as a “claim for abatement,” beginning in November 2015, through May 2016, and finally in November 2018. *See U.S. Oppo.*, Ex. 7. The examining officer’s activity record twice refers to an “abatement request” in November 2018. *Id.*, Ex. 6.

However, the language of the January 31, 2019, letter indicates that the IRS treated Carr’s request as a refund claim. *See Carr Reply*, Ex. J. The letter informs Carr that the IRS has “accepted your claim” for the 2012 tax year, and that it would “send a refund to you” if no other amounts were owed. *See id.* Moreover, the letter is designated a “Letter 570” which, as Carr notes, the IRS uses to close claims for refunds. *See Carr Oppo.* at 6:3-10 (citing Internal Revenue Manual 4.10.11.2.8). The United States submits the testimony of a tax specialist who handled Carr’s case who, after reviewing IRS records, opined that the letter was “sent in error.” *See U.S. Oppo.*, Nicozi Decl. at ¶ 42.<sup>6</sup> Although

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<sup>6</sup> Carr takes issue with the testimony of the tax specialist, Lulu Nicozi, arguing in part that Nicozi testified as an expert, exceeded the scope of her disclosure, “had very limited information,” and was “not qualified to testify about IRS letters” or the signatory’s “state of mind.” *See Carr Reply* at 8. However, when disclosing Nicozi as a non-reporting expert witness, the United States stated that she “may be called on to testify about IRS account transcripts and records” based on her “knowledge of transaction

## App. 16

the letter characterizes Carr's claim as a tax refund, I find the other IRS records more persuasive, as they span a greater amount of time and more often describe Carr's case as a request for an abatement. This suggests that the IRS did not have adequate notice that Carr was seeking a refund.

Carr has not submitted any evidence beyond the letter suggesting that the IRS treated her claim as a refund. She repeatedly references her appeal through the Taxpayer Advocate Service. *See, e.g.*, Carr MSJ at 14:1-5; Carr Oppo. at 10:1-6. But details of that appeal, including whether the parties involved described Carr's claim as one for a refund or an abatement, are lacking. When I asked Carr during oral argument whether she had any documents or other evidence from her appeal showing that it was the former, she noted that it was her representatives who spoke to the Taxpayer Advocate Service, not herself.

While an unrepresented taxpayer may be understandably unclear about the difference between a refund and abatement claim, in addition to having professional tax advisors Carr also received notice from the IRS that she needed to file an amended return or claim for refund in the April 2016 letter. She did not

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codes and entries." *See id.*, Ex. A. It also disclosed that Nicozi "may also be called to provide factual testimony" based on her assignment to Carr's case. *See id.* Moreover, Nicozi testified that her declaration was based on her personal knowledge and review of Carr's case. U.S. Oppo., Nicozi Decl. at ¶ 3. Given Nicozi's experience and review of the IRS records, I find that Nicozi's testimony was appropriate.

do so timely. Although she filed two Forms 843 (a claim for refund and request for abatement)—one that was processed on September 15, 2020, and another on April 1, 2021—they do not establish subject matter jurisdiction because they were submitted after this suit commenced. *See U.S. Oppo.*, Wolfe Decl., Exs. 1, 2. Carr confirmed during oral argument that she did not file any forms related to her 2012 claim beyond the Form 1040X and the two Forms 843. Without a later-filed formal claim, any argument that Carr made an informal claim necessarily fails.

Carr is proceeding pro se. Despite affording her the benefit of the doubt, I find that she has not shown that she filed a tax refund claim, either formally or informally, that falls within my jurisdiction. That ends the case and I must dismiss it with prejudice. But to ensure that this result does not exalt form over substance, I will also consider the merits arguments below as if she had filed a refund claim.

## **II. REFUND CLAIM**

In a refund suit, “the taxpayer bears the burden of proving the amount he is entitled to recover.” *United States v. Janis*, 428 U.S. 433, 440 (1976). “It is not enough for him to demonstrate that the assessment of the tax for which refund is sought was erroneous in some respects.” *Id.*; *see also Wash. Mut., Inc. v. United States*, 856 F.3d 711, 721 (9th Cir. 2017) (“[I]f insufficient evidence is adduced upon which to determine the amount of the refund due, the Commissioner’s

determination of the amount of tax liability is regarded as correct.”) (citation omitted). The Ninth Circuit has made clear that the taxpayer also “bears the burden of showing that he or she meets every condition of a tax exemption or deduction.” *Davis v. C.I.R.*, 394 F.3d 1294, 1298 n.2 (9th Cir. 2005); *see also Rockwell v. C.I.R.*, 512 F.2d 882, 886 (9th Cir. 1975) (“[T]here is no dispute that the taxpayer bears the burden of proof in substantiating claimed deductions.”).

Courts within the Ninth Circuit have also recognized that tax refund suits are *de novo* proceedings. *See, e.g., Interior Glass Sys., Inc. v. United States*, No. 5:13-CV-05563-EJD, 2017 WL 1153012, at \*4 (N.D. Cal. March 28, 2017) (“The court conducts a *de novo* review in tax refund suits.”) (citation omitted); *Hettinga v. United States*, No. CV-18-150, 2019 WL 2619640, at \*2 (C.D. Cal. May 20, 2019) (“[t]ax-refund suits are *de novo* proceedings”); *Access Behavioral Health Servs., Inc. v. United States*, No. 1:16-VC-00107, 2017 WL 4341841, at \*3 (D. Idaho Sept. 29, 2017) (“In such cases, courts conduct a *de novo* review of the correctness of the assessment.”).

#### **A. The Refund Amount**

As the United States argues, Carr has not met her burden in showing that she was entitled to a refund. *See* U.S. Oppo. at 14:14-18. Carr references, but did not submit, any evidence supporting the merits of her refund claim, including any substantiation of the deductions or items claimed on her 2012 Form 1040X.

Rather, she relies on the filing of the 2012 Form 1040X and the January 31, 2019, letter as evidence that she is entitled to a refund (and summary judgment in her favor). *See id.* at 15:1-3.

The United States further contends that Carr did not provide any substantiating evidence: She produced no documents related to her claim during the course of this litigation and stated during her deposition that she had no responsive documents in her possession, custody, or control. *Id.* at 16:5-11 (citing Ex. 1, Carr Depo. at 114:18-22).

Carr repeatedly asserts that the January 31, 2019, letter is “dispositive” of her claim. *See, e.g.*, Carr Oppo. at 9:16; Carr Reply at 3:2-14 (“There is nothing else for the [p]laintiff to prove as the [p]laintiff’s claim was accepted by IRS.”). But the letter, viewed in the most generous way to Carr, does not state the amount of refund to which she may be entitled. *See id.*, Ex. J. When asked at the hearing on this motion to point to such evidence in the record, Carr referenced a Case Management Statement as proof that she was owed \$18,005. *See* Dkt. No. 46 at 8. This statement does not constitute *evidence* showing that Carr is entitled to this or any specific amount.

The January 31, 2019, letter does not substantiate any deductions or items that Carr claimed on her Form 1040X. *See* Carr Oppo., Ex. J. Carr argues that she provided this substantiation during her administrative appeal but does not submit any such exhibits here. *See* Carr Oppo., Carr Decl. at ¶ 4 (“I presented through my

representative at the time Michael Ferguson, C.P.A. documentation substantiating every entry in my 1040x."); Carr Reply at 4:15-18 (similar). Harper, Carr's husband, contends the same in his declaration.<sup>7</sup> *See* Carr Reply, Harper Decl. ¶ 17 (stating that he gave Ferguson "substantiating documentation"). But none of her exhibits in this case evidences that substantiation.

Carr did file some exhibits in connection with the motions at hand: the January 31, 2019, letter; Harper's declaration; the United States' disclosure of Nicozi; a memorandum to Nicozi from the IRS's Office of Chief Counsel; a copy of the Taxpayer Bill of Rights; IRS Publication 556; and excerpts of Nicozi's deposition transcript. *See* Carr Reply, Exs. A-J. She also filed her own declaration. *See* Carr Oppo. None of this substantiates any deductions or items that Carr claimed on her Form 1040X, nor does it indicate the amount of refund that Carr alleges she is entitled to. Simply stating that she is entitled to a refund, or stating that she previously provided such documentation outside of this de novo proceeding, is not sufficient.

Again, I am mindful that Carr representing herself in this matter. However, it is her burden in a tax refund suit to show the amount that she is entitled to, as well as to substantiate any claimed expenses or

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<sup>7</sup> The United States challenged Harper's declaration, saying he improperly testified as an expert witness. *See* U.S. Surreply [Dkt. No. 74] 3:8-18. I need not determine this, as I only cite a portion of Harper's declaration that reflects his personal knowledge of what he provided Ferguson.

deductions. She has failed to produce any evidence doing this, despite having ample opportunity when filing and responding to these motions, and when answering my questions at oral argument. While she did not have a lawyer, she did have the assistance of her husband, who allegedly had extensive tax knowledge and experience. Even if Carr were not initially aware of her burden in a tax refund suit, she had ample notice of what was required and did not meet that burden.

Accordingly, the United States would be entitled to judgment as a matter of law even if this was a refund claim.

### **B. The Refund Itself**

The United States also argues that Carr is not entitled to a refund of *any* amount because she did not overpay her taxes in 2012.<sup>8</sup> *See* U.S. MSJ at 21:1-8. It cites the declaration from Nicozi, who reviewed Carr's "financial position" related to her 2012 Form 1040X and determined that: (1) Carr underreported her income and (2) the IRS failed to account for an early retirement distribution penalty. *See id.* at 21:9-25 (citing U.S. Oppo., Nicozi Decl. at ¶¶ 43-51. After taking both into account, Nicozi testified that Carr would have owed an additional \$7,533 in tax in 2012. U.S. Oppo., Nicozi Decl. at ¶ 51.

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<sup>8</sup> Counsel confirmed during oral argument that the United States did not intend to take any enforcement action related to this argument, and instead raised it for demonstrative purposes.

Carr offers no evidence specifically countering this argument. Rather, she attacks Nicozi’s testimony as improper and asserts that had she underreported her income, she “would undoubtedly have received some type of communication from the IRS.” *See Carr Reply at 11:24-12:11; Carr Oppo. at 13:25-14:2.* This does not overcome the evidence produced by the United States—not only Nicozi’s declaration, but the documents that she reviewed, including Carr’s Form 1040X, a wage and income transcript, and a bank deposits analysis. *See U.S. Oppo., Exs. 3, 8, 9, 11.* If I had jurisdiction over this claim, the United States would be entitled to judgment as a matter of law on this basis as well.

As indicated, Carr’s insufficient evidence is a recurring defect for her claim. She offered little—if any—evidence showing that subject matter jurisdiction exists or that she was entitled to a refund, let alone the amount she was purportedly owed. It is unclear whether any such evidence exists. She stated—both during a previous discovery dispute and again during oral argument—that she was not sure if Ferguson (her C.P.A.) preserved any documents related to her case. *See Dkt. No. 49.* Instead, she relied heavily on the January 31, 2019, letter in responding to the United States’ arguments and in asserting that she is entitled to summary judgment. I agree that this letter raises legitimate questions about whether it was sent in error and, if so, why. But without additional *evidence* supporting her arguments, the letter does not by itself create a material factual dispute. Carr has not met her

App. 23

burden regarding either the procedure or the merits of this case.

### **CONCLUSION**

For the reasons stated above, I grant the motion for summary judgment of the United States and dismiss the case for lack of subject matter jurisdiction. Judgement will be entered accordingly.

**IT IS SO ORDERED.**

Dated: November 22, 2021

/s/ William H. Orrick  
William H. Orrick  
United States District Judge

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

PHYLLIS CARR,  
Plaintiff,  
v.  
UNITED STATES OF  
AMERICA,  
Defendant.

Case No. C20-0744-WHO  
**PROPOSED ORDER  
DENYING AS MOOT  
UNITED STATES'  
MOTION FOR TEMPO-  
RARY RELIEF FROM  
COURT'S CIVIL PRE-  
TRIAL ORDER (DKT.  
NO. 41) PENDING  
COURT'S RULING ON  
THE PARTIES' CROSS  
MOTIONS FOR SUM-  
MARY JUDGMENT**

(Filed Nov. 22, 2021)

In light of the Order granting the United States' motion for summary judgment and dismissing the case for lack of subject matter jurisdiction, the government's motion for temporary relief from court's civil pretrial order (Dkt. No. 41) pending court's ruling on the parties' cross motions for summary judgment is denied as moot.

**IT IS SO ORDERED.**

Dated: November 22, 2021

/s/ William H. Orrick  
William H. Orrick  
United States District Judge

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

PHYLLIS CARR,  
Plaintiff,  
v.  
UNITED STATES OF  
AMERICA,  
Defendant.

Case No.  
20-cv-00744-WHO  
**JUDGMENT IN A  
CIVIL CASE**  
Re: Dkt. No. 87

Pursuant to the Court's Order Granting Defendant's Motion for Summary Judgment and Dismissing Case for Lack of Subject Matter Jurisdiction, judgment is accordingly entered in favor of Defendant and against Plaintiff.

Dated: November 22, 2021

Kathleen M Shambaugh (Acting), Clerk  
/s/ Jean M. Davis  
By: Jean M. Davis, Deputy Clerk

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[SEAL]      **Department of the Treasury**  
IRS            **Internal Revenue Service**  
                  **Small Business/Self-employed**

**Date:** JAN 31 2019

Phillis Carr                    **Taxpayer ID number**  
PO Box 99568                (last 4 digits): 1771  
Emeryville, CA 94662        **Form:** 1040

**Tax periods ended:**  
12/31/2012

**Person to contact:**  
Simon Kenney

**Contact telephone number:**  
303-603-4836

**Employee ID number:**  
1000232862

**Contact hours:**  
7:00 AM to 4:00 PM

Dear Phillis Carr:

Were pleased to tell you that we've accepted your claim for the tax year shown above.

We'll change your account to show your claim and send a refund to you if you owe no other amounts the law requires us to collect. We'll include any interest we owe you.

If you have any questions, please call or write to the contact person listed in this letter.

App. 27

Thank you for your cooperation.

Sincerely,

/s/ Peggy M. Archer  
Peggy M. Archer  
PSP Section Chief

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**Letter 570 (Rev. 2-2017)**  
Catalog Number 40252O

**TAXPAYER  
ADVOCATE  
SERVICE  
YOUR VOICE  
AT THE IRS  
[SEAL]**

THE OFFICE OF THE TAXPAYER  
ADVOCATE OPERATES INDEPENDENTLY  
OF ANY OTHER IRS OFFICE AND REPORTS  
DIRECTLY TO CONGRESS THROUGH THE  
NATIONAL TAXPAYER ADVOCATE.

---

February 24, 2016

Gregory Harper  
54 Railroad Ave  
Point Richmond, CA 94801-4067-542

Tax Form: 1040, U.S. Individual Income Tax Return  
Tax Periods: December 31, 2012; December 31, 2013  
Case Number: 6172397  
Taxpayer Name: Phyllis Carr

Dear Mr. Harper

I'm writing in response to your inquiry dated February 11, 2016. I understand you are concerned about the balances due on the above accounts.

I've attempted to contact you by phone without success. Unfortunately, I can't resolve the problem without additional information. Please send me a signed copy of the Form 1040X, Amended U.S. Individual Income Tax Return, with all schedules and attachments for the 2013 tax year. It appears you are working directly with the IRS examiner on the 2012 year.

Please provide the requested information by March 17, 2016. If you choose to mail your information certified (not recommended), please do not choose Restricted Delivery, since we are unable to receive this type of delivery and it may be returned to you.

App. 29

I'll notify you by March 24, 2016, with an update on your inquiry. I estimate the issue will be resolved by May 31, 2016. In the meantime, I would like to stay in touch with you while I work to resolve your inquiry. Please advise me of any change in your address or telephone number. Also, let me know if another office within IRS contacts you concerning this matter.

If you have any questions, you can reach me at the telephone numbers and during the hours of operation listed below. If you prefer, you can write to me at the address or faxes below. Please provide a telephone number where you can be reached and the best time to call you.

I apologize the IRS has not processed the Forms 1040X on the above tax years. Thank you for your patience and cooperation.

Sincerely,

/s/ Cindy Dabb  
Cindy Dabb  
Case Advocate

Enclosures:  
Envelope  
Taxpayer Bill of Rights Flyer

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**TAXPAYER  
ADVOCATE  
SERVICE  
YOUR VOICE  
AT THE IRS  
[SEAL]**

THE OFFICE OF THE TAXPAYER  
ADVOCATE OPERATES INDEPENDENTLY  
OF ANY OTHER IRS OFFICE AND REPORTS  
DIRECTLY TO CONGRESS THROUGH THE  
NATIONAL TAXPAYER ADVOCATE.

---

May 12, 2016

Gregory Harper  
54 Railroad Ave  
Point Richmond, CA 94801-4067-542

Tax Form: 1040, U.S. Individual Income Tax Return  
Tax Periods: December 31, 2012; December 31, 2013  
Case Number: 6172397  
Taxpayer Name: Phyllis Carr

Dear Mr. Harper:

I'm writing in response to your inquiry of May 5, 2016. I received the Form 1040X, Amended U.S. Individual Income Tax Return, for tax period December 31, 2013.

I tried contacting you by phone without success. I've sent the Form 1040X to the IRS for a determination. If you want my assistance with the 2012 tax year, please provide documentation to substantiate your claims by June 1, 2016.

I'll notify you by June 10, 2016, with an update on your inquiry. I estimate your issue will be resolved by August 31, 2016. In the meantime, I would like to stay in touch with you while I work to resolve your inquiry. Please advise me of any change in your address or telephone number. Also, let me know if another office within IRS contacts you concerning this matter.

App. 31

If you have any questions, you can reach me at the telephone numbers and during the hours of operation listed below. If you prefer, you can write to me at the address or faxes below. Please provide a telephone number where you can be reached and the best time to call you.

I apologize for the difficulties you have experienced getting the accounts corrected. Thank you for your patience and cooperation.

Sincerely,

/s/ Cindy Dabb  
Cindy Dabb  
Case Advocate

Enclosures:  
Envelope  
Taxpayer Bill of Rights Flyer

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

PHYLLIS CARR, Plaintiff-Appellant, v. UNITED STATES INTERNAL REVENUE SERVICE; et al., Defendants-Appellees.	No. 21-17100 D.C. No. 3:20-cv-00744-WHO Northern District of California, San Francisco ORDER (Filed May 5, 2023)
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Before: GRABER, PAEZ, and NGUYEN, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Carr's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 25) are denied.

No further filings will be entertained in this closed case.

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**[SEAL] Internal Revenue Service**  
United States Department of the Treasury

This Product Contains Sensitive Taxpayer Data

**Account Transcript**

Request Date: 04-24-2019

Response Date: 04-24-2019

Tracking Number: 100444844550

FORM NUMBER: 1040

TAX PERIOD: Dec. 31, 2012

TAXPAYER IDENTIFICATION NUMBER: XXX-XX-

CARR

**<<<POWER OF ATTORNEY/TAX INFORMATION  
AUTHORIZATION (POA/TIA) ON FILE>>>**

--- ANY MINUS SIGN SHOWN BELOW  
SIGNIFIES A CREDIT AMOUNT ---

ACCOUNT BALANCE: 0.00

ACCRUED INTEREST: 0.00 AS OF: Apr. 08, 2019

ACCRUED PENALTY: 0.00 AS OF: Apr. 08, 2019

ACCOUNT BALANCE PLUS ACCRUALS  
(this is not a payoff amount): 0.00

\*\* INFORMATION FROM THE  
RETURN OR AS ADJUSTED \*\*

App. 34

EXEMPTIONS: 01  
FILING STATUS: Married Filing Separate  
ADJUSTED GROSS INCOME: 49,547.00  
TAXABLE INCOME: 27,584.42  
TAX PER RETURN: 38,665.00  
SE TAXABLE INCOME TAXPAYER: 42,504.00  
SE TAXABLE INCOME SPOUSE: 0.00  
TOTAL SELF EMPLOYMENT TAX: 5,653.00

RETURN DUE DATE OR RETURN RECEIVED  
DATE (WHICHEVER IS LATER) Oct. 17, 2013  
PROCESSING DATE Dec. 02, 2013

TRANSACTIONS

CODE EXPLANATION OF TRANSACTION			
	CYCLE	DATE	AMOUNT
150	Tax return filed		
	20134605	12-02-2013	\$38,665.00
n/a	89221-307-84224-3		
960	Appointed representative		
		07-30-2012	\$0.00
460	Extension of time to file		
	tax return ext. Date	04-13-2013	\$0.00
	10-15-2013		

App. 35

170	Penalty for not pre-paying tax 12-02-2023	20134605	12-02-2013	\$693.00
276	Penalty for late payment of tax	20134605	12-02-2013	\$1,546.60
196	Interest charged for late payment	20134605	12-02-2013	\$741.09
971	Notice issued CP 0014		12-02-2013	\$0.00
971	Tax period blocked from automated levy program	04-14-2014		\$0.00
706	Credit transferred in from 1040 201012		04-15-2013	\$6,791.03
736	Interest credit transferred in from 1040 201012		04-15-2013	\$50.98
706	Credit transferred in from 1040 201012		06-17-2013	\$1,000.00
706	Credit transferred in from 1040 201012		08-20-2013	\$5,000.00
971	Amended tax return or claim forwarded for processing		02-20-2015	\$0.00
977	Amended return filed	02-20-2015		\$0.00
n/a	33277-491-01838-5			
582	Lien placed on assets due to balance owed	04-03-2015		\$0.00

App. 36

360	Fees and other expenses for collection	04-27-2015	\$50.00
971	Issued notice of lien filing and right to Collection Due Process hearing	04-07-2015	\$0.00
971	Notice issued CP 071C	04-27-2015	\$0.00
196	Interest charged for late payment 20151405	04-27-2015	\$1,039.44
276	Penalty for late payment of tax 20151405	04-27-2015	\$3,628.88
960	Appointed representative	05-05-2015	\$0.00
290	Additional tax assessed 20152805 00-00-0000	08-03-2015	\$0.00
n/a	28254-596-06751-5		
420	Examination of tax return	07-17-2015	\$0.00
971	Pending installment agreement	04-22-2015	\$0.00
972	Removed installment agreement	04-22-2015	\$0.00
971	Collection due process Notice of Intent to Levy – issued	11-23-2015	\$0.00
971	Collection due process Notice of Intent to Levy – return receipt signed	12-02-2015	\$0.00

App. 37

301	Reduced or removed prior tax assessed by Exam	06-27-2016	\$28,724.00
n/a	49247-559-00102-6		
421	Closed examination of tax return	06-27-2016	\$0.00
277	Reduced or removed penalty for late payment of tax	06-27-2016	\$5,108.01
337	Reduced or removed interest charged for late payment	06-27-2016	\$1,753.29
776	Interest credited to your account	04-15-2014	\$4.21
826	Credit transferred out to 1040 201312	08-20-2013	\$213.00
826	Credit transferred out to 1040 201312	08-20-2013	\$6.08
971	Notice issued CP 0021	06-27-2016	\$0.00
971	Notice issued CP 0049	06-27-2016	\$0.00
846	Refund issued	06-17-2016	\$2,014.41
776	Interest credited to your account	06-27-2016	\$165.98
583	Removed lien	06-24-2016	\$0.00
420	Examination of tax return	09-14-2018	\$0.00

App. 38

300	Additional tax assessed by examination			
	20191205	04-08-2019		\$0.00
	00-00-0000			
n/a	49247-474-02739-9			
421	Closed examination			
	of tax return	04-08-2019		\$0.00

This Product Contains Sensitive Taxpayer Data

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**Office of Chief Counsel  
Internal Revenue Service**  
**memorandum**

date:

to: Lulu Nicozi  
Tax Specialist (SBSE)  
1301 Clay Street  
Oakland, CA 94612-5217

from: Kathryn Meyer, Area Counsel  
Small Business/Self-Employed, Area 7

subject: Testimony Authorization  
In Re: Phyllis Carr v. United States  
United States District Court for the  
Northern District of California  
Case No. 3:20-cv-00744-LB

You have been requested to testify in your official capacity as an employee of the Internal Revenue Service in connection with the above-captioned United States District Court litigation through Zoom.gov. Your testimony is scheduled for August 31, 2021 at 11:00AM.

Pursuant to Delegation Order 11-2 (formerly DO 156, Rev. 17), Table 2, and 26 C.F.R. § 301.9000-1, and the subpoena, you are authorized to appear and give testimony in your official capacity as an employee of the Internal Revenue Service, subject to the presence and guidance of counsel for the Government, and subject to the following limitations.

**Unless prohibited by the next section, you may:**

- Testify as to facts of which you have personal knowledge in your official capacity as a tax specialist in the Oakland office of SBSE regarding the examination of Phyllis Carr's 2012 tax year.

**You may not:**

- Produce any privileged documents or records of the Internal Revenue Service;
- Testify as to facts of which you have no personal knowledge;
- Testify regarding the thought processes of agency personnel or answer hypothetical questions;
- Speculate as to matters of which you have no sure knowledge;
- Testify in response to general questions concerning the positions, policies, procedures, or records of the Internal Revenue Service that are not relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence;
- Testify as to other cases or other matters of official business not relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence;
- Disclose any information that is protected by the attorney-client privilege, except, and only to the extent, these protections are waived by this authorization. This includes

App. 41

communications with attorneys from the Office of Chief Counsel and Department of Justice;

- Disclose returns or return information of any third-party taxpayer (i.e., a taxpayer not a party to this proceeding) except as authorized by I.R.C. section 6103(h)(4);
- Disclose any information that may tend to identify a confidential informant, if any;
- Disclose tax convention information subject to I.R.C. section 6105, if any;
- Disclose any information that is secret pursuant to Fed. Crim. 6(e), if any.

If your appearance at the above-referenced time and date is rescheduled, this authorization shall remain valid until such time and date for which your appearance is rescheduled, provided there is no change in the facts affecting the nature of your testimony.

Inquiries concerning this matter may be directed to Office of Chief Counsel Attorney Heather L. Wolfe at (415) 547-3761.

/s/ Kathryn Meyer

Kathryn Meyer  
Area Counsel  
Small Business/Self-Employed, Area 7

---

DAVID HUBBERT  
Acting Assistant Attorney General

M. BLAIR HLINKA  
Trial Attorney, Tax Division  
U.S. Department of Justice  
P.O. Box 683  
Washington, D.C. 20044  
202-307-6483 (v)  
202-307-0054 (f)  
[M.Blair.Hlinka@usdoj.gov](mailto:M.Blair.Hlinka@usdoj.gov)  
[Western.taxcivil@usdoj.gov](mailto:Western.taxcivil@usdoj.gov)

*Attorneys for the United States of America*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF  
SAN FRANCISCO DIVISION

PHYLLIS CARR,	)	Case No. C20-0744-WHO
Plaintiff,	)	DECLARATION OF
v.	)	LULU NICOZI
UNITED STATES	)	(Filed Aug. 26, 2021)
OF AMERICA,	)	
Defendant.	)	

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I, Lulu Nicozi, pursuant to 28 U.S.C. § 1746, declare that:

1. I am a Tax Specialist employed by the Internal Revenue Service (IRS), with a post of duty in Oakland, California.

App. 43

2. The name Lulu Nicozi is not my real name. It is a pseudonym I use in my official capacity as an employee of the IRS. This pseudonym – used for privacy and safety reasons – has been registered with the IRS, in accordance with IRS procedures. and all IRS procedures governing the use of pseudonyms have been followed.

3. As a Tax Specialist, I have been delegated responsibility for examination of Form 1040, U.S. Individual Income Tax Returns, and Form 1040X, Amended U.S. Individual Income Tax Returns. In the ordinary course of my duties as a Tax Specialist, I was assigned to the examination of Phyllis Carr's 2012 individual income tax account in 2018. I make this declaration based on my personal knowledge and my independent review of the IRS's records, reports, transcripts, and data compilations regarding Ms. Carr.

4. My office duties as a Tax Specialist include providing litigation support to the government attorneys who handle litigation on behalf of the United States. This support includes, but is not limited to reviewing IRS examination files and transcripts of taxpayers involved in the litigation.

5. As part of my work as a Tax Specialist, I am authorized to access certain electronic records of assessments, payments and other information for taxpayers, as well as other records maintained on electronic databases by the IRS. I am also authorized to access the Integrated Data Retrieval System (IDRS), which are electronic records of taxpayer filing history and tax

App. 44

return information, and can obtain computerized information regarding taxpayers' accounts. The IRS relies on the IDRS to store and track account information.

6. In the course of my official duties, I reviewed IRS records related to Ms. Carr's 2010 and 2012 tax years, including the attached exhibits.

7. Attached hereto as **Exhibit 1** is a true and correct copy (with social security number redacted) of Form 1040X, Amended U.S. Individual Income Tax Return, for Ms. Carr for the 2010 tax year, contained in the IRS's files (hereinafter, "2010 Form 1040X").

8. Attached hereto as **Exhibit 2** is a true and correct copy (with social security number redacted) of Account Transcript as of August 3, 2021, for Ms. Carr for Federal individual income tax for year 2010.

9. Attached hereto as **Exhibit 3** is a true and correct copy (with social security number redacted) of Form 1040X, Amended U.S. Individual Income Tax Return, for Ms. Carr for the 2012 tax year, contained in the IRS's files (hereinafter "2012 Form 1040X").

10. Attached hereto as **Exhibit 4** is a true and correct copy (with social security number redacted) of TXMODA transcript, dated February 26, 2020, an IRS transcript which displays all tax module information for a specific taxpayer for a specific tax year, including entity data, posted returns, posted transactions, pending transactions, and reject data, for Ms. Carr for Federal individual income tax for year 2012.

App. 45

11. Attached hereto as **Exhibit 5** is a true and correct copy (with social security number redacted) of Account Transcript as of August 3, 2021, for Ms. Carr for Federal individual income tax for year 2012.

12. Attached hereto as **Exhibit 6** is a true and correct copy of Form 9984, Examining Officer's Activity Record, for Ms. Carr relating to Federal individual income tax for year 2012. Form 9984 is a summary of actions taken on the case and is prepared contemporaneously to provide a complete and concise case history. I completed the attached Form 9984. Exhibit 6 is included in the IRS' electronic examination files for Ms. Carr's 2012 tax year.

13. Attached hereto as **Exhibit 7** is a true and correct copy of the Case History Report. The Case History Report is also a summary of actions taken on the case and is prepared contemporaneously to provide a complete and concise case history. Exhibit 7 is included in the IRS' electronic examination files for Ms. Carr's 2012 tax year.

14. Attached hereto as **Exhibit 8** is a true and correct copy of the Wage and Income Transcript for Ms. Carr's 2012 tax year, contained in the IRS's files.

15. Attached hereto as **Exhibit 9** is a true and correct copy of the Bank Deposits Analysis performed by the IRS for Ms. Carr's 2012 tax year, contained in the IRS's files.

App. 46

16. Attached hereto as **Exhibit 10** is a true and correct copy of the Letter 693 sent to Ms. Carr, contained in the IRS's files.

17. Attached hereto as **Exhibit 11** are true and correct copies of Form 4549, Report Income Tax Examination Changes, and Form 886-A, Explanation of Items, prepared by me on August 23, 2021, contained in the IRS's files. I prepared these documents at the request of Department of Justice Trial Attorney Blair Hlinka *for demonstrative purposes only. See infra ¶¶ 43-51.* They were not issued and sent to Ms. Carr.

**Plaintiff's 2010 Tax Account**

18. Based on pertinent information contained in the 2010 Account Transcript, and IRS records, Ms. Carr filed a Form 1040 for 2010 on November 21, 2011, and the IRS assessed the following amounts based on the information reported on the 2010 Form 1040:

Tax Liability	\$55,276	November 21, 2011
Estimated Tax Penalty	\$873	November 21, 2011
Interest	\$1,256.72	November 21, 2011
Failure to Pay Penalty	\$2,191.04	November 21, 2011
Failure to Pay Penalty	\$884.57	July 21, 2014
Interest	\$129.79	July 21, 2014
<b>Total Assessments</b>	<b>\$60,611.12</b>	

App. 47

19. Ms. Carr filed a 2010 Form 1040X on April 20, 2014. Ex. 2, pg. 2. Ms. Carr's 2010 Form 1040X claimed \$27,495 as the total tax, a \$28,773 overpayment and a \$28,773 refund owed to Ms. Carr. *See* Ex. 1, pg. 1, ln. 10, 20-21. Ms. Carr's 2010 Form 1040X also claimed \$56,268 in payments. *Id.* at ln. 16.

20. According to IRS records and transcripts, including the 2010 Account Transcript, Ms. Carr made the following payments toward her 2010 tax liability:

April 14, 2011	\$500
December 22, 2011	\$1,000
May 11, 2012	\$3,000
June 22, 2012	\$6,500
July 13, 2012	\$5,000
November 14, 2012	\$2,500
December 28, 2012	\$5,000
January 14, 2013	\$16,000
June 17, 2013	\$1,000
August 20, 2013	\$5,000
<b>Total Payments Made by Ms. Carr</b>	<b>\$45,500</b>

21. According to IRS records and transcripts, Plaintiff also had \$172.13 in credits applied toward her 2010 tax liability, making the total payments to her 2010 tax account \$45,672.13, not \$56,268 as claimed on the 2010 Form 1040X.

## App. 48

22. On July 21, 2014, the IRS abated \$27,781 of prior tax on Ms. Carr's 2010 tax account after processing her 2010 Form 1040X. *See Ex. 2, pg. 3.*

23. As a result of the abatement, Ms. Carr's total 2010 tax liability, including additions to tax and assessed interest, was \$32,779.14.

24. According to IRS records and transcripts, the IRS determined Ms. Carr was due an overpayment of \$12,842.01 for the 2010 tax year.

25. The IRS updated Ms. Carr's 2010 account to reflect the overpayment and the entire overpayment was credited to Ms. Carr's outstanding 2012 tax liability. *See Ex. 2, pg. 3.* Ms. Carr's outstanding balance for 2010 is zero. *Id.* at 1.

### **Plaintiff's 2012 Tax Account**

26. Based on pertinent information contained in the 2012 Account Transcript and IRS records, Ms. Carr filed a Form 1040 for 2012 on October 17, 2013, and the IRS assessed the following amounts based on the information reported on the 2012 Form 1040:

Tax Liability	\$38,665	December 2, 2013
Estimated Tax Penalty	\$693	December 2, 2013
Failure to Pay Penalty	\$1,546.60	December 2, 2013
Interest	\$741.09	December 2, 2013
Interest	\$1,039.44	April 27, 2015

App. 49

Failure to Pay Penalty	\$3,628.88	April 27, 2015
<b>Total Assessments</b>	\$46,314.01	

27. According to IRS records and transcripts, the IRS applied the \$12,842.01 overpayment from 2010 as a payment on Ms. Carr's 2012 tax account in or around July 2014. Ex. 5, pg. 2.

28. No other payments are reflected in the IRS records for Ms. Carr's 2012 tax year.

29. Ms. Carr filed a 2012 Form 1040X on or around February 20, 2015. Ex. 5, pg. 2 Ms. Carr's 2012 Form 1040X claimed zero total tax. *See* Ex. 3, pg. 1, ln.10. IRS records in the Account Management Service system provide that Exhibit 5, Ms. Carr's 2012 Form 1040X, was received in February 2015 and scanned into IRS records in March 2015.

30. The IRS reviewed Ms. Carr's 2012 Form 1040X. It was considered a request for abatement of taxes because there was an outstanding liability for the 2012 tax year at the time it was filed. *See* Ex.7, pg. 1.

31. The IRS partially allowed some items claimed on Ms. Carr's 2012 Form 1040X and abated \$28,724 in tax, \$5,108.01 in failure to pay tax penalty, and \$1,753.29 in interest. *See* Ex. 5, pg. 2.

32. The IRS sent Ms. Carr a Letter 693 regarding the adjustments made to her 2012 tax account in April

## App. 50

2016. *See Ex. 8, 10.* The letter provided “If you don’t agree with our determination you can, after paying the additional tax due, file an amended return or a claim for refund. If you file a claim or amended return, you should do so within 3 years from the date your return was filed or 2 years from the time the tax was paid, whichever is later.” Ex. 10.

33. As a result of the abatements, a \$219.08 overpayment was credited to Ms. Carr’s 2013 tax year. In addition, Ms. Carr’s 2012 account reflected a \$2,014.41 refund issued to Ms. Carr, which consisted of a \$1,848.43 overpayment and \$165.98 interest payment.

34. Ms. Carr’s 2012 tax year was closed with unagreed changes in May 2016. *See Ex. 7, pg. 2.*

35. On or around November 2, 2018, Ms. Carr’s 2012 case was sent to me to re-close. After reviewing the IRS records, transcripts, and case file, I reclosed the case. *See Ex. 7, pg. 2.*

36. I have reviewed Ms. Carr’s IRS TXMODA transcript for 2012, which is contained in the IDRS. Ex. 4. The following is based on my review and interpretation of this transcript:

- a. Code 706 signifies an overpayment applied from another tax year. According to the TXMODA transcript, Ms. Carr received overpayments, in the amount of \$12,791.03, from tax year 2010 in July 2014. *See id* at 2.
- b. Code 736 signifies interest overpayment applied from another tax year. According to the

## App. 51

TXMODA transcript, Ms. Carr received an interest overpayment, in the amount of \$50.98, from tax year 2010 on 20142705, which means the 5th day of the 27th week of 2014 (that is, the first week of July 2014). *See id.* at 2.

- c. Code 420 signifies the beginning of an examination. According to the TXMODA transcript, the first examination of Ms. Carr's 2012 tax account occurred in July 2015. *See id.* at 2.
- d. Code 301 signifies an initial abatement. According to the TXMODA transcript, Ms. Carr received an initial abatement of tax in June 2016. *See id.* at 3.
- e. Code 421 signifies an examination closed. According to the TXMODA transcript, Ms. Carr's initial examination was closed in June 2016. *See id.*
- f. Code 846 signifies a refund for an overpayment. According to the TXMODA transcript, Ms. Carr receive a refund of \$2,014.41 in June 2016. *See id.*
- g. Code 421 is a losing code. According to the TXMODA transcript, Ms. Carr's 2012 account was closed on June 27, 2016. *See id.*
- h. Code 971 with action code 560 signifies a reconsideration of an account. According to the TXMODA transcript, Ms. Carr's account was under reconsideration in March 2018. *See id.*
- i. A second code 420 signifies the account was sent back to exam for an internal correction or determination. According to the TXMODA

App. 52

transcript, Ms. Carr's account was sent back to exam for an internal correction or determination in September 2018. *See id.* at 4.

j. Code 300 with \$0.00 signifies no change to the prior abatement. According to the TXMODA transcript, Ms. Carr's account was not changed in 2019. Seeing code 300 in combination with code "DISP-CD>08", Ms. Carr's account was closed unagreed and her previous partial abatement was not changed. *See id.* at 4.

37. In addition to reviewing the IRS transcripts for Ms. Carr's 2012 account, I have reviewed the IRS's electronic files regarding Ms. Carr's 2012 tax year.

38. Based on my review of the files described in paragraphs 9 through 17, Ms. Carr's 2012 Form 1040X was treated as a request for abatement, was allowed in part, and closed in May 2016.

39. Based on my review of the IRS's electronic files, the Case History Report, and the Form 9984, it is unclear what Ms. Carr submitted to the IRS regarding her 2012 account in 2018.

40. Based on my review of the IRS's electronic files, the Case History Report, and the Form 9984, no new records were found in the case file and case was re-closed with no change back to centralized processing. The transcripts do not indicate that a new Form 1040X for 2012 was submitted.

41. Examining the TXMODA transcript and the IRS's electronic files regarding Ms. Carr's 2012 tax

App. 53

year, there is not any indication the IRS Office of Appeals reviewed Ms. Carr's case in 2018.

42. Examining the TXMODA transcript and the IRS's electronic files regarding Ms. Carr's 2012 tax year, and based on my experience as a Tax Specialist, it is my opinion that the letter sent on January 31, 2019 was sent in error and does not apply to the 2012 abatement.

43. At the request of Department of Justice trial attorney Blair Hlinka, I examined Ms. Carr's 2012 account, and, for demonstrative purposes, I calculated Ms. Carr's 2012 tax liability and outstanding account balance by reviewing her 2012 Form 1040X, Exhibit 3. *See Ex. 11.*

44. I first reviewed Ms. Carr's income for 2012 based on the information claimed on the 2012 Form 1040X:

- a. Taxable interest \$899 (Ex. 8, pg. 2),
- b. Taxable amount of pension or IRA distributions \$5,874 (Ex. 8, pgs. 2-3), and
- c. Schedule C, Profit or Loss from Business, for Real Properties Unlimited in the amount of \$239 loss.

45. I confirmed the taxable interest and taxable amount of the IRS distributions listed in paragraph 44 using Exhibit 8. Ex. 8 pgs. 2-3.

46. Based on IRS records, Ms. Carr's 2012 Schedule C Gross Receipts or Sales (line 1) were underreported

App. 54

on the 2012 Form 1040X by approximately \$20,000. A bank deposit analysis was performed by the IRS, *see* Ex. 9, and Ms. Carr's Schedule C Gross Receipt or Sales should have been \$66,770, not as reported on the 2012 Form 1040X.

47. I disallowed the following expenses and deductions because Ms. Carr did not have any documentation to support the expenses or deductions:

- a. Schedule C Expenses in the amount of \$43,249 and
- b. Schedule A cash and noncash contributions in the amount of \$2,260 and \$1,500.

48. Ms. Carr's 2012 Profit on Schedule C was \$66,770 because no expenses were allowed, and gross receipts was \$66,770 per the bank deposits analysis calculated from the bank statements.

49. Based on information returns submitted to the IRS, I allowed Schedule A deductions for mortgage interest and income taxes. *See* Ex. 8.

50. Because Ms. Carr received a \$5,874 taxable distribution from an IRA or pension and she was 57 years old at the time of the distribution, an additional 10% penalty for early distribution was assessed. This penalty applies for early distributions to individuals under 59 and half years of age. No documentation was provided by Ms. Carr regarding this distribution.

51. Accepting the adjustments to Ms. Carr's Schedule C as determined through the bank deposit

App. 55

analysis and allowing and disallowing the same deductions discussed above in paragraphs 47 through 50, Ms. Carr would have owed an additional \$7,533 in tax.<sup>1</sup>

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 25th day of August 2021.

By: /s/ Lulu Nicozi  
LULU NICOZI  
Tax Specialist  
Internal Revenue Service.

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<sup>1</sup> For demonstrative purposes, if the IRS were to have accepted the income amounts reported on the 2012 Form 1040X, including Gross Receipts or Sales, disallowed the deductions listed in paragraph 47, and allowed the deductions listed in paragraph 49, it would have resulted in \$561 additional tax owed by Ms. Carr. See Ex. 11 at 13 (Form 4549 accepting Ms. Carr's gross receipts, but disallowing the deductions listed in paragraph 47 and allowing the deductions in paragraph 49).

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DISTRICT COURT OF THE UNITED STATES  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO/OAKLAND DIVISION

PHYLLIS CARR, )  
Plaintiff, )  
vs. ) Case No  
UNITED STATES ) 3:20-cv-0074-WHO  
OF AMERICA, )  
Defendant. )

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DEPOSITION of LULU NICOZI

August 31, 2021

WENDY L. GRAVES, RPR, CSR No. 6138  
475552

\* \* \*

[19] file?

A. I believe it was a complete file from what you provided to the original examiner.

Q. How do you know?

A. Well, when the examiner did your examination back in 2015, it was the case file that he prepared. So that was what I received in 2018 for the review.

Q. But you can't say for certain that it was a complete file; you wouldn't know, would you?

A. I only know that that's the IRS file.

Q. But you are not saying it was the complete file; is that correct?

A. I would say it's everything the IRS had.

Q. Okay. Did the file include receipts?

A. I don't know. May I add something?

Q. Yes.

A. Part of the Schedule C expenses were allowed by the examiner. So because of that I know that he did have records of expenses, because he allowed some of the expenses.

Q. Okay. But the question is, did you actually see receipts in the file? Because if the file is complete, it would mean that it had everything that I submitted to the examiner for the examination. So that was –

A. I don't recall. I don't recall that.

[20] Q. You don't recall seeing receipts?

A. I don't recall that detail.

Q. Okay. But when you say detail, what are you saying? Are you saying that you don't recall seeing receipts or not?

A. I do not recall seeing receipts.

Q. Okay. Thank you. You provided a declaration for this case. Did Heather Wolfe help you prepare your declaration?

A. Yes, she did.

App. 58

MS. HLINKA: And I am just going to caution the witness not to reveal any information that would get into the substance of attorney-client privileged conversations to the IRS counsel.

MS. CARR: She doesn't have attorney-client privilege as a nonreporting expert witness. It's not the same.

MS. HLINKA: There are still some attorney-client privileges. She can still answer questions on the subject. I'm just cautioning her depending on the questions that come in the future to consider whether or not to make sure that she does not disclose anything that would fall within the attorney-client privilege space.

MS. CARR: Okay. I'm kind of confused. You are

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