UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO.3:98-CV-663-H

MARY ANN TOBIN PLAINTIFF

V.

JENNIFER TROUTMAN, *et al*. DEFENDANTS

MEMORANDUM OPINION

Plaintiff Mary Ann Tobin filed this civil action against known and unknown employees of the Internal Revenue Service and against the United States under *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for violation of her constitutional rights under the Fourth and Fifth Amendments, and her statutory rights under 26 U.S.C. § 7431. She also seeks a refund of taxes she alleges were wrongfully collected. Defendants have moved to dismiss the case under Fed. R. Civ. P. 12(b). To support dismissal, Defendants contend the Court lacks subject matter jurisdiction over the refund claim because Plaintiff failed to exhaust her administrative remedies; Plaintiff's *Bivens* claim is precluded by administrative remedies in the Internal Revenue Code; Plaintiff's *Bivens* action is time barred; Plaintiff has failed to state a claim under 26 U.S.C. § 7431.[1] After summarizing the facts, the Court will address each of these contentions.

I.

Plaintiff received a statutory notice of deficiency from the Internal Revenue Service

[1]Defendants also moved to dismiss for Plaintiff's failure to properly serve process on the individually named defendants. Plaintiff has since indicated to the Court that the individual defendants have executed waivers of service and will be filing responsive pleadings, mooting any issues of insufficiency of process. Thus, the Court will not address this issue, noting that the individual defendants, by waiving service of process, have not waived rights preserved under Fed. R. Civ. P. 4(d)(1).

("IRS" or "Service") March 25, 1996 for the tax years 1990 and 1991. Plaintiff believed the deficiency notice was in error and decided to challenge it in Tax Court.[2]

During discovery for the Tax Court case, Plaintiff turned records over to her accountant who then provided the IRS access to the records. Also during discovery of the Tax Court case, Defendant Jennifer Troutman visited the Broadmoor Garden property on February 7, 1997. Plaintiff states that for many months, her tax lawyer, her accountant and Plaintiff believed this was the only visit ever made by an IRS official to Broadmoor Gardens. However, Plaintiff found among the discovery documents returned to her certain records she never turned over to her accountant or the IRS. With some investigation, Plaintiff determined that Defendant Troutman and Defendant Blackburn made another visit to Broadmoor Gardens on February 13, 1997. Plaintiff states that Defendants Troutman and Blackburn gained access to Broadmoor Gardens by representing to Plaintiff's employees that they were associated with Plaintiff's accountant. Plaintiff believes that during this visit, Defendants Troutman and Blackburn illegally searched Plaintiff's home and seized records they later surreptitiously returned to her along with legally discovered documents.

After these events and before conclusion of the first tax claim, the IRS pursued similar deficiencies for the tax years 1992, 1993, and 1994. Plaintiff paid those deficiencies and filed for a refund; she filed this lawsuit three days after filing that refund claim.

II.

[2]The IRS and Plaintiff disagree over Plaintiff's business activities. Plaintiff operates a farming business. She contends Broadmoor Gardens is a legitimate business started "to show and sell indigenous plants and flowers as part of her overall farming operations." Plaintiff's Response to Defendants' Motion to Dismiss at 3. The IRS believes Broadmoor Gardens is a separate and distinct activity that has always lost money and is a hobby farm under IRS regulations. Thus, the parties disputed whether the Broadmoor Gardens losses were deductible on Plaintiff's federal income tax returns.

Defendants first argue that Plaintiff's complaint should be dismissed because she failed to exhaust administrative remedies before filing her federal complaint. Section 7422(a) of Title 26 of the United States Code ("Internal Revenue Code") states:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

Section 6532(a)(1) of the Internal Revenue Code further states:

> No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax penalty, or other sum shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

Under these sections, Plaintiff's initial claim for refund before this court was premature. She filed her request refund on October 20, 1998 and filed this complaint only three days later. Although the complaint was filed before Plaintiff exhausted her remedies, her claim has since matured and could rightfully be filed now. Plaintiff has received notice of the disallowance of the refund and is free to file suit. The only question before the Court now is whether these events vest the Court with jurisdiction, or if the Court must dismiss without prejudice, requiring Plaintiff to re-file.

Defendants cite *Lewis v. United States*, 208 Ct. Cl. 969 (Ct. Cl. 1975) for the proposition that § 6532(a)(1) bars suits before plaintiff's exhausting administrative remedies, "even where at the time the case comes on for hearing 6 months have passed since the date a refund claim was filed." *See also Woodward v. United States*, 232 F.Supp. 831 (E.D. Pa 1964). In *Lewis*, the

plaintiffs sought a refund before the tax liability had even been assessed--that is, they filed a refund for 1974 in September of 1974. In *Woodward*, the court took up the suit before the Service had responded to the refund claim and before the passage of the six month waiting period. The administrative process in those two cases either had not begun or had not concluded when the courts considered the jurisdiction question.

Here, Plaintiff received a response from the Service. That is all the statute requires. Plaintiff's amended complaint states this and cures any prior jurisdictional defect. Defendants are not prejudiced by the amended complaint. Dismissal followed by refiling would waste court resources.

III.

Next, Defendants contend that relief for violations of her Fourth and Fifth Amendment rights under *Bivens* is not available to Plaintiff. Specifically Defendants argue that under the reasoning of *Schweiker v. Chilicky*, 487 U.S. 412 (1988), courts should defer to the remedial mechanisms developed by Congress for such claims. While it is true that the Internal Revenue Code's remedial provisions are extensive, they are not exhaustive. None of the provisions cited by Defendants address violations of the taxpayer's Fourth Amendment rights. Furthermore, though Plaintiff appears to concede that *Bivens* actions are not available for Fifth Amendment due process claims, *Fishburn v. Brown*, 125 F.3d 979, 982 (6th Cir. 1997), *Bivens* claims are available for Fourth Amendment claims. *National Commodity and Barter Ass'n v.* Archer 31 F.3d 1521, 1526 (10th Cir. 1994)*; National Commodity and Barter Ass'n v. Gibbs*, 886 F.2d 1240, 1243 (10th Cir. 1989); *LeClair v. Hart*, 800 F.2d 692 (7th Cir. 1986).

IV.

Defendants next contend that Plaintiff's *Bivens* action is time-barred. The parties agree on what law governs. Kentucky's one-year statute of limitations governs the *Bivens* claim. *McSurely v. Hutchison,* 823 F.2d 1002 (6th Cir. 1987). Federal law governs when the action accrues for purposes of applying the statute of limitations. The parties also agree that under federal law, the cause of action accrues when Plaintiff knew or had reason to know of the injury giving rise to the claim. *Sevier v. Turner*, 742 F.2d 262, 272-3 (6th Cir. 1984). From this point, the parties diverge in their analysis. Defendants argue that Plaintiff *should have known* on February 13, 1997 that her rights had been violated because that is the date of the allegedly unconstitutional search of her home and seizure of her records. Plaintiff argues she did not become aware of the illegal seizure until the misappropriated records were returned to her sometime in November 1997. Thus, the parties conflict over a question of constructive knowledge in February 1997 versus actual knowledge in November of 1997.

Defendants cite numerous cases for the proposition that when *Bivens* claims are based on illegal search and seizure, the claim accrues at the time of the search and seizure. All of the cases are factually dissimilar to the case at hand. None state a legal principle which would support dismissal of Plaintiff's claim. For instance, Defendants cite an unpublished Eastern District of New York case, *Tellier v. Krimmer*, 1996 WL 518108 *1 (E.D.N.Y. 1996). In that case the plaintiff was present or aware of the allegedly illegal search and seizure as it took place. The plaintiff in *Tellier* made the fatal mistake of waiting until the judge in another proceeding ruled the search unconstitutional before proceeding on his rights under *Bivens* or 42 U.S.C. § 1983. Courts consistently hold that such waiting is unnecessary, and that in so waiting, a plaintiff risks filing a time-barred suit.

Defendant also relies on *Powell v. Tordoff*, 911 F.Supp. 1184, 1195 (N.D. Iowa 1995), for the proposition that the claim accrues when the search occurred, "even if they . . . did not know the extent of the search and seizure." In *Powell,* the plaintiffs knew something had been seized, but four years later they claimed that the statute of limitations was tolled because they did not know the *extent* of the search and seizure. Here, Plaintiff claims to have not known about the search and seizure *at all*.

Powell states "it [is not] necessary for the plaintiff to know that the claim is legally redressable or the extent, seriousness, or permanence of any injury, for the statute of limitations to start running *if the plaintiff knows of the harm and its cause*." *Id*. at 1194 (emphasis added). Here, Plaintiff contends she did not know of the harm until November 1997. While it is plausible that Plaintiff could have become aware that Defendants Troutman and Blackburn ventured onto the Broadmoor Gardens property to measure the conservatory, nothing in the record so indicates.

The remainder of Defendants' cases are unpersuasive for similar reasons. They provide a bright line test for those cases when the plaintiff was fully aware of the search and the seizure when it happened. If that were the case here, the Court might easily apply that rule. Plaintiff, however, has pleaded and argued that she was unaware of the search and seizure until several months later. The Court need not reach her fraudulent concealment argument because the Court finds that she has filed her complaint within one year of knowing the critical facts of her injury--when she discovered the allegedly stolen documents upon their return to her.

V.

Plaintiff also alleges that Defendants inspected or disclosed her tax return information in violation of Internal Revenue Code provisions. The general prohibition against disclosure or inspection of tax return and tax return information is found at § 6103 of the Internal Revenue Code while § 7431 provides a right of civil action to the aggrieved taxpayer for violations of that section. Section 7431 states,

> § 7431(a) In general. --
> (1) Inspection or disclosure by employee of United States. — If any officer or employee of the United States knowingly, or by reason of negligence, inspects or discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.[3]

Defendants contend that Plaintiff has not stated a claim under 26 U.S.C. § 7431. The answer lies in the particular actions to which § 7431 has been deemed to apply.

The leading case on the question of what disclosure, (and presumably, inspection) means

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[3]For the purposes of this section, the Internal Revenue Code defines "return" and "return information" at § 6103(b)(1) and (2):

> (1) Return. — The term "return" means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.
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> (2) Return Information. — The term "return information" means—
> (A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, . . .
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> * * *
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> (3) Taxpayer return information. — The term "taxpayer return information" means return information as defined in paragraph (2) which is filed with, or furnished to, the Secretary by or on behalf of the taxpayer to whom such return information relates.

with regard to § 7431 claims seems to be *Stokwitz v. United States*, 831 F.2d 893 (9th Cir. 1987). In *Stokwitz*, Navy personnel illegally seized the plaintiff's tax returns and return information from his office and briefcase. The information was then disclosed to Navy investigators and other Navy employees. The court noted

> the elaborate disclosure procedures of section 6103 are directed to controlling the distribution of information the IRS receives directly from the taxpayer--information the taxpayer files under compulsion and the threat of criminal penalties. Section 6103 establishes a comprehensive scheme for controlling the release *by the IRS* of information received from taxpayers to discrete identified parties, subject to specified conditions.

Id. at 895 (citing S.Rep. No. 938, 94th Cong., 2nd Sess. 328, *reprinted in* 1976 Code Cong. & Admin. News 3757)(emphasis in original). *See also Baskin v. United States*, 135 F.3d 338, 340 (5th Cir. 1998). The court in *Stokwitz* concluded that the search, seizure, and disclosure in that case was not the type of wrongdoing Congress intended to prevent and remedy through § 6103 and § 7431 of the Internal Revenue Code.

Plaintiff argues that merely alleging a violation of § 7431 is enough to state a claim. The Court disagrees. First, Plaintiff focuses on the unlawful *inspection* language of § 7431. That the § 7431 claim is lumped together with her Fourth and Fifth Amendment claims under Count I indicates that the facts of the alleged illegal search and seizure are the same ones Plaintiff is trying to use to support her § 7431 claim. She admits to such bootstrapping in her response: "the testimony . . . in the case demonstrates quite clearly that the 'inspection' of Plaintiff's income tax records which occurred *at her home* was both unlawful and unconstitutional." Plaintiff's Response at 28 (emphasis added). Plaintiff goes on to argue that she cannot plead unlawful disclosure more specifically without discovery. *Id.* The analysis in *Stokwitz* is clear that the wrongfully disclosed or inspected records must have been in the hands of the Internal Revenue

Service, not in the hands of the Plaintiff. *See* 26 U.S.C. § 6103 (b)(1), (2), and (3). By pointing out that the records were inspected in her home, Plaintiff concedes that they were not in the hands of the Internal Revenue Service at the time of allegedly wrongful inspection.

As the Court in *Stokwitz* concluded, "[t]his is not to say that [plaintiff] has no remedy for the alleged unlawful seizure and subsequent use of his tax information. Those issues can be addressed in [plaintiff's] *Bivens* action." *Id.* at 897. The same is true here.

The Court will enter an order consistent with this memorandum.

JOHN G. HEYBURN II
JUDGE, U. S. DISTRICT COURT

cc: Counsel of Record

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ORDER

This case is before the Court on Defendants' Motion to Dismiss. The Court has entered a Memorandum Opinion discussing its views. Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss for lack of subject matter jurisdiction because of Plaintiff's failure to exhaust administrative procedures is DENIED.

IT IS FURTHER ORDERED that the Motion to Dismiss Plaintiff's action under *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) as time-barred is DENIED.

IT IS FURTHER ORDERED that the Motion to Dismiss Plaintiff's action under *Bivens* for violation of Plaintiff's rights under the Fourth Amendment of the Constitution for failure to state a claim is DENIED.

IT IS FURTHER ORDERED that the Motion to Dismiss Plaintiff's *Bivens* claim for violation of her rights under 26 U.S.C. § 7431 and the Fifth Amendment of the Constitution for failure to state a claim is SUSTAINED and Plaintiff's *Bivens* claim alleging violation of rights under 26 U.S.C. § 7431 and the Fifth Amendment of the Constitution is DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss Plaintiff's claim for insufficient service of process on named individual defendants is DENIED as moot.

This _____ day of June, 1999.

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JOHN G. HEYBURN, II
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record