UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION 3:98CV-663-H

MARY ANN TOBIN PLAINTIFF

V.

JENNIFER TROUTMAN and
UNITED STATES OF AMERICA DEFENDANTS

MEMORANDUM OPINION

On June 8, 1999, the Court denied in part and sustained in part Defendants' motions to dismiss Plaintiff's claims. One of the government's unsuccessful motions asserted that the Court lacked subject matter jurisdiction over Plaintiff's tax refund claim because she had failed to exhaust requisite administrative procedures. At the time, the Court gave rather brief mention to this interesting issue, in part because the government did not raise a particularly strenuous argument. Now that has changed.

Since that opinion, almost three years ago, the parties have engaged in intermittent settlement discussions, which have reached an impasse. Plaintiff now seeks to proceed to trial on her tax refund claim. On January 31, 2002, the Court granted the government leave to renew this specific motion to dismiss on the basis of Supreme Court precedent not included in the parties' initial briefing materials. The Court agrees that thoroughly revisiting this difficult jurisdictional problem is appropriate.

I.

Congress has statutorily mandated the limitations period within which taxpayer suits for refunds from the Internal Revenue Service ("IRS") may be filed. 26 U.S.C. § 6532(a) provides, in relevant part:

> 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 . . . .

Likewise, 26 U.S.C. § 7422(a) 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, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully 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.

In other words, the Internal Revenue Code directs that a taxpayer may not file suit in federal court until: one, the taxpayer has filed a refund claim with the Secretary of the IRS; and two, either the Secretary has denied the claim or six months have passed, whichever comes first. Not satisfying either of these prerequisites constitutes a failure to exhaust administrative remedies, and deprives a federal district court of subject matter jurisdiction over a plaintiff's claim. *See, e.g., Bartley v. United States*, 123 F.3d 466, 468 (7th Cir. 1997) (citing *United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 272 (1931)).

There is no question that Plaintiff, at least initially, commenced her suit prematurely. She filed her judicial complaint on October 23, 1998. Plaintiff contends that she filed her administrative claim on or about October 20, 1998; the government asserts that she did so on October 26, 1998. Whether Plaintiff filed her administrative claim three days before or three

days after filing her judicial complaint ultimately matters little. The IRS rejected her claim on February 8, 1999, which means Plaintiff sought to proceed in federal court before either the Secretary had rendered a decision or six months had expired.

In an effort to cure this jurisdictional deficiency, however, Plaintiff subsequently filed a pleading styled "First Amended and Supplemental Complaint" on February 19, 1999. In its June, 1999, order, the Court held that because the Secretary had denied Plaintiff's request for a refund, her claim had matured, and filing an amended complaint satisfactorily remedied her failure to exhaust administrative procedures. The Court found that the two cases relied upon by the government were inapposite to the instant issue, the government was not prejudiced by the amended complaint, and dismissal followed by refiling would waste judicial resources.

II.

The government argues that the jurisdictional prerequisites of 26 U.S.C. §§ 6532(a) and 7422(a) cannot be fulfilled if a plaintiff files suit in federal district court before submitting an administrative claim. Indeed, the statutory language of these provisions does indicate that complete exhaustion is mandatory. Thus, the Court must determine whether a jurisdictional defect – the result of filing an administrative claim outside the time limits set forth in 26 U.S.C. §§ 6532(a) and 7422(a) – may be retroactively cured by refiling a supplemental complaint.

A.

At the outset, the Court notes that neither party cites case law directly on point. Nevertheless, both sides make strong interpretive and policy arguments in their favor. The government argues that statutory exhaustion schemes nearly identical to §§ 6532(a) and 7422(a) have been strictly interpreted. Plaintiff responds that the circumstances of her suit bring it within

one of the recognized exceptions to the exhaustion of administrative procedures doctrine.

The foundation of the government's argument is that the exhaustion requirements of the Internal Revenue Code are analogous to those found in the Federal Tort Claims Act (FTCA), addressed by the Supreme Court fairly recently in *McNeil v. United States*, 508 U.S. 106 (1993). 28 U.S.C. § 2675(a) provides, in relevant part:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes this section.

Thus, § 2675(a) of the FTCA and §§ 6532(a) and 7422(a) of the Internal Revenue Code both contain the same substantive preconditions that must be satisfied prior to filing judicial suit: filing an administrative claim; and either agency denial of that claim or the expiration of six months.

In *McNeil*, an Illinois state prisoner filed a pro se complaint in the Northern District of Illinois on March 6, 1989, seeking money damages for an alleged personal injury. Four months later, on July 7, 1989, he submitted an administrative claim to the Department of Health and Human Services, which denied the claim on July 21, 1989. On August 7, 1989, McNeil sent the court a copy of this denial, as well as a letter again requesting the appointment of counsel and the opportunity to commence his suit. The district court found that McNeil had not exhausted administrative procedures prior to filing suit, and dismissed his claim for lack of jurisdiction. The Seventh Circuit affirmed. *See* 508 U.S. at 107-11.

McNeil argued to the Supreme Court that "an action is not 'instituted' until the occurrence of the events that are necessary predicates to the invocation of the court's jurisdiction – namely, the filing of the complaint and the formal denial of his administrative claim." *Id.* at 111. McNeil asserted this interpretation did not undermine the fundamental purpose of § 2675(a), because, "[a]s long as no substantial progress has been made in the litigation by the time the claimant has exhausted his administrative remedies, the federal agency will have had a fair opportunity to investigate and possibly settle the claim before the parties must assume the burden of costly and time-consuming litigation." *Id.* at 111-12. The Court disagreed, stating:

> In its statutory context, we think the normal interpretation of the word "institute" is synonymous with the words "begin" and "commence." The most natural reading of the statute indicates that Congress intended to require complete exhaustion of Executive remedies before invocation of the judicial process. Every premature filing of an action under the FTCA imposes some burden on the judicial system and on the Department of Justice which must assume the defense of such actions. Although the burdens may be slight in an individual case, the statute governs the processing of a vast multitude of claims. The interest in orderly administration of this body of litigation is best served by adherence to the straightforward statutory command.

Id. at 112. Again, the exhaustion requirements of the FTCA and Internal Revenue Code are substantively indistinguishable. In addition, the same public policy benefits safeguarded by the *McNeil* Court are implicated in a taxpayer refund suit. Thus, argues the government, *McNeil* directs that Plaintiff's suit must be dismissed.

Plaintiff, for her part, likewise seeks refuge under analogous Supreme Court precedent. In *Mathews v. Diaz*, 426 U.S. 67 (1976), one of the plaintiffs pursuing medicare benefits under the Social Security Act failed to file an administrative claim until after he had filed a judicial complaint. The statutory exhaustion scheme at issue, 42 U.S.C. § 405(g), provided that a claimant seeking judicial review of any final decision of the Secretary must do so within sixty

days. The *Diaz* Court stated:

> Although 42 U.S.C. § 405(g) establishes filing of an application as a nonwaivable condition of jurisdiction, [the plaintiff] satisfied this condition while the case was pending in the District Court. A supplemental complaint in the District Court would have eliminated this jurisdictional issue; since the record discloses, both by affidavit and stipulation, that the jurisdictional condition was satisfied, it is not too late, even now, to supplement the complaint to allege this fact.

426 U.S. at 75 (internal citations omitted). Here, according to Plaintiff, the jurisdictional prerequisite that she receive agency denial of her administrative claim was satisfied while her suit was pending in federal district court. She then filed the "amended and supplemental" complaint to reflect this fact, thus eliminating the jurisdictional defect.

B.

Both sides in the instant case naturally disagree over the seemingly contrary holdings of *McNeil* and *Diaz*. They are not alone, as the federal courts have also struggled to define the parameters of the exhaustion of administrative remedies doctrine and its exceptions. For example, in *Black v. Secretary of Health and Human Services*, 93 F.3d 781 (Fed. Cir. 1996), a suit involving the jurisdictional provisions of the National Childhood Vaccine Injury Act of 1986, the Federal Circuit attempted to reconcile *McNeil* and *Diaz.* First, "[d]etermining whether a supplemental pleading can be used to rescue an insufficient petition or complaint in a particular case depends on a careful reading of the substantive provision at issue." *Id.* at 790. According to the Federal Circuit, *McNeil* illustrates the point that:

> If the statute in question contains . . . an express prohibition against filing a complaint before the expiration of a statutory waiting period, it would defeat the purpose of the statutory prohibition to permit a plaintiff to ignore the waiting period, file his complaint during the prohibited period, and then seek to cure the defect by filing a supplemental pleading alleging that the waiting period expired during the pendency of the action.

* * * * *

> By contrast, the statute at issue in *Mathews v. Diaz* did not contain similar language forbidding a claimant from filing an action prior to the agency's denial of an administrative claim, although the statute barred the claimant from obtaining judicial review before seeking administrative relief. The Supreme Court therefore found that it did not do violence to the applicable statute to permit the plaintiff's case to go forward, even though the exhaustion of administrative remedies occurred after the complaint was filed rather than before.

Id. at 790, 791. Under this reasoning, of course, Plaintiff's suit for a tax refund would be barred, as §§ 6532(a) and 7422(a) of the Internal Revenue Code both contain an express prohibition against filing a complaint before the expiration of the statutory waiting period.

Indeed, courts within the Federal Circuit have relied upon *Black* to dismiss taxpayer refund suits under §§ 6532(a) and 7422(a), the same Internal Revenue Code provisions at issue in Plaintiff's case. For instance, in *Harris v. United States*, 2000 WL 141272 (Fed. Cl. Jan. 6, 2000), the plaintiff filed his federal income tax return on April 15, 1999, and then filed suit for a refund in federal court only four days later. The court found that the plaintiff's failure to wait for either an agency denial of his claim or the passage of six months time from the date it was filed rendered the claim procedurally deficient. The fact that six months had passed since plaintiff filed the claim was not sufficiently curative. The court further noted that although supplemental pleading may remedy jurisdictional defects, "the rule does not apply to cases in which a claimant has violated a specific statutory prohibition against filing a complaint before the expiration of a waiting period." *Id.* at *2 (citing *Black*, 93 F.3d at 790).

III.

While *Black* – and by extension *Harris* – is not binding here, it is a significant opinion which this Court probably should either accept or explain. After careful consideration, this Court believes that the analysis applied in *Black* and *Harris* overstates the scope of *McNeil's*

holding. Stated simply, *McNeil* did not, as the Federal Circuit suggests in *Black* (and the government argues in this case) announce a per se rule that a jurisdictionally defective complaint cannot be cured by filing a supplemental complaint. In fact, the *McNeil* Court at several points specifically emphasizes that it does not reach the issue of whether initiating a new action would have been sufficient to vest the district court with jurisdiction.

Understanding this important point requires, first, a close reading of the Seventh Circuit decision reviewed by the Supreme Court. *See McNeil v. United States*, 964 F.2d 647 (7th Cir. 1992). Again, McNeil filed his judicial complaint in March, 1989, and submitted an administrative claim the following June. The agency denied his claim on July 21, 1989, and "[i]nstead of commencing a new suit, McNeil sought assistance in the existing one, attaching the administrative decision to a request filed in August 1989 for the appointment of counsel." *Id.* at 648. The district court dismissed the suit as premature, McNeil having failed to initially pursue the administrative remedies required by 28 U.S.C. § 2675(a). *Id.* The Seventh Circuit affirmed, but also discussed 28 U.S.C. § 2401(b), which mandates that a tort claim against the United States must be "begun within six months after the date of mailing . . . of notice of final denial of the claim by the agency to which it was presented." *Id.* at 648 (quoting 28 U.S.C. § 2401(b)). Thus, according to § 2675(a), "March 1989 was too early [to file a judicial complaint]." *Id.* And, according to § 2401(b), "[u]nless McNeil began a fresh suit within six months after July 21, 1989, he loses." *Id.* at 649. The plain implication of the latter statement is that had McNeil refiled a new complaint by July 21, his claim may have survived. In other words, a supplemental complaint filed within the requisite six month time period would have satisfied the time limits of § 2401(b), as well as cured the jurisdictional deficiency of § 2675(a). Accordingly, "[o]nly if the

letter [McNeil mailed to the district court in August, 1989,] was itself a complaint does the submission satisfy the statute." *Id.* The majority opinion of Judge Easterbrook held that it was not, while the dissent of Judge Ripple believed otherwise. *Id.*

The Supreme Court affirmed, and the unanimous opinion repeatedly disclaimed that it did not reach the issue of whether McNeil's August 1989 letter constituted the filing of a supplemental complaint, and, if so, whether this action would have remedied the jurisdictional deficiency. First, the Court noted Judge Ripple's dissent, but emphasized that "[o]ur grant of certiorari did not encompass the question whether a new action had been filed in August and we therefore express no opinion as to the correctness of the Court of Appeals' ruling on that issue." 508 U.S. at 110 n.5. Second, the Court stated:

> As the case comes to us, we assume that the Court of Appeals correctly held that nothing done by petitioner after the denial of his administrative claim on July 21, 1989, constituted the commencement of a new action. The narrow question before us is whether his action was timely either because it was commenced when he lodged his complaint with the District Court on March 6, 1989, or because it should be viewed as having been "instituted" on the date when his administrative claim was denied.

Id. at 110-11. Finally, the Court once more reiterated: "[a]gain, the question whether the Court of Appeals should have liberally construed petitioner's letter of August 7, 1989, as instituting a new action is not before us." *Id.* at 113 n.9.

That *McNeil* did hold that "[t]he FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies," *id.* at 113, does not necessarily mean that it also held that a plaintiff may not file a supplemental complaint demonstrating these exhaustion requirements have been met, thereby properly vesting a federal district court with jurisdiction over the suit. The Seventh Circuit indicated that had McNeil appropriately

commenced a new action after the agency denial of his claim, he would have averted dismissal of his suit. The Supreme Court stated repeatedly that its opinion did not reach this issue. Consequently, this Court declines to apply *Black* and *Harris* to these particular circumstances.

IV.

In sum, even though this complaint was improperly filed and subject to dismissal, the Court concludes that Plaintiff's "amended and supplemental" complaint meets the statutory requirements set forth in 26 U.S.C. § 6532 and 7422. *McNeil* does not bar such a result.

The Court recognizes the various public policy implications of its decision. The exhaustion of remedies doctrine is vital to protecting the circumscribed jurisdictional limits of the federal judiciary, as well as minimizing the government's burden in defending the massive amount of litigation filed against it. Thus, one may argue (as does the government), that permitting claimants simply to amend premature complaints post-agency denial will vitiate the statutory requirement that administrative remedies must be exhausted *prior* to filing a judicial complaint. This argument has considerable merit. However, in these particular circumstances it is not conclusive. As a practical matter, in most instances a government motion to dismiss a premature complaint will be granted, provided the government so moves before a claimant files a supplemental complaint.[1] Thus, the Court's holding should not lend encouragement to abusive

[1]The Court qualifies this statement because this discretionary ruling necessarily turns on the circumstances presented by each motion, as the unusual procedural posture of the instant case aptly demonstrates.

Again, Plaintiff filed her administrative claim on October 20, 1998, and her judicial complaint on October 23, 1998. On December 28, 1999, the government moved to dismiss Plaintiff's claim for, *inter alia*, failure to exhaust administrative remedies. On January 11, 1999, Plaintiff moved for a twenty day extension in which to respond to the government's motion to dismiss. Plaintiff again requested extensions on February 1, 1999 (seven days), and February 9, 1999 (two days). On February 8, 1999, the IRS Secretary rejected Plaintiff's administrative claim. On February 9, 1999, Plaintiff filed her response to Defendant's motion to dismiss, but did not reference the Secretary's decision of one day earlier, possibly because Plaintiff had not yet received the IRS' ruling. On February 19, 1999, the government moved for a seven day extension in which to file its reply. Also on February 19, Plaintiff filed a supplemental response as well as a "First Amended and Supplemental Complaint" informing the Court of the

filings of premature complaints.

Furthermore, to hold otherwise would produce unduly harsh results. The logical extension of the government's argument is that if a plaintiff mistakenly files a premature judicial complaint, correction is impossible. The rule of law is that an action may not proceed if a court is without jurisdiction, not that a plaintiff can never fix a jurisdictionally deficient complaint. *See* FED. R. CIV. P. 15(d) (providing a court may permit a party to "to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented . . . even though the original pleading is defective in its statement of a claim for relief or defense").

The proper result in this case should not depend on whether Plaintiff's pleading was an amended or a supplemental pleading or whether Plaintiff received proper leave to file it. Because a supplemental complaint typically would add matters which have arisen since the original complaint, the motion was probably one under Rule 15(d). Such a motion can be made and should be granted "even though the original pleading is defective." *Id.* Rule 15(d) was promulgated in 1963 precisely to avoid requiring a plaintiff to file a new complaint. *See* Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure: Civil 2d* § 1505 at 189-93 (1990). Where a defendant is not unfairly prejudiced in a given case, the motion should be granted and would have been here.

Secretary's denial and alleging that the Court now properly had jurisdiction over Plaintiff's claim. On March 2, 1999, the government filed its reply, which argued Plaintiff's supplemental complaint was insufficient, but did so only perfunctorily, without either relying on *McNeil* or distinguishing *Diaz*.

At this point, briefing was complete and the matter was submitted to the Court, which issued its Order on June 8, 1999. In other words, during the period that the Court was considering the government's motion to dismiss, two factors were relevant. First, the administrative process had concluded and the IRS had denied Plaintiff's claim. Second, the government had not persuasively argued that Plaintiff's initial failure to exhaust administrative procedures barred this Court from exercising subject matter jurisdiction. Today, it is not possible for the Court to revisit this issue as though the situation were as it existed prior to the IRS denial of Plaintiff's claim.

Consequently, the Court's holding promotes fundamental justice without contravening either specific statutory language reasonably applied to these circumstances or legitimate policy objectives of the statute. The Court therefore now has subject matter jurisdiction over Plaintiff's claim.

The Court will enter an order consistent with this Memorandum Opinion.

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

cc: Counsel of Record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
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ORDER

Defendants have moved the Court to reverse its June 8, 1999, Order denying Defendants' motion to dismiss Plaintiff's income tax refund action. The Court has reviewed the memoranda of the parties, and being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Defendants' renewed motion to dismiss is DENIED.

The Court will set a conference in the near future to resolve all remaining issues in this case.

This _____ day of April, 2002.

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

cc: Counsel of Record