




EXHIBIT

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FEDERAL JURISDICTION TAX QUESTION ANSWERED

2001 WL 306496

EXHIBIT 38

87 A.F.T.R.2d 2001-1233, 2001-1 USTC P 50,366
 (Cite as: 2001 WL 306496 (S.D.Cal.))

United States District Court, S.D. California.

Matthew A. FOGEL, Plaintiff,

v.

UNITED STATES of America, Defendant.

No. 00-CV-2293-J (LSP). ↗

Feb. 6, 2001.



ORDER GRANTING DEFENDANT'S MOTION TO DISMISS WITH PREJUDICE

JONES, District J.



*1 This matter comes before the Court on the United States OF America's Motion to Dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Because section 2201(a) of the Declaratory Judgment Act [FN1] expressly denies federal courts subject matter jurisdiction over requests for declaratory judgments in federal tax matters, the Government's motion to dismiss for lack of subject matter jurisdiction is GRANTED with prejudice. Because the Court lacks jurisdiction, Defendant's motion to dismiss for failure to state a claim upon which relief may be granted is DENIED as MOOT.

FN1. 28 U.S.C. § 2201(a) (2001).

BACKGROUND

Plaintiff, Matthew A. Fogel, was born in New York and has paid taxes in the United States for several years. (Compl.PP 6, 10.) On November 14,2000, Mr. Fogel, *in propria persona*, filed a complaint against the United States of America, alleging "fraud, slavery and involuntary servitude in the application of the Collective Entity Rule." (Compl. at 1.) Plaintiff claims that obtaining a Social Security Number from the government amounts to a contractual relationship with the United States and that paying taxes is voluntary under that contractual relationship. Plaintiff further alleges that because he

was not born "within the boundaries of the United States" he is not a "person" or "taxpayer" within the meaning of the United States tax code and thus, his social security "contract" is void. (Compl.PP 10-13.) Plaintiff now seeks a declaratory judgment which provides him with "non-taxpayer" status and rescinds all "contracts" between him and the United States. (Compl. at 3.)

DISCUSSION

I. Subject Matter Jurisdiction

A. Standard of Review

→ [Under Federal Rule of Civil Procedure 12(b)(1), a motion to dismiss for lack of subject matter jurisdiction may be properly granted if the plaintiff does not meet its burden in establishing that the court has such jurisdiction. Because federal courts are courts of limited jurisdiction, the plaintiff must demonstrate that the court has been authorized to preside over the case either by statute or the constitution. See *Willy v. Coastal Corp.*, 503 U.S. 131, 136-37 (1992). Whenever it appears that the court lacks subject matter jurisdiction, the court is obligated to dismiss the action. Fed.R.Civ.P. 12(h) (3). In a suit against the United States, a 12(b)(1) motion is proper when sovereign immunity has not been waived. See *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir.1988). "[A] waiver cannot be implied but must be unequivocally expressed." *United States v. King*, 395 U.S. 1,4 (1969).

B. Analysis

→ [The government's motion to dismiss for lack of subject matter jurisdiction must be granted pursuant to 28 U.S.C. § 2201(a), which expressly declares an exception to federal court jurisdiction in controversies "with respect to Federal taxes" when the plaintiff requests declaratory relief. See *Hughes v. United States*, 953 F.2d 531, 536-37 (9th Cir.1991) (where the real issue in the case is whether the plaintiff must pay taxes, the court lacks subject matter jurisdiction under § 2201). Because Plaintiff has requested a declaratory judgment finding that he is a "non-taxpayer" and is not required to file taxes in the United States, this Court lacks subject matter jurisdiction and is obligated to grant the United States' motion to dismiss.

*2 Furthermore, even if Plaintiffs claim validly invoked federal question jurisdiction under 28 U.S.C. § 1331, he has failed to demonstrate that the United States has given consent to be sued and thereby waived its sovereign immunity, a requirement that must be met before this Court may preside over such a case. See *United States v. Dalm*, 494 U.S. 596,608 (1990). Section 1331 itself does not contain a waiver of sovereign immunity. See *Kester v. Campbell*, 652 F.2d 13 (9th Cir.1981). Because the Plaintiff has failed to establish that the United States has waived its sovereign immunity, there is undeniably no for subject matter jurisdiction in this case. [FN2]

FN2. Plaintiff filed an untimely opposition motion for summary judgment on January 25, 2001. In it he asserts that the United States is not sovereign to him, thus no waiver is necessary. Plaintiff's failure to recognize the U.S. as his sovereign does not obliterate the doctrine of sovereign immunity.

CONCLUSION

↓ [Based on the foregoing, Defendant's Motion to Dismiss for lack of subject matter jurisdiction is GRANTED with prejudice pursuant to section 2201(a) of Declaratory Judgment Act. The Defendant's Motion to Dismiss for failure to state a claim upon which relief may be granted is DENIED as MOOT. Plaintiffs Motion for Summary Judgment is also DENIED as MOOT. The Clerk of the Court is ORDERED to close this file.

IT IS SO ORDERED.

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