

NOTE: This disposition is nonprecedential.

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

BAHIG F. BISHAY,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2020-1020

Appeal from the United States Court of Federal Claims
in No. 1:18-cv-01665-EDK, Judge Elaine Kaplan.

Decided: August 30, 2022

BAHIG F. BISHAY, Norwood, MA, pro se.

JULIE CIAMPORCERO AVETTA, Tax Division, United
States Department of Justice, Washington, DC, for defend-
ant-appellee. Also represented by JACOB EARL
CHRISTENSEN, RICHARD E. ZUCKERMAN.

Before NEWMAN, LOURIE, and CHEN, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* CHEN.

Dissenting opinion filed by *Circuit Judge* NEWMAN.

CHEN, *Circuit Judge*.

Mr. Bahig Bishay appeals two decisions of the United States Court of Federal Claims (Claims Court), the first dismissing his tax refund, declaratory judgment, and injunctive relief claims for lack of subject matter jurisdiction; and the second denying his request for an order of default. On appeal, Mr. Bishay challenges the Claims Court's dismissal of his tax refund claim and its denial of his request for a default order. Because we agree with the Claims Court that Mr. Bishay has not satisfied the minimum payment required for his tax refund action, we *affirm* the Claims Court's dismissal for lack of subject matter jurisdiction. We also *affirm* the Claims Court's denial of Mr. Bishay's request for a default order because, at the time of the request, the government had not yet been served with the complaint due to a docketing error.

I

In February 2007, the Internal Revenue Service (IRS) assessed a penalty of \$41,612.40 against Mr. Bishay pursuant to 26 U.S.C. § 6672 for failure to pay taxes for two quarters in 2002. *Bishay v. United States*, No. 18-1665C, 2019 WL 4415143, at *1 (Fed. Cl. Sept. 16, 2019). In August 2013, the IRS recorded a lien to recover the still unpaid penalty. *Id.*; *see also id.* at *1 n.3. Mr. Bishay then unsuccessfully litigated the assessment of the penalty before the United States Tax Court (Tax Court). In its summary denial of Mr. Bishay's claim, the Tax Court noted that a taxpayer "can make a small 'token' payment towards the section 6672 penalty, file a refund claim with the IRS, and, if the refund claim is denied, file a refund suit in Federal District Court or the Court of Federal Claims." *Bishay v. Comm'r*, T.C.M. 2015-105, 2015 WL 3505310, at *6 n.9 (June 4, 2015), *aff'd Bishay v. Comm'r*, No. 15-2040, 2017 WL 11453028 (1st Cir. Oct. 11, 2017).

On October 17, 2018, Mr. Bishay filed the complaint at issue in this appeal. Appx. 27–32.¹ He sought “declaratory, injunctive, and monetary relief” based on allegations that the IRS “arbitrarily, maliciously, and unjustly recorded a Federal Tax Lien against [him],” “falsely claim[ed]” that he owed payroll taxes, and “unlawfully claimed” that he was responsible for the payment of penalties under § 6672 for failure to pay the same taxes. Appx. 27. The complaint alleged, among other things, that Mr. Bishay sent the IRS “a ‘token’ payment pursuant to the federal authority explained in *Weber v. Commissioner*, 138 T.C. 348, 363 n.12 (2012).” Appx. 28. The cited authority explains that to litigate a tax refund claim, a taxpayer generally must show that he satisfied the “full payment rule” by remitting “the prior full payment of the liability.” *Weber*, 138 T.C. at 363 & n.12. The § 6672 penalty, however, “is divisible, so that a taxpayer may litigate the penalty after having paid an amount corresponding to the tax withheld from a single employee.” *Id.* at 363 n.12 (citing *Davis v. United States*, 961 F.2d 867, 870 n.2 (9th Cir. 1992); *Bland v. Comm’r*, T.C.M. 2012-84, 2012 WL 967651, at *25 n.13 (Mar. 22, 2012)); see also *Barnhill v. Comm’r*, 155 T.C. 1, 15 n.7 (2020).

On January 8, 2019, Mr. Bishay filed an application for an order of default after he did not receive a response to his complaint by the deadline, leading to the realization that the complaint had never been served on the government. Appx. 1, 5. The Claims Court subsequently served a copy of the complaint on the government. Appx. 1. On January 11, 2019, the Claims Court denied Mr. Bishay’s application for a default order since the complaint had not been properly served. Appx. 1–2. On January 22, 2019, Mr. Bishay moved for reconsideration and the Claims Court

¹ “Appx.” citations are to the appendix filed concurrently with Appellant’s brief.

denied the motion, again finding that “a default judgment was not warranted given that the United States did not receive the complaint until after the deadline for filing an answer had passed.” Appx. 5.

On May 24, 2019, the government moved for a more definite statement, asking the Claims Court to require Mr. Bishay to show that he paid the equivalent of the tax due for one employee for one quarter of liability. *Bishay*, 2019 WL 4415143, at *1. Although IRS records indicate that Mr. Bishay paid \$100 towards the § 6672 penalty, the government argued that payroll records attached to his complaint “cast doubt” on whether his payment met the requirements set forth in *Weber*. *Id.*; see also Appx. 79–81. The Claims Court denied the motion for a more definite statement, but noted that Mr. Bishay would, in fact, be required to produce evidence that the \$100 payment was sufficient. *Bishay*, 2019 WL 4415143, at *2. The government subsequently moved to dismiss Mr. Bishay’s claims for lack of subject matter jurisdiction and the Claims Court granted the motion. *Id.*

Regarding Mr. Bishay’s tax refund claims, the Claims Court found that it did not have subject matter jurisdiction because his \$100 token payment was less than the smallest withholding for one employee for one quarter, which was \$135.53. *Id.* at *3. The Claims Court also concluded it did not have jurisdiction over Mr. Bishay’s declaratory judgment claims because it “may not grant declaratory relief if such relief is the primary focus of the plaintiff’s suit.” *Id.* at *4 (quoting *Rice v. United States*, 31 Fed. Cl. 156, 164 (1994), *aff’d*, 48 F.3d 1236 (Fed. Cir. 1995)). For Mr. Bishay’s claims related to the validity of the tax lien, the Claims Court found that “Congress reserved tax lien challenges for federal district and state courts” and that there was no money-mandating substantive source of law that would provide it with jurisdiction. *Id.* Finally, the Claims Court concluded that the Anti-Injunction Act prevents it

from adjudicating requests for injunctive relief regarding IRS collection proceedings. *Id.*

Mr. Bishay appealed, challenging the Claims Court's determination that it lacked jurisdiction over Mr. Bishay's tax refund claim and arguing the merits of the underlying action. Mr. Bishay also appealed the Claims Court's denial of his application for an order of default in a separate decision. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

II

We review the Claims Court's legal conclusions de novo and its factual findings for clear error. *Casitas Mun. Water Dist. v. United States*, 708 F.3d 1340, 1351 (Fed. Cir. 2013) (citing *Est. of Hage v. United States*, 687 F.3d 1281, 1285 (Fed. Cir. 2012)). The Claims Court's dismissal of an action for lack of subject matter jurisdiction is a legal conclusion we review de novo. *Diversified Grp. Inc. v. United States*, 841 F.3d 975, 980 (Fed. Cir. 2016). The plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence and we "accept as true all undisputed facts asserted in the plaintiff's complaint and draw all reasonable inferences in favor of the plaintiff." *Id.* (quoting *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011)).

The subject matter jurisdiction of the Claims Court is limited by statute and includes tax refund claims. 28 U.S.C. § 1346(a)(1). To establish Claims Court jurisdiction over a tax refund action pursuant to the Tucker Act, the plaintiff must satisfy the "full payment rule," which "requires that a person seeking a refund for a tax or penalty pay in full before filing suit." *Diversified Grp.*, 841 F.3d at 979 (citing *Flora v. United States*, 362 U.S. 145, 177 (1960)). The "full payment rule" is subject to the "divisibility exception," whereby "[i]f an assessment or penalty is merely the sum of several independent assessments triggered by separate transactions, it is considered divisible

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.