IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

KYOCERA AVX COMPONENTS CORPORATION, *Plaintiff*, v. UNITED STATES OF AMERICA, *Defendant*.	Civil Action No. 6:22-cv-02440-TMC

UNITED STATES' MOTION TO DISMISS

Congress has long established how a taxpayer may bring a suit to contest income taxes in the district court: a taxpayer must pay the tax first, then seek a refund. 26 U.S.C. § 7422; 28 U.S.C. § 1346(a)(1). In *Flora v. United States*, 357 U.S. 63 (1958), *aff'd on reh'g*, 362 U.S. 145 (1960), the Supreme Court held that, in order to confer refund suit jurisdiction on a district court, payment of those taxes must be *in full*. 362 U.S. at 167-68; *see also Dwight Moore v. United States*, 394 F. Supp. 2d 782, 784 (D.S.C. 2005) ("[t]he Supreme Court, in a comprehensive opinion, has clearly decided" that full payment is required). Plaintiff Kyocera AVX Components Corporation concedes that it has not fully paid the taxes shown as due on its original income tax return (*compare* ECF No. 1, ¶ 46 (showing total tax due of $101,087,342), *with* ¶ 47 (showing total taxes paid of $64,857,236)). Because Plaintiff has not met this jurisdictional requirement, the Court should dismiss Plaintiff's suit pursuant to Federal Rule of Civil Procedure 12(b)(1).

STATEMENT OF RELEVANT FACTS

Plaintiff is a Delaware corporation whose principal place of business is in South Carolina. (ECF No. 1, ¶ 2.)[1] Plaintiff states that it is one of the largest employers in South Carolina and that it also employs thousands of workers across the United States, Europe, and Asia. (*Id.* ¶ 10.) With respect to its foreign operations, Plaintiff describes that it often operates through foreign subsidiaries. (*Id*.) That is, it is a shareholder in foreign corporations that are treated as "controlled foreign corporations" for purposes of the Internal Revenue Code. (*See* ECF No. 1-1 at 9 (narrative portion of plaintiff's claim for refund).) For tax purposes, Plaintiff operates on a fiscal year that ends on March 31, and the tax year at issue here encompasses the period April 1, 2017, through March 31, 2018. (ECF No. 1, ¶¶ 1, 7.)

In 2017, Congress passed the Tax Cuts and Jobs Act (TCJA), Pub. L. No. 115-97, 131 Stat. 2054 (Dec. 22, 2017). The TCJA was a significant overhaul of the international tax provisions of the Internal Revenue Code. Before the TCJA became effective, U.S. taxpayers generally did not pay tax on foreign earnings of controlled foreign corporations until those earnings were repatriated. *See Charles Moore v. United States*, 36 F.4th 930, 933 (9th Cir. 2022). For many years preceding the TCJA's overhaul, controlled foreign corporations had accumulated trillions of dollars in earnings offshore that had not yet been subject to U.S. taxation. *Id*. One significant change made by Congress in the TCJA was that it "transformed U.S. corporate taxation from a worldwide system, where corporations

[1] The United States accepts the facts alleged as true for this motion only.

were generally taxed regardless of where their profits were derived, toward a territorial system, where corporations are generally taxed only on their domestic source profits." *Id*. That is, under the TCJA, some foreign income of a controlled foreign corporation is now effectively exempt from U.S. taxation. This rule, referred to in the legislative history as the U.S.'s version of a "participation exemption" system, allows taxpayers to potentially repatriate, tax-free (at least at the corporate level), certain foreign income by way of a "dividends-received deduction" through new Internal Revenue Code § 245A (26 U.S.C). To account for the trillions of dollars in earnings that had not yet been taxed under prior law, "the TCJA created a new, one-time tax," under I.R.C. § 965, sometimes called a repatriation or transition tax. *Id*. The one-time transition tax was imposed on the untaxed post-1986 profits of controlled foreign corporations. I.R.C. § 965(a). Even though the entire transition tax was imposed on a single tax year and reported on a single tax return, Congress allowed taxpayers to elect to make payments of the transition tax in eight annual installments. I.R.C. § 965(a), (h).

Plaintiff states it timely filed its federal income tax return for its tax period ending March 31, 2018. (ECF No. 1, ¶ 44.) Plaintiff's original return reported a total tax owed of $101,087,342, which included $30,776,884 for its corporate income tax and $70,311,016 as its transition tax liability on untaxed foreign earnings of foreign subsidiaries deemed repatriated to the United States under section 965. (*Id.* ¶¶ 45-46; *see also* ECF No. 1-1, at 5.) Plaintiff did not claim a section 245A dividends-received deduction on its original return. (ECF No. 1-1, at 5.) Plaintiff elected to pay the transition tax through installment payments as permitted under section 965(h). (ECF No. 1, ¶ 47.) As of July 2020, Plaintiff

had paid $64,857,236 toward the $101,087,342 tax liability that it reported on its original return. (*Id.* ¶ 48.)

On June 21, 2019, the United States Treasury issued final regulations addressing certain circumstances under which a taxpayer may not claim a dividends-received deduction under section 245A. *See* 84 Fed. Reg. 39288 (June 21, 2019) (final regulations). Plaintiff seeks to challenge the validity of those final regulations in this lawsuit (ECF No. 1, ¶¶ 33-43), but the merits of Plaintiff's challenge are not at issue in this motion to dismiss, which is directed at the question whether this Court has subject matter jurisdiction.

In July 2021, without having fully paid the tax reported on its original income tax return, Plaintiff filed an amended return for its tax year ending March 31, 2018. (ECF No. 1, ¶ 52.) In its amended return, Plaintiff claimed a dividends-received deduction of $143,483,636. (*Id.* ¶ 51.)[2] Due to the changes Plaintiff made on its amended return, Plaintiff contended that its tax liability should be reduced from $101,087,342 to $55,923,814. (ECF No. 1-1, at 5.) As a result, on its amended return, taking into consideration the payments that it had made, Plaintiff claimed a refund of $8,933,422. (*Id.* ¶ 52.) The IRS did not render a decision on Plaintiff's claim for refund. (*Id.* ¶ 17.)

Plaintiff filed this suit on July 28, 2022, seeking a refund of the overpayment that it reported on its amended return. (*Id.*, Prayer for Relief.) Plaintiff contends that it has satisfied the jurisdictional prerequisites for bringing a refund suit because its July 2021 amended return was a claim for refund for the purposes of I.R.C. § 7422(a), and that the

[2] Plaintiff's amended return also made two smaller adjustments, first to revise a computational error, and second, to claim additional research and development credits. (*Id.* ¶¶ 49-50.)

suit was filed within the appropriate statutory period since more than six months had passed from the date it filed its claim for refund without the IRS having rendered a decision on that claim, I.R.C. § 6532(a)(1). (*Id.* ¶¶ 6-8.) Plaintiff contends that this Court has subject matter jurisdiction under 28 U.S.C. §§ 1340 and 1346(a)(1). (*Id.* ¶ 5.) But Plaintiff is wrong. Just like any other taxpayer, it is subject to *Flora*'s basic rule—the taxpayer must pay the assessment in full before suing for a refund, as explained below.

LEGAL STANDARD

A taxpayer bringing a suit against the United States for a refund of federal income taxes bears the burden of proving subject matter jurisdiction. *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999). In addition, "[t]he United States, as sovereign, is immune from suit unless it waives that immunity." *Webb v. United States*, 66 F.3d 691, 693 (4th Cir. 1995). Although Congress has waived sovereign immunity for refund suits filed under 28 U.S.C. § 1346 and I.R.C. § 7422, "limited waivers of the federal Government's sovereign immunity must be 'strictly construed … in favor of the sovereign.'" *Doe v. Chao*, 306 F.3d 170, 179 (4th Cir. 2002) (citing *Lane v. Pena*, 518 U.S. 187, 192 (1996)). If the United States consents to suit, "the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Dalm*, 494 U.S. 596, 608 (1990) (internal quotations omitted). A motion under Rule 12(b)(1) challenges "whether [the plaintiff] has a right to be in the district court at all and whether the court has the power to hear and dispose of [the] claim." *Holloway v. Pagan River Dockside Seafood, Inc.*, 669 F.3d 448, 452 (4th Cir. 2012). When a facial challenge to subject matter jurisdiction is raised, the facts alleged by the plaintiff in the complaint are

taken as true, "and the motion must be denied if the complaint alleges sufficient facts to invoke subject matter jurisdiction." *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009).

ARGUMENT

Section 1346(a)(1) of Title 28 provides district courts with jurisdiction to hear federal income tax refund suits. District courts have original jurisdiction to hear any "civil action against the United States *for the recovery* of any internal-revenue tax alleged to have been erroneously ... assessed or collected … under the internal-revenue laws." *Id*. (emphasis added). One prerequisite for bringing suit under section 1346 is that taxpayers must fully pay the original tax reported owed. *Flora*, 362 U.S. at 159 ("[T]hroughout the congressional debates are to be found frequent expressions of the principle that payment of the full tax was a precondition to suit: 'pay his tax . . . then . . . file a claim for refund'"); *see also Dwight Moore*, 394 F. Supp. 2d at 784 (finding that *Flora* "clearly decided" the question whether a taxpayer must fully pay its liability before bringing suit). To satisfy the jurisdictional requirement of paying the full amount assessed, a taxpayer must pay the full amount assessed by the IRS, not an amount later claimed by the taxpayer. *Rocovich v. United States*, 18 Cl. Ct. 418, 423 (1989), *aff'd*, 933 F.2d 991 (Fed. Cir. 1991); *see also Ray v. IRS*, No. 4:08-cv-1067, 2009 WL 3572076, at *6 (D.S.C. Aug. 3, 2009) ("a taxpayer must pay the full amount of the challenged deficiency before this Court may hear an action for a refund," even when the taxpayer has fully paid the amount shown due on an amended return).

In this case, Plaintiff filed its original federal income return for the period ending March 31, 2018, reporting a total tax liability of $101,087,342 on that return. (ECF No. 1, ¶ 48.) Plaintiff acknowledges that it has paid only $64,857,236. (*Id*.) The IRS was plainly authorized by statute to assess the tax liability shown by the Plaintiff on its return. I.R.C. § 6201(a) ("The Secretary shall assess all taxes determined by the taxpayer"). As Plaintiff has not fully paid the assessed liability, it has not satisfied the well-established *Flora* full-payment rule to challenge that liability.

To be sure, Plaintiff now contends that the tax liability shown on its original tax return is wrong, that it should have reported an income tax of only $55,923,814, and that it has fully paid that lower amount. But for jurisdictional purposes, the Court must look to Plaintiff's original return, not its amended return, to determine whether full payment has been made. "Neither the Internal Revenue Code nor the Treasury Regulations make any provision for the acceptance of an amended return in place of the original return previously filed." *Badaracco v. Commissioner*, 693 F.2d 298, 301 n.5 (3d Cir. 1982); *see also Koch v. Alexander*, 561 F.2d 1115, 1117 (4th Cir. 1977) ("[t]he treatment of amended returns is a matter of internal administration solely within the discretion of the Commissioner"); *Evans Cooperage Co., Inc. v. United States*, 712 F.2d 199 (5th Cir. 1983) (look to the tax liability shown on an original return, not to any amended return filed at some subsequent date). While Plaintiff's amended return describes the reasons why it believes it is entitled to a tax refund, it is not an appropriate reference point for determining whether a taxpayer has fully paid the tax liability that it is contesting.

Plaintiff's election to pay its section 965 transition tax in installments does not exempt it from *Flora*'s full payment requirement. The full payment rule equally applies in cases involving installment payments expressly authorized by statute. *See Rocovich*, 933 F.2d at 993-94. In *Rocovich*, the Federal Circuit considered whether the full payment rule in *Flora* applied to a case involving an estate tax under I.R.C. § 6166, which allows certain qualifying estates to make estate tax payments in ten annual installments. *Id.* at 995. There, the taxpayer argued that the installment payment scheme should be treated as an exception to *Flora*. *Id.* The court rejected this argument because the statutory allowance for taxpayers to pay the estate tax through installments did not also create an exception to the full payment rule for bringing a refund suit.[3] *Id*. The Federal Circuit distinguished the estate tax from types of divisible taxes, such as excise or employment taxes, which are assessed as the sum of the taxes imposed on multiple separate transactions. *Id.* It reasoned that the estate tax was not a divisible tax because it arose from a single event. *Id*. Therefore, the *Flora* full payment rule was not satisfied because, although the taxpayer had made some installment payments towards the tax reported, he had not fully paid the assessed tax liability before filing suit. *Id.*

The *Rocovich* court's reasoning applies with equal force here. The installment scheme in section 6166 is analogous to section 965(h), the section under which Plaintiff

[3] In 1998, Congress created such an exception by statute. It amended I.R.C. § 7422 so that federal courts were deemed to have refund jurisdiction over estate taxpayers that had elected to make installment payments under I.R.C. § 6166, even though they had not satisfied the full amount of tax liability. *See* I.R.C. § 7422(j); Pub. L. No. 105–206, Title III, § 3104(a), 112 Stat 685, 731 (July 22, 1998). In the TCJA, Congress created no such statutory exception to provide subject matter jurisdiction for refund claims involving section 965 transition taxes.

has elected to make installment payments of TCJA's transition tax. Both sections permit taxpayers to defer payment of a single tax over a designated number of years. And the section 965 tax, like the estate tax in *Rocovich*, is not a divisible tax because it arose from a single taxable event. Congress chose to tax corporations' entire accumulated, tax-deferred foreign income all at once. *See* I.R.C. § 965(a), (d). The transition tax thus does not fall within any exception to the full payment rule. *See Diversified Grp., Inc. v. United States*, 123 Fed. Cl. 442, 451-52 (2015) (explaining that taxes and penalties are only divisible when they represent the sum of multiple assessments, *i.e.*, excise or payroll taxes where a tax arises upon each transaction); *see also Ardalan v. United States*, 748 F.2d 1411, 1414 (10th Cir. 1984) (income taxes are not divisible). Therefore, the divisible tax exception does not apply, and Plaintiff's partial payment of the tax reported on its original return does not create subject matter jurisdiction for this Court. *See also Rodewald v. United States*, 231 Ct. Cl. 962, 963 (1982) (dismissing suit for lack of jurisdiction where the taxpayer had not yet paid all of the payments under an installment plan).

Plaintiff has fashioned this action as a "refund" suit, but its claims may also be viewed as a request for an abatement of the remaining transition tax it reported on its original return, in addition to a refund. As described in one treatise, "[t]he Supreme Court has held that in order for a District Court … to have jurisdiction of a tax refund matter against the United States, the taxpayer must first pay the full amount of any income tax deficiency. If a taxpayer seeking a refund files [an amended return] but still has an outstanding tax liability, it is instead a claim for abatement rather than refund." 15 Mertens Law of Fed. Income Tax'n § 58A:19 (Sept. 2022 update); *see also Nasharr v. United*

States, 105 Fed. Cl. 114, 120 (2012).

But even if Plaintiff's suit is construed as one for an abatement of tax, it has no statutory right to sue for an abatement here. Under I.R.C. § 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." Section 6404's permissive nature prevents taxpayers from seeking judicial review of abatements. *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). Section 6404(b) also prohibits taxpayers from filing a claim for abatement "in respect of an assessment of any tax imposed under subtitle A or B." *Goettee v. Commissioner*, 192 F. App'x 212, 216-17 (4th Cir. 2006) (taxpayers have no right to sue for an abatement of a liability in respect of an income tax under section 6404(b)); *Graham v. IRS*, 602 F. Supp. 864, 866 (W.D. Pa. 1984) ("Under [section 6404(b)], it is clear to the court that the Internal Revenue Service cannot be compelled to abate any income tax assessments."). The transition tax is imposed under subtitle A. There is thus no cause of action for abatement of the transition tax. *See also* I.R.C. § 7421(a) (withdrawing jurisdiction to enjoin collection of assessed taxes); 28 U.S.C. § 2201(a) (removing most federal tax matters from ambit of Declaratory Judgment Act).

In sum, Plaintiff has not fully paid the tax that it originally reported it owed and that was assessed by the IRS. This Court lacks subject matter jurisdiction to hear Plaintiff's suit for a refund of federal income taxes, and the complaint must be dismissed. *See Dwight Moore*, 394 F. Supp. 2d at 784-86 (holding that a taxpayer's failure to submit full payment violates *Flora* and deprives the court of subject matter jurisdiction until the challenged tax is fully paid).

CONCLUSION

The Court should grant the United States' motion and dismiss this case for lack of subject matter jurisdiction.

Dated: December 6, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2022, I served the foregoing *United States' Motion to Dismiss* (ECF No. 16) on Plaintiff Kyocera AVX's counsel by electronically filing it with the Clerk of Court using the CM/ECF system.

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