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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DOUGLAS WATERHOUSE,  
  
Plaintiff,

No. Civ. S-07-619 RRB CMK

Memorandum of Opinion  
and Order

v.

UNITED STATES OF AMERICA  
  
Defendant.

\_\_\_\_\_ /

Plaintiff, Douglas Waterhouse ("Waterhouse") filed an action against the United States of America ("United States") seeking judicial review of a decision by the Internal Revenue Service ("IRS") Appeals Office upholding the imposition of a trust fund recovery penalty assessed against him. The United States now moves to dismiss the entire action under Federal Rule of Civil Procedure 12(b)(1) on the ground that this court lacks

1 subject matter jurisdiction. For the following reasons, the  
2 court **GRANTS** the motion.<sup>1</sup>

3 **I. BACKGROUND**

4 Waterhouse is a former minority shareholder of Skyline  
5 Contract Glass, Inc. ("Skyline"). Compl. ¶ 6. On or about  
6 October 2004, the IRS proposed to assess a trust fund recovery  
7 penalty against Waterhouse as a "responsible" individual under  
8 26 U.S.C. § 6672 for employment taxes allegedly not paid by  
9 Skyline for the following tax periods: June 2002, June 2003,  
10 September 2003, December 2003 and March 2004. Compl. ¶¶ 8, 11.<sup>2</sup>

13 \_\_\_\_\_  
14 <sup>1</sup> Inasmuch as the Court concludes the parties have submitted  
15 memoranda thoroughly discussing the law and evidence in support  
16 of their positions, it further concludes oral argument is  
17 neither necessary nor warranted with regard to the instant  
18 matter. See Mahon v. Credit Bureau of Placer County, Inc., 171  
19 F.3d 1197, 1200 (9th Cir. 1999)(explaining that if the parties  
20 provided the district court with complete memoranda of the law  
and evidence in support of their positions, ordinarily oral  
argument would not be required). As a result, the oral argument  
presently scheduled for Wednesday, August 22, 2007, at 10:00  
a.m., is hereby **VACATED**.

21 <sup>2</sup> The Internal Revenue Code ("IRC") requires employers to  
22 withhold from their employees' paychecks funds representing the  
23 employees' personal income and Social Security taxes. 26 U.S.C.  
24 § 3102(a); United States v. Energy Resources Co., Inc., 495 U.S.  
25 545, 546 (1990). Because employers must hold these funds in  
26 "trust" for the United States, 26 U.S.C. § 7501, the taxes are  
27 commonly referred to as "trust fund" taxes. Energy Resources,  
28 495 U.S. at 546-47. Should employers fail to turn over the  
trust fund taxes, the IRS may collect a Trust Fund Recovery  
Penalty, equal to the sum of the unpaid taxes, directly from the  
officers or other persons within the company who are responsible  
for collecting the taxes. 26 U.S.C. § 6672; Energy Resources,  
495 U.S. at 547. These persons are commonly referred to as  
"responsible" individuals. Energy Resources, 495 U.S. at 547.

1 On or about November 25, 2005, the IRS Office of Appeals  
2 sustained the proposed trust fund recovery penalty assessment  
3 against Waterhouse. Compl. ¶ 10. On December 14, 2005, the  
4 penalty was assessed in the following amounts: (1) \$101,783.16  
5 (June 2002); (2) \$37,723.21 (June 2003); (3) \$72,765.58  
6 (September 2003); (4) \$76,562.51 (December 2003); and (5)  
7 \$47,906.27 (March 2004). Compl. ¶ 11. On July, 18, 2006, the  
8 IRS issued a Notice of Intent to Levy the assessed penalty.  
9 Compl. ¶ 12. Waterhouse timely filed a request with the IRS for  
10 a Due Process hearing. Compl. ¶ 13.

13 On March 2, 2007, the IRS Office of Appeals issued a Notice  
14 of Determination sustaining its Notice of Intent to Levy.  
15 Compl. ¶ 14. On March 3, 2007, Waterhouse filed the instant  
16 action alleging that the IRS abused its discretion in concluding  
17 that he was a "responsible" individual liable for Skyline's  
18 unpaid employment taxes. Compl. ¶ 16. Additionally, Waterhouse  
19 alleges that he was not afforded the proper opportunity to  
20 dispute the assessed penalty. Compl. ¶ 17.

22 In the instant action, Waterhouse seeks a determination  
23 that he is not a "responsible" individual liable for Skyline's  
24 unpaid employment taxes. Compl. ¶ 17. Waterhouse also seeks  
25 abatement of the trust fund recovery penalty assessment. Compl.  
26 ¶ 17.

27 //

1 **II. DISCUSSION**

2 **A. Legal Standard**

3 Rule 12(b)(1) authorizes a party to move to dismiss a claim  
4 for lack of subject matter jurisdiction. Because federal courts  
5 are courts of limited jurisdiction, a lack of jurisdiction is  
6 presumed, and the party seeking to invoke the court's  
7 jurisdiction bears the burden of proving that subject matter  
8 jurisdiction exists. Curtis v. Treasury Dept., 2007 WL 460646,  
9 \*1 (N.D. Cal. 2007) (citing Kokkonen v. Guardian Life Ins. Co.,  
10 511 U.S. 375, 377 (1994)). A Rule 12(b)(1) jurisdictional  
11 attack may be facial or factual. Safe Air for Everyone v.  
12 Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004).

13 A facial attack occurs where "the challenger asserts that  
14 the allegations contained in a complaint are insufficient on  
15 their face to invoke federal jurisdiction." Safe Air, 373 F.3d  
16 at 1039. In resolving a facial attack to jurisdiction, the  
17 court must accept the factual allegations in the complaint as  
18 true. Curtis, 2007 WL 460646 at \*2 (citing Miranda v. Reno, 238  
19 F.3d 1156, 1157 n.1 (9th Cir. 2001)).

20 **B. 26 U.S.C. § 6330**

21 The United States argues that this court lacks subject  
22 matter jurisdiction because 28 U.S.C. § 6330 confers exclusive  
23 jurisdiction over Collection Due Process ("CDP") claims to the  
24 United States Tax Court ("Tax Court").  
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1           When the IRS notifies a taxpayer of its intent to impose a  
2 levy for failure to pay taxes, the taxpayer has the right to a  
3 CDP hearing before the IRS Office of Appeals, and is entitled to  
4 raise defenses and to contest the levy or lien. Gorospe v.  
5 C.I.R., 451 F.3d 966, 967 (9th Cir. 2006) (citing 26 U.S.C.  
6 § 6330(c)(2)(A)). After a taxpayer receives a determination by  
7 the IRS Office of Appeals, he or she may seek judicial review.  
8 Gorospe, 451 F.3d at 967.

9  
10           Specifically, a taxpayer may, within thirty days of a  
11 determination by the IRS Office of Appeals, seek judicial review  
12 of such determination by appealing to the Tax Court (and the Tax  
13 Court shall have jurisdiction with respect to such matter). 26  
14 U.S.C. § 6330(d); see also 26 C.F.R. § 301.6330-1(f) (stating  
15 that a taxpayer may appeal a Notice of Determination by the IRS  
16 Office of Appeals to the Tax Court within thirty days following  
17 a determination); cf. Gorospe, 451 F.3d at 967 (holding that  
18 under former § 6330(d) a taxpayer could seek judicial review,  
19 either in the Tax Court or in district court, depending on  
20 whether the Tax Court had jurisdiction to consider the  
21 underlying liability).<sup>3</sup>

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27 <sup>3</sup> 26 U.S.C. § 6330(d) formerly read:

28 "(1) Judicial review of determination. The person may, within  
30 days of a determination under this section, appeal such  
determination-

1           26 U.S.C. § 6330(d), amended in 2006, states:

2   “(d) Proceeding after hearing.--

3   (1) Judicial review of determination.--The person may, within 30  
4   days of a determination under this section, appeal such  
5   determination to the Tax Court (and the Tax Court shall have  
6   jurisdiction with respect to such matter).

7   (2) Jurisdiction retained at IRS Office of Appeals.--The  
8   Internal Revenue Service Office of Appeals shall retain  
9   jurisdiction with respect to any determination made under this  
10   section, including subsequent hearings requested by the person  
11   who requested the original hearing on issues regarding--

12   (A) collection actions taken or proposed with respect to such  
13   determination; and

14   (B) after the person has exhausted all administrative remedies,  
15   a change in circumstances with respect to such person which  
16   affects such determination.”

17           Based on the plain language of the statute, the court  
18   concludes that it does not have subject matter jurisdiction over  
19   this action. The removal of subdivision (d)(1)(B) from § 6330  
20   divests district courts of jurisdiction to review CDP claims.

21   (A) to the Tax Court (and the Tax Court shall have jurisdiction  
22   with respect to such matter); or

23   (B) if the Tax Court does not have jurisdiction of the  
24   underlying tax liability, to a district court of the United  
25   States.

26   If a court determines that the appeal was to an incorrect court,  
27   a person shall have 30 days after the court determination to  
28   file such appeal with the correct court.”

29           In Gorospe, the Ninth Circuit explained that former  
30   § 6330(d) did not vest the Tax Court with plenary jurisdiction  
31   over appeals of CDP determinations. Gorospe, 451 F.3d at 968.  
32   Rather, the Tax Court was only vested with jurisdiction over  
33   appeals of CDP determinations where it had jurisdiction to  
34   consider the underlying liability. Id. In all other cases,  
35   jurisdiction was vested in the district courts. Id.

1 For this reason, the court **GRANTS** the motion to dismiss.

2 **C. Request to Amend the Complaint**

3 Waterhouse requests leave to amend the Complaint to add a  
4 claim under 26 U.S.C. § 7433(a). The Taxpayer Bill of Rights,  
5 26 U.S.C. § 7433, provides a cause of action, and a waiver of  
6 sovereign immunity, for alleged misconduct by the IRS.<sup>4</sup> However,  
7 while § 7433 allows for the award of damages, a taxpayer is not  
8 entitled to bring suit in federal court until all available  
9 administrative remedies have been exhausted. 26 U.S.C.  
10 § 7433(d)(1).  
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13 Under IRS regulations, a taxpayer alleging misconduct must  
14 file an administrative claim prior to filing suit. 26 C.F.R.  
15 § 301.7433-1. More particularly, the taxpayer must submit his  
16 claim, in writing, "to the Area Director . . . of the area in  
17 which the taxpayer currently resides." 26 C.F.R. § 301.7433-  
18 1(e)(1). The claim must include, among other things, the  
19 grounds for the claim, a description of the injuries, and the  
20 dollar amount of damages sought. 26 C.F.R. § 301.7433-  
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24 <sup>4</sup> 26 U.S.C. § 7433(a) provides: "If, in connection with any  
25 collection of Federal tax with respect to a taxpayer, any  
26 officer or employee of the Internal Revenue Service recklessly  
27 or intentionally, or by reason of negligence disregards any  
28 provision of this title, or any regulation promulgated under  
this title, such taxpayer may bring a civil action for damages  
against the United States in a district court of the United  
States. Except as provided in section 7432, such civil action  
shall be the exclusive remedy for recovering damages resulting  
from such actions."

1 1(e)(2)(ii-iv). A taxpayer may not file suit until the IRS has  
2 issued a decision or failed to act on the claim within six  
3 months of the date of filing. 26 C.F.R. § 301.7433-1(d).  
4

5 Although Waterhouse claims to have exhausted all his  
6 administrative remedies, he has failed to provide a description  
7 of how he satisfied the express requirements of the  
8 administrative claim process. As such, there is no indication  
9 that Waterhouse actually exhausted the administrative remedies  
10 available to him. Therefore, he cannot sue for damages under §  
11 7433.  
12

13 For this reason, the court **DENIES** Waterhouse's request for  
14 leave to amend the Complaint.  
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16 **D. Request for Transfer**

17 Waterhouse requests a transfer of this action to the Tax  
18 Court. The court, however, has already determined that it lacks  
19 subject matter jurisdiction. Therefore, it does not have the  
20 power to transfer this action pursuant to § 1404(a).<sup>5</sup> See  
21 Grimsley v. United Engineers and Constructors, Inc., 818 F.  
22 Supp. 147, 148 (D.S.C. 1993) (citing cases). However, because  
23 28 U.S.C. § 1631 permits federal courts to transfer matters even  
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27 <sup>5</sup> 28 U.S.C. § 1404(a) provides: "For the convenience of  
28 parties and witnesses, in the interest of justice, a district  
court may transfer any civil action to any other district or  
division where it might have been brought."

1 when it lacks subject matter jurisdiction, transfer may be  
2 appropriate. Id.

3 Section 1631 provides, in pertinent part: "Whenever a civil  
4 action is filed in a court as defined in section 610 of this  
5 title . . . and that court finds that there is a want of  
6 jurisdiction, the court shall, if it is in the interest of  
7 justice, transfer such action . . . to any other such court in  
8 which the action . . . could have been brought at the time it  
9 was filed or noticed, and the action . . . shall proceed as if  
10 it had been filed in or noticed for the court to which it is  
11 transferred on the date upon which it was actually filed in or  
12 noticed for the court from which it is transferred." 28 U.S.C.  
13 § 1631. Section 610 provides: "the word 'courts' includes the  
14 courts of appeals and district courts of the United States, the  
15 United States District Court for the District of the Canal Zone,  
16 the District Court of Guam, the District Court of the Virgin  
17 Islands, the United States Court of Federal Claims, and the  
18 Court of International Trade." 28 U.S.C. § 610.

19 Thus, under § 1631, a federal "court," as defined by § 610,  
20 may transfer a case to another court if the following conditions  
21 are satisfied: (1) the transferee court must have been able to  
22 exercise jurisdiction on the date the notice of filing was  
23 misfiled; (2) transferor court must lack jurisdiction, and (3)  
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1 transfer must serve interests of justice. Public Citizen Inc.  
2 v. Mineta, 343 F.3d 1159, 1171, n.22 (9th Cir. 2003).<sup>6</sup>

3 Although it would otherwise be proper to transfer this  
4 action under § 1631, this court lacks the authority to do so  
5 because the Tax Court is not specifically enumerated as a  
6 "court" under 28 U.S.C. § 610. See Skillo v. U.S., 68 Fed. Cl.  
7 734, 746-47 (Fed. Cl. 2005) (holding that the Tax Court is not a  
8 "court" under § 610 such that another "court" could, under §  
9 1631, transfer an action to it).<sup>7</sup>

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12 For this reason, the court **DENIES** Waterhouse's request to  
13 transfer this action to the Tax Court.

### 14 **III. CONCLUSION**

15 For the reasons stated above, the court GRANTS the motion  
16 to dismiss and DENIES Waterhouse's requests for leave to amend  
17 and for a transfer of this action to the Tax Court.  
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20 <sup>6</sup> "The 'interest of justice' requirement ordinarily will be  
21 satisfied if the statute of limitations has expired subsequent  
22 to the time of the original filing, so that transfer, rather  
23 than dismissal, will preserve the plaintiff's cause of action."  
Butler v. U.S., 442 F.Supp.2d 1311, 1317 (Ct. Int'l Trade 2006)  
(quotation marks omitted).

24 <sup>7</sup> Notably, Waterhouse was specifically informed in writing by  
25 the IRS that he was required to file an appeal with the Tax  
26 Court within thirty days of the IRS's Notice of Determination,  
27 and that if he filed in the wrong court (e.g., United States  
28 District Court), he would be unable to refile in the Tax Court  
if the time for filing a Tax Court petition had expired. Exh.  
A, attached to Decl. of Paul S. Ham, In Support of Def.'s Mtn.  
to Dismiss.

