UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2789

UNITED STATES OF AMERICA,

Defendant-Appellee,

versus

RICHARD L. BISCHOFF and
ANDREW A. SCHATTE,

Plaintiffs-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-93-1470)

(April 26, 1995)

Before POLITZ, Chief Judge, GARWOOD and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge:*

Richard Bischoff and Andrew Schatte (taxpayers) brought suit against the United States alleging that employees of the federal government unlawfully disclosed certain tax return information in violation of 26 U.S.C. § 6103(a). The taxpayers also alleged that federal agents disclosed information obtained during the grand jury process in violation of Rule 6(e) of the Federal Rules of Criminal Procedure. The district court dismissed the Rule 6(e) claims based

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

on sovereign immunity and dismissed the § 6103 allegations for failure to state a claim. We affirm the dismissal of the Rule 6(e) claims. However, because we find that the allegations regarding the § 6103 violations do state a claim, we vacate and remand for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

The taxpayers filed suit against the United States alleging wrongful disclosure of confidential "return information" by federal officers or employees in violation of 26 U.S.C. § 6103 and disclosure of matters occurring before the grand jury in violation of Federal Rule of Criminal Procedure 6(e). Prior to the government's response, the taxpayers filed a supplemental complaint alleging additional disclosures of information in violation of both § 6103 and Rule 6(e), which were allegedly made after the original complaint was filed.

The government filed a motion to dismiss the Rule 6(e) claims in both complaints on the basis of sovereign immunity, and the district court granted that motion. The government later filed a motion to dismiss the remaining portion of the supplemental complaint regarding disclosures in violation of § 6103, arguing that the information allegedly disclosed did not constitute "return information." The district court also granted that motion. Although the government had filed an answer to the original complaint, it had never moved for dismissal of the § 6103 claims in that complaint.

The district court subsequently entered a final take-nothing

judgment against the taxpayers. None of the district court's orders expressly addressed the § 6103 claims in the original complaint. The taxpayers appealed that judgment, and the government moved this Court to vacate and remand the case to allow the district court to either vacate the final judgment or clarify it. We granted that motion, which was opposed by the taxpayers.

On remand, the government filed a motion requesting the court either to state its reasons for dismissing the entire case or to vacate its judgment. The district court entered a clarification order, which provided in part:

> In ruling on Rule 6(e) claims . . . adverse to the plaintiffs and finding that any information disclosed did not constitute "return information", . . . the Court concluded that no triable issues remained in the case and, therefore, entered a final judgment. The fact that the memorandum references the plaintiffs' supplemental complaint is of no consequence. No issue remains for disposition as the two memorandums address the entirety of the plaintiffs' complaint.

The appeal was then reinstated.

II. DISMISSAL OF SECTION 6103 ALLEGATIONS FOR FAILURE TO STATE A CLAIM

The taxpayers argue that the district court erred in dismissing their § 6103 allegations for failing to state a claim under Federal Rule of Civil Procedure 12(b)(6). We review such dismissals de novo. Carney v. Resolution Trust Corp., 19 F.3d 950, 954 (5th Cir. 1994). The allegations in the complaint are taken as true, and the dismissal will not be affirmed unless it appears beyond any doubt that the plaintiff cannot prove any set of facts in support of his claim which would entitle him to relief. Id.

Section 7431 permits a suit against the United States for the

unauthorized disclosures of tax return information. Section 7431(a) provides:

> (1) Disclosure by Employee of United States.-- If any officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

The taxpayers alleged that there had been a disclosure of confidential "return information" in violation of § 6103. Section 6103(b)(2)(A) defines "return information" as follows:

> a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]

The government contends that the district court properly dismissed the claims because the information allegedly disclosed is not "return information" as defined under § 6103.

A. ORIGINAL COMPLAINT

In their original complaint, the taxpayers alleged that one or more of three federal agents (Special Agents Ellen H. Rodriguez and Lafeyette Prince of the Criminal Investigation Division IRS, and Special Agent Justin G. Fox of the FBI) contacted numerous third parties and made the following illegal disclosures of confidential information:

(a) In interviewing one or more former or current employees of businesses owned by plaintiffs and other third parties, one or more of the agents disclosed their position that plaintiffs Bischoff and Schatte had failed to timely disclose to the Houston Municipal Employees Pension System that they did not own the Jersey Meadow Golf Course property.

* * *

(b) In interviewing one or more former or current employees of businesses owned by plaintiffs and one or more former or current members of the board of the Houston Police Officers Pension System, one or more of said agents disclosed their position that plaintiffs Bischoff and Schatte had only paid $700,000.00 plus for the Wedgewood Golf Course property and had made a profit of approximately $2,000,000.00 through obtaining $3,500,000.00 from the Houston police Officers Pension System.

* * *

(c) One or more of the agents have also illegally disclosed confidential information by asking certain third parties if they knew certain monies ended up in the personal bank accounts of plaintiffs Bischoff and Schatte.

* * *

(d) One or more of the agents have also illegally disclosed confidential information by suggesting that the Jersey Meadow Golf Course deal was not a "fair deal."

* * *

(e) In interviewing one or more former or current board members of the Houston Municipal Employees Pension System, Agent Rodriguez asked if the board member would be "surprised or disappointed" if he knew that Bischoff and Schatte bought "cars and boats" with some of the proceeds of the loan from the [pension system] and if the board member would be "surprised or disappointed" to find out that someone else might have received cash from the loan proceeds.

* * *

(f) In interviewing one or more former or current board members of the Houston Municipal Employees Pension System, Agent Fox has improperly suggested to such

> persons that a bribe was offered to influence a vote on a proposal by BSL Golf Corporation by asking the purported question ". . . have you heard that a bribe was offered. . . ."

The government's principal argument is that there is no nexus between the disclosed information and an investigation of possible offenses under Title 26 of the Internal Revenue Code.[1] The taxpayers respond that the record demonstrates that the grand jury investigated them under Title 26 for possible offenses committed during the period 1986-91. The issue, however, is whether the taxpayers have stated a claim in their complaint pursuant to Rule 12(b)(6)-- not whether they were actually under investigation for tax offenses.

This Court, interpreting § 6103, has explained that "[r]eturn information includes the taxpayer's identity, the fact that the taxpayer is under investigation or subject to further investigation, and data that the IRS has collected about a return. Huckaby v. United States Dept. of Treasury, I.R.S., 794 F.2d 1041, 1046 (5th Cir. 1986) (citing 26 U.S.C. § 6103(a), (b)). Accordingly, because the information does not have to be gathered during the investigation of a possible criminal offense under Title 26 to constitute "return information," the government's interpretation of the statute is too narrow.

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[1] The government points to the language in section 6103(b)(2) which provides that "any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense . . . ." (emphasis added).

Viewing the allegations in the original complaint as true, the taxpayers could prove that at least (a), (b), (c), (d), and (e) outlined above constituted "return information" as defined in Huckaby. In regard to allegation (f), we fail to see how any return information would be disclosed by a question whether the interviewed party had heard that a bribe was offered.[2] Thus, the dismissal of the original complaint should be vacated and remanded for further proceedings.

B. SUPPLEMENTAL COMPLAINT

In their supplemental complaint, the taxpayers alleged that certain unidentified federal officials familiar with the grand jury investigation disclosed to Houston Post reporter Scott Harper ("and probably other newspaper reporters") the following information:

(a) The investigation is winding down,

(b) Loose ends are being tied up,

(c) The newspaper reporter (or reporters) can expect "something" to happen in the next month or so,

(d) I or we (the federal officials) can't disclose what that "something" is, but you (the newspaper reporter(s)) can read between the lines,

(e) You (the newspaper reporter(s)) should be on the lookout for this "something" to happen, and

(f) The incorrect and slanderous opinion of the federal official(s) that Mr. Bischoff and Mr. Schatte filed this lawsuit because they were trying to find out things about the grand jury investigation.

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[2] Broadly construing the complaint (in particular the allegations concerning the IRS agents), we find that it adequately alleged that the information was of the character described in § 6103(b)(2)(A) and that those making the disclosure acquired the information from such a source.

The government argues that the information allegedly disclosed does "not suggest in any manner that the grand jury was investigating a possible criminal offense under the internal revenue laws." It further argues that the supplemental complaint alleges only that one or more government employees made disclosures regarding the status of an unidentified grand jury investigation and the employee's opinion as to why the taxpayers filed the suit.

As previously stated, the government's reading of § 6103 is too narrow. Read as true, and in conjunction with the original complaint, it is possible that the taxpayers could prove that some of the above-quoted information constituted "return information" as defined in Huckaby, i.e., "the fact that the taxpayer is under investigation or subject to further investigation." 794 F.2d at 1046. Consequently, the district court improperly granted the government's motion to dismiss the supplemental complaint for failure to state a claim.

III. DISMISSAL OF THE RULE 6(e) CLAIMS BASED ON THE SOVEREIGN IMMUNITY OF THE UNITED STATES.

The taxpayers next contend that the district court erred in granting the government's motion to dismiss their claims regarding the alleged violations of Rule 6(e) of the Federal Rules of Criminal Procedure. Rule 6(e)(2), the general rule of secrecy in grand jury proceedings, provides that:

> A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph

> (3)(A)(ii)[3] of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(footnote added).

As previously stated, in the original complaint, the taxpayers made numerous allegations of wrongful disclosure of confidential return information against Agents Rodriguez, Prince and Fox. The taxpayers contended that to the extent that any federal agents involved in the case disclosed information they had obtained during the grand jury process, those disclosures were also in violation of Rule 6(e). In their supplemental complaint, the taxpayers alleged that certain unidentified federal officials familiar with the grand jury investigation disclosed certain (previously quoted) information to Houston Post reporter Scott Harper.

The taxpayers argued that the above disclosures were intended to impart the federal officials' knowledge or belief that the grand jury was going to indict the taxpayers in the next month. They requested the court to conduct an evidentiary hearing and hold the "responsible federal officials" in contempt of court for the disclosure of matters occurring before the grand jury.[4]

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[3] Rule 6(e)(3)(A)(ii) provides that disclosure of matters occurring before the grand jury may be made to "such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law."

[4] The taxpayers sought no remedy under Rule 6(e) other than of contempt.

Relying on McQueen v. Bullock, 907 F.2d 1544 (5th Cir. 1990), cert. denied, 499 U.S. 919, 111 S.Ct. 1308 (1991), the United States argued that the Rule 6(e) claim should be dismissed because it was barred by the doctrine of sovereign immunity. The district court agreed and struck the claims on that basis.

In McQueen, the plaintiff sued the United States and the Texas state comptroller for alleged violations of Rule 6(e), and the United States argued that sovereign immunity barred such a suit. This Court stated that there were no statutes which remotely suggested that the United States had consented to suit for Rule 6(e) violations. Id. at 1550-51. To the contrary, the case law revealed that Rule 6(e) must be enforced through contempt motions filed against the individuals. We held that because sovereign immunity barred the claim, the plaintiff had "opted for a procedure and for relief which [was] not available to him." Id. at 1551.

The taxpayers argue that "McQueen requires only that the plaintiffs file their motion for contempt hearing against the individuals, which is, in effect, what plaintiffs did." Contrary to their argument, the taxpayers failed to follow the procedure outlined in McQueen, i.e., they did not file suit against the specific individuals. See McQueen, 907 F.2d at 1551 n.20 ("McQueen also erred by suing the Comptroller instead of any specific individuals alleged to have made any disclosures."). We note that such a dismissal is without prejudice to any suit the taxpayers may bring against an official in an individual capacity. See Capozzoli v. Tracey, 663 F.2d 654, 656 n.1 (5th Cir. 1981).

CONCLUSION

For the above stated reasons, we AFFIRM the dismissal of the Rule 6(e) claims and VACATE the judgment of the district court dismissing the § 6103 claims and REMAND for further proceedings.