

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-2864
Summary Calendar

ROBERT E. UNDERHILL and
ALYNE L. UNDERHILL,

Plaintiffs-Appellants,

VERSUS

R. E. PORTER,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-93-832)

(August 24, 1994)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:¹

Appellants Robert E. and Alyne L. Underhill, contending that they are "wholly exempt from federal tax liability", challenge the district court's order dismissing their suit against R. E. Porter, an IRS agent. The Underhills sought the return of property that agent Porter caused to be seized by the IRS. We dismiss the appeal

¹Local 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

as frivolous.

I.

The Underhills, Texas residents, refused to pay their federal income tax, and as of January 1993, they owed more than \$300,000. After the Underhills refused to pay the full amount of the tax assessed within 30 days after receiving notice and demand from R. E. Porter, an IRS revenue officer, the IRS seized certain property belonging to the Underhills. Mr. Porter, as the IRS officer handling this case, caused the seizure to be made.

The Underhills responded by filing suit against Porter in state court "in his individual capacity under the color of law." The Underhills alleged that after they had explained to Porter that they were immune from paying tax, he "stepped out of his cloak of immunity and into his individual, private capacity, under color of law, proceeded to collect on unknown taxes." The Underhills sought to recover the seized property along with attendant legal costs.

Porter promptly removed the case to federal district court. The Underhills moved to remand. Porter then filed a motion to dismiss the suit or alternatively for summary judgment. The district court denied the Underhills' motion to remand and granted Porter's motion to dismiss and for summary judgment. The Underhills filed a notice of appeal to the United States Court of Appeals for the Federal Circuit. The Federal Circuit transferred the appeal to this court.

II.

The Underhills raise a number of issues, all of which are frivolous. Porter argues that the district court lacked subject matter jurisdiction because of sovereign immunity. We agree with Porter that this action against a revenue officer is barred by sovereign immunity. Porter was acting in his official capacity; therefore, this action is legally considered a suit against the United States. **Hawaii v. Gordon**, 373 U.S. 57, 58 (1963). The Underhills' action is one for the "recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected" within the meaning of I.R.C. § 7422(a). Although the United States has waived sovereign immunity under section 7422(f)(1), **United States v. Michel**, 282 U.S. 656, 658 (1931), section 7422(a) provides that "[n]o suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected" until a refund claim has been filed in accordance with the pertinent treasury regulations. **Zernial v. United States**, 714 F.2d 431, 434 (5th Cir. 1983). As the Underhills have not satisfied the requirements of § 7422(a), this action is barred by sovereign immunity and must be dismissed for lack of subject matter jurisdiction.

Taxpayer's reliance on 28 U.S.C. § 1447(c) for the principle that this case must be remanded because the district court lacks subject matter jurisdiction is misplaced. Such a remand would be futile. The jurisdictional defect is created by the fact that the United States has not waived its sovereign immunity. Thus, the

state court could not entertain this action because a waiver of sovereign immunity is a prerequisite to the exercise of jurisdiction over the United States by any court, state or federal. Because a state court could grant no relief to a taxpayer, the district court correctly declined to remand the action.

The Underhills' remaining arguments are equally meritless. Porter was entitled to file motions to dismiss for lack of jurisdiction under F.R.C.P. 12(b). Thus, Porter was not required to file an answer before the district court ruled on his motions, and the court did not err in declining to enter a default in favor of the Underhills.

Similarly, the district court did not err in cancelling a scheduling conference. Such conferences are held at the discretion of the court. The case was properly removed from state court to federal district court under 28 U.S.C. 1442(a)(1). This statute permits removal by an officer of the United States or any agency whenever a suit in state court is for any act of that officer under color of federal law.²

Because this appeal is frivolous, it is dismissed, and we assess double costs against appellants and further order appellants to pay the sum of \$1,000 to the United States as sanctions under F.R.A.P. Rule 38. Any further frivolous appeals arising out of the Underhills' baseless contention that they are exempt from the federal income tax laws will draw increasingly severe sanctions.

² We have considered Underhill's remaining arguments and they are all frivolous.

APPEAL DISMISSED.