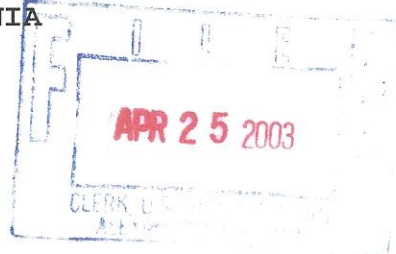


IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division



AMBASSADOR LEO WANTA, SOMALIA)
AMBASSADOR TO CANADA and)
SWITZERLAND)

Plaintiff,)
v.)

UNITED STATES OF AMERICA,)
et al.)

Defendants.)

Civil Action 02-1363-A

JUDGMENT

Pursuant to the order of this Court entered on April 25, 2003 and in accordance with Federal Rules of Civil Procedure 58, JUDGMENT is hereby entered in favor of the defendants United States of America, John Ashcroft, Paul O'Neill and George Tenet, against the Plaintiff Ambassador Leo Wanta, Somalia Ambassador to Canada and Switzerland.

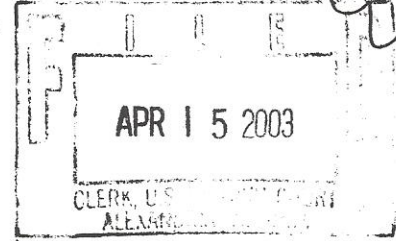
ELIZABETH H. PARET, CLERK

By: *Elizabeth H. Paret*
Deputy Clerk

April 25, 2003
Alexandria, Virginia

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

ALEXANDRIA DIVISION



AMBASSADOR LEO WANTA,

Plaintiff,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

Civil Action No. 02-1363-A

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendants the United States of America, et al.'s, motion to dismiss Plaintiff Ambassador Leo Wanta's claim of breach of contract based on lack of subject matter jurisdiction and on Plaintiff's motion to amend his complaint. The issue before the Court is whether the Court should dismiss an alleged secret government agent's claim against the Attorney General, the Director of the Central Intelligence Agency, the Secretary of the Treasury and the Government based on lack of subject matter jurisdiction. The Court grants Defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) because the Government has not waived sovereign immunity and public policy forbids the adjudication of a suit relating to matters of an alleged national security contract. The Court denies Plaintiff's motion to amend his complaint under Federal Rule of Civil Procedure 15(a) because such an action would be futile.

I. BACKGROUND

Plaintiff alleges that he served as a secret agent, employee and /or independent contractor of the United States government and that the scope of his duties fell within the provisions of the National Security Act of 1947. (Compl. at ¶ 1.) His complaint further alleges that in April 1992, Plaintiff and a now deceased third party foreign national executed a Tax Treaty Agreement ("the Agreement") with the United States government. (Id. at ¶ 5.) The purpose of the Agreement, commencing on June 11, 1995, was to provide for Plaintiff's termination and retirement from his service with the United States government. (Id.) Despite Plaintiff's repeated demands for performance, the United States government has refused to comply with the terms of the Agreement. (Id. at ¶ 6.) As a result, Plaintiff seeks an order from the Court requiring the United States, *inter alia*, to comply with their responsibilities under the terms of the Agreement or, alternatively, to pay him \$1.0 billion in damages for breach of contract. (Id. at ¶¶ 21, 23.)

II. DISCUSSION

A. Subject Matter Jurisdiction

1. Standard of Review

The Court may consider a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) by examining "(1) the complaint alone; (2) the complaint supplemented by undisputed

facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.'" See *Hostetler v. United States*, 97 F. Supp. 2d 691, 694 (E.D. Va. 2000) (quoting *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981)). The burden of establishing subject matter jurisdiction lies with the plaintiff. *Id.* at 695.

2. Jurisdiction Over Contractual Claims Against the United States

The United States Court of Federal Claims has exclusive jurisdiction over any contractual claims against the United States for monetary damages in excess of \$10,000. 28 U.S.C. § 1491(a)(1). In this case, Plaintiff seeks specific performance of the Agreement or \$1.0 billion in monetary damages for breach of the Agreement.

3. Inability of this Court to Provide Equitable Relief

Plaintiff argues that this Court is the appropriate venue for this suit because the purported Agreement between the parties provides for arrangements concerning the payment of Plaintiff's federal income taxes resulting from the liquidation and distribution of assets from various foreign and domestic corporations. This Court has subject matter jurisdiction over an action against the United States for any incorrect or wrongful assessment of federal taxes or an illegal collection action under

the Internal Revenue Code. See 28 U.S.C. § 1346(a)(1). However, despite Plaintiff's clarification of the purpose of the Agreement, he does not claim that he is attempting to recover any payments or assessments of taxes by the United States. Instead, Plaintiff asserts that the terms of the Agreement establish a formula that determines the amount of income taxes owed for the liquidation of assets in various foreign and domestic corporations, as well as the timing for those tax payments to the United States government.

The Court, however, is precluded from intervening in a dispute involving the calculation of income taxes owed before an assessment is made against the taxpayer or the taxpayer tenders payment. The Anti-Injunction Act provides that ". . . no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). A court does not have the right to interfere with the collection or assessment of federal taxes. *Int'l Lotto Fund v. Virginia State Lottery Dep't*, 20 F.3d 589, 591 (4th Cir. 1994). A court may issue an injunction prohibiting the assessment or collection of taxes "only if it is clear that the Government could in no circumstances ultimately prevail on the merits and that equity jurisdiction exists." *Prof'l Eng'rs, Inc. v. United States*, 527 F.2d 597, 600 n.1 (4th Cir. 1975).

Furthermore, application of the Anti-Injunction Act does not result in a denial of due process provided that the taxpayer can seek redress in a refund action. *Id.* at 600. The Plaintiff has not demonstrated that his position is so compelling that only he, and not the government, could prevail. Nor does the Plaintiff currently seek to recover any payments or assessments of federal income taxes or assert that he was denied judicial review in a refund action. Accordingly, this Court cannot provide any injunctive relief in this matter. Since the Plaintiff's claim against the United States government would appear to be contractually based, the appropriate venue for this action is the United States Court of Federal Claims.

B. Failure to State a Claim

1. Standard of Review

A Federal Rule of Civil Procedure 12(b)(6) motion should not be granted unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. Fed. R. Civ. P. 12(b)(6); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In considering a Rule 12(b)(6) motion, the Court must construe the complaint in the light most favorable to the plaintiff, read the complaint as a whole, and take the facts asserted therein as true. *Mylan Labs, Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). Conclusory

allegations regarding the legal effect of the facts alleged need not be accepted. See *Labram v. Havel*, 43 F.3d 918, 921 (4th Cir. 1995). Because the central purpose of the complaint is to provide the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests," the plaintiff's legal allegations must be supported by some factual basis sufficient to allow the defendants to prepare a fair response. *Conley*, 355 U.S. at 47. This initial standard sets out how the Court construes the Complaint.

2. Contrary to Public Policy

The Plaintiff fails to state a claim upon which relief may be granted by this Court or the United States Court of Federal Claims. Because the Agreement is a contractual claim against the United States for more than \$10,000, transfer to the United States Court of Federal Claims would be appropriate. However, the transferee court must also possess subject matter jurisdiction for this Court to be able to transfer the case.. The United States Court of Federal Claims cannot order specific performance or award damages for breach of contract in this suit as a matter of public policy. "Public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law regards as confidential." *Totten v. United States*, 92 U.S. 105, 107 (1875). The Plaintiff contends that the Agreement does not

involve a contract for services. Instead, he states that the Agreement provides a mechanism for the timing and payment of income taxes resulting from the distribution and liquidation of various domestic and foreign corporations that the plaintiff established while employed by the United States government. Plaintiff also unequivocally states that certain terms of the Agreement may be subject to the National Security Act of 1947. (Compl. at ¶ 1.) Despite Plaintiff's attempt to mollify his original statement by saying that the provisions of the Agreement relating to the tax payments are not covered by the National Security Act, the Court must conclude, based on Plaintiff's initial statement and his failure to attach a copy of the Agreement to his complaint, that the Agreement involves secret or covert activities subject to the National Security Act of 1947.

3. Failure to Establish Sovereign Immunity

Even assuming, *arguendo*, that the Agreement is not subject to the National Security Act of 1947, the Plaintiff cannot demonstrate that the United States Court of Federal Claims has subject matter jurisdiction. See *McNutt v. GMAC*, 298 U.S. 178, 182, 189 (1936) (stating that the burden is on the plaintiff to demonstrate that a court has subject matter jurisdiction). The Plaintiff has sued the federal government as well as three named federal officials in their official capacities to obtain specific performance of the Agreement or, alternatively, monetary damages

for breach of the Agreement. A suit against such a federal officer is deemed to be a suit against the federal government. *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). Thus, this suit rests exclusively against the federal sovereign.

The United States, is immune from suit based on its sovereign powers, unless consent to suit is granted to prospective litigants. The United States' consent to be sued must be express and unequivocal. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). The Plaintiff has failed to demonstrate that the United States has expressly consented to be sued in this matter. While the alleged Agreement between the parties may provide such consent, the Plaintiff has elected not to attach a copy of the Agreement to the Complaint to support that such consent exists.

Without express consent, only Congress can waive the sovereign immunity of the United States. *Block v. North Dakota*, 461 U.S. 273, 287 (1983). Congress has adopted legislation that provides for a waiver of sovereign immunity in suits for equitable relief. See Administrative Procedures Act (APA), 5 U.S.C. § 701, et seq. However, relief may not be available under the APA if other statutes prohibit this remedy. 5 U.S.C. § 701(a)(1). The Anti-Injunction Act, as previously discussed, precludes such relief in this case. 26 U.S.C. § 7421 (disallowing lawsuits that interfere with the assessment or

collection of federal income taxes). Likewise, the Declaratory Judgment Act expressly excludes actions relating to federal taxes. 28 U.S.C. § 2201; *Prof'l Eng'rs*, 527 F.2d at 600. The Plaintiff cannot establish that the United States consents to be sued. As a result, the United States Court of Federal Claims would be precluded from ordering specific performance of the Agreement since federal law prohibits a waiver of sovereign immunity in matters involving assessment and collection of income taxes. Therefore, because the United States Court of Federal Claims is prohibited from granting relief in this matter, it would be futile for this Court to transfer this case.

C. Amendment of Complaint

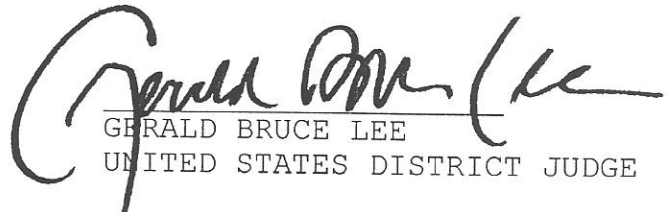
Although a court may allow a party to amend its complaint when it is in the interests of justice under Federal Rule of Civil Procedure 15(a), such action in this case would not further the interests of justice. *Khandelwal v. Compuadd Corp.*, 780 F. Supp. 1077, 1082 (E.D.Va. 1992). Even if Plaintiff were allowed to amend his complaint to dismiss his claim for breach of contract, this Court would continue to lack subject matter jurisdiction in this case because the remaining claim seeks specific performance of a contract involving the United States government and jurisdiction lies in the United States Court of Federal Claims. However, as discussed previously, the Court may not transfer this matter to the United States Court of Federal

Claims. Nor would an amended complaint change this Court's ability to provide equitable relief in this matter since Plaintiff does not seek recovery of payment or assessment of federal taxes. Moreover, allowing Plaintiff to amend his Complaint would not remove Plaintiff's bar from suing the United States government because he lacks express consent or a waiver of sovereign immunity by the United States government that would allow the United States Court of Federal Claims to have subject matter jurisdiction in this case. Therefore, the Court denies Plaintiff's motion to amend his complaint because such an action would be futile. Plaintiff's sole remedy in this matter is to proceed with the liquidation of the corporations and report these transactions to the Internal Revenue Service in accordance with the Internal Revenue Code and then challenge the assessment of any taxes in a refund proceeding. See *Int'l Lotto Fund*, 20 F.3d at 591.

III. CONCLUSION

The Court grants Defendants' motion to dismiss based on lack of subject matter jurisdiction and failure to state a claim on which relief may be granted. The Court denies Plaintiff's motion to amend his complaint.

Dated: *April 15, 2003*
Alexandria, Virginia


GERALD BRUCE LEE
UNITED STATES DISTRICT JUDGE