

FOR PUBLICATION

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA**

In re:)	
MANUEL F. BARCELOS)	Case No. 11-14278-A-12
and MARY F. BARCELOS,)	
)	
Debtors.)	
)	
MANUEL F. BARCELOS,)	Adv. No. 16-1057-A
)	WW-1
Plaintiff,)	US-2
)	
v.)	
)	
UNITED STATES OF AMERICA,)	
)	MEMORANDUM
Defendant.)	
)	

Argued and Submitted on August 24, 2017

at Fresno, California

Honorable Fredrick E. Clement, Bankruptcy Judge Presiding

Appearances: Matthew P. Bunting, Walter Wilhelm Bauer argued on
 behalf of plaintiff Manuel F. Barcelos; Boris Kukso,
 U.S. Department of Justice argued on behalf of the
 United States of America

1 In this § 362(k)¹ action, the government's return of tax refunds
2 to the debtor has narrowed the debtor's damages claim to the debtor's
3 attorney's fees and costs of litigation and accountant's fees.
4 Barcelos's failure to exhaust administrative remedies means that
5 sovereign immunity is not waived for this action, and this deprives
6 the court of jurisdiction.

7 **FACTS**

8 Manuel F. Barcelos ("Barcelos") filed an adversary complaint
9 under 11 U.S.C. § 362(k) against the United States of America
10 ("United States"). Barcelos asserts that the United States, acting
11 through the Internal Revenue Service ("IRS"), violated the automatic
12 stay of § 362(a) during his Chapter 12 bankruptcy by seizing his 2013
13 income tax refund in the amount of \$11,917 and 2014 income tax refund
14 in the amount of \$9,262. His action pursues recovery of actual
15 damages as well as attorney's fees and costs.

16 The parties agree that, after commencing this adversary
17 proceeding, Barcelos attempted to exhaust his administrative remedies
18 informally. He sent his administrative claim for attorney's fees of
19 \$8,399.25 and accounting fees of \$738.00 to two different IRS
20 employees and an attorney at the U.S. Department of Justice. He did
21 not, however, file the claim with the Chief of the Insolvency Unit of
22 the IRS for the Eastern District of California. The claim has also
23 never been properly served.

24 Barcelos and the United States have filed cross-motions for
25 summary judgment. The parties agree that the United States violated
26 the stay by seizing Barcelos's income tax refunds but that it has
27

28 ¹ Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. All "Civil Rule" references are to the Federal Rules of Civil Procedure, Rules 1-86.

1 since returned those refunds plus statutory interest to Barcelos.
2 The 2013 income tax refund was returned prior to commencement of this
3 adversary proceeding; the 2014 refund was remitted to Barcelos after
4 the commencement of this action.

5 The only remaining damages sought by Barcelos are his attorney's
6 fees of \$28,683 and accounting fees of \$738. Barcelos incurred these
7 fees in pursuing the return of his 2014 tax refunds and litigating
8 this adversary action for attorney's fees and costs. *See In re*
9 *Schwartz-Tallard*, 803 F.3d 1095, 1101 (9th Cir. 2015).

10 DISCUSSION

11 As the sovereign, the United States is immune from suit, unless
12 it has expressly consented to be sued. *United States v. Shaw*, 309
13 U.S. 495, 500-501 (1940). Absent consent, courts lack jurisdiction
14 over the sovereign, and any action filed against it must be
15 dismissed. *Powelson v. United States*, 150 F.3d 1103, 1104-05 (9th
16 Cir. 1998); *see also McCarthy v. United States*, 850 F.2d 558, 560
17 (9th Cir. 1988) (waiver of sovereign immunity against actions for
18 damages presents a question of jurisdiction). Furthermore, an
19 aggrieved party's failure to exhaust administrative remedies in this
20 context means sovereign immunity has not been waived, which deprives
21 this court of jurisdiction. *Conforte v. United States*, 979 F.2d
22 1375, 1377 (9th Cir. 1993) (failure to exhaust administrative
23 remedies under 26 U.S.C. § 7433(d)(1) deprives the court of
24 jurisdiction); *see also Kuhl v. United States*, 467 F.3d 145, 148-49
25 (2nd Cir. 2006) (holding that Congress has conditionally waived
26 sovereign immunity under § 7433(e) for willful discharge violations
27 by imposing an exhaustion-of-remedies requirement).

28 The United States has consented to suits for violation of the
automatic stay. 11 U.S.C. § 106(a)(1) (containing waiver of
sovereign immunity for the enumerated Code sections, including

1 § 362).² But that consent must be read narrowly. *Allied/Royal*
2 *Parking L.P. v. United States*, 166 F.3d 1000, 1003 (9th Cir. 1999).

3 For an action under § 362(k), the United States has different
4 standards of consent applicable to (1) claims for compensatory
5 damages generally and (2) claims for attorney's fees and costs. No
6 exhaustion-of-remedies prerequisite exists for the government's
7 consent to a § 362(k) proceeding when compensatory damages other than
8 attorney's fees and costs are sought.³ But the United States' waiver

10
11 ² Section 106(a)(3) imposes limitations on the general waiver of
12 sovereign immunity under § 362 and provides that an "order or judgment for
13 costs or fees under this title or the Federal Rules of Bankruptcy Procedure
14 against any governmental unit shall be consistent with the provisions and
15 limitations of section 2412(d)(2)(A) of title 28." 28 U.S.C. § 2412, the
16 Equal Access to Justice Act ("EAJA"), contains an exception to its
17 applicability for fees and costs incurred "in connection with any proceeding
18 to which section 7430 of the Internal Revenue Code of 1986 applies." 28
19 U.S.C. § 2412. Ninth Circuit precedent confirms that the EAJA and 26 U.S.C.
20 § 7430 are mutually exclusive. *United States v. Arkison (In re Cascade*
Roads, Inc.), 34 F.3d 756, 768 (9th Cir. 1994). "In the cases to which
§ 7430 applies it is exclusive and precludes recovery under the EAJA." *Smith*
v. Brady, 972 F.2d 1095, 1099 (9th Cir. 1992) (citing 28 U.S.C. § 2412(e));
accord United States v. McPeck, 910 F.2d 509, 513 (8th Cir. 1990). Read
together, these statutes waive sovereign immunity, subject to conditions and
limitations, for actions under § 362(k) to recover attorney's fees and
costs. See 11 U.S.C. § 106(a)(1), (3); 28 U.S.C. § 2412(e); 26 U.S.C. §§
7430(a)-(b), 7433(e)(2)(B)(i).

21 ³ This conclusion requires a close reading of applicable Internal
22 Revenue Code provisions. 26 U.S.C. § 7433(e) allows a petition to be brought
23 in the bankruptcy court for a willful violation of § 362 or § 524. 26
24 U.S.C. § 7433(e)(1). This is the exclusive remedy for (1) willful
25 violations of the stay other than actions under § 362(k) and (2) all
26 discharge-injunction violations. *Id.* § 7433(e)(2)(A). All § 7433(e)(1)
27 petitions in the bankruptcy court are subject to an exhaustion-of-remedies
28 requirement. See *id.* § 7433(b), (d)(1), (e)(1). But proceedings under
§ 362(k) are excepted from the exclusive-remedy provision of
§ 7433(e)(2)(A). *Id.* § 7433(e)(2)(B); see also 26 C.F.R. § 301.7433-2(a)(2)
("In addition, taxpayers injured by violations of section 362 of the
Bankruptcy Code may maintain actions under section 362[k] of the Bankruptcy
Code (relating to an individual injured by a willful violation of the
stay.")). As a result, § 362(k) proceedings are not subject to the
exhaustion-of-remedies requirement that applies to § 7433(e)(1) petitions in
bankruptcy court. But the fees-and-costs component of a § 362(k) proceeding
are subject to an exhaustion-of-remedies requirement under a different
statute. See 26 U.S.C. § 7430; 26 C.F.R. § 301.7433-2(a)(2).

1 of sovereign immunity for awards of attorney's fees and costs has a
2 condition precedent: compliance with administrative requirements
3 imposed by the Internal Revenue Code, i.e., exhaustion of
4 administrative remedies. See 26 U.S.C. §§ 7430(b)(1),
5 7433(e)(2)(B)(i).⁴

6 26 C.F.R. § 301.7430-1(e) establishes the administrative
7 remedies that a debtor-taxpayer must exhaust before pursuing
8 attorney's fees and costs for a violation of the automatic stay under
9 § 362(k). This regulation requires a party to "file[] an
10 *administrative claim* for relief from a violation of section 362 of
11 the Bankruptcy Code *with the Chief, Local Insolvency Unit*, for the
12 judicial district in which the bankruptcy petition that is the basis
13 for the asserted automatic stay violation was filed *pursuant to*
14 *§ 301.7433-2(e)* and *satisfies the other conditions set forth in*
15 *§ 301.7433-2(d).*" 26 C.F.R. § 301.7430-1(e) (emphases added). In
16 turn, § 301.7433-2(e) and (d) contain more conditions that must be
17 satisfied according to 26 C.F.R. 301.7430-1(e). Section 301.7433-2(d)
18 requires a debtor-taxpayer to file an administrative claim and wait
19 for the earlier of the decision on the claim or six months after the
20 claim was filed to commence an adversary proceeding for attorney's
21 fees and costs. *Id.* § 301.7433-2(d).

22 In this case, Barcelos made critical procedural errors that
23 precluded him from exhausting his administrative remedies and
24 bringing his action within the United States' waiver of sovereign
25 immunity. First, he improperly commenced this adversary proceeding
26

27 ⁴ Section 7433(e) provides that "administrative and litigation costs in
28 connection with [an action under § 362(k)] may only be awarded under section
7430." *Id.* § 7433(e)(2)(B)(i). "Section 7430 in turn allows recovery of
attorneys' fees provided that 'the prevailing party has exhausted the
administrative remedies available to such party within the Internal Revenue
Service.'" *Kuhl v. United States*, 467 F.3d 145, 147 (2d Cir. 2006) (quoting
26 U.S.C. § 7430(b)(1)).

1 before attempting to exhaust his administrative remedies.
2 Specifically, he failed to bring this § 362(k) action after the
3 earlier of (1) the IRS's decision on his administrative claim or (2)
4 six months after a compliant filing of the administrative claim.

5 Second, his claim was not properly filed and served. The
6 regulations identify a specific official with whom a formal
7 administrative claim must be filed to exhaust administrative
8 remedies. But Barcelos did not file his claim with such official,
9 the IRS's Chief, Local Insolvency Unit, for the Eastern District of
10 California. 26 C.F.R. §§ 301.7430-1(e)(2), 301.7433-2(e). Sending
11 his claim to two different IRS employees (not the Chief of the Local
12 Insolvency Unit) and an attorney at the U.S. Department of Justice
13 does not suffice under any reading of the applicable regulation. See
14 *Hoogerheide v. I.R.S.*, 637 F.3d 634, 639 (6th Cir. 2011) (finding
15 improperly addressed letters insufficient and rejecting as doubtful
16 any doctrine of substantial compliance). These deficiencies preclude
17 Barcelos from having exhausted his administrative remedies, and the
18 court need not decide whether the content of Barcelos's
19 administrative claim satisfied 26 U.S.C. § 7430(b)(1) and its
20 implementing regulations.

21 Because Barcelos did not exhaust his administrative remedies as
22 to his attorney's fees and other litigation costs, his action falls
23 outside the scope of the United States' waiver of sovereign immunity.
24 Accordingly, this court lacks jurisdiction over this proceeding.

25 26 27 **CONCLUSION**

28 The court lacks jurisdiction over Barcelos's claim for
attorney's fees and other litigation costs because Barcelos has
failed to exhaust administrative remedies. The adversary proceeding

1 will be dismissed. Each motion for summary judgment is denied. The
2 court will issue a separate order.

3
4 Dated: October 12, 2017

5 /s/

6 _____
7 Fredrick E. Clement
8 United States Bankruptcy Judge
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28