IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON, and ROGER FREEBORN, Defendants.	**ORDER DENYING DEFENDANTS' MOTION TO DISMISS** Case No. 2:15-cv-00828 DN-EJF District Judge David Nuffer Magistrate Judge Evelyn J. Furse

Defendants' filed a Motion to Dismiss,[1] arguing that the United States' claims in this case are too speculative to be presented to this Court for adjudication, and therefore should be dismissed for lack of subject matter jurisdiction. For the reasons stated in the United States' brief in opposition,[2] the Motion to Dismiss will be denied.

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[1] ECF No. 257

[2] ECF No. 262.

I. The United States' claims in this case.[3]

The United States seeks to enjoin Defendants from organizing, promoting, and selling the "solar energy scheme" that they have been promoting since or before 2010.[4] As described in the complaint, the solar energy scheme purportedly offers a "disruptive and revolutionary" approach to capturing and using solar energy.[5] The technology underlying the solar energy scheme, purportedly invented by Neldon Johnson, uses "solar lenses" on "solar towers."[6] Defendants make money by selling "lenses" to customers, which the customers purportedly lease to LTB, LLC.

The government alleges that Defendants assure their customers that, by purchasing lenses, customers may claim a depreciation deduction and a solar energy tax credit. The underpinnings of Defendants' solar energy scheme, according to the United States, are their statements assuring their customers that:

- customers who buy and then purportedly lease the lenses to LTB are in a "trade or business" and have bought the lenses for the purpose of making a profit;[7]
- by virtue of their "trade or business," customers may deduct "business" expenses, consisting mostly of depreciation[8] on the lenses, from their ordinary income like wages from their full-time jobs[9]; and

[3] The following information is drawn from the United States' complaint, ECF No. 2, and its motion for partial summary judgment, ECF No. 251.

[4] ECF No. 2 and ECF No. 35 ¶ 1(a).

[5] ECF No. 2 ¶ 16.

[6] ECF No. 2 ¶¶ 17, 22.

[7] *E.g.*, ECF No. 252-1, Pl. Ex. 1 at 2-3.

[8] 26 U.S.C. § 162; 26 U.S.C. § 167; ECF No. 252-4, Pl. Ex. 25 at 1-2.

[9] ECF No. 252-3, Pl. Ex. 24; ECF No. 252-6, Pl. Ex. 40 at 12; ECF No. 252-9, Pl. Ex. 214; ECF No. 252-10, Pl. Ex. 216; ECF No. 252-14, Pl. Ex. 492; ECF No. 252-29, Pl. Ex. 674.

- customers may claim a solar energy tax credit to further reduce their tax liability.[10]

The United States alleges that Defendants' statements are false or fraudulent as to material matters under the internal revenue laws.[11] It also alleges that Defendants knew or had reason to know that these statements were false or fraudulent when they made the statements while promoting the solar energy scheme.[12] The United States further alleges that, to increase the tax benefits they promote to their customers, Defendants falsely inflate the value of the lenses to more than 200 percent of the correct value.[13] According to the government, when Defendants tell customers this falsely inflated purchase price, Defendants make a gross valuation overstatement.[14] The United States claims that Defendants have not stopped making these statements and will not stop without an order from this Court permanently enjoining Defendants under § 7408.[15] The United States also seeks to enjoin Defendants under § 7402(a) because it claims an injunction (and other equitable relief including disgorgement) is appropriate for the enforcement of the internal revenue laws.[16]

[10] 26 U.S.C. § 48; ECF No. 252-4, Pl. Ex. 25 at 2.

[11] 26 U.S.C. § 6700(a)(2)(A); ECF No. 2, Counts VII-XI; ECF No. 251.

[12] 26 U.S.C. § 6700(a)(2)(A); ECF No. 2, Counts VII-XI; ECF No. 251.

[13] 26 U.S.C. § 6700(a)(2)(B), (b)(1); ECF No. 2, Counts VII-XI.

[14] 26 U.S.C. § 6700(a)(2)(B); ECF No. 2, Counts VII-XI.

[15] ECF No. 251 at 14-15, 36; *See* 26 U.S.C. §§ 6700, 7408; ECF No. 2, Counts VII-XI.

[16] 26 U.S.C. § 7402(a); ECF No. 2 at Counts I-VI.

II. Discussion

Under Article III of the Constitution, federal courts have subject matter jurisdiction to decide, among other matters, "all Cases, in Law and Equity, arising under . . . the Laws of the United States . . . [and] to Controversies to which the United States shall be a Party."[17] This "cases" or "controversies" requirement has led federal courts to develop justiciability doctrines to "identify appropriate occasions for judicial action."[18] Two of the categories of justiciability concepts are standing and ripeness.[19]

"Standing and ripeness are closely related in that each focuses on whether the harm asserted has matured sufficiently to warrant judicial intervention."[20] To establish standing, a plaintiff must allege that it has suffered "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[21] "In evaluating ripeness the central focus is on whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all."[22]

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[17] U.S. Const. art. III, § 2, cl. 1; *see also* 28 U.S.C. § 1340 (granting district courts original jurisdiction over any civil action arising under any statute "providing for internal revenue"); 28 U.S.C. § 1345 (granting district courts original jurisdiction over all civil actions "commenced by the United States").

[18] Justiciability, 13 Fed. Prac. & Proc. Juris. § 3529 (3d ed.).

[19] *E.g.*, [Standing] In General, 13A Fed. Prac. & Proc. Juris. § 3531 (3d ed.); [Ripeness] In General, 13B Fed. Prac. & Proc. Juris. § 3532 (3d ed.).

[20] *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1097 (10th Cir. 2006) (quotation omitted).

[21] *Allen v. Wright*, 468 U.S. 737, 751 (1984) *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386-88 (2014); *accord Lujan v. Defenders. of Wildlife*, 504 U.S. 555, 560–61 (1992).

[22] *Initiative & Referendum Inst.*, 450 F.3d at 1097 (quotation omitted). Ripeness questions often arise in suits that challenge statutes before they are enforced. Although that is not the context here, another framework for evaluating whether a case is ripe in that context "turns on the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983).

This case is, and has always been, a justiciable case. The United States has standing to sue when a statute expressly authorizes the United States to bring suit.[23] Sections §§ 7408 and 7402(a) authorize the United States to bring this suit. Both the law and the facts at issue show that the United States has standing to sue Defendants for the requested relief and that this case is ripe for decision by this Court.

A. The United States has standing to sue Defendants under § 7408 and its claims under that statute are ripe.

Section 7408 expressly provides: "[a] civil action in the name of the United States to enjoin any person from further engaging in specified conduct may be commenced at the request of the Secretary [of the Treasury]."[24] The "specified conduct" means, among other things, "any action, or failure to take action, which is . . . subject to penalty under [26 U.S.C.] section 6700."[25]

A person is "subject to penalty" under § 6700 if he (1) either organizes or assists in the organization of a plan or arrangement or participates in the sale of any interest in a plan or arrangement; and (2) makes or furnishes, or causes another to make or furnish, certain statements.[26] One such statement subject to penalty is a statement with respect to the securing of

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[23] *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 484 (1985) ("We do not doubt . . . the standing of the [Federal Election Commission], which is specifically identified in [26 U.S.C.] § 9011(b)(1), to bring a declaratory action to test the constitutionality of a provision of the [Presidential Election Campaign] Fund Act."); *United States v. Ekblad*, 732 F.2d 562, 563 (7th Cir. 1984) (Under both 28 U.S.C. § 1345 and 26 U.S.C. § 7402(a), "[t]he United States has standing to seek relief from actual or threatened interference with the performance of its proper governmental functions.").

[24] 26 U.S.C. § 7408(a), (b).

[25] 26 U.S.C. § 7408(c); *see also* ECF No. 2 ¶¶ 157-160; ECF No. 251at 57.

[26] 26 U.S.C. § 6700(a)(2); *see also* ECF No. 2 ¶¶ 157-160; ECF No. 251 at 53-54.

a tax benefit by reason of holding an interest in an entity or participating in a plan or arrangement that the person knows or has reason to know is false or fraudulent as to any material matter.[27] Another such statement subject to penalty is a "gross valuation overstatement as to any material matter."[28] A gross valuation overstatement is "any statement as to the value of any property or services" if the value of the property or services is directly related to the amount of any tax deduction or credit and the stated value is more than 200 percent of the correct value of the property or services.[29]

Congress enacted §§ 7408 and 6700 in 1982 to combat "the onerous burden abusive tax shelters place on the federal tax system."[30] Before §§ 7408 and 6700, the IRS could only react to abusive tax shelters by auditing hundreds or thousands of customers and then waiting for such customers to file suit to challenge the assessments.[31] This enforcement mechanism was inadequate to combat the deluge of abusive tax shelters and resulting drain on the Treasury.[32] "By allowing the government to attack abusive tax shelters directly at their source with injunctive actions and penalties against the promoters [with §§ 7408 and 6700]. . . [Congress] created affirmative downside risks to . . . promoters . . . who participate in abusive tax

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[27] 26 U.S.C. § 6700(a)(2)(A); *see also* ECF No. 2 ¶¶ 157-160; ECF No. 251 at 53-54.

[28] 26 U.S.C. § 6700(a)(2)(B); *see also* ECF No. 2 ¶¶ 157-160.

[29] 26 U.S.C. § 6700(b)(1); *see also* ECF No. 2 ¶¶ 157-160.

[30] D. French Slaughter, *The Empire Strikes Back: Injunctions of Abusive Tax Shelters After TEFRA*, 3 Va. Tax Rev. 1, 9 (1983).

[31] *Id.* at 1-8.

[32] *Id.* at 9.

shelters."[33] With §§ 7408 and 6700, the United States no longer need wait to combat abusive shelters until the legitimate tax liability of a shelter customer (or hundreds of them) is adjudicated.[34] Rather, the United States has standing to sue because of the "personal injury" caused by a defendant having violated its laws by engaging in penalty conduct under § 6700, which harm is likely to be redressed by injunctive relief.[35]

It follows that a suit to enforce §§ 7408 and 6700 is ripe when a person has engaged in conduct subject to penalty under § 6700 and "injunctive relief is appropriate to prevent recurrence of such conduct."[36] This is consistent with the general (and uncontroversial) idea that a case seeking an injunction is ripe when the conduct to be enjoined has already occurred, is continuing to occur, and will continue to occur absent a court order.[37]

The United States has standing to bring this injunction suit against Defendants under § 7408, and its claims are ripe, because it alleged (and has offered, on summary judgment) facts sufficient to show that Defendants have engaged in conduct, continue to engage in conduct, and will engage in conduct that violates the internal revenue laws including (but not limited to)

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[33] *Id.* at 9.

[34] Federal district courts have subject matter jurisdiction to hear and determine suits under § 7408 regardless of whether the United States has brought any other action against the same promoter, such as an action to collect penalties assessed under § 6700. § 7408(a); Slaughter, *The Empire Strikes Back*, 3 Va. Tax Rev. at 21 ("Congress intended that the new injunctive remedy be available without regard to any other power or authority of the Service, including the assessment of penalties.").

[35] *See Allen*, 468 U.S. at 751; *Lujan*, 504 U.S. at 560–61.

[36] 26 U.S.C. § 7408(a)-(c).

[37] *See generally United States v. Elsass*, 978 F. Supp. 2d 901, 934-41 (S.D. Ohio 2013); *Original Knights of Ku Klux Klan*, 250 F. Supp. at 356. While neither *Elsass* nor *Original Knights of the Ku Klux Klan* directly addresses ripeness as a justiciability factor, the discussion of the defendants' past, current, and likely future conduct absent an injunction show that both cases were ripe.

§ 6700.[38] There is nothing uncertain, contingent, or speculative about the United States' cause of action. In cases just like this one, federal district courts routinely decide whether a defendant has engaged in penalty conduct under § 6700 and should be enjoined under § 7408.[39] This is exactly what Congress intended when it enacted §§ 7408 and 6700.

Defendants' arguments to the contrary are unconvincing. They argue that, because none of the 193 (to date) Tax Court cases filed by their customers have been decided on their merits, the United States' claims in this injunction case are not ripe.[40] According to Defendants, until the Tax Court decides their customers' tax liabilities, there is no way to know whether Defendants made statements as to material matters that were false or fraudulent. Carried to its logical conclusion, however, Defendants' argument would eliminate §§ 7408 and 6700 from the Internal Revenue Code. But by enacting §§ 7408 and 6700, Congress directed that the United States may bring a suit like this one against an abusive tax shelter's promoters, no matter the status of any customer's tax liability.

B. The United States has standing to sue Defendants under § 7402(a) and its claims under that statute are ripe.

The United States also has standing to sue Defendants under § 7402(a), and its claims are ripe. Just like § 7408, § 7402(a) expressly authorizes this suit: "[t]he district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil

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[38] *See generally* ECF No. 2 and ECF No. 251.

[39] *E.g.*, *United States v. Stover*, 650 F.3d 1099 (8th Cir. 2011), *Elsass*, 978 F. Supp. 2d at 934-41; *United States v. United Energy Corp.*, No. C-85-3655-RFP (CW), 1987 WL 4787 (N.D. Cal. Feb. 25, 1987); *United States v. Music Masters, Ltd.*, 621 F. Supp. 1046, 1055 (W.D.N.C. 1985).

[40] ECF No. 257 at 3.

actions . . . orders of injunction, . . . and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws." An injunction under § 7402 may be issued "in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws."[41] "It would be difficult to find language more clearly manifesting a congressional intention to provide the district courts with a full arsenal of powers to compel compliance with the internal revenue laws" than the language in § 7402(a).[42]

The United States need not show that a Defendant "has violated a particular Internal Revenue Code section in order for an injunction to issue" under § 7402(a).[43] All the United States must show is that an injunction (or other order, such as one for disgorgement and other equitable relief) "may be necessary or appropriate for the enforcement of the internal revenue laws."[44] It follows that, if the United States' allegations are true, all of Defendants' conduct that warrants an injunction under § 7408 also warrants an injunction under § 7402(a). Because the United States' claims under § 7408 are ripe, for the reasons described above, so are its claims under § 7402(a). The additional allegations the United States offers to support an injunction and

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[41] 26 U.S.C. § 7402(a).

[42] *Brody v. United States*, 243 F.2d 378, 384 (1st Cir. 1957).

[43] *E.g.*, *United States v. Ernst & Whinney*, 735 F.2d 1296, 1300 (11th Cir. 1984); Elsass, 978 F. Supp. 2d at 941 ("[E]ven if the Defendants' business structure somehow left them outside the legal definition of tax return preparers, broad relief would still be appropriate, as § 7402(a) is undoubtedly designed to prevent individuals from undermining the Nation's tax laws through exploiting loopholes in the [Internal Revenue Code]'s overall regulatory scheme.").

[44] 26 U.S.C. § 7402(a); *accord*, *e.g.*, *United States v. ITS Financial, LLC*, 592 F. App'x 387, 394 (6th Cir. 2014) ("The fact that no other court has ever granted the precise injunction granted in this case does not mean [§ 7402(a)] does not authorize it."); *United States v. Stinson*, 239 F. Supp. 3d 1299, 1326 (M.D. Fla. 2017) ("Because § 7402(a) encompasses a broad range of powers necessary to compel compliance with the tax laws, the Court has determined that disgorgement is an available remedy in this case." (quotation omitted)).

order of disgorgement (along with other equitable relief) under § 7402(a) (like Defendants' personal enrichment from their widespread sales of solar lenses through an internet-based, commission-incentivized multi-level marketing arrangement and their assistance to customers in both preparing unlawful tax returns and defending them to the IRS and Tax Court), if true, only bolster the United States' standing and the ripeness of its claims under this statute.

III. Conclusion

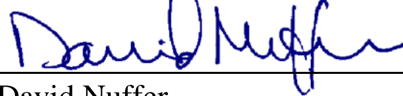
The United States has standing to sue Defendants under its explicit statutory authorization in §§ 7408 and 7402(a) and all of the United States' claims are ripe for decision.

ORDER

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss[45] is DENIED.

Dated February 27, 2018.

BY THE COURT:



David Nuffer
United States District Judge

[45] ECF No. 257.