UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMELIA PETERSHEIM,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 06-900 (RWR)**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

Pro se plaintiff Amelia Petersheim has sued the United States for damages under 26 U.S.C. § 7433, alleging violations of the Internal Revenue Code by agents of the Internal Revenue Service ("IRS") in the collection of taxes from her. The government has filed a motion to vacate the clerk's entry of default against it and to dismiss the complaint under Federal Rule Civil Procedure 12(b). Because the government has shown good cause why the default should be set aside and because Petersheim did not exhaust her mandatory administrative remedies, the government's motion will be granted.

BACKGROUND

On September 12, 2005, Petersheim filed her first complaint against the United States alleging violations of various provisions of the Internal Revenue Code. The government successfully moved to dismiss the complaint for ineffective service of process. On May 10, 2006, Petersheim filed a second

complaint that was nearly identical to the first complaint. Because the government did not answer or otherwise respond to the complaint and Petersheim had not requested an entry of default against the government, an order was issued directing Petersheim to show cause why the case should not be dismissed for failure to prosecute. Petersheim responded by filing an affidavit for default and the Clerk entered default against the government. The government filed a motion to vacate the clerk's entry of default and to dismiss the complaint.[1]

DISCUSSION

I. MOTION TO VACATE ENTRY OF DEFAULT

"For good cause shown the court may set aside an entry of default . . . ." Fed. R. Civ. P. 55(c); see Guthery v. United States, Civil Action No. 06-176 (EGS), 2007 WL 259940, at *1 (D.D.C. Jan. 30, 2007) ("As long as judgment has not yet been entered, . . . the Court can set aside the default for good cause

[1] Although the government characterized its motion relating to exhaustion of remedies as one for lack of subject matter jurisdiction under Rule 12(b)(1), failure to exhaust administrative remedies is more properly analyzed as a failure to state a claim under Rule 12(b)(6). Arbaugh v. Y&H Corp., 126 S. Ct. 1235, 1245 (2006) ("[W]hen Congress does not rank a statutory limitation on [the statute's] coverage as jurisdictional, courts should treat the restriction as non-jurisdictional in character."); Turner v. United States, Civil Action No. 05-1716 (JDB), 2006 WL 1071852, *3-4 (D.D.C. Apr. 24, 2006) (applying Arbaugh to analyze a failure to exhaust administrative remedies as an element of a claim). Here, the government's motion to dismiss for lack of subject matter jurisdiction will be construed and analyzed as a motion to dismiss for failure to state a claim upon which relief may be granted.

shown." (citation and internal quotation marks omitted)). "Though the decision lies within the discretion of the trial court, exercise of that discretion entails consideration of whether (1) the default was willful, (2) a set-aside would prejudice plaintiff, and (3) the alleged defense was meritorious." Keegel v. Key West & Carribean Trading Co., 627 F.2d 372, 373 (D.C. Cir. 1980) (citations and internal quotation marks omitted). "On a motion for relief from the entry of a default . . ., all doubts are resolved in favor of the party seeking relief." Jackson v. Beech, 636 F.2d 831, 836 (D.C. Cir. 1980).

The government claims that it failed to timely answer Petersheim's complaint because it mistakenly believed that this case was dismissed by the court sua sponte. (Mem. in Supp. of U.S.'s Mot. to Vacate Entry of Default & Mot. to Dismiss ("Mot. to Dismiss") at 2.) The government explains that in a similar action, Brandt v. United States, Civil Action No. 06-1199 (ESH), one of over 100 nearly identical complaints that have been filed in the district court over the last year,[2] plaintiff's second complaint was dismissed by the court sua sponte because it contained the same allegations as those in the first dismissed

[2] See, e.g., McReynolds v. United States, Civil Action No. 06-924 (JR), 2007 WL 521889 (D.D.C. Feb. 14, 2007), Guidetti v. United States, Civil Action No. 06-476 (JR), 2007 WL 521891 (D.D.C. Feb. 14, 2007).

complaint. (See id.) As in Brandt, Petersheim's second complaint contained the same allegations as those in her first complaint. The government thus oddly rationalized that "it did not seem unlikely that the Court dismissed plaintiff's second complaint" in this case. (Mot. to Dismiss at 2 n.1.) The government's failure to respond timely in this case may have been careless, but there is no evidence that it was willful. Setting aside the entry of default will not prejudice the plaintiff since the government has a meritorious defense to this complaint, as is discussed below. Thus, the government has shown good cause why the clerk's entry of default should be vacated.

II. MOTION TO DISMISS

In considering a motion to dismiss for failure to state a claim upon which relief may be granted, a court must accept all the allegations in a plaintiff's complaint as true and construe them in the light most favorable to the plaintiff. Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan, 115 F.3d 1020, 1027 (D.C. Cir. 1997). "Dismissal under Rule 12(b)(6) is proper when, taking the material allegations of the complaint as admitted, and construing them in plaintiff's favor, the court finds that the plaintiff has failed to allege all the material elements of his cause of action." Weyrich v. The New Republic, Inc., 235 F.3d 617, 623 (D.C. Cir. 2001) (internal citations omitted). Stated differently, a dismissal for failure to state a claim upon which

relief may be granted is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

Section 7433 of the Internal Revenue Code authorizes a taxpayer to bring a civil action for damages against any officer or employee of the IRS who "recklessly or intentionally, or by reason of negligence disregards any provision" of the Code or its implementing regulations, but also provides that "[a] judgment for damages shall not be awarded . . . unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service." 28 U.S.C. § 7433(a) & (d)(1). Prior to filing a civil action for damages, an aggrieved taxpayer must submit her claim "in writing to the Area Director, Attn: Compliance Technical Support Manager[,] of the area in which the taxpayer currently resides," and must include:

> (i) The name, current address, current home and work telephone numbers and any convenient times to be contacted, and taxpayer identification number of the taxpayer making the claim;
>
> (ii) The grounds, in reasonable detail, for the claim (include copies of any available substantiating documentation or correspondence with the Internal Revenue Service);
>
> (iii) A description of the injuries incurred by the taxpayer filing the claim (include copies of any available substantiating documentation or evidence);

> (iv) The dollar amount of the claim, including any damages that have not yet been incurred but which are reasonably foreseeable (include copies of any available substantiating documentation or evidence); and
>
> (v) The signature of the taxpayer or duly authorized representative.

26 C.F.R. § 301.7433-1(e). Only if such a claim is filed may the taxpayer proceed to file suit in federal district court pursuant to 26 U.S.C. § 7433(a). See 26 C.F.R. § 301.7433-1(d)(1)&(2).[3]

Petersheim does not claim that she followed the procedures set forth in § 301.7433-1(e). Rather, she contends that Federal Rule of Civil Procedure 8 "do[es] not require a claimant to set out in detail the facts upon which he bases his claim." (Pl.'s Opp'n at 5.) Rule 8 requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Petersheim could be entitled to relief under 26 U.S.C. § 7433(a) only if she pleads or demonstrates that she has satisfied § 7433's exhaustion requirement. She has done neither.

Petersheim further argues that "[f]ailure to exhaust administrative remedies is not a grounds [sic] upon which the court may dismiss the instant matter . . . ." (Pl.'s Opp'n at 6.) She claims that the exhaustion requirement does not apply where an adverse decision is certain, and in particular, where

---

[3] For a period between 1996 and 1998, failure to exhaust the administrative remedies did not act as a bar to a civil action, but since 1998 it has acted as a bar. See Evans v. United States, Civil Action No. 06-32 (JDB), 2006 WL 1174481, at *2 (D.D.C. May 4, 2006). Petersheim filed this suit in 2006.

the agency has articulated a clear position on an issue and has demonstrated an unwillingness to reconsider. (See Compl. at ¶ 7 (citing Randolph-Sheppard Vendors of Am. v. Weinberger, 795 F.2d 90, 105 (D.C. Cir. 1986).) However, neither the statute nor the implementing regulation provides an adverse decision exception to the requirement to exhaust administrative remedies. Where, as here, exhaustion is a statutory mandate, a court may not carve out an exception unsupported by the statutory text. See McCarthy v. Madigan, 503 U.S. 140, 144 (1992) (stating that "[w]here Congress specifically mandates, exhaustion is required"); Avocados Plus, Inc. v. Veneman, 370 F.3d 1243, 1247-48 (D.C. Cir. 2004) (stating that "[i]f [a] statute does mandate exhaustion, a court cannot excuse it") (citing Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1, 13 (2000)). Moreover, even under circumstances in which the exhaustion requirement is not explicitly mandated by statute, an implied "exhaustion requirement may be waived in 'only the most exceptional circumstances.' . . . Even the probability of administrative denial of the relief requested does not excuse failure to pursue [the administrative remedies]." Randolph-Sheppard Vendors of Am., 795 F.2d at 106 (citations omitted). Accordingly, Petersheim's argument that she was not required to exhaust the administrative remedies prescribed by the regulation must fail.

CONCLUSION

The government has shown good cause why the clerk's entry of default should be vacated. Moreover, Petersheim did not exhaust her administrative remedies and therefore cannot state a claim upon which relief can be granted. Therefore, the government's motion to vacate the entry of default and to dismiss the complaint will be granted. A separate order accompanies this Memorandum Opinion.

SIGNED this 13th day of March, 2007.

/s/
RICHARD W. ROBERTS
United States District Judge