UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID ,

Defendant.

CASE NO. C05-810JLR

ORDER

This matter comes before the court on the United States of America's ("Government") motion for relief from judgment under Federal Rule of Civil Procedure 60(b) (Dkt. # 83). The Government requests that the court vacate the judgment entered in its favor so as to allow it to resubmit briefing on summary judgment with a proper evidentiary foundation. Having considered all papers filed by the parties, for the following reasons, the court DENIES the motion (Dkt. # 83) because the Government filed it outside the applicable one-year limitations period.

I. BACKGROUND

On April 29, 2005, the Government filed a complaint to reduce federal tax and penalty assessments to judgment and to foreclose federal tax liens against Defendant David L. Elmore. (Dkt. # 1.) The Government alleged that Mr. Elmore underpaid or failed to pay federal income tax between 1987 and 1993.

On December 14, 2005, the Government filed its first motion for summary judgment ("First Motion") (Dkt. # 30). In the First Motion, the Government requested that the court reduce seven tax assessments to judgment, alleging that it had provided proof as to the validity of the assessments. (December 14, 2005 Motion for Summary Judgment ("First Motion") (Dkt. # 30) at 1.) In support of the First Motion, the Government submitted verified copies of "Form 4340" for each of the tax years from 1987 to 1993. (Declaration of Richard A. Latterell ("Latterell Decl.") (Dkt. # 30-2), Ex. A.) For each tax year, the Form 4340 indicates the Government's assessment of Mr. 's taxable income, the tax assessed, as well as penalties for late filing, failure to make estimated tax payments, and negligence. The Government argued that Forms 4340 "are presumptive proof of a valid assessment" and "in the absence of contrary evidence, [are] sufficient to establish that an assessment was properly made and that notices and demand for payment were sent." (First Motion at 5.) Although the Government submitted only the Forms 4340, it stated that it prepared substitute returns for Mr. "based on payor information provided by third parties, relating to the taxpayer's income as a construction drywaller." (*Id.* at 2.)

On March 2, 2006, the court granted in part and denied in part the First Motion. (March 2, 2006 Order ("First Order") (Dkt. # 40) at 1.) The court held that the seven tax assessments against Mr. were valid. (*Id.* at 6.) In reaching this conclusion, the court reasoned that "a Form 4340 is presumptive evidence of a procedurally valid assessment," and concluded that the tax assessments were valid because Mr. had not met his burden in rebutting the presumption. (*Id.* at 5.) The court rested its decision on this issue on the Forms 4340, and did not consider any other evidence.

On March 21, 2006, the Government filed its second motion for summary judgment ("Second Motion") (Dkt. # 45). The court granted the Second Motion, concluding that the

Government's 1996 liens against Mr. 's property in Kent, Washington were valid and that the Government was entitled to foreclose. (June 2, 2006 Order ("Second Order") (Dkt. # 50) at 5, 7.) The court entered judgment (Dkt. # 61) on March 14, 2008, and Mr. Elmore appealed.

On appeal, the Government discovered what it believes to be a mistake regarding the First Motion, the First Order, and the judgment. On April 14, 2008, the Government explained that in the First Motion it had incorrectly argued that the Forms 4340, without more, were presumptive proof of valid tax assessments in this case. (Dkt. # 68.) The Government now understands the law to provide that while a Form 4340 is ordinarily presumptive proof of a valid tax assessment, *see Huff v. United States*, 10 F.3d 1440, 1445 (9th Cir. 1993), and *Hughes v. United States*, 953 F.2d 531, 535 (9th Cir. 1992), this presumption does not extend to cases involving unreported income, *Hardy v. Comm'r*, 181 F.3d 1002, 1004 (9th Cir. 1999), *Palmer v. U.S. Internal Revenue Serv.*, 116 F.3d 1309, 1313 (9th Cir. 1997), and *Weimerskirch v. Comm'r*, 596 F.2d 358, 360-62 (9th Cir. 1979). Instead, in cases involving unreported income, such as this case, the government "must show some minimal evidence linking the taxpayer to the source of that income before the presumption of correctness will attach." *Palmer*, 116 F.3d at 1313; *see United States v. McMullin*, 948 F.2d 1188, 1192 (10th Cir. 1991); *United States v. Stonehill*, 702 F.2d 1288, 1293-94 (9th Cir. 1983); *Avery v. Comm'r*, T.C.M. 2007-60, at *4 (T.C. 2007). As the *Palmer* court explained:

> Where the government's deficiency determination rests on the reasonable inference that the taxpayers must have had sufficient income to support themselves for years when no income was reported, and statistics are used to reconstruct income, the evidentiary foundation necessary for the presumption of correctness to attach is minimal. When this reasonable inference is coupled with the information linking [a taxpayer] to wages for at least part of the [. . .] period, a sufficient evidentiary foundation has been established for the presumption of correctness to attach to the assessments. Of course, this presumption creates only a prima facie case, which shifts the burden to taxpayers to rebut the showing that the inference is unreasonable in their case.

Palmer, 116 F.3d at 1313; *see Hardy*, 181 F.3d at 1004 ("For the presumption to apply, however, the Commissioner must base the deficiency on some substantive evidence that the taxpayer received unreported income."). In *Palmer*, the Ninth Circuit concluded that the IRS had satisfied the minimum evidentiary threshold and that the presumption of correctness attached to the assessments for four tax years where the IRS provided evidence that the taxpayer earned income for some but not all of the four tax years. *Palmer*, 116 F.3d at 1313. Similarly, in *Hardy*, the Ninth Circuit concluded that the IRS had established the minimum evidentiary foundation based on stipulations and income statements the IRS received from the taxpayer's employer and bank. *Hardy*, 181 F.3d at 1005.

The Government contends that the judgment was entered in error because it failed to present the minimal evidentiary foundation for the tax assessments. (Mot. (Dkt. # 83) at 4-5.) The Government states that evidence allegedly sufficient to establish the minimal evidentiary foundation "does exists and is in the possession of the counsel for the United States." (*Id.* at 6.) The Government does not specify whether this evidence was in its possession at the time it filed the First Motion.

On October 10, 2008, with this alleged error in mind, the Government filed a motion requesting that the court indicate whether it would be willing to consider a Rule 60(b) motion if re-vested with jurisdiction by the United States Court of Appeals for the Ninth Circuit (Dkt. # 71). This is the correct procedure when a case is on appeal. *See Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2004); *Gould v. Mut. Life Ins. Co. of New York*, 790 F.2d 769, 772 (9th Cir. 1986); *Scott v. Younger*, 739 F.2d 1464, 1466 (9th Cir. 1984). On January 16, 2009, after both parties requested extensions of time, this court indicated its willingness to entertain a Rule 60(b) motion. (Dkt. # 80.) On February 17, 2009, the Ninth Circuit remanded the case to this court "for the limited purpose of enabling the district court to consider [the

Government's] Federal Rule of Civil Procedure 60(b) motion." (Order of the USCA (Dkt. # 81) at 1.)

II. DISCUSSION

Federal Rule of Civil Procedure 60(b) authorizes courts to grant relief from final judgments in limited circumstances. Fed. R. Civ. P. 60(b). In relevant part, the Rule provides:

> Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; [. . .] or (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). Courts exercise substantial discretion under Rule 60(b), *Martella v. Marine Cooks & Stewards Union*, 448 F.2d 729, 730 (9th Cir. 1971), and the Ninth Circuit teaches that "Rule 60(b) is meant to be remedial in nature and therefore must be liberally applied," *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984). In the Ninth Circuit, a district court may correct not only a party's mistake or inadvertence, but also an error of law pursuant to Rule 60(b). *Liberty Mut. Ins. Co. v. Equal Employment Opportunity Comm'n*, 691 F.2d 438, 441 (9th Cir. 1982) ("The law in this circuit is that errors of law are cognizable under Rule 60(b)."); *see Kingvision Pay-Per-View Ltd. v. Lake Alice Bar*, 168 F.3d 347, 350 (9th Cir. 1999); *Sierra Club v. City and County of Honolulu*, 486 F. Supp. 2d 1185, 1188 (D. Haw. 2007); *Rodriguez v. Bowen*, 678 F. Supp. 1456, 1457-58 (E.D. Cal. 1988).

A. Grounds for Relief Under Rule 60(b)

The grounds for relief available under clauses (1) and (6) of Rule 60(b) are mutually exclusive. *Corex Corp. v. United States*, 638 F.2d 119, 121 (9th Cir. 1981); *see Martella*, 448 F.2d at 729. A Rule 60(b)(6) motion must be brought for a reason distinct from those grounds listed in clauses (1) though (5) of Rule 60(b). *Corex*, 638 F.2d at 121. Accordingly,

a movant may not shoehorn an argument properly made under clause (1) of Rule 60(b) into the catch-all category of clause (6).

The Government argues that relief is appropriate under either Rule 60(b)(1) on the grounds of "mistake, inadvertence, surprise, or excusable neglect" or Rule 60(b)(6) for "any other reason that justifies relief." (Mot. at 5.) This type of broad-brush argument does not help focus the issue for decision by the court. Clauses (1) and (6) of Rule 60(b) follow different standards, time limitations, and theories of relief. They are not interchangeable. To the extent the Government wishes to proceed under either or both clauses, it would be well-advised to present the applicable legal standards under Ninth Circuit case law and to analyze the relevant facts under those standards.

It appears that the Government's request for relief is raised pursuant to Rule 60(b)(1) on grounds of mistake or inadvertence. The Government argues that relief is appropriate because, in briefing the First Motion, it failed to present the type of evidence necessary to establish the minimal evidentiary foundation. (Mot. at 5-6.) The Government does not dwell on why it failed to present this evidence; rather, it notes only that the evidence "was inadvertently or mistakenly omitted from the government's summary judgment briefing in this matter." (*Id.* at 7; *see also* Reply (Dkt. # 85) at 2 ("[T]he prior government counsel on this case made a mistake in submitting only the Forms 4340, and not the additional IRS workpapers and reports.").) The Government presents no analysis of Rule 60(b)(6) other than its assertion that it seeks such relief.[1] (Mot. at 5.) Therefore, for purposes of the instant

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[1] To the extent the Government actually seeks relief under Rule 60(b)(6), it has made no assertion of extraordinary circumstances. *See Latshaw v. Trainer Wortham & Co., Inc.*, 452 F.3d 1097, 1103 (9th Cir. 2006); *Twentieth Century-Fox Film Corp. v. Dunnahoo*, 637 F.2d 1338, 1341 (9th Cir. 1981).

motion, the court will consider the Government's arguments to be raised pursuant to Rule 60(b)(1).

B. Timeliness of the Rule 60(b) Motion

Federal Rule of Civil Procedure 60(c)(1) provides that motions under Rule 60(b)(1) must be brought "no more than a year after the entry of the judgment or order or the date of the proceeding" and "within a reasonable time." Fed. R. Civ. P. 60(c)(1). The court entered judgment on March 14, 2008, and the Government filed its Rule 60(b) motion on March 20, 2009. (Dkt. # 61.) The Government thus filed its Rule 60(b) motion outside the one-year window, albeit by less than one week.

Failure to file a Rule 60(b) motion within one year of entry of the judgment forecloses the court's ability to entertain the motion. *See Nevitt v. United States*, 886 F.2d 1187, 1188 (9th Cir. 1989). Filing within the one-year window is a jurisdictional requirement, and an appeal does not toll the one-year period. *Id.* Courts characterize the one-year limitations period as "absolute," *Warren v. Garvin*, 219 F.3d 111, 114 (2d Cir. 2000), as an "absolute bar," *United States v. Berenguer*, 821 F.2d 19, 21 (1st Cir. 1987), and as an "outside limit" or "extreme limit," *Berwick Grain Co., Inc. v. Ill. Dep't of Agric.*, 189 F.3d 556, 560 (7th Cir. 1999). The Government has presented no analysis regarding the issue of timeliness.

Here, the Ninth Circuit, the parties, and this court have all been on notice of the Government's intention to file the instant Rule 60(b) motion since at least October 10, 2008, when the Government filed its request that this court consider a Rule 60(b) motion. (Dkt. # 71.) Resolution of the Government's request was delayed by requests for additional time by Mr. (Dkt. # 73) and by the Government (Dkt. # 75), and the Government filed the Rule 60(b) motion within the briefing schedule set by this court on remand (Dkt. # 82). Despite these considerations, the Government had the responsibility to apprise itself and the

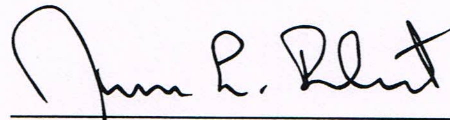
court of applicable deadlines and to file the Rule 60(b) motion in a timely manner.[2] It has not done so. The court concludes that, because the Government filed the Rule 60(b) motion outside the one-year window of Rule 60(c)(1), the court does not have jurisdiction to entertain the motion. The court therefore denies the motion.

The court notes that the Ninth Circuit remanded this case "for the limited purpose of enabling the district court to consider appellee's Federal Rule of Civil Procedure 60(b) motion." (Order of the USCA at 1.) Absent further direction from the Ninth Circuit, the court interprets its obligation to "consider" the Government's Rule 60(b) motion to include a review of the timeliness of the motion, which is part of the court's ordinary review of a Rule 60(b) motion. Moreover, it is not the case that the Ninth Circuit's order substantially altered the judgment, which some courts have concluded triggers a new, one-year limitations period. *See Berwick Grain*, 189 F.3d at 559-60; *Simon v. Navon*, 116 F.3d 1, 3 (1st Cir. 1997). The one-year limitations period remains unaltered.

III. CONCLUSION

For the reasons stated above, the court DENIES the Government's Rule 60(b) motion (Dkt. # 83).

Dated this 30th day of April, 2009.



JAMES L. ROBART
United States District Judge

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[2] The Ninth Circuit remanded the case on February 17, 2009. (Dkt. # 81.) Although presented with a relatively small window of time, the Government could have filed the Rule 60(b) motion prior to expiration of the one-year limitations period.