UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

BERNHARD GUBSER,	§	
	§	
Plaintiff	§	
VS.	§	CIVIL ACTION NO. 5:15-CV-298
	§	
INTERNAL REVENUE SERVICE, *et al.*,	§	
	§	
Defendants.	§	
	§	

MEMORANDUM AND ORDER

This case concerns a foreign bank account that Bernhard Gubser (Plaintiff) failed to disclose to the Internal Revenue Service (IRS) in 2008 in violation of the Bank Secrecy Act. After months of engaging in IRS administrative procedures without any resolution, Plaintiff filed this suit seeking a declaratory judgment regarding the IRS's burden of proof to show a willful violation of the Report of Foreign Banks and Financial Accounts (FBAR) filing requirement. The United States filed a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. (Dkt. No. 11). Having reviewed the parties' submissions, their arguments at hearing, and the applicable law, Defendant's Motion (Dkt. No. 11) is **GRANTED** for the reasons given below.

I. BACKGROUND

Plaintiff is a dual citizen of Switzerland (by birth) and the United States (via naturalization in 1992). Department of Treasury regulations require U.S. citizens with foreign bank accounts exceeding $10,000 to file a FBAR annually with the IRS,

disclosing the account information. 31 C.F.R. § 1010.350 (setting forth the reporting requirements under 31 U.S.C. § 5314). Plaintiff, however, did not file a FBAR to report his Swiss bank account to the IRS until the 2009 reporting year, when he alleges he first became aware of the reporting requirement. Since 2009, Plaintiff has filed a FBAR with the IRS annually.

In March 2015, Plaintiff received a form letter (Letter 3709) from the IRS concerning his failure to file a FBAR for 2008. The letter proposed assessing a civil penalty of half the account's balance ($1,363,336.00) for willful failure to meet FBAR filing requirements. The letter explained that Plaintiff could either agree to the proposed penalty and submit payment, or request a conference with the Appeals Office to contest the proposed penalty. If Plaintiff did neither, the letter stated that the IRS would assess the penalty and begin collection procedures.

In response to the letter, Plaintiff submitted a written request in May 2015 to meet with the Appeals Office. Plaintiff's attorneys met with an appeals officer on September 10, 2015. At the meeting, the appeals officer stated that the agency's burden of proof is by a preponderance of the evidence, and that under this burden the agency could show a willful violation of FBAR filing requirements by Plaintiff. Plaintiff also alleges, however, that the appeals officer represented if the burden of proof was clear and convincing evidence, the agency could *not* prove willfulness. Ultimately, the matter was not resolved at the meeting or in the months that followed.

Approximately three months after the Appeals Office conference, Plaintiff

filed the instant suit against the IRS, United States, and IRS Commissioner in his official capacity. Plaintiff seeks a declaration that the IRS must prove willful violations of FBAR filing requirements by clear and convincing evidence.

The United States has now moved for dismissal under Rule 12(b)(1) on several grounds.[1] First, Defendant claims that the suit is barred by sovereign immunity. Second, Defendant contends that Plaintiff lacks standing because no formal penalty assessment has, or is certain to, take place. Finally, Defendant argues that Plaintiff's claims are not ripe for consideration.

II. LEGAL STANDARD FOR 12(B)(1)

A Rule 12(b)(1) motion to dismiss challenges the court's subject matter jurisdiction. "Under Rule 12(b)(1), a claim is 'properly dismissed for lack of subject-matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate' the claim." *In re FEMA Trailer Formaldehyde Products Liab. Litig.*, 668 F.3d 281, 286 (5th Cir. 2012) (quoting *Home Builders Ass'n, Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998)). On a Rule 12(b)(1) motion, the party asserting jurisdiction bears the burden of proof, but the court must accept as true the allegations and facts in the complaint. *Life Partners Inc. v. United States*, 650 F.3d

[1] Although there are three Defendants in this lawsuit, the Motion to Dismiss (Dkt. No. 11) is entitled "United States of America's Motion to Dismiss Plaintiff's Complaint for Declaratory Judgment and Brief" and signed by Jon E. Fisher as Attorney for the United States without reference to the other two Defendants. Plaintiff, however, refers to Dkt. No. 11 as "Defendants' Motion to Dismiss" throughout his response. To the extent it is unclear whether Dkt. No. 11 was intended to serve as a filing on behalf of the IRS and the IRS Commissioner, the Court considers its jurisdiction with regard to these two Defendants sua sponte. *See Howery v. Allstate Ins. Co*, 243 F.3d 912, 919 (5th Cir. 2001) ("[F]ederal courts must address jurisdictional questions whenever they are raised and must consider jurisdiction sua sponte if not raised by the parties."). For the same reasons that Plaintiff lacks standing to pursue claims against the United States, *see infra*, an Article III case-or-controversy is also lacking between Plaintiff and both other Defendants.

1026, 1029 (5th Cir. 2011). The court may find that subject matter jurisdiction is lacking based on "(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." *Choice Inc. of Tex. v. Greenstein*, 691 F.3d 710, 714 (5th Cir. 2012) (citation omitted).

Here Plaintiff's complaint is supplemented by two undisputed documents: the proposed penalty letter (Letter 3709) and an agreement between the Parties to extend the statute of limitations period to assess civil FBAR penalties.

III. ANALYSIS

Defendant argues that this court lacks subject matter jurisdiction and Plaintiff's complaint must be dismissed for the following reasons: (1) Plaintiff's suit is barred by sovereign immunity; (2) Plaintiff lacks standing; and (3) Plaintiff's claims are not ripe for adjudication. Because the Court concludes that this matter is not justiciable on standing grounds, the Court does not reach Defendant's ripeness and sovereign immunity arguments. *See Sinochem Int'l Co. v. Malaysia Int'l. Shipping Corp.*, 549 U.S. 422, 431 (2007) ("[A] federal court has leeway 'to choose among threshold grounds for denying audience to case on the merits.'").

Article III of the Constitution limits the jurisdiction of federal courts to cases or controversies. Const., Art. III, § 2. Standing is an essential element of Article III's case-or-controversy requirement. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The requirements of Article III standing are built on separation-of-powers principles, and serve "to prevent the judicial process from being used to

usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013).

"To establish standing, a plaintiff must show: (1) it has suffered, or imminently will suffer, a concrete and particularized injury-in-fact; (2) the injury is fairly traceable to the defendant's conduct; and (3) a favorable judgment is likely to redress the injury." *Hous. Chronicle Pub. Co. v. City of League City, Tex.*, 488 F.3d 613, 617 (5th Cir. 2007) (citing *Lujan*, 504 U.S. at 560–61). "An allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (internal quotation marks omitted) (quoting *Clapper*, 133 S. Ct. at 1150 n.5); *see also Bauer v. Texas*, 341 F.3d 352, 357–58 (5th Cir. 2003) ("A plaintiff can meet the standing requirements when suit is brought under the Declaratory Judgment Act by establishing actual present harm or a significant possibility of future harm, even though the injury-in-fact has not yet been completed." (citation omitted)). To show redressability, "it must be 'likely, as opposed to merely speculative, that a favorable decision will redress the plaintiff's injury.'" *Dep't of Tex., Veterans of Foreign Wars of U.S. v. Tex. Lottery Comm'n*, 760 F.3d 427, 432 (5th Cir. 2014) (en banc) (quoting *S. Christian Leadership Conference v. Supreme Court of State of La.*, 252 F.3d 781, 788 (5th Cir.2001)).

Here, even assuming Plaintiff can establish an injury-in-fact caused by Defendant's conduct, he cannot satisfy the redressability requirement of Article III standing. Plaintiff argues that a declaration that the IRS must prove willful

violations of FBAR filing requirements by clear and convincing evidence would resolve the threat of a $1.36 million penalty. Plaintiff's arguments, however, are highly speculative, and his pleadings cannot support the conclusion that a declaration by this Court would be likely to redress the claimed harmed. Although Plaintiff alleges that an individual appeals officer represented the IRS could not meet this higher burden, Plaintiff has not claimed that this representation was legally binding or would preclude the IRS from still assessing a penalty. In fact, Plaintiff conceded at oral argument that the appeals officer could choose to assess or not assess the penalty regardless of any declarations by this Court regarding the burden of proof. In other words, without additional facts, it is far from likely that a favorable declaration regarding the IRS's burden of proof would prevent the assessment of a penalty against Plaintiff.

Accordingly, because Plaintiff fails to satisfy the redressability requirement of standing, Plaintiff cannot meet Article III's case-or-controversy requirement.

IV. CONCLUSION

For the reasons explained above, the Court concludes that it lacks subject matter jurisdiction. Accordingly, Defendant's Motion to Dismiss (Dkt. No. 11) is hereby **GRANTED**.

It is so **ORDERED**.

SIGNED this 4th day of May, 2016.

Marina Garcia Marmolejo
United States District Judge