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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 United States of America,

10 Plaintiff,

11 v.

12 Jeffrey S. Page,

13 Defendant.
14

No. CV-20-08072-PCT-JAT

ORDER

15 Pending before the Court is the government's motion for default judgment against
16 Defendant Jeffrey S. Page. (Doc. 15). The Court now rules on the motion.

17 **I. BACKGROUND**

18 We all make mistakes, the federal government included. This case involves a
19 mistake the Internal Revenue Service (IRS) made on May 5, 2017, when it mailed Page an
20 erroneous \$491,104.01 tax refund check, which Page cashed on April 5, 2018. (Doc. 1 at
21 3). After Page did so, the IRS contacted Page and requested that he return the money to the
22 government. (*Id.*). On December 6, 2019, Page returned \$210,000 of the erroneous refund
23 but not the rest. (*Id.*). On March 31, 2020, the government filed this case under
24 26 U.S.C. § 7405 to recover the remaining balance of the erroneous refund plus interest.
25 (*Id.* at 1). The government alleges that Page retained the remainder of the refund for his
26 personal use and enjoyment. (*Id.* at 3).

27 On June 16, 2020, the government filed Page's waiver of service. (Doc. 10).
28 Because Page did not file a responsive pleading within 60 days of the government's waiver

request, the government moved for default on August 24, 2020 under Federal Rule of Civil Procedure (“Rule”) 55(a). (Doc. 11). The clerk entered default on August 25, 2020, and the government moved for default judgment under Rule 55(b) on February 17, 2021. (Doc. 13, Doc. 15).

II. LEGAL STANDARD

Once the clerk has entered default, a court may, but is not required to, grant default judgment under Rule 55(b). *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980) (*per curiam*). In considering whether to enter default judgment, a court may consider the following factors:

(1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff’s substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Eitel v. McCool, 782 F.2d 1470, 1471–72 (9th Cir. 1986). When considering these factors, a defendant is deemed to have admitted all well-pleaded allegations in the complaint. *DirecTV, Inc. v. Hoa Huynh*, 503 F.3d 847, 851 (9th Cir. 2007). The Court considers these factors below.

III. DISCUSSION

a. Merits of Plaintiff’s Substantive Claim and Sufficiency of the Complaint

“The Ninth Circuit has suggested that . . . two *Eitel* factors — involving the substantive merits of plaintiff’s claim and the sufficiency of the complaint — require that [a plaintiff’s] allegations ‘state a claim on which the [plaintiff] may recover.’” *Kloepping v. Fireman’s Fund*, No. C 94-2684 TEH, 1996 WL 75314, at *2 (N.D. Cal. Feb. 13, 1996) (quoting *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978)) (second alteration in original). The Court finds that these two factors weigh strongly against default judgment.

In this case, 26 U.S.C. § 7405 authorizes the government to recover an erroneous tax refund through a civil action. However, subject to an exception not relevant here, when the government sues to recover an erroneous refund, 26 U.S.C. § 6532(b) provides that

1 recovery “shall be allowed only if such suit is begun within 2 years after the making of
 2 such refund.” Under Ninth Circuit law, “[t]he refund is considered to have been made on
 3 the date the taxpayer received the refund check.” *United States v. Carter*, 906 F.2d 1375,
 4 1377 (9th Cir. 1990); *see also O’Gilvie v. United States*, 519 U.S. 79, 91 (1996) (“[T]he
 5 law ordinarily provides that an action to recover mistaken payments of money accrues upon
 6 the receipt of payment.” (internal quotation marks and citation omitted)). “Although the
 7 statute of limitations is ordinarily an affirmative defense that the defendant must raise at
 8 the pleadings stage and that is subject to rules of forfeiture and waiver, district courts may
 9 dismiss an action *sua sponte* on limitations grounds in certain circumstances where the
 10 facts supporting the statute of limitations defense are set forth in the papers plaintiff himself
 11 submitted.” *Donell v. Keppers*, 835 F. Supp. 2d 871, 877 (S.D. Cal. 2011) (quoting *Walters*
 12 *v. Indus. & Commer. Bank of China, Ltd.*, 651 F.3d 280, 293 (2d Cir. 2011)); *see also*
 13 *Taiwan C.R. Litig. Org. v. Kuomintang Bus. Mgmt. Comm.*, 486 F. App’x 671, 671–72 (9th
 14 Cir. 2012) (“[T]he district court did not err by addressing the statute of limitations issue
 15 *sua sponte* in ruling on plaintiffs’ motion for default judgment.”).

16 The government initiated the instant action on March 31, 2020. (Doc. 1). Therefore,
 17 the earliest Page could have received the erroneous refund check for the government’s suit
 18 to fall within the statute of limitations is March 31, 2018. Although the government’s
 19 complaint does not allege when Page received the refund check, the government mailed
 20 Page the erroneous refund on May 5, 2017, and it defies common sense to believe it took
 21 330 days for Page to receive the check in the mail. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679
 22 (2009) (recognizing that “[d]etermining whether a complaint states a plausible claim for
 23 relief will . . . be a context-specific task that requires the reviewing court to draw on its
 24 judicial experience and common sense”). Accordingly, it is apparent from the face of the
 25 government’s complaint that its claim is barred by the statute of limitations.

26 The government, however, argues that the statute of limitations does not begin to
 27 run when Page received the check, but rather when Page cashed the check on April 5, 2018.
 28 (Doc. 15 at 8–11). The government notes that the Ninth Circuit in *Carter* and the Supreme

1 Court in *O’Gilvie* considered two possible points at which the statute of limitations could
2 begin to run: the date on which the IRS sent the erroneous refund check and the date on
3 which the taxpayer received it. *O’Gilvie*, 519 U.S. at 90–92; *Carter*, 906 F.2d at 1377. In
4 both cases, the Courts determined the statute of limitations began to run when the taxpayer
5 received the check but did not consider whether the better starting point would be the date
6 on which the check cleared. *O’Gilvie*, 519 U.S. at 91–92; *Carter*, 906 F.2d at 1377.

7 Instead, the government directs the Court to *United States v. Commonwealth Energy*
8 *Sys. & Subsidiary Cos.*, 235 F.3d 11 (1st Cir. 2000), and *United States v. Greene-Thapedi*,
9 398 F.3d 635 (7th Cir. 2005). Both cases characterized the Supreme Court’s statements on
10 the issue in *O’Gilvie* as dicta and, consequently, did not consider *O’Gilvie* binding. In
11 *Commonwealth Energy*, the First Circuit also declined to follow *Carter*, explaining that
12 *Carter* “assumed, without elaboration, that the date a refund is ‘made’ is the date it is
13 received, and did not address the important policies which [the First Circuit] considered in
14 choosing between the date of receipt rule and date of clearance rule.” 235 F.3d at 14.
15 Instead, *Commonwealth Energy* concluded that the statute of limitations began to run “at
16 the time the check cleared the Federal Reserve and payment was authorized by the
17 Treasury” and observed that “[u]sing the check-clearing date here both satisfies the rule
18 that we construe statutes of limitations in favor of the Government and provides a certain
19 limitations date by which the Government must abide.” *Id.* In *Greene-Thapedi*, the Seventh
20 Circuit adopted the holding of *Commonwealth Energy* and dismissed *Carter* as “just
21 another case in which the court was presented with a choice between the date of mailing
22 and the date of receipt.” 398 F.3d at 639.

23 This Court, however, is not at liberty to depart from *Carter* in light of what the
24 government believes is a better rule adopted by other Circuits. Unless and until the Ninth
25 Circuit chooses to revisit, clarify, or depart from *Carter*, it remains binding on this Court.
26 And, under *Carter*, a “refund is considered to have been made on the date the taxpayer
27 received the refund check.” 906 F.2d at 1377.

28 Accordingly, the Court finds that the government’s claim is barred by

1 26 U.S.C. § 6532(b), and this weighs strongly against granting the government's motion.

2 **b. Remaining Factors**

3 The Court's consideration of the remaining *Eitel* factors is fairly straightforward.

4 First, the Court finds that the government will be prejudiced in the absence of default
5 judgment. Page received a considerable amount of money from the government to which
6 he is not entitled, and the government has failed to collect the money from Page without
7 court intervention. Accordingly, this factor weighs in favor of default judgment.

8 Next, the government concedes that the amount at issue is substantial, which weighs
9 against granting default judgment, as does public policy favoring decisions on the merits.

10 Conversely, because all well-pleaded allegations of the complaint are deemed true
11 upon the entry of default, *DirecTV*, 503 F.3d at 851, there are no genuine issues of material
12 fact, which favors granting default judgment.

13 Further, because Page was made aware of the commencement of this case and
14 waived service, the record presently before the Court does not reflect that Page's failure to
15 file a responsive pleading was the product of excusable neglect, and this factor also weighs
16 in favor of the government.

17 **c. Summary**

18 Balancing the *Eitel* factors, the Court does not find the government entitled to
19 default judgment. Although the government has shown prejudice and the lack of material
20 issues of fact or excusable neglect, it has not presented a meritorious substantive claim, its
21 complaint is insufficient on its face, and the remaining factors weigh in Page's favor. Under
22 these circumstances, the Court does not find that the government should be able to collect
23 a debt otherwise uncollectable under 26 U.S.C. § 6532(b) because Page has failed to file a
24 responsive pleading.

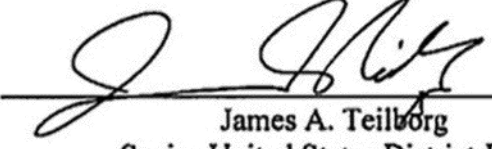
25 **IV. CONCLUSION**

26 For the foregoing reasons,

27 **IT IS ORDERED** that the government's Motion for Default Judgment (Doc. 15) is
28 **DENIED.**

1 **IT IS FURTHER ORDERED** that within 14 days of this Order, the government
2 shall show cause as to why this case should not be dismissed with prejudice as barred by
3 26 U.S.C. § 6532(b). If the government fails to do so, the Clerk of Court shall dismiss this
4 case with prejudice and enter judgment accordingly.

5 Dated this 16th day of April, 2021.

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9 James A. Teilborg
10 Senior United States District Judge
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