# United States Court of Appeals

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 17-5274** **September Term, 2018**

FILED ON: APRIL 9, 2019

DONALD DEWEES,
APPELLANT

v.

UNITED STATES OF AMERICA,
APPELLEE

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Appeal from the United States District Court
for the District of Columbia
(No. 1:16-cv-01579)

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Before: GARLAND, *Chief Judge*, MILLETT, *Circuit Judge*, and WILLIAMS, *Senior Circuit Judge*.

**J U D G M E N T**

This case comes before the court on appeal from the United States District Court for the District of Columbia's order dismissing Donald Dewees' complaint for lack of standing and for failure to state a claim upon which relief can be granted. The court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

**ORDERED AND ADJUDGED** that the order of the district court be affirmed.

Donald Dewees, an American citizen, moved from the United States to Canada in 1971 and has continued to reside there. In 1979, Dewees established a consulting business that he incorporated in Canada. He paid his Canadian taxes annually, but he did not file his federal tax returns in the United States. In 2009, Dewees became concerned about his United States tax liability. So he applied to participate in an Internal Revenue Service program that "encourage[s] non-compliant taxpayers to come into compliance with the applicable law" through the voluntary disclosure of foreign assets. *Maze v. Internal Rev. Serv.*, 206 F. Supp. 3d 1, 5 (D.D.C. 2016), *aff'd*, 862 F.3d 1087 (D.C. Cir. 2017); *see also id*. at 5–6 ("Common to all such programs is that the IRS provides certain benefits for taxpayers," such as lower penalties and a greatly reduced risk of criminal prosecution, "in exchange for voluntary disclosure pursuant to the applicable guidelines."). The program to which Dewees applied was the 2009 Offshore Voluntary Disclosure Program ("Disclosure Program"). Dewees was preliminarily accepted into the Disclosure Program in November 2009, and was assessed $185,862 in tax penalties. Dewees

balked. Viewing that penalty to be "excessive," he withdrew from the Disclosure Program.

By withdrawing from the Disclosure Program, Dewees became subject to a fuller examination and to "all applicable penalties." *Voluntary Disclosure: Questions and Answers*, INTERNAL REVENUE SERVICE (May 6, 2009), https://www.irs.gov/newsroom/voluntary-disclosure-questions-and-answers. Upon completion of that full examination, the IRS imposed a penalty of $120,000.

Dewees administratively challenged the $120,000 penalty, first through the IRS Taxpayer Advocate's Office, and then through the IRS Appeals Office. Neither succeeded. Dissatisfied, Dewees refused to pay the penalty. But then, in 2015, Canada withheld his 2014 tax refund under the United States-Canada Tax Treaty. *See* Convention Between the United States and Canada with Respect to Taxes on Income and on Capital, Sept. 26, 1980, U.S.-Can., T.I.A.S. No. 11,087; *see also* Third Protocol Amending the Convention Between Canada and the United States of America with Respect to Taxes on Income and on Capital, Mar. 17, 1995, U.S.-Can., Art. 15.

Dewees then filed suit in the United States District Court for the District of Columbia, asserting that the penalty violated the United States Constitution. Specifically, Dewees' complaint alleged that (i) the limited procedures for challenging the penalty prior to payment denied him the due process guaranteed by the Fifth Amendment, (ii) the higher penalties provided for in the Disclosure Program as opposed to a different tax compliance program deprived him of the equal protection of the law under the Fifth Amendment, and (iii) the penalty constituted an excessive fine forbidden by the Eighth Amendment. J.A. 9–14. The district court dismissed the case for lack of jurisdiction and failure to state a claim under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), respectively. *Dewees v. United States*, 272 F. Supp. 3d 96, 103 (D.D.C. 2017).

Dewees does not challenge the district court's dismissal of his Eighth Amendment claim. He appeals only the dismissal of his due process and equal protection claims. Both challenges fail.

As for the due process claim, the district court correctly dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Dewees argues that the Constitution required the government to afford him additional opportunities for review of the penalty before he had to pay it. But Dewees was able to administratively challenge the penalty twice—first through the Taxpayer Advocate's Office, and then through the IRS Appeals Office. Federal law also provided Dewees with a broad post-payment right to challenge the penalty in federal court. *See* 28 U.S.C. § 1346(a)(1) (District courts have jurisdiction over "[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws[.]"). Dewees does not identify any constitutional flaw in any of those proceedings; he simply wants more proceedings—a third bite at the apple—before review becomes contingent on pre-payment of the tax penalty. But the Due Process Clause does not demand that taxpayers be

given three chances before paying up. *See Bob Jones Univ. v. Simon*, 416 U.S. 725, 747–748 (1974) ("[A]lthough the congressional restriction to postenforcement review may place an organization * * * in a precarious financial position, the problems presented do not rise to the level of constitutional infirmities, in light of the powerful governmental interests in protecting the administration of the tax system from premature judicial interference, and of the opportunities for review that are available.") (internal citations omitted); *Phillips v. Commissioner*, 283 U.S. 589, 597–598 (1931) (holding that the "postponement of the judicial enquiry is not a denial of due process" in tax cases "if the opportunity given for the ultimate judicial determination of the liability is adequate").

With respect to Dewees' equal protection claim, we affirm the district court's dismissal albeit on an alternative ground.

Dewees argues that in 2014—five years after he sought to come into compliance under the Disclosure Program—the federal government unconstitutionally offered lower tax penalties to taxpayers participating in a new Streamlined Filing Compliance Procedures program ("Streamlined Program"). In so arguing, Dewees admits that his prior participation in the Disclosure Program rendered him ineligible for the Streamlined Program.

The district court dismissed Dewees' equal protection claim for lack of standing, under Federal Rule of Civil Procedure 12(b)(1). That was a mistake. To establish standing, a plaintiff must demonstrate "an 'injury in fact' that is 'fairly traceable' to the defendant's actions and that is 'likely to be redressed by the relief' []he seeks." *Attias v. Carefirst, Inc.*, 865 F.3d 620, 625 (D.C. Cir. 2017) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)). Dewees' equal protection claim fits that bill. His obligation to pay a higher penalty than other taxpayers, whom Dewees considers to be similarly situated, amounts to a concrete and particularized legal injury. *See Carpenters Industrial Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017) (recognizing that "economic harm" is "an injury-in-fact for standing purposes"). That injury is plainly caused by the IRS and redressable by court decree. Article III requires no more.

The district court reasoned that standing was contingent on Dewees' first applying for the more favorable governmental program. *Dewees*, 272 F. Supp. 3d at 102 & n.1. But there is no dispute that Dewees was categorically ineligible for the Streamlined Program. Under these circumstances, Article III standing does not hinge upon Dewees' failure to undertake a futile act. *See Safari Club Int'l v. Jewell*, 842 F.3d 1280, 1285–1286 (D.C. Cir. 2016) ("In the context of applications for government benefits," the general obligation to "submit to a government policy to establish standing to challenge it * * * may be excused where a plaintiff makes a substantial showing that the application for the benefit would have been futile.") (formatting edited).

While Dewees wins the standing battle, he still loses the war. Dewees' equal protection argument fails to state a legally cognizable claim, and so the district court's dismissal of the claim was proper under Federal Rule of Civil Procedure 12(b)(6). When it comes to matters of purely economic and financial regulation, differences in governmental classifications "cannot run afoul of the Equal Protection clause if there is a rational relationship between the disparity of treatment

and some legitimate governmental purpose." *Armour v. City of Indianapolis*, 566 U.S. 673, 680 (2012) (evaluating a "tax classification") (formatting edited); *see also Nordingler v. Hahn*, 505 U.S. 1, 11 (1992). That means that we must uphold the government's imposition of different penalties under the Disclosure Program and the Streamlined Program "if 'there is any reasonably conceivable state of facts that could provide a rational basis for [it].'" *Armour*, 566 U.S. at 681 (quoting *FCC v. Beach Communications*, 508 U.S. 307, 313 (1993)). The difference in treatment here is rational. The purpose of the Streamlined Program was "[t]o encourage * * * taxpayers to come forward." *See* Statement of IRS Commissioner John Koskinen, INTERNAL REVENUE SERVICE (June 18, 2014), https://www.irs.gov/newsroom/statement-of-irs-commissioner-john-koskinen. For Dewees and other taxpayers who had already voluntarily come forward years earlier, no such incentive was needed. It was therefore rational for the government, which had already assessed Dewees' liability though the Disclosure Program, to decline to devote further resources to reassess his liability under the Streamlined Program's revised penalty structure.

For all of those reasons, the district court properly dismissed Dewees' complaint.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

**Per Curiam**

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk