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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 Before the Court is the government's supplemental response (Doc. 22) to the  
16 Court's April 16, 2021 Order to Show Cause (Doc. 16), as requested by the Court's June  
17 28, 2021 Order granting limited discovery into the timing of Defendant Jeffrey S. Page's  
18 receipt of the refund check (Doc. 19). For the reasons that follow, the Court will deny the  
19 government's request to order Page to respond to the Complaint and the Court will dismiss  
20 the Complaint with prejudice as barred by the applicable statute of limitations.

21 **I. BACKGROUND**

22 In this case, the government sued Page under 26 U.S.C. § 7405 to recover an  
23 erroneous tax refund. Page did not respond, and after the clerk entered default, the  
24 government moved for default judgment. (Docs. 13, 15). The Court denied the  
25 government's motion for default judgment and ordered the government to show cause as  
26 to why this case should not be dismissed with prejudice as barred by the statute of  
27 limitations. (Doc. 16). On April 30, 2021, the government responded to the Court's Order  
28 to Show Cause requesting the Court to find the Complaint timely, or in the alternative,

1 order limited discovery into the timeliness of the Complaint based on the underlying facts  
2 outlined below. (Doc. 18). The Court granted the government's request for limited  
3 discovery and ordered the government to either re-move for default judgment or file a  
4 supplemental response to the Court's show cause order after serving interrogatories on  
5 Page. (Doc. 19).

6 In both of its previous Orders (Docs. 16, 19) the Court noted that the applicable  
7 statute of limitations, outlined in 26 U.S.C. § 6532(b), requires that recovery of an  
8 erroneous tax refund "shall be allowed only if such suit is begun within 2 years after the  
9 making of such refund." The Court considered the law of other circuits and was not  
10 persuaded to depart from the Ninth Circuit's binding precedent that "[a] refund is  
11 considered to have been made on the date the taxpayer received the check." *United States*  
12 *v. Carter*, 906 F.2d 1375, 1377 (9th Cir. 1990).

13 The Complaint alleges that the IRS mailed the erroneous refund check on May 5,  
14 2017 and that Page cashed the check on April 5, 2018. (Doc. 1 at 2, 3). The government  
15 did not bring the instant suit until March 31, 2020. (Doc. 1 at 5). The Complaint does not  
16 allege, and the limited discovery did not identify, the date on which Page received the  
17 erroneous refund check. Although Page is in default in this case, he responded to the  
18 government's interrogatories to state: he cannot recall the exact date he received the check  
19 and does not have any related records; he "told a retired-CPA that [he] work[s] with at the  
20 airport about it 2-3 months after [he] received the check;" and that he "tried to get in contact  
21 with the IRS to ask about [the check]," which he ultimately cashed after no response from  
22 the IRS. (Doc. 22 at 4–5).

## 23 II. DISCUSSION

24 The government's Supplemental Response first argues that the Complaint was  
25 timely because the statute of limitations on its suit, under 26 U.S.C. § 6532, did not (and  
26 should not) begin to run until the date that Page cashed the erroneous refund check, i.e.,  
27 April 5, 2018. (Doc. 22 at 5–8). In the alternative, the government argues that if the statute  
28 of limitations begins upon Page's receipt of the erroneous refund check (instead of the date

1 of deposit), the Court is without sufficient information to determine that the government's  
 2 Complaint is barred by the statute of limitations in view of Page's unilluminating  
 3 interrogatory responses. (*Id.* at 8). The government urges the Court to order Page to file a  
 4 responsive pleading to address the factual question regarding the date of receipt. (*Id.* at 9–  
 5 10).

#### 6 **a. Statute of Limitations**

7 The government puts forth three reasons why the Court should abandon applicable  
 8 Ninth Circuit precedent that the statute of limitations runs until two years from the date of  
 9 a taxpayer's receipt of an erroneous refund check. The Court is not persuaded.

10 First, the government argues that its right to sue to recover an erroneous refund does  
 11 not ripen until the taxpayer actually cashes the check, so the statute of limitations should  
 12 not begin to run until that same point in time, i.e., when the government contends the refund  
 13 is "considered complete." (Doc. 22 at 6). While the government cites to no authority for  
 14 this position in its supplemental response, the government appears to be relying on the  
 15 reasoning in *Commonwealth Energy Sys. & Subsidiary Companies*. See 235 F.3d 11, 15  
 16 (1st Cir. 2000). However, the Court is not in the First Circuit and is not at liberty to choose  
 17 which Circuit Court's law and logic to follow.

18 Next, the government argues that relying on the check clearance date would provide  
 19 more certainty in cases like this where the date of receipt of the refund check is unknown.  
 20 (Doc. 22 at 7). However, as noted in *U.S. v. Woodmansee*, 388 F. Supp. 36, *rev'd on other*  
 21 *grounds*, 578 F.2d 1302 (9th Cir. 1978):

22 [a] construction based on final payment...would result in a  
 23 nonuniform date of payment. There would be a different date  
 24 depending on whether the taxpayer cashed the refund check in  
 25 a currency exchange, deposited it in his checking or savings  
 account, or merely stored it in a shoebox. Also, a difference in  
 banking laws would result in different payment dates.

26 *Id.* at 46. The Court agrees with the *Woodmansee* court and is unpersuaded that relying on  
 27 the check clearance date provides any more certainty such that a deviation from Ninth  
 28 Circuit law is required here.

1           The government also points out that “[i]f the date of receipt starts the tolling period,  
2 a taxpayer can conceivably hold on to a check and not cash it until the day before it becomes  
3 void” which it alleges would “hurt[] the IRS and the public fisc” by depriving the IRS of  
4 “11 months of a 24-month period to bring its erroneous refund action.” (*Id.*) However, as  
5 evidenced by the Exhibit 1 to the government’s Motion for Default Judgment, an  
6 independent ledger existed for Jeffery Page’s tax account transactions documenting that  
7 the IRS issued him a \$491,104.01 refund in May of 2017. (Doc. 15-1 at 9). It seems equally  
8 hurtful to the public fisc that the IRS, having its own documentation of an erroneous tax  
9 refund issuance, should be incentivized to wait until the Federal Reserve clears a check to  
10 identify a misallocation of nearly a half of a million dollars in taxpayers’ funds.

11           Third, the government reminds the Court that the check clearance rule, as applied  
12 to this case, “is consistent with the principle that ambiguous statutes of limitations in  
13 Government actions should be interpreted in the Government’s favor.” (Doc. 22 at 7).  
14 Unfortunately for the government, however, the allegedly ambiguous statute in question  
15 has already been interpreted in *United States v. Carter*, where the Ninth Circuit applied  
16 that same principle to decide the case in favor of the government and held that the date of  
17 receipt controls. *Carter*, 906 F.2d at 1377. The government here cites no authority requiring  
18 the Court to reinterpret the statute and go against binding Ninth Circuit precedent so that  
19 the government may prevail in every variation of erroneous tax refund cases that arise.

20           Additionally, the government contends that *Carter*, upon which the Court relies,  
21 only considered the date of mailing and date of receipt in its analysis and holding, such that  
22 *Carter* is not controlling and does not address the specific question in this case. (Doc. 22  
23 at 7). However, the government appears to be conflating the date that the check is deposited  
24 with the date the check clears the Federal Reserve. While it is possible the check deposit  
25 and clearance could occur on the same day, the government makes no mention of a date  
26 that the check actually cleared at the Federal Reserve. So, it seems that the government is  
27 definitively basing its argument on the date Page deposited the check, April 5, 2018, but is  
28 relying on case law stating that the check clearance date controls. *See Commonwealth*

1 *Energy*, 235 F.3d at 15 (“Although the Treasury cannot know for certain when a check is  
 2 received by a taxpayer, **it can know when that check clears**, and determine whether or  
 3 when to file suit accordingly.”) (emphasis added); *see also United States v. Greene-*  
 4 *Thapedi*, 398 F.3d 635, 639 (7th Cir. 2005) (adopting check clearance rule from  
 5 *Commonwealth Energy*). Following the government’s own logic that *O’Gilvie* and *Carter*  
 6 did not address the exact question at issue here, it appears that *Commonwealth Energy* and  
 7 *Green-Thapedi* also do not this question either, to the extent their holdings are limited to a  
 8 determination that the statute of limitations begins to run as of the check clearance date,  
 9 not the date of deposit.

10 Thus, as discussed at length in the Court’s April 16, 2021 (Doc. 16) and June 28,  
 11 2021 (Doc. 19) Orders, the Court is not persuaded by the government’s arguments and  
 12 applies the longstanding Ninth Circuit rule that the statute of limitations outlined in 26  
 13 U.S.C. § 6532(b) begins to run from the date that an erroneous refund check is received,  
 14 not from the date the check is cashed. *Carter*, 906 F.2d at 1377.

#### 15 **b. Case Disposition**

16 While statute of limitations issues are usually raised as an affirmative defense that  
 17 the defendant bears the burden to prove, “district courts may dismiss an action *sua sponte*  
 18 on limitations grounds in certain circumstances where the facts supporting the statute of  
 19 limitations defense are set forth in the papers plaintiff himself submitted.” *Donell v.*  
 20 *Keppers*, 835 F. Supp. 2d 871, 877 (S.D. Cal. 2011) (quotations omitted); *see also Taiwan*  
 21 *C.R. Litig. Org. v. Kuomintang Bus. Mgmt. Comm.*, 486 F. App’x 671, 671–672 (9th Cir.  
 22 2021) (“[T]he district court did not err by addressing the statute of limitations issue *sua*  
 23 *sponte* in ruling on plaintiff’s motion for default judgment.”).

24 The Court allowed the government to conduct discovery into this issue and as the  
 25 government notes, the interrogatory responses “fail to definitely answer the question of  
 26 when [Page] received the erroneous refund check.” (Doc. 22 at 8). Ordinarily, failure to  
 27 respond to a complaint allows courts to deem the facts pled in the complaint as defendant’s  
 28 admissions. *See DirecTV, Inc. v. Hoa Huynh*, 503 F.3d 847, 851 (9th Cir. 2007). However,

1 the government failed to allege the date of receipt (or the check clearance date upon it seeks  
2 to rely) in the Complaint here, so the Court cannot use Page's lack of response to deem an  
3 admission regarding the date of receipt of the check. Additionally, because Page responded  
4 to the government's interrogatories stating that he does not know which day he received  
5 the check, the Court is not at liberty to deem his response as an admission that he received  
6 the check on a particular date. In both prior Orders, the Court noted that it defies common  
7 sense to believe it took 330 days for Page to receive the check in the mail, citing *Ashcroft*  
8 *v. Iqbal*, 556 U.S. 662, 679 (2009). (Docs. 16, 19).

9 Finally, the government cites no authority for its position that the Court should force  
10 Page to come out of default to answer the Complaint and allow the government to conduct  
11 full discovery to prove their case, and the Court declines to do so.

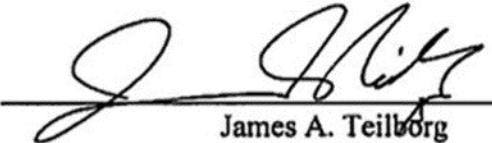
### 12 **III. CONCLUSION**

13 For the foregoing reasons,

14 **IT IS ORDERED** that the United States' request to order Page to file a responsive  
15 pleading is **DENIED** (Doc. 22).

16 **IT IS FURTHER ORDERED** that the Complaint is **DISMISSED** with prejudice  
17 as untimely and barred by the statute of limitations laid out in 26 U.S.C. § 6532(b) and the  
18 Clerk of the Court shall enter judgment accordingly.

19 Dated this 25th Day of October, 2021.

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23 James A. Teilborg  
24 Senior United States District Judge  
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