

**US TAX COURT
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BRIAN H. MCLANE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

ELECTRONICALLY FILED

Docket No. 20317-13 L

RESPONDENT'S SIMULTANEOUS SUPPLEMENTAL BRIEF

UNITED STATES TAX COURT

BRIAN H. MCLANE,)
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 Petitioner,)
)
 v.) Docket No. 20317-13 L
)
 COMMISSIONER OF INTERNAL REVENUE,) Filed Electronically
)
 Respondent.)

SIMULTANEOUS SUPPLEMENTAL BRIEF FOR RESPONDENT

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SIMULTANEOUS SUPPLEMENTAL BRIEF FOR RESPONDENT

I. Introduction

The present case involves a notice of federal tax lien (NFTL) collection due process (CDP) hearing, in which the petitioner successfully contested the underlying tax liability. As a result of documents that petitioner produced immediately prior to trial as well as information provided during the trial, respondent now concedes that petitioner's correct tax liability for 2008 is \$0.00.

II. The Tax Court Lacks Jurisdiction to Determine an Overpayment in a CDP Case

The Tax Court does not have jurisdiction to determine an overpayment in a CDP case; it only has jurisdiction under I.R.C. §§ 6320 or 6330 over the unpaid tax liability that the Service is trying to collect through an NFTL or proposed levy. The Tax Court and the District of Columbia Circuit Court of Appeals have

held that section 6330 does not give the Court jurisdiction to determine an overpayment or order a refund or credit of taxes paid.¹ Willson v. Commissioner, 805 F.3d 316 (D.C. Cir. 2015); Greene-Thapedi v. Commissioner, 126 T.C. 1 (2006); see also Chocallo v. Commissioner, T.C. Memo. 2004-152; MacDonald v. Commissioner, T.C. Memo. 2009-240; Weber v. Commissioner, 138 T.C. 348, 366 (2012).

In Willson, the IRS had sent Mr. Willson an erroneous refund and subsequently issued him a notice of intent to levy. Willson, 805 F.3d at 317. Mr. Willson challenged the collection in a CDP hearing, during which he realized that he had, in fact, received an erroneous refund. Id. at 319. He paid a portion of the erroneous refund back and suggested a payment method for the rest, which the IRS' settlement officer rejected. Id. at 318-19. Mr. Willson challenged the notice of determination in Tax Court. Id. at 319. During the Tax Court case, the IRS conceded that the notice of intent to levy was improper, abated Mr.

¹ We note that this case would be appealable to the Fourth Circuit, the circuit of the petitioner's legal residence, rather than the District of Columbia Circuit. In this regard, the petition in this case was filed before December 18, 2015, the effective date for the amendments to section 7482(b)(1)(G). However, because the underlying liability is at issue in this case, there is no question that that appellate venue lies in the circuit of the petitioner's legal residence. See I.R.C. § 7482(b)(1)(A); Byers v. Commissioner, 740 F.3d 668 (D.C. Cir. 2013).

Willson's remaining assessment, and filed a motion to dismiss the case as moot. Id. at 318-19. Mr. Willson objected, arguing that the IRS should refund the portion of the erroneous refund that he had previously paid back to the IRS. Id. at 319.

The Tax Court dismissed the case as moot. On appeal to the District of Columbia Circuit, the court affirmed the dismissal for mootness, reasoning that an actual case or controversy had ceased to exist when the IRS abated the assessment. Id. (citing Byers v. Commissioner, 740 F.3d 668, 679 (D.C. Cir. 2014)). Mr. Willson argued that the Tax Court had jurisdiction to order the IRS to refund the payment because it was part of an incorrectly assessed underlying tax liability. Id. The Circuit Court instead held:

No unpaid tax liability remains on Willson's 2006 tax account. The IRS no longer seeks to levy on his property. This is, in fact, the very relief Willson ostensibly sought when he requested a CDP hearing to challenge the proposed levy in the first place. Willson has received all the relief that section 6330 authorizes the tax court (sic) to grant him; if he is entitled to any other relief... he must seek it in district court or in the Court of Federal Claims.

Id. at 321.

Greene-Thapedi was a CDP levy case where Ms. Greene-Thapedi disputed her underlying liability for the tax year 1992, but the IRS had already used a later tax year overpayment to offset the

1992 liability; she requested a refund. 126 T.C. 1, 6-8. The IRS moved to dismiss the case as moot because the 1992 period was fully paid. Id. at 8-9. The Tax Court reasoned that it lacked jurisdiction to hear the case. Id. at 9. The Court said that CDP jurisdiction originates in I.R.C. § 6330, Id.², and the Tax Court's jurisdiction in a CDP case is "defined by the scope of the determination" that the settlement officer is required to make. Id., (citing Sklar v. Commissioner, 125 T.C. 281 (2005)). The settlement officer makes determinations about the issues that the taxpayer raises and presents at the hearing, including any relevant issue relating to the unpaid tax or proposed levy, or in some circumstances, the existence or amount of the underlying liability, and also verifies that the requirements of applicable law or administrative procedure have been met. Id. at 6. The Tax Court stated that Ms. Greene-Thapedi's claim for a refund stemmed from her challenge to the existence and amount of her underlying 1992 liability. Id. at 8. However, the Tax Court stated that pursuant to section 6330(c)(2):

...whatever right petitioner may have to challenge the existence and amount of her underlying tax liability in this proceeding arises only in

² In the case of a lien CDP case, jurisdiction comes from I.R.C. § 6320(c), which makes subsections (c), (d) (other than paragraph (3)(B) thereof), (e), and (g) of section 6330 applicable to CDP lien cases.

connection with her challenge to the proposed collection action. Inasmuch as the proposed levy is moot, petitioner has no independent basis to challenge the existence or amount of her underlying tax liability in this proceeding. More fundamentally, section 6330 does not expressly give this Court jurisdiction to determine an overpayment or to order a refund or credit of taxes paid.

Id.

The Tax Court bolstered this reasoning with references to the legislative history. Id. at 9-10. The Court summarized the legislative history by explaining that before the Court acquired jurisdiction to determine overpayments in deficiency cases and then to enforce the overpayment, the Court had to gain explicit statutory authority. Id. at 11. Further, the Court noted that section 6330 contains no reference to the rules of I.R.C. § 6512(b), which involves overpayment jurisdiction in deficiency cases. Id. at 12.

Our position is that the overpayment jurisdiction provided under section 6512(b)(1) is ancillary to the deficiency jurisdiction provided by section 6214(a). Section 6512(b)(1) does not grant jurisdiction to order a refund in this CDP case.

The Tax Court is a court of limited jurisdiction. LG Kendrick, LLC v. Commissioner, 146 T.C. 17 (2016); Orum v. Commissioner, 123 T.C. 1, 8 (2004), aff'd 412 F.3d 819 (7th Cir.

2005). As discussed in Green-Thapedi, section 6512(b)(3) specifically incorporates the refund provisions in deficiency cases.

By contrast, section 6330 incorporates no such limitations on the allowance of tax refunds or credits. There is no indication that in enacting section 6330, Congress intended, sub silentio, to provide taxpayers a back-door route to tax refunds and credits free of these longstanding and well-established limitations. Nor, in light of the detailed and comprehensive codification of such limitations in sections 6511 and 6512(b), do we believe that Congress would have intended that such limitations should arise by inference in section 6330 with respect to claims for tax refunds or credits as to which our jurisdiction would similarly arise under section 6330, if at all, only by inference.

126 T.C at 12.

Because section 6330 does not expressly provide for refund jurisdiction, the Tax Court in Greene-Thapedi therefore properly concluded that Congress did not intend for section 6330 to provide refund jurisdiction. In contrast, if a CDP case involves innocent spouse relief or interest abatement, and the notice of determination addresses and rejects innocent spouse relief or interest abatement, the Tax Court has overpayment jurisdiction with respect to such relief or abatement under sections 6015(g)(1) and 6404(h)(2)(B), subject to the rules provided by sections 6511 and 6512(b). See King v. Commissioner, T.C. Memo.

2015-36 at *15 - 17, rev'd on other grounds, 829 F.3d 795 (7th Cir. 2016) (abatement of interest jurisdiction); Minhan v. Commissioner, 138 T.C. 1, 14 (2012), amended on reconsideration 2012 WL 3338426 (2012) (before innocent spouse may be allowed a credit or refund, she must establish that she made an overpayment); Cutler v. Commissioner, T.C. Memo. 2013-119 at *10-11. The difference is that in innocent spouse and interest abatement situations, there is a separate statute that grants the Court overpayment jurisdiction.

In the present case, there is no secondary statute that provides the Court with the authority to determine an overpayment. Neither interest abatement nor innocent spouse were issues raised or considered in his CDP hearing, so these narrow grants of overpayment jurisdiction do not apply here. See King at *15 - 17; Minhan at 14; Cutler at *10-11. The abatement of petitioner's 2008 liability and subsequent release of the lien on the 2008 tax year, both of which respondent concedes petitioner is entitled to receive, were the very relief that petitioner sought when he challenged the original CDP notice of determination. Upon issuance of the Court's Decision in this case, petitioner will receive all of the relief that

I.R.C. § 6320 authorizes the Tax Court to grant him.³

III. Petitioner's Refund Statute of Limitations Has Expired

Even if this Court had jurisdiction to determine an overpayment for petitioner's 2008 tax year, the statute of limitations has expired. Any claim for a refund of an overpayment must be made within the later of three years from the filing of the relevant return or two years from the time the taxpayer paid the tax. I.R.C. § 6511(a). Petitioner filed his 2008 return on October 19, 2009. Three years from that date was October 19, 2012. Petitioner made payments on his self-assessed liability for 2008 from December 24, 2009 until September 21, 2012. Therefore, the statute of limitations for filing a claim for refund expired no later than September 21, 2014, which was two years from the time that petitioner paid the last portion of the tax for which he seeks a refund. The refund statute of limitations on the prior payments, however, expired sooner.

Petitioner filed his petition in the present case on September 16, 2013. At that time, a portion of his 2008 payments were available for refund. Petitioner could have filed

³ Note that petitioner did not dispute anything involving the 2006 tax year, which is also included in the notice of federal tax lien.

a refund claim at any time prior to September 21, 2014. However, petitioner only finished organizing his complete substantiating documents for 2008 a few days prior to the trial, which took place on September 19, 2016.

The refund statute of limitations was not tolled by any part of the CDP hearing. Nowhere in sections 6320, 6330, or 6511, or the associated regulations is there any mention of tolling of the statute of limitations for a refund due to any part of a collection due process hearing. Notably, the Supreme Court has held that Congress did not intend for "equitable tolling" to apply to section 6511's time limitations for filing a refund. United States v. Brockamp, 519 U.S. 347, 354 (1997). The only tolling for the refund statute of limitations involves "financial disability." I.R.C. § 6511(h)(2). Section 6511(h)(2)(A) suspends the refund statute of limitations due to an individual taxpayer's financial disability, during any period of the person's life where the taxpayer is unable to manage their own financial affairs because of a medically determinable mental or physical impairment that can be expected to result in death, or has lasted for a continuous period of not less than 12 months. Id. The taxpayer must furnish proof of that financial disability to the IRS through a written statement from a

physician and a written statement by the individual requesting the refund that no one else was authorized to act on the individual's behalf during that time. I.R.C. § 6511(h)(2)(A); Rev. Proc. 99-21, 1999-17 I.R.B. 18.

Petitioner has raised no facts indicating that he may have been subject to this financial disability exception at any time. To the contrary, he argued his case before respondent's Office of Appeals and the Tax Court with detailed writings that included legal citations. He was also able to eventually organize his documentation and submit it to respondent. Even if he had help in making his arguments before respondent, he capably participated in obtaining the assistance and in the process generally, including at trial.

Petitioner took no affirmative action that could have been construed as a refund claim, such as the filing of an amended return for 2008 showing an overpayment. Petitioner's CDP request disputed only the additional assessment based on the notice of deficiency for 2008. It did not ask for a refund of taxes paid. Petitioner is therefore not legally entitled to a refund of taxes for 2008, even if the Court had jurisdiction to order such a refund.

CONCLUSION

It follows that the determination of the Commissioner of Internal Revenue, as modified herein, should be sustained.

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Date: April 26, 2018

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