



United States Tax Court

Washington, DC 20217

Scott Allan Webber,)	
)	
Petitioner)	
)	
v.)	Docket No. 14307-18L.
)	
Commissioner of Internal Revenue,)	
)	
Respondent)	

ORDER

This is a “collection due process” (“CDP”) case brought pursuant to section 6330(d),¹ in which petitioner, Scott Allan Webber, asks us to review a determination by the IRS Office of Appeals² (“IRS Appeals”) sustaining proposed collection of Mr. Webber’s tax liability for the year 2013 by levy. In our order dated October 15, 2020 (Doc. 33), we granted the parties’ joint motion (Doc. 32) to remand this case to IRS Appeals for further consideration of whether Mr. Webber’s alleged credit elect was allowed or disallowed by the IRS. IRS Appeals issued a supplemental notice of determination on May 20, 2021 (Doc. 47 at 13-15). Respondent, the Commissioner of Internal Revenue, filed his motion for summary judgment (Doc. 46) on August 18, 2021. Before ordering a response to the Commissioner’s motion from Mr. Webber, we will first order the Commissioner to file a supplement to his motion.

Background

The following recitation of facts presumes knowledge of our prior substantive orders issued in this case (Docs. 8, 28, and 33).

¹Unless otherwise indicated, all section references are to the Internal Revenue Code (26 U.S.C.) in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure. All dollar amounts are rounded to the nearest whole dollar.

²On July 1, 2019, the IRS Appeals Office was renamed the “Internal Revenue Service Independent Office of Appeals”. See Taxpayer First Act, Pub. L. No. 116-25, sec. 1001(a), 133 Stat. at 983 (2019). Since some of the events in this case predate that renaming, we use the term “Appeals” without distinction to refer to the office both before and after the name change.

Mr. Webber's cascading claims of credits elect and associated correspondence

In April 2017, Mr. Webber filed his untimely Federal income tax return for 2013 (Doc. 47 at 312-323). On his 2013 return, Mr. Webber reported a credit elect--i.e. an "amount [of overpayment] applied from 2012 return"--of \$77,782. The credit elect Mr. Webber reported on his 2013 return is derived from a cascade of credit elect claims dating back to (at least) 2003. Mr. Webber alleges that, starting with his 2003 return, he filed a series of returns³ that report an overpayment in each year, and on each return he elected to have the overpayment applied to the following year's tax balance as a credit elect, and he alleges that his credit elect cascades all the way to 2013 (the year at issue in the CDP hearing). If Mr. Webber is correct in his analysis, then his credit elect would satisfy his balance due for 2013 and collection by levy would not be appropriate. However, based on the evidence before us, Mr. Webber's entitlement to his reported credit elect is both unclear and heavily disputed.

Based on our record, the history of correspondence regarding Mr. Webber's credit elect begins with an IRS letter dated September 15, 2008, in which the IRS adjusted Mr. Webber's claimed credit elect on his 2006 return from \$73,734 to zero because the IRS was unable to locate an overpayment from 2005 (Doc. 47 at 276-277).

Thereafter, IRS examination personnel sent Mr. Webber a "Letter 3401" dated May 26, 2010, proposing "no change"⁴ to his 2004 return (Doc. 47 at 341). The same IRS personnel sent Mr. Webber a "Letter 569", also dated May 26, 2010, *proposing*⁵ full disallowance of Mr. Webber's claim of an overpayment on his 2005 return (Doc 47 at 343). The Letter 569 notified Mr. Webber of his right to appeal the proposed disallowance, which he claims he did.

³None of the post-2005 returns report any payment of tax other than a credit elect from the prior year. Mr. Webber has not filed Federal income tax returns for 2014, 2015, 2016, or 2017. Doc 47 at 17.

⁴In the examination context, IRS personnel interpret "no change" to mean that the IRS will not change the information on file regarding the 2004 return, such as a balance due for 2004. According to the IRS, "no change" does not mean that the information reported on the 2004 return--i.e., the reported credit elect--is deemed correct and allowed. Doc. 47 at 18.

⁵IRS correspondence from October 2017 quoted seems to refer to this letter as if it were a notice of disallowance that, under section 6532(a)(1), would have started the running of the two-year deadline for filing a refund suit. However, the letter "propos[es]" disallowance, rather than determining it, and there is no indication that this letter was sent by certified or registered mail, as section 6532(a)(1) would have required.

Next is a letter to Mr. Webber from IRS Appeals dated January 09, 2012 (“the January 2012 letter”), addressing Mr. Webber’s 2004 and 2005 tax years, stating:

Our office has completed its review of your claim for abatement and/or refund of taxes we have charged you. Based on the information submitted, I am pleased to tell you *we are allowing the full amount of your claim*. After your claim is processed, we will send you a notice explaining any changes we made to your tax account.

(Doc. 47 at 347) (emphasis added). Settlement Officer Richard Robinson (“SO Robinson”) is the IRS employee listed on the January 2012 letter. Neither party has presented any evidence that the IRS ever effectuated this allowance by processing an overpayment (by refund or credit).

Five years later, the IRS sent Mr. Webber a “Letter 916C”, dated October 4, 2017 (“the October 2017 letter”), which addresses Mr. Webber’s claim of a \$73,734 overpayment for the 2005 year (Doc. 47 at 61). The October 2017 letter states: “We are unable to consider your claim, which was reviewed by our Examination area and disallowed. You [were] provided a copy of their initial disallowance notice in May of 2010 and [were] provided with a period of time for reply. The date the disallowance was recorded on your file was June 11, 2012. The 2 year period to appeal this disallowance expired on June 11, 2014, and cannot be extended.” No letter or notice dated in June 2012 appears in our record. Mr. Webber appears to have received this October 2017 letter, because the only copy that exists in our record is as an attachment to one of his submissions and includes his hand-written comments in the margins. However, no evidence in our record shows that the IRS in fact “recorded” the disallowance on June 11, 2012.

CDP hearing

When the IRS received Mr. Webber’s 2013 return in 2017, it assessed the tax liability he reported (\$5,690), plus additions to tax for late filing and late payment, and interest, but did not allow his reported credit elect. To collect Mr. Webber’s 2013 liability, the IRS issued to him a Notice of Intent to Levy. Mr. Webber thereafter submitted a request for a CDP hearing, and the Commissioner no longer disputes the timeliness of that request. See Docs. 8, 9.

The CDP hearing was held by Settlement Officer Denise Walsh (“SO Walsh”). At the CDP hearing, Mr. Webber did not dispute the amount of his self-reported 2013 liability, and he did not propose any collection alternative such as an installment agreement or offer-in-compromise (for which he would not have been eligible because of his unfiled returns). The only issue Mr. Webber raised in the CDP hearing was his entitlement to the credit elect.

SO Walsh's case activity record print (Doc. 47 at 4-17) indicates that, in her investigation into Mr. Webber's claimed credit elect, she discovered that Mr. Webber had overpayments for multiple years that either had been offset to other debts or had been refunded to him. The case notes further indicate that Mr. Webber received refund checks--which he stated in the CDP hearing that he did not cash--and that Mr. Webber used the amounts of those uncashed refund checks to calculate his reported credit elect. Mr. Webber did not return any of the uncashed refund checks to the IRS.

SO Walsh also investigated the January 2012 letter--which had stated, "I am pleased to tell you *we are allowing the full amount of your claim*" of an overpayment for 2005--and determined (after corresponding with the technical advisor for the IRS area office that issued the letter) that the January 2012 letter had been issued in error. SO Walsh notated that the IRS apparently sent Mr. Webber a follow-up letter, dated June 15,⁶ disallowing his claim to an overpayment for 2004 and 2005, clarifying their mistake, and providing him "an exhaustive analysis of each tax year." Doc. 47 at 21-22. Mr. Webber claims to have not received the June 15 letter because he moved multiple times during his divorce. A copy of the June 15 letter does not appear in our record.

Based on the information available to her, SO Walsh issued a notice of determination sustaining the proposed levy. Mr. Webber thereafter appealed the notice of determination by filing a petition in the Tax Court.

Remand and supplemental notice of determination

On October 15, 2020, we granted the parties' joint motion to remand this case to IRS Appeals for further consideration of Mr. Webber's claim to a credit elect and to reconcile the conflicting letters in the administrative record. On remand, the supplemental hearing was again administered by SO Walsh. Doc. 47 at 22. SO Walsh schedule the supplemental hearing for November 12, 2020. Doc. 47 at 24. In preparing for the supplemental hearing, SO Walsh reviewed Mr. Webber's account history from years 1993-2005. SO Walsh notated that multiple refunds were issued to Mr. Webber over the years and that some were offset to other debts he owed. At the November 12 hearing, Mr. Webber confirmed that he had been issued multiple refund checks but did not cash them and did not return them to the IRS. SO Walsh advised Mr. Webber that refund checks issued to him but not returned to the IRS would not automatically result in a credit elect on his account, and asked him to gather the checks currently in his possession to calculate the amount of any credit elect to which he might be entitled. Doc. 47 at 25. Mr. Webber alleged that he did not currently possess any uncashed refund

⁶It is unclear from the current record whether the subsequent letter sent by IRS Appeals to explain the denial of Mr. Webber's claim to an overpayment for 2005 is dated June 15, 2018, or June 15 of a prior year. Accordingly, we refer to it as the "June 15 letter".

checks, however, because they had been lost during his divorce, and he instead deferred to the amounts as claimed on his tax returns and the January 2012 letter allowing his claim to a credit elect. SO Walsh reiterated that the January 2012 letter had been issued in error and that a subsequent letter disallowing his claim in full had been sent to him on June 15. Mr. Webber explained that he changed addresses multiple times and did not receive the June 15 letter. SO Walsh then requested files on Mr. Webber's 2004 and 2005 tax years in hopes of obtaining a copy of the June 15 letter. SO Walsh and Mr. Webber agreed that they could not proceed with the supplemental hearing until the requested files were received; however, because these records are archived, and because covid-19 restrictions have made them even more difficult to obtain, SO Walsh could not estimate when she would receive them. Accordingly, SO Walsh continued the supplemental hearing indefinitely while waiting to receive the requested records containing the June 15 letter. Doc. 47 at 26.

SO Walsh retired in December 2020--without having received the records she requested--and Mr. Webber's supplemental hearing was reassigned to Settlement Officer Robin Roth ("SO Roth"). As of February 19, 2021, SO Roth had not received the requested records because the Federal Records Center was still closed in response to the covid-19 pandemic. SO Roth decided to issue a supplemental determination without having received the requested records. SO Roth determined that Mr. Webber is not entitled to a credit elect based on the following: (1) the notice of proposed disallowance, dated May 26, 2010; (2) the October 2017 letter denying Mr. Webber's claim to the credit elect; and (3) a phone call with SO Robinson clarifying that the claim had been disallowed, as well as a copy of SO Robinson's case history. Doc. 47 at 14. At present, we have in our record not a complete copy of the October 2017 letter, but only page 1 of 3 (with Mr. Webber's hand-written commentary). No portion of SO Robinson's case history appears in our record.

The Commissioner's motion

The Commissioner filed his motion for summary judgment (Doc. 46) on August 18, 2021, arguing that Mr. Webber "has not established the credit indisputably exists", and that there is no genuine dispute of material fact regarding whether IRS Appeals abused its discretion in sustaining the proposed levy to collect Mr. Webber's balance for 2013.

Discussion

The purpose of our remand in October 2020 was to allow IRS Appeals to determine whether Mr. Webber's claimed credit elect is or is not an "available credit", see Freije v. Commissioner, 125 T.C. 14, 26 (2005), that can be applied to his 2013 liability at issue in this CDP case, see Hershal Weber v. Commissioner, 138 T.C. 348, 360-362 (2012), and to further develop the administrative record in this case as to correspondence between the IRS and Mr. Webber on that issue. In reviewing the record currently before us, we notice that materially relevant documents such as the June 15 letter, a full copy of the October 2017 letter, the account transcript for Mr. Webber's 2005 tax year that the October 2017 letter relies on, and the case notes allegedly obtained from SO Robinson regarding the January 2012 letter, are absent.

We are sympathetic to the constraints on IRS Appeals' ability to obtain the requested records due to covid-19 restrictions; and we assume that the records are lacking here because the Commissioner was attempting to satisfy the Court by resolving the matter without undue delay. However, the administrative record (as it appears in the declaration attached to the Commissioner's motion) seems to remain incomplete. To determine whether Mr. Webber is entitled to his claimed credit elect, it would be helpful to have as complete a record as possible of the IRS correspondence regarding the (dis)allowance of his claim. Gaps in that record are especially problematic in the context of summary judgment.

Accordingly, we will order that the Commissioner supplement his motion for summary judgment with copies of the June 15 letter, a full copy of the October 2017 letter, the account transcript for Mr. Webber's 2005 tax year showing that disallowance of Mr. Webber's claim to overpayment was recorded, and the case notes obtained from SO Robinson relied on in drafting the supplemental notice of determination. Mr. Webber shall not file a response to the Commissioner's motion until the Commissioner supplements his motion as provided in this order.

To give effect to the foregoing, it is

ORDERED that our order of March 3, 2021 (Doc. 42) requiring the parties to file periodic status report every 90 days, is hereby vacated and set aside. It is further

ORDERED that, no later than October 1, 2021, the Commissioner shall file a supplement to his motion for summary judgment that includes the following: (1) the June 15 letter; (2) the complete Oct. 2017 letter; (3) Mr. Webber's 2005 account transcript; and (4) the case notes SO Roth obtained from SO Robinson. If the Commissioner needs more time to obtain the requested records than what is provided in this order, then he may request an extension of time by appropriate motion under Rule 50(a). If the Commissioner determines that he is unable to retrieve those documents, then he shall describe his efforts to retrieve them. It is further

ORDERED that Mr. Webber need not file a response to the Commissioner's motion for summary judgment at this time. After the Commissioner has responded to this order, and before we rule on the Commissioner's motion, we expect to order Mr. Webber to file a response.

(Signed) David Gustafson
Judge