

UNITED STATES TAX COURT  
WASHINGTON, DC 20217

SARAH KURKO,	)	
	)	
Petitioner,	)	<b>CZ</b>
	)	
v.	)	Docket No. 24040-13 L.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

**ORDER**

The petition in this CDP case addresses proposed collection of tax by respondent (the IRS) for three years--2008, 2009, and 2011. We previously granted respondent’s motion to dismiss (“MTD”) on grounds of mootness as to the year 2008. Now before us is respondent’s motion for summary judgment (“MSJ”) as to the years 2009 and 2011. We will grant the motion in part, and as to the remainder we will direct the IRS to file a supplement to its motion, responding to the following discussion and stating whether it agrees that we should remand the case to IRS Appeals for further consideration of the petitioner’s credit elect claim for the application of her admitted 2008 overpayment to the 2009 liability at issue here. We will order petitioner Sarah Kurko to respond to that supplement and to make a filing with respect to the possible entry of a “next friend” into this case.

Background

It appears from the record (including Ms. Kurko’s letters filed April 14 and September 4, 2014) that the following facts may be true, and under Rule 121 we assume that they are true for purposes of respondent’s motion.

Ms. Kurko’s depression

In 2009 Ms. Kurko had an accident that “kept [her] out of work for a few months”. She suffered “major depression” that resulted in her being--

unemployed since 2010.... I originally filed for SSDI [social security disability income] in 2011 and was denied. It took me another year to file again. Case still pending.

Due to depression [I] have an inability to process paperwork and to make appointments for lawyers and such.

... I have contacted legal help and yes have been trying to get psychiatric help. [Letter filed 8/27/2014.]

### Ms. Kurko's untimely tax returns

In 2008 Ms. Kurko earned income, from which \$10,895 of tax was withheld. Ms. Kurko's 2008 income tax return was due in April 2009, but she did not file a timely return. The IRS therefore prepared a substitute for return ("SFR") based on the information available to it and issued to Ms. Kurko a notice of deficiency. When Ms. Kurko did not file a petition challenging that notice, the IRS assessed the resulting tax and additions, and after application of withholding credits, there was an unpaid assessed liability of about \$15,000. Ms. Kurko thereafter filed a late 2008 return in June 2013 (MSJ Ex. J), reporting a liability less than the IRS had determined and assessed and claiming an overpayment, which she requested to be applied to her 2009 liability. The IRS processed the late 2008 return and found an overpayment of \$8,560. However, the IRS did not credit the overpayment to 2009 because it found that the claim was so untimely that the overpayment was barred by section 6511(a). The IRS's transcript for Ms. Kurko's 2008 return reflects a "transfer" of the resulting credit, but we infer that it was not a true transfer in satisfaction of any other liability. (MTD Ex. A.)

For 2009 Ms. Kurko did not file a timely return, and the IRS prepared for that year a substitute for return ("SFR") based on the information available to it and issued to Ms. Kurko a notice of deficiency (MSJ Ex. 3). When Ms. Kurko did not file a petition challenging that notice, the IRS assessed the resulting tax and additions, the unpaid balance of which (after withholding credits) totaled more than \$10,000. Ms. Kurko apparently did not file a return for 2009 before IRS Appeals issued its notice of determination, and the assessments resulting from the SFR have not been abated. (MSJ Ex. 1.)

For 2011, Ms. Kurko filed an untimely income tax return (MSJ Ex. O) in September 2012 reporting a tax due of \$1,274, but she did not pay that liability.

With penalties and additions, the unpaid liability totaled more than \$1,600. (MSJ Ex. 2.)

### Lien filing and CDP hearing

On February 19, 2013 (before Ms. Kurko filed her late 2008 return), the IRS issued to her a notice of the filing of a Federal Tax lien with respect to her income tax liabilities for 2008, 2009, and 2011. (MSJ Ex. B.) Ms. Kurko then requested a collection due process (“CDP”) hearing on Form 12153 (MSJ Ex. C). On that form she checked a box indicating “I Cannot Pay Balance”; she wrote “Amount Incorrect”; and she wrote “I am in the process of seeking legal assistance and psychiatric assistance. Told agents unemployed and am applying for SSDI.”

In the course of the consideration of her case by IRS Appeals, Ms. Kurko submitted her 2008 return showing an overpayment, and the IRS accepted it as filed but did not credit the 2008 overpayment to her 2009 liability as requested.

Although Ms. Kurko’s request for a CDP hearing did generally allege “Amount Incorrect”, the record does not show that she ever made any specific challenge to her liability for 2009 (as determined by the IRS) or for 2011 (as she reported it on her return). She alleges that she has recently filed a 2009 return that shows a refund due.

Respondent’s motion also shows that, in the course of that CDP hearing, Ms. Kurko: (a) did not provide information to substantiate her financial condition, (b) did not bring herself into “compliance” by filing returns for 2010 and 2012 (which she had not previously filed), and (c) did not provide information to challenge the 2011 income tax liability that she had reported on her return. It appears that during this CDP proceeding Ms. Kurko “mentioned many, many times that ... due to major depressive state [I] do not handle paperwork well.” [Letter of 8/27/2014.] On September 3, 2013, IRS Appeals issued to Ms. Kurko a “Notice of Determination concerning Collection Action(s) Under 6320 and/or 6330” (MSJ Ex. A).

### Tax Court proceedings

Ms. Kurko then timely filed her petition in this Court.

On March 13, 2014, the IRS moved “that this case be dismissed as moot as to the taxable year 2008 given that the tax liability for the taxable year 2008 has been paid in full.” Ms. Kurko’s response to this motion included the assertion that

“I have been hospitalized twice for bipolar disorder and currently am in a severe depressive state.... I would like to ... file for financial disability.” Because there was a zero liability for 2008 and no further collection needed for that year, we dismissed the case in part as moot for 2008. (We assume that respondent has now released the lien as to 2008.)

On August 7, 2014, respondent filed its motion for summary judgment as to the years 2009 and 2011. Petitioner Sarah Kurko filed a response by letter dated August 27, 2014, filed September 4, 2014.

### Discussion

#### I. Challenges to underlying liability

Because the IRS had issued to Ms. Kurko a notice of deficiency for 2009 (which she does not allege she did not receive), she is barred from challenging her underlying liability in this CDP case. See sec. 6330(c)(2)(B). She is not barred from requesting audit reconsideration, which evidently she has done by her recent filing of a 2009 return--but that matter is not properly before us for review in this case.

As for 2011, there is no evidence that during the CDP hearing Ms. Kurko explicitly disputed the merits of the liability she herself had reported. As a result, she is barred from disputing that liability before this Court. Giamelli v. Commissioner, 129 T.C. 107 (2007). The IRS’s motion for summary judgment will therefore granted to the extent it asserts that Ms. Kurko may not challenge her liability for 2009 or 2011.

#### II. Denial of collection alternatives

The IRS did not abuse its discretion in denying a collection alternative where Ms. Kurko failed to show herself in compliance with filing requirements, see Huntress v. Commissioner, T.C. Memo. 2009-161; and where she did not provide financial information to document her entitlement to a collection alternative, see McLaine v. Commissioner, 138 T.C. 228, 243 (2012). Therefore, the IRS’s motion for summary judgment will be granted to the extent it asserts that Ms. Kurko is not entitled to a collection alternative.

### III. Application of credit elect to 2009 liability

#### A. Credit elect

Ms. Kurko apparently made another contention to which we believe IRS Appeals may have given inadequate consideration during the agency-level CDP hearing. Ms. Kurko asserted that her 2008 overpayment--not disputed by the IRS--should have been applied against her 2009 liability, pursuant to her “credit elect” on the Form 1040 for 2008, made under section 6402(b) and 26 C.F.R. section 301.6402-3(a)(5). This contention could be characterized as “relating to the unpaid tax [for 2009]”, sec. 6330(c)(2)(A), or as a “challenge[] to the appropriateness of [the] collection action[]”, sec. 6330(c)(2)(A)(ii).

As we stated in Weber v. Commissioner, 138 T.C. 348, 360 (2012):

[W]here a credit elect overpayment is claimed on the return for the year at issue—we have held that “the validity of the underlying tax liability, i.e., the amount unpaid after application of credits to which \* \* \* [the taxpayer] is entitled, is properly at issue” in a CDP case. See Landry v. Commissioner, 116 T.C. 60, 62 (2001). We therefore have jurisdiction to consider [petitioner’s] contention that he is entitled to apply a credit elect overpayment \* \* \* to the \* \* \* liability at issue here.

Unlike Weber, Ms. Kurko’s case does present “an overpayment that had been determined by the IRS (e.g., in response to a claim for refund) but that had not yet been refunded or credited.” 138 T.C. at 368. There is therefore no evident jurisdictional impediment to our considering her credit elect claim.

#### B. Limitation of section 6511(b)

The IRS denied Ms. Kurko’s request for the application of the 2008 overpayment to her 2009 liability, reasoning as follows: Under section 6513(a), Ms. Kurko’s withheld tax for 2008 is deemed to have been paid on April 15, 2009. As the IRS argued in its motion to dismiss 2008 on grounds of mootness, under section 6511(b)(2)(A), her claim for refund (i.e., her Form 1040 reporting an overpayment) filed in June 2013 can reach back only 3 years (to June 2010). Thus, the IRS argued, her 2008 return was filed 14 months too late to reach her withholding, and the refund of the admitted overpayment is barred.

C. Tolling of statute during “financial disability”

However, there is no indication that the IRS gave any consideration to section 6511(h):

(h) Running of periods of limitation suspended while taxpayer is unable to manage financial affairs due to disability.

(1) In general.--In the case of an individual, the running of the periods specified in subsections (a), (b), and (c) shall be suspended during any period of such individual’s life that such individual is financially disabled.

(2) Financially disabled.--(A) In general.--For purposes of paragraph (1), an individual is financially disabled if such individual is unable to manage his financial affairs by reason of a medically determinable physical or mental impairment of the individual ... which has lasted or can be expected to last for a continuous period of not less than 12 months....

If Ms. Kurko’s “major depression” fits within section 6511(h)(2)(A) and lasted for more than 14 months between April 2009 and June 2013, then the statute of limitations would not bar the credit she requests. If not, then the admitted 2008 overpayment should apparently have been applied as a “credit elect” against her 2009 liability.

For purposes of Rule 121, we construe Ms. Kurko’s statements during the CDP hearing (that “due to major depressive state[, I] do not handle paperwork well”) as her attempt to obtain relief from the statute of limitations on the grounds of her disability. We see no indication in the record that IRS Appeals gave attention to this request. If it did not, then that would seem to be an abuse of discretion that would prompt a remand, to enable Appeals to give this contention the necessary consideration.

D. Petitioner’s burden in the event of remand

Of course, if the case were to be remanded, then it would be incumbent on Ms. Kurko to carry her burden under section 6511(h) to show a “financial disability” that lasted more than 14 months during the relevant period (April 2009 through June 2013). Section 6511(h)(2)(A) requires “proof of the existence [of the

“financial disability”] ... in such form and manner as the Secretary may require.” The Secretary has set out the requirements in Rev. Proc. 99-21, sec. 4, which states:

Unless otherwise provided in IRS forms and instructions, the following statements are to be submitted with a claim for credit or refund of tax to claim financial disability for purposes of § 6511(h).

(1) a written statement by a physician (as defined in § 1861(r)(1) of the Social Security Act, 42 U.S.C. § 1395x(r)), qualified to make the determination, that sets forth:

(a) the name and a description of the taxpayer's physical or mental impairment;

(b) the physician's medical opinion that the physical or mental impairment prevented the taxpayer from managing the taxpayer's financial affairs;

(c) the physician's medical opinion that the physical or mental impairment was or can be expected to result in death, or that it has lasted (or can be expected to last) for a continuous period of not less than 12 months;

(d) to the best of the physician's knowledge, the specific time period during which the taxpayer was prevented by such physical or mental impairment from managing the taxpayer's financial affairs; and

(e) the following certification, signed by the physician:

I hereby certify that, to the best of my knowledge and belief, the above representations are true, correct, and complete.

(2) A written statement by the person signing the claim for credit or refund that no person, including the taxpayer's spouse, was authorized to act on behalf of the taxpayer in financial matters during the period described in paragraph (1)(d) of this section. Alternatively, if a person was authorized to act on behalf of the taxpayer in financial matters during any part of the period described in paragraph (1)(d), the

beginning and ending dates of the period of time the person was so authorized.

If this case were to be remanded, it would be incumbent on Ms. Kurko to submit to IRS Appeals the physician statement and her own statement, as required by Rev. Proc. 99-21.

#### IV. “Next friend”

Ms. Kurko states that she sometimes has “an inability to process paperwork”. She has expressed a desire for “legal assistance” but has evidently not been able to hire a lawyer. For her benefit, we point out that Tax Court Rule 60(d) provides for the prosecution of a case in this Court through a “next friend” recognized by the Court. See Campos v. Commissioner, T.C. Memo. 2003-193. We are willing under the circumstances to entertain a Motion to Be Recognized as Next Friend if one is filed by an appropriate person. Such a motion should recite and explain--

- that the person filing the motion would like to be recognized as Ms. Kurko’s next friend and would represent Ms. Kurko’s best interests;
- that Ms. Kurko cannot prosecute this case without assistance;
- that the person filing the motion has a significant relationship with Ms. Kurko; and
- that there is no other person better suited to serve as next friend.

The person filing the motion should also state in the motion whether anyone (including Ms. Kurko) is known to have an objection to the Court’s recognizing him as Ms. Kurko’s next friend. We will order that such a motion be filed no later than November 24, 2014.

If Ms. Kurko intends that this person also speak on her behalf with the IRS (e.g., during any remand to IRS Appeals), then she should execute a Form 2848 “Power of Attorney” authorizing him to do so.

In view of the foregoing, it is



ORDERED that respondent's motion for summary judgment is granted in part, to the extent it asserts (a) that in this suit Ms. Kurko may not challenge her liability for 2009 or 2011, and (b) that Ms. Kurko is not entitled to a collection alternative. However, as to Ms. Kurko's asserted entitlement to the application of a "credit elect" to her 2009 liability, it is

ORDERED that, no later than November 26, 2014, respondent shall file either (a) a supplement to his motion for summary judgment, addressing the issues discussed in this order, and/or (b) a motion to remand, if he concludes that IRS Appeals should give consideration to section 6511(h), or (c) another appropriate filing responsive to this order. It is further

ORDERED that, no later than December 8, 2014, Ms. Kurko shall file a response to respondent's filing due November 26, 2014. If it would be expedient for Ms. Kurko to be assisted and represented by a relative or friend who would act as her "next friend" in this suit, then she shall induce that person to file a "Motion to Be Recognized as Next Friend", by no later than December 8, 2014.

**(Signed) David Gustafson**  
**Judge**

Dated: Washington, D.C.  
November 12, 2014