Pursuant to Tax Court Rule 50(f), orders shall not be treated as precedent, except as otherwise provided.

JRN

UNITED STATES TAX COURT
WASHINGTON, DC 20217

SARAH KURKO,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 24040-13 L.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

O R D E R

To give effect to the opinion of the Court as set forth in the pages of the transcript of the proceedings before Judge David Gustafson at Boston, Massachusetts, on December 16, 2014, containing his oral findings of fact and opinion, it is

ORDERED that the Clerk of the Court shall transmit herewith to petitioner and to respondent a copy of the pages of the transcript of the trial in the above case before Judge Gustafson at Boston, Massachusetts, containing his oral findings of fact and opinion rendered at the trial session at which the case was heard.

In accordance with the oral findings of fact and opinion, an order directing remand will be issued.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
December 30, 2014

SERVED Dec 30 2014

1 Bench Opinion by Judge David Gustafson
2 December 16, 2014
3 Sarah Kurko v. Commissioner
4 Docket No: 24040-13L
5 THE COURT: The Court has decided to render
6 the following as its oral Findings of Fact and
7 Opinion in this case. This Bench Opinion is made
8 pursuant to the authority granted by section 7459(b)
9 of the Internal Revenue Code, and Rule 152 of the Tax
10 Court Rules of Practice and Procedure, and it shall
11 not be relied on as precedent in any other case.
12 This "collection due process" ("CDP") case
13 is an appeal by petitioner Sarah Kurko pursuant to 26
14 U.S.C. section 6330(d), asking this Court to review
15 the determination by the Office of Appeals of the
16 Internal Revenue Service ("IRS") to sustain a notice
17 of Federal tax lien to collect petitioner's unpaid
18 income tax for the years 2008, 2009, and 2011. The
19 IRS filed and served a motion for summary judgment,
20 and the Court's order of November 12, 2014, granted
21 the IRS's motion in part and held (1) that Ms. Kurko
22 is barred from challenging her underlying liability
23 as to 2009 and 2011, and (2) that the IRS did not
24 abuse its discretion in denying a collection
25 alternative where Ms. Kurko failed to show herself in

1 compliance with filing requirements and did not
2 provide financial information to document her
3 entitlement to a collection alternative. However, by
4 our order of December 5, 2014, we denied respondent's
5 motion in part, and ordered that the case would
6 proceed to trial on the issue of whether IRS Appeals
7 abused its discretion by failing to consider
8 adequately Ms. Kurko's claim that her 2008
9 overpayment--not disputed by the IRS on its merits--
10 was not untimely by virtue of section 6511(h) and
11 that it should have been applied against her 2009
12 liability, pursuant to her "credit elect" on the Form
13 1040 for 2008.
14 The case was tried in Boston,
15 Massachusetts, on December 15, 2014. Ms. Kurko
16 represented herself, and Michael E. D'Anello
17 represented respondent. We hold that IRS Appeals
18 abused its discretion, and we will remand the case
19 for further consideration of Ms. Kurko's claim of
20 "financial disability" and her 2008 credit elect
21 overpayment.
22 FINDINGS OF FACT
23 Returns and liabilities
24 For 2008 and 2009 Ms. Kurko failed to file
25 timely returns, and the IRS prepared substitutes for

1 return ("SFRs") pursuant to section 6020(b) and
2 assessed the resulting tax. For 2011 Ms. Kurko filed
3 an untimely return, and the IRS assessed the tax
4 reported thereon. (Ex. 1-J at 3.) When Ms. Kurko did
5 not pay those liabilities, the IRS filed a notice of
6 Federal tax lien and served on Ms. Kurko a notice of
7 that filing and of her right to a CDP hearing. (Ex. 2
8 J.)
9 CDP hearing
10 Ms. Kurko duly requested a CDP hearing on
11 Form 12153 (Ex. 3-J). On that form, as the "Reason",
12 she stated: "I am in the process of seeking legal
13 assistance and psychiatric assistance. I told agents
14 unemployed and am applying for SSDI" (i.e., Social
15 Security Disability Insurance). When the IRS
16 initiated the matter on its records, it quoted Ms.
17 Kurko's reference to "psychiatric assistance". (Ex.
18 4-J, p. 18.)
19 The settlement officer ("SO") in IRS
20 Appeals assigned to Ms. Kurko's case was Ms. Nicole
21 Mullin. She had been an SO for more than 10 years.
22 She estimates that she has handled 450 cases per year
23 (i.e., more than 4,500 cases by the current time) and
24 states that she cannot recall the details of the
25 cases. At trial several of her answers to questions

1 about what was said on a given subject in Ms. Kurko's
2 case were in the nature of "Nothing that I can
3 recall" or "Nothing that I can remember", and she
4 appeared to indicate that in fact she had no recall
5 of Ms. Kurko's hearing. For each case the SO
6 prepares a "Case Activity Record" on which she makes
7 dated entries of her contacts with the taxpayer, but
8 it is clear that she does not attempt thereby to give
9 a transcript of her conversations nor even to note
10 every specific subject that is discussed.
11 Consequently, some of what we find Ms. Kurko said
12 over the telephone does not appear in the SO's case
13 activity record or other documents in the IRS's
14 record for this case. The SO believes that, in her
15 more than 10 years on this job with more than 4,500
16 taxpayers, no taxpayer has ever requested in a CDP
17 hearing that he be found "financially disabled" for
18 purposes of the statute of limitations on refund
19 claims (see section 6511(h)).
20 The SO spoke with Ms. Kurko by telephone on
21 May 28, 2014. (Ex. 13-J at 47). In that conversation,
22 among other things, Ms. Kurko explained that she is
23 bi-polar, for which she had been hospitalized in 1998
24 and in October 2009, and that for much of the time
25 after that October 2009 hospitalization she had been

1 in a major depression, which rendered her unable to
2 maintain employment or to handle paperwork. She
3 stated that she was applying for "disability"
4 benefits from the Social Security Administration (an
5 application that was granted after the CDP hearing
6 was over (Ex. 17 P)), but she did not explicitly name
7 the concept of "financial disability" from section
8 6511(h), of which she was unaware. Ms. Kurko
9 explained that her tax liability for 2008 was less
10 than had been assessed pursuant to the SFR and that
11 in fact she had overpaid her taxes. She asked
12 whether she would be able to get the benefit of that
13 refund if she filed her now-long-overdue 2008 return,
14 and the SO replied, "We'll see."
15 Ms. Kurko prepared a 2008 return and
16 submitted it to the IRS no later than June 17, 2013.
17 (Ex. 10-J.) As Ms. Kurko had foretold, it reported
18 an overpayment and made a credit elect to 2009. She
19 left several voicemail messages with the SO to
20 confirm her receipt of the return (along with several
21 other returns). The SO did see the 2008 return and
22 noted that it claimed a refund of $8,570. However,
23 the SO made entries in her notes for 6/21/2013 that
24 "the refund will be lost due to RSED" (i.e., refund
25 statute expiration date) and for 8/5/2013 that

1 "refund lost due to RSED (expired 4/15/12)" --i.e.,
2 evidently invoking section 6511--apparently without
3 recalling (or without perceiving the significance of)
4 subsection (h) of section 6511, to which Ms. Kurko's
5 claimed disability was relevant.
6 The SO attempted to phone Ms. Kurko on
7 August 5, 2014, as she had previously offered to do,
8 but her call did not go through. She sent a letter to
9 Ms. Kurko that reported that failed attempt, invited
10 any additional information Ms. Kurko wanted to
11 provide, and promised to issue a notice of
12 determination promptly.
13 Notice of determination
14 On September 3, 2013, IRS Appeals issued
15 its final notice of determination upholding the
16 filing of the notice of lien. The attachment to the
17 notice mentioned the 2008 return, stated that it had
18 been processed and that the assessment of tax for
19 2008 had been adjusted, and that "[t]he current
20 balance" of Ms. Kurko's 2008 income tax account was
21 zero. The notice of determination made no mention of
22 Ms. Kurko's claim of a 2008 overpayment that should
23 be applied to the subsequent liabilities at issue.
24 Ms. Kurko timely submitted her petition to
25 this Court. At that time she resided in

1 Massachusetts. Her petition includes the contention,
2 "2008 should have been listed as a $8,540 credit not
3 zeroed out." Her other contentions were resolved by
4 summary judgment, and this contention remains.
5 OPINION
6 I. Collection Due Process principles
7 When a taxpayer fails to pay any Federal
8 income tax liability after demand, section 6321
9 imposes a lien in favor of the United States on all
10 the property of the delinquent taxpayer, and section
11 6323 authorizes the IRS to file notice of that lien.
12 However, the IRS must provide written notice of a tax
13 lien filing to the taxpayer within five business
14 days. After receiving such a notice, the taxpayer may
15 request an administrative hearing before Appeals.
16 Sec. 6320(a)(3)(B), (b)(1). Administrative review is
17 carried out by way of a hearing before IRS Appeals
18 pursuant to section 6330(b) and (c); and, if the
19 taxpayer is dissatisfied with the outcome there, she
20 can appeal that determination to the Tax Court under
21 section 6330(d), as Ms. Kurko has done. For the
22 agency level CDP hearing before IRS Appeals, the
23 pertinent procedures are set forth in section
24 6330(c).
25

1 II. Burden of proof and standard and scope of review

2 As petitioner, Ms. Kurko bears the burden

3 of proof. See Rule 142(a)(1). Ms. Kurko makes no

4 contention that the burden has shifted for any

5 reason, and we see no basis in the record for such a

6 contention.

7 In considering IRS Appeals' consideration

8 of collection issues, the Court reviews the

9 administrative determination for an abuse of

10 discretion. See Sego v. Commissioner, 114 T.C. 604,

11 610 (2000). The IRS contends that our review is

12 confined to the administrative record. The IRS says

13 that an appeal in this case would lie in the United

14 States Court of Appeals for the First Circuit, and

15 that the First Circuit has adopted the "record rule"

16 and has held that, in such a review, we are confined,

17 with "limited exceptions", to the administrative

18 record developed in the CDP hearing before IRS

19 Appeals. Murphy v. Commissioner, 469 F.3d 27, 31 (1st

20 Cir. 2006). This position involves two difficulties--

21 first, that it is unclear whether a contention

22 (explained below) that a credit elect overpayment

23 should be applied to the liability is an "issue

24 relating to the unpaid tax" (sec. 6330(c)(2)(A)) that

25 would be subject to the record rule; and second, that

1 it is unclear whether a taxpayer seeking a credit
2 elect is "seeking redetermination of tax liability"
3 for purposes of section 7482(b)(1)(A) or whether
4 instead appeal would be to the D.C. Circuit (sec.
5 7482(b) (flush language)).
6 However, we assume for present purposes
7 that the "record rule" does govern this case, but we
8 find applicable one of the exceptions that the First
9 Circuit noted--i.e., that "[a] reviewing court may
10 accept evidence outside the administrative record ...
11 where there is a 'failure to explain administrative
12 action [so] as to frustrate effective judicial
13 review,' Camp v. Pitts, 411 U.S. 138, 142-43, 93
14 S.Ct. 1241, 36 L.Ed.2d 106 (1973) (per curiam)."
15 We think that the silence of the notice of
16 determination about IRS Appeals' resolution of Ms.
17 Kurko's credit elect claim and the absence from the
18 record of the information she gave about her
19 disability combines to fit this exception. Whether
20 from overwork or inattention, the SO failed to record
21 Ms. Kurko's insistence that her disability accounted
22 for her late 2008 return, and in its determination
23 IRS Appeals failed to address that contention, which
24 we now explain.
25 III. Application of credit elect to 2009 liability

1 A. Credit elect

2 Ms. Kurko asserted that her 2008

3 overpayment--not disputed by the IRS--should have

4 been applied against her 2009 liability, pursuant to

5 her "credit elect" on the Form 1040 for 2008, made

6 under section 6402(b) and 26 C.F.R. section 301.6402-

7 3(a)(5). This contention could be characterized as

8 "relating to the unpaid tax [for 2009]", sec.

9 6330(c)(2)(A), or as a "challenge[] to the

10 appropriateness of [the] collection action[]", sec.

11 6330(c)(2)(A)(ii). As we stated in Weber v.

12 Commissioner, 138 T.C. 348, 360 (2012): "'[W]here a

13 credit elect overpayment is claimed on the return for

14 the year at issue—we have held that "the validity of

15 the underlying tax liability, i.e., the amount unpaid

16 after application of credits to which * * * [the

17 taxpayer] is entitled, is properly at issue' in a CDP

18 case. See Landry v. Commissioner, 116 T.C. 60, 62

19 (2001)."

20 B. Limitation of section 6511(b)

21 IRS Appeals did not grant Ms. Kurko's

22 request for the application of the 2008 overpayment

23 to her 2009 liability. The notice of determination

24 does not say why; but the SO's notes refer to the

25 statute of limitations, and the apparent reasoning

1 would be as follows: Under section 6513(a), Ms.
2 Kurko's withheld tax for 2008 is deemed to have been
3 paid on April 15, 2009. Under section 6511(b)(2)(A),
4 her claim for refund (i.e., her Form 1040 reporting
5 an overpayment) filed in June 2013 can reach back
6 only 3 years (to June 2010). Thus, her 2008 return
7 was arguably filed 14 months too late to reach her
8 withholding, and the refund of the admitted
9 overpayment is barred.
10 C. Tolling of statute during "financial
11 disability"
12 However, there is no indication that IRS
13 Appeals gave any consideration to section 6511(h),
14 which provides that the "[r]unning of periods of
15 limitation [is] suspended while [the] taxpayer is
16 unable to manage [her] financial affairs due to
17 disability." If Ms. Kurko's "major depression" fits
18 within section 6511(h)(2)(A) and lasted for more than
19 14 months between April 2009 and June 2013, then the
20 statute of limitations would not bar the credit she
21 requests. And if it would not, then the admitted 2008
22 overpayment should apparently have been applied as a
23 "credit elect" against her 2009 liability.
24 Ms. Kurko did not cite section 6511(h) nor
25 use the phrase "financial disability", but we do not

1 hold that she was required to do so. It was enough
2 that she complained about the inequity of cutting off
3 her refund because of a lapse of time attributable to
4 her depression, which she did refer to as a
5 "disability" (when she stated that she was applying
6 for disability benefits). Ms. Kurko did not make mere
7 vague allegations of being depressed; rather, she
8 informed IRS Appeals of her hospitalization and of
9 periods of unemployment. Her alleged disability is
10 among the circumstances that Congress surely had in
11 mind when enacting section 6511(h). When Ms. Kurko
12 made that contention in the CDP hearing (even without
13 citing the statute or mentioning the magic words
14 "financial disability"), it was incumbent on Appeals
15 to entertain the contention and request the
16 information that would have substantiated it.
17 We will therefore order that the case be
18 remanded to IRS Appeals, so that adequate
19 consideration may be given to Ms. Kurko's credit
20 elect overpayment claim and her claim of financial
21 disability under section 6511(h).
22 This concludes the Court's oral Findings of
23 Fact and Opinion in this case.
24 (Whereupon, at 10:10 a.m., the above-
25 entitled matter was concluded.)