

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

UNITED STATES TAX COURT  
WASHINGTON, DC 20217

BRIAN H. MCLANE, )  
)  
Petitioner(s), ) **CT**  
)  
v. ) Docket No. 20317-13 L.  
)  
COMMISSIONER OF INTERNAL REVENUE, )  
)  
Respondent )

**ORDER**

This case is before us to review a determination by the Internal Revenue Service Appeals office to sustain a Notice of Federal Tax Lien (NFTL) respondent issued to petitioner in regard to his taxable years ended December 31, 2006, and 2008. In his petition, petitioner made no assignment of error in regard to his 2006 taxable year and respondent now agrees that, as a result of his acceptance of substantiation of deductions in amounts in excess of those petitioner claimed on his 2008 Federal income tax return, petitioner's Federal income tax liability for that year is less than the amount he reported on his return. (Respondent's concession regarding the deductions allowable to petitioner for 2008 renders moot petitioner's claim that respondent did not mail a notice of deficiency for that year so that the assessment of additional tax beyond that shown on petitioner's return was invalid.) During a conference call with the parties on February 21, 2018, we asked if they objected to our entry of a decision upholding respondent's determination only in regard to 2006. While respondent's counsel voiced no objection, petitioner objected because he now believes he is entitled to a refund of a portion of the tax he previously paid for 2008.

Although petitioner made no claim in his petition for a refund of taxes paid for his 2008 taxable year, we do not view that failure as precluding him from pursuing any refund claim that we might have jurisdiction to consider. Although Rule 34(b)(4) generally treats a petitioner as having conceded any issue not raised in the assignments of error set forth in his petition, Rule 41(b)(1) requires us to treat as having been raised in the parties' pleadings any issues tried by their express

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or implied consent.<sup>1</sup> During and after our trial of the present case, respondent agreed to allow deductions to petitioner that, respondent now agrees, reduce his tax liability for 2008 below the amount reported on his 2008 return and may result in his having made an overpayment for that year. We view respondent's concessions as implied consent to trial of the issue of petitioner's entitlement to a refund of amounts he previously paid toward his 2008 tax liability.

The parties' agreement to the trial of an issue not raised in the pleadings, however, does not establish our jurisdiction to consider that issue. Our ability in a deficiency case to determine and order the refund or credit of an overpayment is well established. See sec. 6512(b)(1). But the present case is not a deficiency case. (Although the parties dispute whether respondent properly mailed to petitioner a notice of deficiency for his 2008 taxable year, they agree that petitioner never received such a notice and, therefore, did not file a petition for redetermination of the deficiency respondent purportedly assessed.) Because the question of our jurisdiction in a collection due process (CDP) case to determine and order the credit or refund of an overpayment appears to be a novel one, we will require the parties to submit supplemental briefs addressing the issue before we resolve it.

To guide the parties in their preparation of supplemental briefs, we offer the following observations and questions about the two statutory provisions that we believe relevant to the issue of our jurisdiction in a CDP case to determine and order the refund or credit of an overpayment.<sup>2</sup> We view section 6330(d)(1) as the principal (if not sole) basis for our jurisdiction in this case. That section allows us to consider a taxpayer's appeal of a determination made by the Internal Revenue Service Appeals office. Our authority under that section would thus appear to be limited to matters within the scope of Appeals' determination. We thus can decline to uphold Appeals' determination to sustain the NFTL in regard to petitioner's 2008 taxable year. Whether section 6330(d)(1) allows us to go further and determine that respondent's Appeals office erred in not ordering a refund to petitioner of any portion of the tax he previously paid for that year may turn on whether Appeals had the authority to take that action. Appeals cannot have erred in failing to do

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<sup>1</sup>All Rule references are to the Tax Court Rules of Practice and Procedure, and all section references are to the Internal Revenue Code in effect for 2008, unless otherwise indicated.

<sup>2</sup>We of course encourage the parties to bring to our attention any additional statutory provisions that they believe to be relevant to the issue.

something that it lacked the authority to do. Thus, we expect petitioner to advise us of whether he views our ability to order the refund he seeks as within the jurisdiction granted to us by section 6330(d)(1) and, if so, what analysis or authorities support that view. If respondent's position is that our jurisdiction under section 6330(d)(1) does not allow us to order the refund of an overpayment because his Appeals office had no authority to do so, we expect him to provide us with relevant documentation regarding the scope of Appeals' authority.

As we have already observed, section 6512(b) gives us jurisdiction to determine and order refunds or credits of overpayments. Section 6512(b)(1) provides as a general rule:

[I]f the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of income tax for the same taxable year \* \* \* in respect of which the Secretary determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of such tax, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall \* \* \* be credited or refunded to the taxpayer.

We thus have jurisdiction in a deficiency case to determine and order the refund or credit of an overpayment. Our jurisdiction to determine overpayments may be viewed as ancillary to the jurisdiction granted us by section 6214(a) to redetermine deficiencies. The plain terms of section 6512(b)(1) suggest that we can find that a taxpayer has made an overpayment only after finding that there is no deficiency. And we can only find the absence of a deficiency in a deficiency case. (A taxpayer's underlying tax liability is often relevant in a CDP case, but the term "deficiency" has a narrower meaning. See sec. 6211(a).) Moreover, section 6512(b)(3) limits our ability to order a credit or refund to only that portion of a tax paid after the mailing of a notice of deficiency or in regard to which a timely claim for refund was pending (or could have been filed) on the date of mailing of the notice of deficiency. If, as petitioner alleges in the present case, respondent did not mail a notice of deficiency, how can we apply the limit on our ability to order a refund imposed by section 6512(b)(3)? Because the limitation provided in section 6512(b)(3) is based in part on the date of mailing of a notice of deficiency, we take that limitation as a further indication that the overpayment jurisdiction provided us by section 6512(b)(1) is ancillary to the deficiency jurisdiction provided by section 6214(a).

We thus have the following questions for the parties regarding the implications of section 6512(b)(1) for the issue at hand: Does petitioner view section 6512(b)(1) as giving us jurisdiction to determine and order the refund or credit of an overpayment that is independent of our deficiency jurisdiction under section 6214(a)? In other words, does section 6512(b)(1) allow us to order a refund in the present case, even though the petition he filed with this Court was not a petition for redetermination of a deficiency but instead a petition for review of the determination by respondent's Appeals office to uphold the NFTL? If respondent takes the position that section 6512(b)(1) does not grant us jurisdiction to determine and order a refund of any overpayment petitioner may have made for his 2008 taxable year, does respondent have any grounds for that position other than those alluded to above?

During the February 21, 2018, telephone conference, petitioner suggested that his claim to a refund of taxes paid for 2008 is allowed by respondent's efforts to collect a deficiency for that year. We agree with petitioner that respondent's efforts to collect a deficiency for 2008 that petitioner had not previously had the opportunity to contest put in play the amount of his tax liability for that year. See sec. 6330(c)(2)(B) (allowing a taxpayer to raise at a CDP hearing "challenges to the existence or amount of the underlying tax liability for any tax period if the \* \* \* [taxpayer] did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability"). But it does not follow that respondent's collection efforts also gave rise to the possibility of obtaining a refund should it ultimately be determined that petitioner's tax liability for 2008 was less than the amount he had already paid. It is not clear that respondent's collection action had any effect on petitioner's ability to pursue a refund claim for 2008.

A taxpayer who overpays his tax liability can pursue a refund by filing an amended return. Sec. 601.105(e)(1), Statement of Procedural Rules. If the Commissioner disallows the taxpayer's claim, the taxpayer can sue for a refund in a Federal district court of the Court of Federal Claims. If the Commissioner issues a notice of deficiency for the affected year, the taxpayer's petition with this Court for a redetermination of that deficiency denies him the ability to pursue in another court any refund claim he might have: Our overpayment jurisdiction in deficiency cases is exclusive. See sec. 6512(a). Again, however, the parties agree that, regardless of whether respondent issued a notice of deficiency to petitioner for his 2008 taxable year, he did not receive it. Therefore, he did not file with this Court a petition for redetermination of the deficiency. We are thus unaware of any reason why petitioner could not have pursued his refund claim, to the extent permitted by

the applicable statute of limitations, independently of respondent's collection action and our consideration of the petition filed under section 6330(d)(1).

Section 6511(a) requires that any claim for a refund of an overpayment 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. Petitioner filed his 2008 return in October 2009. According to the transcript of his account for his 2008 taxable year, he then made payments toward the liability shown on his return between December 2009 and September 2012. Therefore, in the absence of any extension, the period for filing a claim for refund for any overpayment petitioner made for 2008 would have expired no later than September 2014. Does petitioner claim that respondent's issuance of the NFTL, or any other event that occurred as part of this CDP case, suspended the running of the period of limitations provided in section 6511(a)? If so, on what authority does petitioner rely? Alternatively, does petitioner claim that he took action prior to the expiration of the period of limitations to preserve his ability to claim a refund of any overpayment he might have made for 2008? If so, what was that action? If respondent's issuance of the NFTL did not affect petitioner's ability to pursue a refund claim that has since become time-barred, he has no apparent grounds for complaint about our inability to entertain a belated refund claim as part of the present case.

We recognize that petitioner, as a pro se taxpayer, may have difficulty addressing the legal questions that we would like covered by the parties' supplemental briefs. And the amount at stake does not appear to justify the hiring of private counsel. Petitioner may be able to obtain assistance in preparing his supplemental brief on a pro bono basis from a low income taxpayer clinic (LITC) in his locale. See sec. 7526(a) (authorizing the Secretary to "make grants to provide matching funds for the development, expansion, or continuation of qualified low income taxpayer clinics"). Below is a list of LITCs in the Baltimore, Maryland area:

Maryland Volunteer Lawyers Service  
201 North Charles Street, Suite 1400  
Baltimore, MD  
410-547-6537  
800-510-0050

University of Baltimore School of Law  
1420 North Charles Street  
Baltimore, MD 21201  
410-837-5706

The Catholic University of America-Columbus School of Law  
Columbus Community Legal Services LITC  
3600 John McCormack Road, N.E.  
Washington, D.C. 20064  
202-319-6788

University of Maryland Francis King Carey School of Law  
500 West Baltimore Street  
Baltimore, MD 21201  
410-706-3295

It is, therefore

ORDERED that the parties shall, on or before April 30, 2018, file supplemental briefs addressing the issue of our jurisdiction to consider, as part of this CDP case, petitioner's claim for a refund of any overpayment of tax he might have made for his 2008 taxable year.

**(Signed) James S. Halpern  
Judge**

Dated: Washington, D.C.  
March 13, 2018