

UNITED STATES TAX COURT  
WASHINGTON, DC 20217

STEVEN W. WEBERT & )  
 CATHERINE S. WEBERT, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 COMMISSIONER OF INTERNAL )  
 REVENUE, )  
 )  
 Respondent. )

Docket No. 15981-17

**ORDER**

This case is before the Court on petitioner Steven W. Webert’s Motion to Restrain Assessment or Collection or to Order Refund of Amount Collected (Motion to Restrain) filed pursuant to Rule 55.<sup>1</sup> Respondent filed a Notice of Objection to Motion to Restrain Assessment or Collection or to Order Refund of Amount Collected (Notice of Objection), followed by three supplements. Mrs. Webert also filed a response to Mr. Webert’s motion. As noted in a separate Order filed this same date, Mrs. Webert does not agree with or support the motion to restrain.

A. Background

The following relevant facts are based on the various filings and attachments thereto in the current record. Petitioners resided in the State of Washington when the petition was timely filed.

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<sup>1</sup>Unless otherwise indicated, subsequent section references are to the Internal Revenue Code in effect for all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure. All monetary amounts are rounded to the nearest dollar.

Before April 25, 2017, neither Mr. Webert nor Mrs. Webert filed income tax returns for the taxable years 2010 through 2015. The Internal Revenue Service (IRS)<sup>2</sup> issued a separate notice of deficiency to each petitioner on April 25, 2017, for taxable years 2010 through 2015, determining deficiencies on the basis of substitutes for returns (SFRs) authorized under section 6020(b) as follows:

<u>Year</u>	<u>Deficiency</u>	<u>Sec. 6651(a)(1) addition to tax</u>	<u>Sec. 6651(a)(2) addition to tax</u>	<u>Sec. 6654 addition to tax</u>
2010	\$22,019	\$4,954	\$5,506	\$472
2011	10,372	2,334	2,593	205
2012	39,757	8,945	*to be computed	713
2013	37,861	8,519	*to be computed	680
2014	10,225	526	*to be computed	---
2015	123,768	27,629	*to be computed	2,210

Two days later, on April 27, 2017, the IRS received and filed petitioners' delinquent joint income tax returns for taxable years 2010 through 2015, which were signed and dated March 23, 2017. Petitioners' returns each reported a tax due or an overpayment as follows:

<u>Year</u>	<u>Total tax</u>	<u>Payments and credits</u>	<u>Prior year overpayment</u>	<u>Tax due/ (overpayment)</u>
2010	\$2,235	-0-	-0-	\$2,235
2011	1,413	-0-	-0-	1,413
2012	5,583	-0-	-0-	5,583
2013	2,306	-0-	-0-	2,306

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<sup>2</sup>The Court uses the term "IRS" to refer to administrative actions taken outside of these proceedings. The Court uses the term "respondent" to refer to the Commissioner of Internal Revenue, who is the head of the IRS and is respondent in this case, and to refer to actions taken in connection with this case.

2014	1,507	(8,551)	-0-	(7,044)
2015	1,581	(1,650)	(7,044)	(7,113)

Petitioners' delinquent income tax returns were submitted without remittance. Petitioners elected to have the 2014 overpayment applied to their 2015 estimated tax and to have the 2015 overpayment applied to their 2016 estimated tax. Petitioners do not indicate on the returns that they are contesting the taxable income or tax due as reported for the years in issue.

On May 1, 2017, petitioners timely filed a joint 2016 Form 1040, U.S. Individual Income Tax Return.<sup>3</sup> Petitioners reported total tax of \$1,591, a net premium tax credit of \$4,466, and the \$7,113 overpayment reflected on their 2015 return, resulting in an overpayment of \$9,988. Petitioners directed that this overpayment be applied to their estimated tax for 2017.

On June 13, 2017, the IRS issued a joint notice to petitioners indicating that it had reduced the tax increase previously reflected in the notice of deficiency. The notice further advised petitioners of the opportunity to file a petition with the Tax Court making reference to the notice of deficiency dated April 25, 2017, and the last date for filing a petition of July 24, 2017.

On June 19, 2017, the IRS sent a Notice CP24, Changes to your 2016 Form 1040, stating that "We changed your 2016 Form 1040 to match our record of your estimated tax payments, credits applied from another tax year, and/or payments received with extension to file." This notice reflects payments totaling \$4,466 (net premium tax credit) and does not include the \$7,044 overpayment from 2014.

On June 26, 2017, the IRS processed the delinquent income tax returns for the years in issue; according to respondent the IRS assessed the tax as reported.<sup>4</sup>

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<sup>3</sup>Petitioners requested an extension of time to file; thus the due date was October 15, 2017.

<sup>4</sup>The account transcripts for taxable years 2010, 2013, 2014, and 2015 reflect the same amount of total tax as reported on petitioners' income tax returns as filed. The account transcripts reflect that the IRS assessed tax due of \$1,228 for

By Notices CP49, dated June 26, 2017, the IRS informed petitioners that it had applied the overpayment of \$2,875 (\$4,466 net premium tax credit – \$1,591 total tax) from petitioners' 2016 Form 1040 to their account balances for 2010 and 2011, satisfying the entire balance for 2010 and reducing the 2011 tax liability.<sup>5</sup>

A timely joint petition was filed on July 26, 2017, in response to the notice of deficiency dated April 25, 2017. Petitioners dispute the amounts computed by the IRS in the notice of deficiency, asserting that their income tax returns filed for taxable years 2010 through 2015 “dramatically reduced Petitioner’s tax obligation by taking into account expenses on Schedule C’s, credits and prior years’ net operating losses carried forward \* \* \* Petitioners’ returns demonstrate they owed \* \* \* only a modest amount of self-employment tax.” Petitioners also requested “an abatement of all penalties for late filing and payment due to Petitioners’ severe health and financial hardship history.” Petitioners do not assert in their petition that they are disputing the amounts reported on their income tax returns as filed for the years in issue.

Respondent asserts in his Notice of Objection, as supplemented, and in his Response to the Court’s Order,<sup>6</sup> that the assessment of tax for the tax years 2010

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2011 and tax due of \$4,853 for 2012. It is unclear why these amounts differ from (and are lower than) the amounts reflected on petitioner’s income tax returns as filed, \$1,413 for 2011 and \$5,583 for 2012.

<sup>5</sup>It is unclear why the IRS did not apply petitioners’ \$7,044 overpayment from their 2014 income tax return. The account transcript for 2014, a copy of which was printed on September 22, 2017, reflects that petitioners have an account balance of (\$7,044).

<sup>6</sup>Respondent’s Notice of Objection was filed September 25, 2017. Respondent’s first, second, and third supplements to the Notice of Objection were filed on October 18, 2017, November 9, 2017, and December 1, 2017, respectively. By Order dated January 23, 2018, the Court ordered respondent to file a response setting forth respondent’s position about whether sec. 6213(a) bars the IRS from assessing and collecting the self-assessed income tax liabilities reported on petitioners’ income tax returns for taxable years 2010 through 2015. The Response was filed February 8, 2018.

through 2015 was properly made on the basis of the joint tax returns filed and that there is no violation of section 6213(a). Respondent further indicates that the assessment and subsequent offset of a prospective refund is consistent with section 6402 and the Internal Revenue Manual. Respondent attached a number of exhibits to the third supplement, including the Declaration of Alyssa L. Rucker, the IRS Tax Compliance Officer who prepared petitioners' SFRs for the years in issue and received and reviewed their delinquent income tax returns. Ms. Rucker states that when she received petitioners' income tax returns for taxable years 2010 through 2015 she did not accept the figures on the returns as substantially correct and reviewed the instructions in the Internal Revenue Manual (IRM) pt. 4.12.1.10.2 (Oct. 5, 2010). Ms. Rucker states that she "followed the procedures set forth in IRM pt. 4.12.1.10.2(1)2, immediately had the returns assessed as a partial agreement, and issued a revised report to the Weberts \* \* \* [t]he assessments made in this case were based upon the Weberts' delinquent returns, not upon the notice of deficiency \* \* \* or the revised report I issued to them."

Respondent asserted in the third supplement that after the Answer was filed counsel for respondent and the Appeals Office tried unsuccessfully to contact petitioners via telephone and letter several times to determine whether they dispute the taxes reported on their delinquent income tax returns. By Order dated December 4, 2017, the Court ordered petitioners to file a response by December 26, 2017, informing whether they dispute the tax liabilities reported on their delinquent income tax returns. Mr. Webert did not file a response by the due date.

By Order dated March 23, 2018, the Court directed Mrs. Webert to file a response to Mr. Webert's Motion to Restrain and respondent's responses. In her response filed May 3, 2018, Mrs. Webert states that she "fully disputes" the deficiencies from the notice of deficiency dated April 24, 2017. Mrs. Webert also asserts the following positions, as relevant here: (1) "Respondent may not assess or collect any portion" of the deficiencies set forth in the notice of deficiency and (2) "Respondent may assess and collect such self-assessed tax liabilities, including applying Petitioners' tax refund from 2016 to offset the self-assessed tax liabilities \* \* \* Petitioner does not join the Motion with respect to such self-assessed liabilities" \* \* \*.

To date, Mr. Weibert has not filed a response to the Court's Order dated December 4, 2017. As indicated, the Order dated December 4, 2017, directed petitioners to advise if they dispute the tax liabilities reported on their delinquent returns for taxable years 2010 through 2015.

## B. Discussion

Section 6213(a) provides that the Commissioner generally is precluded from assessing or collecting a deficiency until a notice of deficiency authorized under section 6212(a) is mailed to the taxpayer with respect to the notice of deficiency and until the expiration of the 90-day or 150-day period for filing a timely petition for redetermination with the Court. Upon filing of a petition for redetermination contesting the notice of deficiency, the Commissioner is further precluded from assessing or collecting the deficiency until the decision of the Court becomes final. Powerstein v. Commissioner, 99 T.C. 466, 471 (1992); Powell v. Commissioner, 96 T.C. 707, 710-711 (1991). The term "deficiency" is defined as the amount by which the tax imposed exceeds the sum of the amount of tax shown on the return and the amount of tax previously assessed. Sec. 6211(a).

Conversely, as explained in Meyer v. Commissioner, 97 T.C. 555, 559 (1991), the Commissioner is authorized to immediately "assess and collect the amount of taxes that are computed and shown due on a taxpayer's individual income tax return, as well as the amount of any additional computed and shown due on a subsequently filed amended income tax return." See also sec. 6201(a)(1); sec. 301.6211-1(a), Proced. & Admin. Regs. The IRS is also authorized to "immediately assess and collect" the additions to tax under sections 6651(a)(1) 6651(a)(2), and 6654, if such additions are determined by the amount of tax shown on the taxpayer's return if a return is filed. Meyer v. Commissioner, 97 T.C. at 559-560; see also sec. 6665(b). Such summary assessments are not subject to normal deficiency procedures and are beyond the scope of this Court's jurisdiction, and no action or proceeding may be commenced to enjoin the IRS' actions. Sec. 7421(a); Meyer v. Commissioner, 97 T.C. at 560. Additionally, section 6213(a) specifies that the Court "shall have no jurisdiction to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition." [Emphasis added.]

The facts in this case are distinguishable from the facts in Powerstein. In Powerstein v. Commissioner, 99 T.C. at 470, after the filing of the petition the taxpayers submitted amended returns claiming an overpayment in some years and agreeing to respondent's position in other years. The amended returns made reference to the pending case in the Tax Court and the taxpayers made clear that the submission of the adjustments in the amended returns were to be considered by the Court. Id. Here, petitioners submitted original delinquent returns prior to the filing of the petition and did not indicate that they disputed the amounts or that the returns related to the notice of deficiency determination. As indicated, the Court gave petitioners an additional opportunity to make reference to the delinquent returns and Mr. Webert did not respond. Mrs. Webert did not join the motion and agrees that respondent may assess the amounts reported on the delinquent returns. Therefore, the prohibition as discussed in Powerstein v. Commissioner, 99 T.C. at 471, and Powell v. Commissioner, 96 T.C. at 710-711, does not apply.

Given the foregoing, we conclude that the IRS' actions here are in accordance with Meyer v. Commissioner, 97 T.C. at 559-560. Since petitioners do not appear to dispute the amounts reported on the delinquent returns, section 6213(a) does not apply to bar assessment and collection of the amounts reported on said returns. The liabilities assessed for taxable years 2010 through 2015 were based on the tax due that petitioners reported on their income tax returns filed on April 27, 2017, plus statutory additions premised thereon. These amounts are not deficiencies, need not be collected through deficiency procedures, and are not a part of the instant litigation. See also secs. 6201(a)(1), 6211(a), 6213(a), 6665(b), and 7421(a); sec. 301.6211-1(a), Proced. & Admin. Regs.

The Court notes that section 6402(a) allows respondent to credit a taxpayer's overpayment against that taxpayer's outstanding liabilities from prior years. See also sec. 301.6402-3(a)(5), (6), Proced. & Admin. Regs. The Commissioner's crediting of a refund for one year against tax liability of another year does not prevent the Commissioner from later determining a deficiency for the year from which the refund arose. Savage v. Commissioner, 112 T.C. 46, 48-49 (1999). If the taxpayer then files a timely petition with this Court, we "have jurisdiction to redetermine the correct amount of the deficiency". Sec. 6214(a). If we find "that there is no deficiency and \* \* \* that the taxpayer has made an overpayment of income tax" for the year before us, we "have jurisdiction to

determine the amount of such overpayment” and order that amount “be credited or refunded to the taxpayer.” Sec. 6512(b)(1). Thus, we have jurisdiction to determine whether the income tax liabilities for the years in issue are correct and whether petitioners are entitled to overpayments for any of the years in issue.

Premises considered, it is

ORDERED that petitioner Steven W. Webert’s Motion to Restrain Assessment or Collection or to Order Refund of Amount Collected, filed September 6, 2017, is denied.

**(Signed) Peter J. Panuthos**  
**Special Trial Judge**

Dated: Washington, D.C.  
May 25, 2018