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

UNITED STATES TAX COURT **DRC**
WASHINGTON, DC 20217

SCOTT KIMREY GOLDSMITH, ET AL.,	)
	)
Petitioner(s),	)
	)
v.	) Docket No. 13335-12, 14342-12.
	)
COMMISSIONER OF INTERNAL REVENUE,	)
	)
Respondent	)

ORDER

The Court released the opinion in these cases some time ago and they became bogged down in the computations that sometimes need to be made before we can enter decisions. The parties nevertheless are getting closer, with agreement on many issues and articulation of their disagreements about those that remain. They have submitted an agreed decision in the higher numbered case, which was brought by Mr. Goldsmith's corporation; but disagree about several items in the lower-numbered case, which was brought by Mr. Goldsmith himself. In this order we assume their knowledge of the background of that case and discuss each of the remaining contested items.

NOLs. This problem arises from Mr. Goldsmith's NOL carrybacks for 2001 and 2002. Both sides assumed during the pretrial and trial stages of the litigation that a two-year carryback applied; it was only a computations specialist who realized that a five-year waivable carryback period applied for those tax years. *See* I.R.C. § 172(b)(1)(H), (j) (2002) (repealed 2014). The issue is especially relevant for the proper computation of the deficiency for Mr. Goldsmith's 2000 tax year, the only year before us that wasn't a loss year.[1]

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[1] And carryback NOLs from 2001 and 2002 all the way back to 1996 and 1997 would mean that Mr. Goldsmith overpaid his taxes for those years, but might not be able to claim a refund

Mr. Goldsmith volunteered after the trial that he still had a copy of his 1996 return and was willing to share it with IRS counsel. (The 1997 return was in the record already.) In running the computations, the Commissioner assumed the correctness of this 1996 return. Taking Mr. Goldsmith's 2001 NOL all the way back to 1996 and not just to 1999 meant that his deficiencies for later years should have been larger than they would have been using the current 2-year carryback rule.

Mr. Goldsmith has several objections to the use of the 5-year carryback.

1. He first argues that the Commissioner waived the benefit of this period. Waiver is the "intentional relinquishment or abandonment of a known right," *U.S. v. Olano*, 507 U.S. 725, 733 (1993); *U.S. v. Harrison*, 393 F.3d 805, 806 (8th Cir. 2005). We, however, see no *intentional* relinquishment of anything here -- just mutual ignorance about the proper carryback period for an NOL until the computations specialist was working on the problem. This carryback procedure is simply a matter of law that affects those computations. We agree with the Commissioner that a better analogy would be to a hypothetical IRS lawyer who wrote a taxpayer that the limitation on miscellaneous itemized deductions under I.R.C. § 67 is 1% of adjusted gross income, and not 2% percent. Such a misstatement would not require the IRS to reprogram its computers for the benefit of that taxpayer in doing Rule 155 computations.

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because so much time has passed. (There is a special statute of limitations for NOLs whose carryback creates an overpayment for an earlier year. *See* I.R.C. § 6511(d)(2)(A). Its language is less than straightforward, but its gist is that a taxpayer generally has 3 years from the time that the return for the year of the NOL was due to claim any resulting overpayment. In this case, the year of the NOL was 2001, and 3 years after the due date for that return would be about 2005. But it may well be the case that he never filed any claim for a refund for any overpayment of his 1996 and 1997 taxes even by this extended deadline.

(There is also controversy over whether this subsection carves out an exception to the other deadline for claiming refunds -- section 6511(a)'s rule that a taxpayer can sue for a refund within 2 years of paying a tax or 3 years from the date the return was filed, whichever is later. *See Brashear v. United States*, 138 F. Supp. 2d 786, 790 (N.D. Tex. 2001) (analyzing divergent authorities).)

We don't need to decide these questions but must only figure out the effect of these NOLs on the 2000 tax year deficiency.

We might let a taxpayer off the hook on a settlement based on a mutual mistake of law like this, but we wouldn't let such a mistake effectively amend the Code for a particular case.

2. Mr. Goldsmith next argues that the Commissioner should be estopped from claiming the benefit of the 5-year carryback period. The rules of estoppel, however, generally don't apply to misstatements of law, *see, e.g.*, *Wilkins v. Commissioner*, 120 T.C. 109, 112 (2003), because both parties are charged with knowing what the law is and any misstatement is not sufficiently detrimental or egregious.

3. The carryback period for NOLs *is* waivable. The problem here is that Mr. Goldsmith did not even try to waive the carryback of his 2001 NOL, which would have required that he use the procedure set out in Revenue Procedure 2002-40. Rev. Proc. 2002-40, 2002-1 C.B. 1096, 1098. He does claim to have waived his smaller 1998 NOL carryback, but he never introduced that waiver into evidence during the trial. Rule 155(c) reminds both parties that computations after trial are "not to be regarded as affording an opportunity for retrial or reconsideration."

Bottom line: The parties need to use the legally required 5-year carryback for the NOLs generated in the years at issue here.

Schedule A business deductions. The Commissioner conceded this $3,379 item that Mr. Goldsmith identified, and the Commissioner's computations seem to reflect the concession.

Costs of redeeming the Goldsmiths' home. This $1.125 million item was litigated and decided in the Commissioner's favor. It remains a nondeductible personal expense. *See Goldsmith v. Commissioner*, 113 T.C.M. 1090, 1094 (2017). We won't retry or reconsider this issue. Rule 155(c).

2002 Schedule E adjustments. Mr. Goldsmith contends that the total 2002 adjustments for his S corporation were $164,433 but were computed at only $160,675. We compared the Form 4605-A to line 7(b) of the Form 5278 that the Commissioner attached to his computations, and Mr. Goldsmith is right about this one.

2001 capital gain on sale of coins. Mr. Goldsmith says he should have shown basis in some precious coins he sold for $7000 in 2001. This would have reduced his capital gains for the year. He never raised this issue in his pleadings or at trial, however, and cannot raise it here -- the only mention we can find is in a chart that Mr. Goldsmith prepared of the capital contributions that he made to his corporation. On page 11, the second entry reads "2001 SKG Loan from Sale of Coins." The accompanying footnote implies that Mr. Goldsmith sold his coin collection and lent the proceeds to his corporation when it was short of cash. This cryptic reference is not sufficient to raise the computation of capital gain on that sale as an issue.

Cancellation of debt income from 2000. This $5,597 item was tried, *see Goldsmith*, 113 T.C.M. at 1096. We acknowledge that Mr. Goldsmith has now found additional evidence, but Rule 155 computations are not an opportunity to retry or reconsider an issue like this.

We are getting closer to being able to enter decisions in these cases, but Mr. Goldsmith's success on the Schedule E adjustment does mean the parties have to rerun their computations yet again.

It is therefore

ORDERED that on or before April 5, 2019, the parties submit the computations under Rule 155 or explain their different positions.

(Signed) Mark V. Holmes
Judge

Dated: Washington, D.C.
February 4, 2019