

UNITED STATES TAX COURT

WASHINGTON, DC 20217

MICHELLE D. BROWN,)
)
 Petitioner)
)
 v.)
)
 COMMISSIONER OF INTERNAL REVENUE,)
)
 Respondent)

Docket No. 7540-09.

ORDER

On September 7, 2011, respondent filed a Motion to Dismiss for Lack of Jurisdiction and to Strike as to the Taxable Year 2003 on the grounds that respondent did not determine a deficiency in tax for the 2003 tax year or make a determination for the 2003 tax year that would otherwise confer jurisdiction on the Court. On October 17, 2011, petitioner filed a Response to Motion to Dismiss for Lack of Jurisdiction and to Strike as to the Taxable Year 2003 asking the Court to allow petitioner to change her filing status from married, filing separately to married, filing jointly for tax year 2003.

On January 21, 2009, respondent sent petitioner a notice of deficiency, which, on its face, listed deficiencies in tax for 2000 through 2003. In response to the notice of deficiency petitioner timely filed a petition with the Court on March 26, 2009. On September 12, 2011, petitioner and respondent filed a Stipulation of Settled Issues for tax years 2000, 2001, and 2002, leaving tax year 2003 at issue.

During 2003 petitioner was a resident of Texas, a community property state, and filed her 2003 Federal income tax return as married, filing separately without splitting her tax items with her husband. However, if a husband and wife domiciled in a community property State make separate returns, each spouse for Federal income tax purposes, must report half of the community income, such as wages, and half of the credit allowable for taxes withheld on such income. See sec. 66; secs. 1.31-1(a) and 1.66-1(a), Income Tax Regs.¹ The Internal Revenue Service audited petitioner's 2003 return and adjusted petitioner's tax items accordingly. As a result petitioner did not owe Federal income tax in 2003, but she claimed an excessive withholding credit that created a refund overpayment of \$5,067.

¹ All section references are to the Internal Revenue Code in effect for the tax year at issue, and all Rule references are to the Tax Court Rules of Practice and Procedure, unless otherwise indicated.

SERVED MAR 19 2012

To recover the refund resulting from petitioner's overstated withholding credit respondent included tax year 2003 in petitioner's notice of deficiency and listed \$5,067 as a Federal income tax deficiency for 2003. Respondent now argues that respondent did not make a deficiency determination for 2003 and, therefore, the Court does not have jurisdiction over petitioner's 2003 tax year.

This Court is a court of limited jurisdiction and may exercise jurisdiction only to the extent expressly provided by statute. Sec. 7442; Breman v. Commissioner, 66 T.C. 61, 66 (1976). Section 6213(a) allows the taxpayer to seek judicial review of a proposed deficiency before this Court. Under section 6211(b)(1) a deficiency is determined "without regard to the credit under section 31". Section 31 generally allows the taxpayer to claim a credit for Federal income tax withheld from wages for that taxable year. The amount of an overstated credit may be summarily assessed and is not subject to deficiency procedures. Sec. 6201(a)(3); Bregin v. Commissioner, 74 T.C. 1097, 1104-1105 (1980). Since the withholding credit issue is not a factor in determining a tax deficiency, the Court does not have jurisdiction to consider whether petitioner is entitled to the withholding credit that created an excessive refund in 2003. Cf. Whalen v. Commissioner, T.C. Memo. 2009-37 (when determining an overpayment for a related deficiency proceeding or penalties the Court may consider withholding credits).

Although the Court does not have jurisdiction to address petitioner's 2003 tax year at this time, petitioner has yet to receive an opportunity to dispute the underlying tax liability for that year. In the event of a collection hearing, petitioner may challenge the existence or amount of the underlying tax liability for 2003. See sec. 6330(c)(2)(B); Montgomery v. Commissioner, 122 T.C. 1 (2004).

The Court has considered petitioner's remaining arguments and, to the extent not discussed above, concludes that they are irrelevant, moot, or without merit.

To reflect the foregoing, it is

ORDERED that respondent's Motion to Dismiss for Lack of Jurisdiction and to Strike as to the Taxable Year 2003, filed September 7, 2011, is granted.

**(Signed) Elizabeth Crewson Paris
Judge**

Dated: Washington, D.C.
March 9, 2012