UNITED STATES TAX COURT
WASHINGTON, DC 20217

SCOTT ALLAN WEBBER,	)	
	)	
Petitioner,	)	
	)	**CT**
v.	)	Docket No. 14307-18 L.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

O R D E R

In this collection due process ("CDP") case brought pursuant to I.R.C. section 6330(d)(1), petitioner Scott Allan Webber challenges the Commissioner's attempt to collect income tax for 2013 by levy. Now pending before the Court are the Commissioner's motion for summary judgment (Doc. 17), and Mr. Webber's response (Doc. 24), which contains a motion to dismiss and a motion to remand. The issue before us is whether, for 2013, Mr. Webber is entitled to a credit elect from 2012 that would satisfy his 2013 liability. We will deny the motions.

Background

The following facts are not disputed by Mr. Webber. Unless otherwise noted, exhibits cited in this order are attached to Doc. 18 (the declaration submitted in support of the Commissioner's motion).

Claim of credit elect for 2013

In April 2017 Mr. Webber filed his untimely Federal income tax return for 2013 on Form 1040 (Ex. BB). On line 61 he reported "total tax" of $5,690. However, on line 63 he reported a credit elect--i.e., an "amount [of overpayment] applied from 2012 return"--of $77,782. Consequently, for 2013 Mr. Webber

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reported not a net amount due but rather an overpayment of income tax of $72,092 (which he then requested to be applied to 2014).

Cascade of credit elect claims from 2003

In his response to the Commissioner's motion, Mr. Webber explains how this credit elect from 2012, which he claimed for 2013, was derived:

> [T]he 2012 Return accurately reflects the information provided from Petitioner's 2011 Return, which accurately reflects the information provided from Petitioner's 2010 Return, which accurately reflects the information provided from Petitioner's 2009 Return, which accurately reflects the information provided from Petitioner's 2008 Return, which, accurately reflects the information provided from Petitioner's 2007 Return, which accurately reflects the information provided from Petitioner's 2006 Return, which accurately reflects the information provided from Petitioner's 2005 Return, which is currently under review by the Executive Response Team of the IRS Commissioner and [in conjunction with my 2004 Return) are pending Final Determination following my 2004 and 2005 examinations which resulted in "No Change" [WDE FF-15] and/ or "Fully Allowed" [WDE FF21] decisions all the way up through the Appeals process(es).

That is, Mr. Webber alleges that, starting with 2005, he filed a series of returns that report in each year an overpayment of $77,782 that cascades all the way down to 2013. The record before us is incomplete or unclear; but for purposes of the Commissioner's motion, we assume this to be correct--i.e., that he claimed the cascade of credit elects for this series of years.

In fact, the series of credit elects seems to begin even earlier, with 2003, the transcript for which (Ex. FF at 51) shows that a claimed overpayment of $71,012 for 2003 (on a return filed April 15, 2007) was requested to be applied to 2004. An undated Form 1040 for 2004 (Ex. FF at 47) shows a claim of the credit elect of $71,012 and requests its application to 2005. (See also Ex. FF at 39.)

The return for 2005--the first year in Mr. Webber's reckoning of this series--is a Form 1040X amended return and an attached Form 1040, both dated "08/08/08"; but the Form 1040X claims an overpayment of $21,578 to be applied as a credit elect to 2006 (see Ex. W, p. 1 of 18), while the Form 1040 claims an

overpayment of $73,734 to be applied as a credit elect to 2006 (see Ex. W, p. 8 of 18). The return for 2006 is not in our record, but is described in an IRS letter (Ex. W, p. 13 of 18). The return for 2007 (Ex. X) is a Form 1040X with an attached Form 1040, both dated "4/17/14" and received by the IRS in April 2014, and both claiming $77,782; but Mr. Webber stated (Ex. X at 9 of 10) that there was a "prior 1040X" (possibly Ex. Y, a Form 1040X and Form 1040, both dated 4/15/14) and a "Form 1045". The return for 2008 (Ex. Z) is a Form 1040X and an attached Form 1040, both dated "4/21/14" and received by the IRS in April 2014. The return for 2010 (Ex. V) is apparently an original Form 1040 (not an amended return) filed in 2014. The return for 2012 (Ex. FF-5) is a Form 1040 dated "4-15-16". (See also Ex. FF at 7.) The return for 2013 (Ex. FF at 3) is a Form 1040 dated "4-14-17". As far as we can tell, and except where information is not available ("N/A"), the returns show as follows:

Year	Ex.	From prior year	Other payments	To next year
2003	FF	N/A	N/A	71,012
2004	FF	71,012	0	71,012
2005	W	71,012	4,782	73,734
2006	W	73,734	N/A	N/A
2007	X	77,782	0	77,782
2008	Z	77,782	0	77,782
2009				
2010	V	77,782	0	77,782
2011				
2012	FF	77,782	0	77,782
2013	BB	77,782	0	72,092

None of the post-2005 returns reports any payment of tax other than a credit elect from the prior year.

Information about the returns for 2009 and 2011 seems to be missing altogether from the record before us, and the information for 2006 does not explicitly show a request that the overpayment be applied to 2007. However, Mr. Webber asserts--and the Commissioner does not dispute, so we assume--that each return claimed the credit elect from the asserted overpayment in the prior year and requested its application to the succeeding year.

IRS action

The evidence before us is unclear as to whether the IRS allowed the overpayment underlying the credit elects.

An IRS letter of September 15, 2008 (Ex. W, p. 13 of 18), addressing the year 2006, adjusted a claimed credit elect of $73,734 to zero, explaining that "In processing your return for [2006], we made the following corrections: * * * We could not fin[d] the amount of $73,734 from the prior year. We adjusted the amounts to reflect the correct amount"--i.e., an overpayment not of $77,782 but of $4,048.00.

A later "Letter 3401" from IRS examination personnel dated May 26, 2010 (Ex. FF at 15), stated that, for 2004, "I'm proposing no change to your tax return. * * * [M]y findings are subject to the Area Director's approval. We will send you a final letter when we finish processing your file." As to 2005, the same personnel sent on the same date a "Letter 569" (Ex. FF at 17) that proposed "Full disallowance" of Mr. Webber's "claim" (of an overpayment) for 2005.

However, a subsequent letter of January 9, 2012 (Ex. FF at 21), from IRS Appeals addressing the periods "12/2004" and "12/2005" stated:

> Our office has completed its review of your claim for abatement and/or refund of taxes we have charged you. Based on the information submitted, I am pleased to tell you we are allowing the full amount of your claim. After your claim is processed, we will send you a notice explaining any changes we made to your tax account.

Neither party has presented any evidence that the IRS ever effectuated this determination and processed an overpayment (by refund or credit).

The Commissioner presented a document (Ex. Q) entitled "ATAO Notes", evidently generated within the Office of Appeals, which bears an entry entitled "2017-10-04 NARRATIVE" that states as follows:

> 1040X for 2005 referred to Statute to clear, did IMFOLB to recall mod from the retention register. Both the ASED and RSED are expired. The return contains a credit decrease, a statute issue. Examination previously reviewed and disallowed tp claim; tp

> provided copy ltr 569 dated 05/26/2010 with "Full Disallowance" checked. formal disallow entered w "290 06112012 . 00 20122205 28254-544-98182-2" 2 year period to appeal that disallowance expired on 06/11/2014. Sending no consider letter, copy to ATAO.
> * * *

The entry then seems to quote a letter that may have been sent to Mr. Webber:

> We are unable to consider your claim, which was reviewed by our Examination area and disallowed. You provided a copy of their initial disallowance notice in May of 2010 and provided with a period of time for reply. The date the disallowance was recorded on your file was June 11, 2012. The 2 year period to appeal this disallowance expired on June 11, 2014 and cannot be extended.]23Note that our records do not reflect the $71,012.00 payment or credit elect shown on your Form 1040X Lines 12B and 12C, or any refundable tax payments received in the last 2 years. Because the law allows us a limited period of time in which to assess taxes and reduce credits, and that period expired on Apr. 15, 2011, we will not decrease your Additional Child Tax Credit as amended.

That is, these notes seem to presume the issuance of a disallowance on June 11, 2012, but no copy of that document appears in our record.

Unfiled returns

Mr. Webber has evidently not filed returns for 2014, 2015, 2016, or 2017.

Attempted collection for 2013

Mr. Webber's 2013 return had been due in April 2014; and when the IRS received the return in April 2017, the IRS did not allow the credit elect but assessed the tax liability he had reported (i.e., $5,690) plus an addition to tax for late filing, an addition to tax for late payment, and interest. To collect that liability, the IRS issued to Mr. Webber a Notice of Intent to Levy. He submitted a request for a CDP hearing, and the Commissioner does not dispute the timeliness of that request. (See Docs. 8, 9.)

CDP hearing

At the CDP hearing Mr. Webber did not dispute the 2013 tax liability he had reported, and he proposed no collection alternative, such as an installment agreement or offer-in-compromise. (To be entitled to such an alternative, he would have had to submit his unfiled returns for 2014-2017, but he did not do so.) Rather, the only issue he raised was his claimed entitlement to the credit elect from 2012 that would have more than satisfied the 2013 liability. During the CDP hearing--

> The SO listened to your recap of issues you had going back to the year 1989 and forward. She advised you she did see previous Appeals however there was no change to the account. The SO explained to you the letters you received stating no change meant no change to the account on our system not the information you placed on your tax return. The SO listened to your concerns however most were based on tax years not part of the Appeal. The SO explained she inquired on what year credit elect first became available to research your account and insure there wasn't a payment or credit not applied to your account. You discussed how you received refunds and how overpayments were misapplied to state tax debts. The SO advised you she had no authority over the older years and how those overpayments were applied. You advised the SO you were working with the Taxpayer Advocate and they were unable to assist you with this ongoing issue of the credit elect not showing on your account. * * * You insisted you had documentation from the IRS showing the credit elect and did not understand why the SO could not see it. * * *
>
> You sent a copy of the Letter 3401 for the tax year 2004 proposing no change as indicated on the Form 4549. You also faxed a copy of the 2005 claim disallowance letter. Next was a letter allowing your claim in full for 2004 and 2005 with a notice to be issued explaining any changes. You state you did not get any further notice. This is an issue you would need resolve outside of Appeals. * * *
>
> On 05/25/2018 the manager reviewed the documents you submitted and agreed the credit elect is not available in the 2012 to be applied to 2013. In review of your account, the refunds issued could be part of the credit elect you are stating should be available. It was

> recommended you work with the IRS Collection office since you were not compliant in filing your returns. [Doc. 18, Ex. A.]

Appeals issued a notice of determination sustaining the proposed levy. (Doc. 18, Ex. A.) Mr. Webber filed his petition in the Tax Court seeking review of Appeals' determination.

The Commissioner's motion

The Commissioner filed his motion for summary judgment, arguing (Doc. 17 at 5-7) that at the time of the CDP hearing there was no "available credit" (in the language of Frieje v. Commissioner, 125 T.C. 14, 26 (2005), explicated in Hershal Weber v. Commissioner, 138 T.C. 348, 361-372 (2012)) because the IRS had disallowed the overpayment on which the credit elect was based.

Discussion

I. Summary judgment standard

Where the pertinent facts are not in dispute, a party may move for summary judgment to expedite the litigation and avoid an unnecessary trial. Fla. Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). Summary judgment may be granted where there is no genuine dispute as to any material fact and a decision may be rendered as a matter of law. Rule 121(a) and (b); see Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994); Zaentz v. Commissioner, 90 T.C. 753, 754 (1988). As we explain below, there is a dispute about certain material facts in this case.

II. General CDP procedures

A. Right to a CDP hearing

If a taxpayer fails to pay any Federal income tax liability after demand, section 6331(a) authorizes the IRS to collect the tax by levy on the taxpayer's property. However, the IRS must first issue a final notice of intent to levy, and notify the taxpayer of the right to an administrative hearing before IRS Appeals. Secs. 6320(a), 6330(a) and (b)(1). After receiving such a notice, the taxpayer may request an administrative hearing before IRS Appeals. Sec. 6330(a)(3)(B), (b)(1).

B. Collection issues at the CDP hearing

At the CDP hearing, IRS Appeals must make a determination whether the proposed collection action may proceed. In so doing, Appeals is required to: verify that the requirements of any applicable law and administrative procedure have been met by IRS personnel, see sec. 6330(c)(3)(A); consider any collection alternatives proposed by the taxpayer, see sec. 6330(c)(3)(B) (citing sec. 6330(c)(2)); and consider "whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary", see sec. 6330(c)(3)(C).

Mr. Webber did not raise any of these issues in his petition or in his response to the Commissioner's motion for summary judgment.

C. Liability challenges in the CDP hearing

A liability challenge may sometimes be raised in an agency-level CDP hearing (and in the subsequent Tax Court suit). Section 6330(c)(2)(B) provides:

> The person may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.

Mr. Webber presents the issue he raises--the availability of the credit elect--as being, under Landry v. Commissioner, 116 T.C. 60, 62 (2001), a challenge to the existence of an underlying liability.

D. Tax Court review

When IRS Appeals issues its determination, the taxpayer may "petition the Tax Court for review of such determination", pursuant to section 6330(d)(1), as Mr. Webber has done. For collection issues, we review the determination for abuse of discretion. Goza v. Commissioner, 114 T.C. 176, 181-182 (2000). That is, we decide whether the determination was arbitrary, capricious, or without sound basis in fact or law. See Murphy v. Commissioner, 125 T.C. 301, 320 (2005), aff'd, 469 F.3d 27 (1st Cir. 2006); Sego v. Commissioner, 114 T.C. at 610; Goza v. Commissioner, 114 T.C. at 181-182. Where the validity of the underlying liability is properly at issue, we review that determination de novo. Sego v. Commissioner,

114 T.C. 604, 610 (2000). The Commissioner does not dispute Mr. Webber's contention that we review the credit elect issue de novo.

III. Mr. Weber's other issues

Before we address the principal issue, we will address two additional contentions that Mr. Webber advances.

First, Mr. Webber contends that no valid CDP hearing was conducted. He therefore asks us to "dismiss for lack of jurisdiction", but what he really asks is that "[t]his matter should be remanded back to IRS Appeals for appropriate action in accordance with the applicable law." Even where Appeals erred or abused its discretion in conducting the hearing, we have jurisdiction to review its action, and dismissal for lack of jurisdiction would be unwarranted. In this instance, remand may or may not be appropriate (depending on whether the Commissioner can later show that the credit elect issue was sufficiently ventilated in the CDP hearing), so we will not remand at this time.

Second, Mr. Webber contends that the 2013 income tax at issue was not "the result of a self-assessment based on tax shown on petitioner's return", as the Commissioner alleges. However, what Mr. Webber means is that his return did not show a net liability, since in addition to reporting a tax liability he reported a credit elect that more than satisfied that liability. But section 6201(a)(1) (entitled "Taxes shown on return") authorizes the Commissioner to assess "all taxes determined by the taxpayer * * * as to which returns * * * are made under this title". Mr. Webber did make a return for 2013 on Form 1040, and on line 61 he did report "total tax" of $5,690. The Commissioner was therefore authorized to assess that tax, and he did so.

IV. The status of Mr. Webber's credit elect

A. Credit elect in the CDP context

The Commissioner correctly summarizes the law concerning our ability to address credits in the CDP context:

> 23. The Tax Court can have jurisdiction to determine the proper application of overpayments or credits where the initial availability of the overpayment or credit has been determined or is not in dispute. Freije v. Commissioner, 125 T.C. 14, 27 (2005).

24. However, the Court does not have jurisdiction in a CDP case to determine a taxpayer's entitlement to a refund on the merits for a non-CDP year. Murphy v. Commissioner, T.C. Memo. 2019-72 (concluding that the Court lacks jurisdiction to decide a disputed refund claim for a year not before it); Weber v. Commissioner, 138 T.C. 348 (2012) (declining to consider taxpayer's claim to credit for non-CDP section 6672 liability); Precision Prosthetic v. Commissioner, T.C. Memo. 2013-110.

25. "A credit must actually exist in order to constitute an 'available credit.' A mere claim for a credit 'is not an 'available credit,' and such a claim 'need not be resolved before the IRS can proceed with collection of the liability at issue.'" Murphy v. Commissioner, T.C. Memo. 2019-72 p.10 (citing Weber v. Commissioner at p. 372; Del-Co W. v. Commissioner, T.C. Memo. 2015-142).

We therefore will not adjudicate in this case Mr. Webber's entitlement to the overpayment underlying the credit elect in 2013.

B. Whether the credit elect was allowed.

However, we do have the responsibility to determine whether, as a matter of fact, the IRS did allow the overpayment but failed to credit it. The Commissioner contends that the IRS did not allow the credit, but we hold that there is a genuine dispute of material fact on that point--arising chiefly from the fact that, as we noted above, the Office of Appeals itself stated in 2012 (Ex. FF at 21):

[W]e are allowing the full amount of your claim [for 2004 and 2005].

Mr. Webber pressed this fact during his CDP hearing, and we do not understand the Appeals Officer's response, which featured the puzzling assertion that "[t]his is an issue you would need [to] resolve outside of Appeals." (Ex. A.) It was Appeals that had made the determination of "allowing the full amount of your claim". It is unclear why Appeals was not a sensible forum for inquiring about the crediting of that overpayment.

C. Possible reasons for disallowance

The Appeals Officer stops short, in the notice of determination and in her remarks during the CDP hearing, of explaining or even directly asserting a disallowance of the overpayment; but she seems to allude to several possible reasons that the credit elect could have been disallowed, so we examine those to see whether they indicate at least implicitly a disallowance.

1. Statute of limitations

An October 2017 note (perhaps quoting a letter) states: "The date the disallowance [for 2005] was recorded on your file was June 11, 2012. The 2 year period to appeal this disallowance expired on June 11, 2014 and cannot be extended." This statement apparently refers to the two-year statute of limitations period of section 6532(a)(1), which requires that a refund suit be filed no later than "2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of disallowance". The mere "record[ing]" of a disallowance "on your file" does not trigger the statute of limitations, nor does a letter sent other than by certified or registered mail. We do not assume that the Appeals Officer lapsed into an error on this point.

2. Non-determination years

Mr. Weber's CDP hearing concerned collection of his 2013 liability, whereas the overpayment underlying his claimed credit elect allegedly arose in (and cascaded from) 2005. Appeals' notice of determination states that Mr. Webber's "concerns * * * were based on tax years not part of the Appeal". Strictly speaking, that is true; but to say that facts from other years would necessarily be out of bounds in a CDP case would be error. As we stated in Freije v. Commissioner, 125 T.C. 14, 27 (2005), "our jurisdiction under section 6330(d)(1)(A) encompasses consideration of facts and issues in nondetermination years where the facts and issues are relevant in evaluating a claim that an unpaid tax has been paid." We assume that the Appeals Officer understood this fact.

3. Refunds

The record includes reference to Mr. Webber having supposedly "received refunds". See also Ex. S at 2 ("TP did get refunds in the earlier years"). Of course, if a taxpayer has received a refund or credit for an overpayment, then that overpayment would no longer be available for use as a credit elect. However, if

Mr. Webber did receive refunds related to the overpayments at issue here, then that would be evidence that the overpayments had indeed been allowed. As far as we can tell, Appeals made no attempt to identify or quantify refunds or credits (if any) that Mr. Webber received or to determine whether they related in any way to the overpayment underlying the credit elect at issue here.

None of these issues enable us to conclude whether the IRS disallowed the overpayment as to which Appeals had determined, on the contrary, that it was "allowing the full amount". Therefore, for purposes of summary judgment we must conclude, on the current record, that a genuine dispute of fact exists as to whether there was an overpayment available to be credited by way of Mr. Webber's credit elect.

It is therefore

ORDERED that Mr. Webber's two motions contained in his response (Doc. 24) to the Commissioner's motion for summary judgment are both denied--i.e., his motion to dismiss is denied, and his motion to remand is denied without prejudice. It is further

ORDERED that the Commissioner's duplicate filing (Doc. 19) of his motion for summary judgment (Doc. 17) is stricken from the record. It is further

ORDERED that the Commissioner's motion for summary judgment (Doc. 17) is denied for the reasons stated above. It is further

ORDERED that, no later than June 15, 2020, the parties shall file a joint status report (or, if that is not expedient, then separate reports) recommending a schedule for further proceedings in this case.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
May 13, 2020