UNITED STATES TAX COURT
WASHINGTON, DC 20217

GONZALO LUQUE & MARIBEL LUQUE,	)	
	)	
Petitioner(s),	)	
	)	
v.	)	Docket No. 10712-14.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

O R D E R

This case is before us on motions for entry of decision filed by both petitioners and respondent. The case was called at the Court's trial session on December 14, 2015, in San Diego, California. Before trial, respondent conceded the only adjustment made in the notice of deficiency he issued to petitioners concerning their 2011 taxable year. The parties agree that there is no deficiency in income tax due from petitioners for that year. Petitioners, however, move for entry of a decision that they have made an overpayment of income tax of $4,223 for the year. Petitioners' alleged overpayment is the difference between the tax liability shown on their Federal income tax return for 2011 and the amount withheld in respect of that liability. Respondent apparently agrees that petitioners' 2011 return correctly stated their tax liability for that year, and he does not dispute the amounts shown on the return as withholdings. Instead, respondent alleges that he credited the $4,223 overpayment shown on petitioners' 2011 return against assessed tax liability of petitioners for 2009 and that the credit reduces petitioners' 2011 overpayment to zero. Petitioners claim that respondent has failed to demonstrate that the credit of the refund shown on their 2011 return against 2009 liability actually occurred.

When a taxpayer files a return for a taxable year that shows payments of tax in excess of tax liability, instead of refunding the indicated overpayment to the taxpayer, the Commissioner may instead credit the amount of the overpayment

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against the taxpayer's tax liability for other taxable years. Sec. 6402(a).[1] 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 that amount "be credited or refunded to the taxpayer." Sec. 6512(b)(1). In determining the existence and amount of any overpayment, we must take into account the extent to which the Commissioner previously credited any overpayment shown on the taxpayer's return for the year before us against the taxpayer's tax liability for another year. See Belloff v. Commissioner, 996 F.2d 607, 612-613 (2d Cir. 1993), aff'g T.C. Memo. 1991-350.

Although, in exercising our jurisdiction under section 6512(b) for a taxable year before us, we must take into account any prior credits allowed by the Commissioner under section 6402(a) from that year to another year, our jurisdiction does not extend to weighing the merits of the assessed liability against which the credit was applied. As the Court of Appeals for the Second Circuit wrote in Belloff: "A valid IRS assessment will ordinarily provide a proper basis for the application of an overpayment in satisfaction of the assessment, so the Tax Court will not be obliged to weigh or determine the merits of the asserted liability underlying that assessment". Id. at 612. Congress later codified the Second Circuit's decision in Belloff by adding section 6512(b)(4) to the Code, which provides: "The Tax Court shall have no jurisdiction under this subsection to restrain or review any credit or reduction made by the Secretary under section 6402." As we explained in Winn-Dixie Stores, Inc. v. Commissioner, 110 T.C. 291, 294 (1998): "Section 6512(b)(4) restricts our jurisdiction in two situations. First, we may not restrain or prevent respondent from reducing a refund by way of credit or reduction pursuant to section 6402. Second, we may not review the validity or merits of any reduction of a refund under section 6402 after such reduction has been made by respondent." But while we may not "review the validity or merits" of a credit in the sense of evaluating the position underlying the assessment against which the credit was made, the exercise of our jurisdiction

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[1]Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for 2011.

under section 6512(b) still requires that we verify that the credit was in fact made against an assessed liability.

Petitioners argue that any application of the refund shown on their 2011 return against tax liability for 2009 was not authorized by section 6402(a) and that, consequently, our ability to review that allowance is not limited by section 6512(b)(4). Section 6402(a) allows for the granting of a credit for "the amount of * * * [an] overpayment" and, petitioners argue, an "overpayment" for a year cannot exist until a final determination of the taxpayer's liability for that year is made. We disagree with the premise of petitioners' argument. Section 6402(a) applies to the crediting of refunds shown on a return even before any final determination of the taxpayer's tax liability for the year covered by the return. In Savage v. Commissioner, 112 T.C. at 48-49, for example, we concluded that, after relying on section 6402(a) to apply a taxpayer's overpayment for one year against the taxpayer's liability for another year, "the Commissioner is not precluded from subsequently determining a deficiency for the taxable year in respect of which the overpayment was originally claimed and allowed." See also sec. 301.6402-3(a)(5) and (6), Proced. & Admin. Regs. (allowing a refund shown on a return to be credited under section 6402 against any outstanding tax liability of the taxpayer). Obviously, if the Commissioner can still determine a deficiency for the taxable year that generated the credit, the overpayment initially credited under section 6402(a) cannot be based on a final determination of the taxpayer's tax liability for that year. Therefore, we accept that section 6512(b)(4) limits our ability to review respondent's crediting of the refund shown on petitioners' 2011 return against any liabilities assessed for 2009. But we do not read section 6512(b)(4) to prevent us from verifying, in the exercise of our jurisdiction under section 6512(b)(1), that the credit respondent professes to have made actually occurred. To the extent that petitioners are asking us to go further and evaluate the liability against which respondent claims to have applied their 2011 refund, we decline to do so. Petitioners' 2009 taxable year is not before us, and section 6512(b)(4) prevents us from considering their liability for that year. To the extent that petitioners are arguing that respondent's crediting of their 2011 refund against an assessed liability for 2009, even if made, does not reduce their overpayment for 2011, we reject that argument as unsupported by the law. See, e.g., Belloff v. Commissioner, 996 F.2d at 612-613.

Petitioners do, however, raise valid questions about respondent's substantiation of the credit in issue. Those questions deserve answers. Respondent claims that, under his section 6402(a) authority, he credited the refund petitioners reported on their 2011 return as an offset against a liability they owed for 2009. In

support of that claim, respondent submitted transcripts of petitioners' accounts for 2009 and 2011. The 2011 transcript shows an overpayment credit transfer of $4,223 on April 15, 2012. Respondent also alleges, however, that "[p]etitioners filed their 2011 tax return late, and respondent processed the return on May 21, 2012." Petitioners fairly ask how respondent could have credited the refund shown on their 2011 return to their 2009 account before processing that return. In fact, because petitioners' 2011 return was not due until April 17, 2012 (April 15th having fallen on a Sunday and April 16th having been a holiday in the District of Columbia), if they filed their return late, as respondent alleges, the transcript he submitted shows the crediting of the reported refund as having occurred even before petitioners filed their return.

Although the question of whether the refund reported on petitioners' 2011 return was credited to their 2009 account is more important than precisely when that credit was allowed, the ambiguity in the dates on the transcripts respondent submitted calls into question the transcripts' reliability as evidence that the credit was, in fact, made. Because of the questions raised by the transcripts respondent submitted, we do not view them as adequate, of themselves, to substantiate respondent's claim that he applied the refund shown on petitioners' 2011 return against liability assessed for 2009. We therefore order respondent to submit a sur-reply to petitioners' response to respondent's motion for entry of decision and a response to petitioners' motion for entry of decision that address the ambiguity regarding the timing of the alleged credit in relation to the filing of petitioners' 2011 return.

It is, therefore

ORDERED that respondent shall on or before April 29, 2016, file a response to petitioners' motion for entry of decision and a sur-reply to petitioners' response to respondent's motion for entry of decision. At his option, respondent may combine the two documents into one document.

(Signed) James S. Halpern
Judge

Dated: Washington, D.C.
March 29, 2016