

ID: CCA_2010060211551947

Number: **201040005**

Release Date: 10/8/2010

Office:

UILC: 6330.00-00

From:

Sent: Wednesday, June 02, 2010 11:55:21 AM

To:

Cc:

Subject: CDP Issue -

Hi

This email responds to your request for assistance dated April 7, 2010. You asked for advice regarding whether the taxpayers in this case are precluded from challenging their underlying liability in a collection due process (CDP) hearing. For the reasons discussed below, we believe that the taxpayers are entitled to dispute their underlying liability for tax years through .

The following are the facts as we understand them according to our email and telephone conversations with you and the Settlement Officer:

On November 8, 2006, the taxpayers filed a Form 1045, Application for Tentative Refund, seeking to carry back a casualty loss, incurred in , to tax years through . Subsequently, the Service sought to disallow the casualty loss. While Appeals was considering the taxpayers' case, the taxpayers signed a Form 4549, Income Tax Examination Changes, disallowing the casualty loss for . Although the disallowance completely eliminated any loss carryback to the three prior years, the Form 4549 did not address the carryback years.

Based on the Form 4549, the Service disallowed the loss carrybacks for tax years through and summarily assessed those amounts pursuant to I.R.C. § 6213(b)(3). On March 5 and 6, 2009, the Service mailed the taxpayers notices of adjustments made to their tax returns for through and enclosed unsigned Forms 4549, which indicated that the reason for the change was the disallowance of the carryback losses.

The Service initiated collection action against the taxpayers to collect the unpaid tax liability for tax years through . The taxpayers requested a CDP hearing and are now attempting to challenge their underlying tax liability for tax years through . Their position is that they did not realize that signing the Form 4549, disallowing the loss for , would ultimately disallow their losses claimed in the carryback years.

A taxpayer is precluded from challenging the existence or amount of the underlying tax liability during a CDP hearing if the taxpayer received a statutory notice of deficiency for the tax liability or otherwise had an opportunity to dispute the liability. I.R.C. §

6330(c)(2)(B). Other than receipt of a notice of deficiency, neither the statute nor its legislative history defines what constitutes an “opportunity to dispute” the underlying tax liability. Generally, we interpret this to mean an opportunity to dispute the liability in an administrative hearing before Appeals or in a judicial proceeding. See Treas. Reg. § 301.6330-1(e)(3) Q&A-E2. See, e.g., Kendrick v. Commissioner, 124 T.C. 69, 77 (2005).

Pursuant to section 6213(b)(1), if the Service notifies a taxpayer that due to a mathematical or clerical error an assessment of tax has been or will be made, such notice is not considered a notice of deficiency for purposes of section 6213(a). The Service is permitted to summarily assess amounts arising out of excessive tentative carryback adjustments, as if those amounts were mathematical or clerical errors. I.R.C. § 6213(b)(3); see also Midland Mortgage Co. v. Commissioner, 73 T.C. 902 (1980).

Where the Service summarily assesses due to a mathematical error, the taxpayer may raise, and Appeals must consider, any liability that arose as a result of a mathematical error adjustment. See Thomas v. Commissioner, T.C. Memo 2007-269; see also I.R.M. 8.22.2.2.11.1. Because liability arising from excessive tentative carryback adjustments is assessed in the same manner as liability arising from mathematical error adjustments, we see no reason why taxpayers should not similarly be afforded the opportunity to dispute their underlying liability in a CDP hearing.

In this case, the Service summarily assessed the taxpayers’ liability arising from excessive tentative carryback adjustments for tax years through pursuant to section 6213(b)(3). Thus, the Service was not required to issue a notice of deficiency offering the taxpayers an opportunity to dispute their liability before the Tax Court. The taxpayers are permitted, however, to challenge their underlying liability for tax years through in their CDP hearing. The taxpayers otherwise would not be given an opportunity to dispute the liability before the Tax Court or with Appeals.

Ordinarily, a signed Form 4549 waives taxpayers’ right to contest their underlying liability. See Aguirre v. Commissioner, 117 T.C. 324 (2001). Here, the Form 4549 signed by the taxpayers does not preclude the taxpayers from challenging their liability for tax years through with Appeals because the Form 4549 relates only to the loss year, , and does not mention the carryback years, through .

Please let me know if you have any questions.

Thank you.