

**In the United States Court of Federal Claims**

No. 10-381T

(Filed June 6, 2012)

NOT FOR PUBLICATION

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**LUCY HAMRICK POWELL and  
JAMES CLEMENT POWELL,**

Plaintiffs,

v.

**THE UNITED STATES,**

Defendant.

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**ORDER**

Pending before the Court is defendant’s motion to dismiss the complaint in part. The government contends that only a portion of the plaintiffs’ claim for an income tax refund for 2004 is within our jurisdiction, based on the “look-back” period of 26 U.S.C. § 6511(b)(2)(B) and the Internal Revenue Service’s Certificate of Assessments, Payments and Other Specified Matters (Form 4340) for that tax year. *See* Mot. to Dismiss at 2-3, 5-7 & Ex. 2. The government argues that the Form 4340 shows that only \$356.28 was credited toward the satisfaction of the plaintiffs’ 2004 taxes within two years of the filing of their refund claim. *Id.* at 7 & Ex. 2 at 3.

The plaintiffs, Lucy H. and James C. Powell, appearing *pro se*, have submitted a document from the Internal Revenue Service (“IRS”) dated July 5, 2006 --- less than two years and two months prior to the filing of their refund --- which indicated that they owed \$22,223.71 in taxes, penalty and interest for tax year 2004 as of that date (including \$17,303.47 in taxes). *See* Sched. 8 to Pls.’ Opp’n. The Powells have also submitted a copy of a letter they sent to the IRS, dated September 17, 2006 --- less than two years prior to the filing of the 2004 refund claim --- in which they requested that \$10,071.68 in overpayments for tax year 2003 be applied to their 2004 taxes, Sched. 9 to *id.*; and they rely on a copy of their cancelled check for \$12,567.00, dated October 28, 2006, sent to the IRS purportedly to pay the balance of their 2004 taxes. *See* Attach. 3 to Compl.; Sched. 10 to Pls.’ Opp’n.

According to the Form 4340, other than the two items totaling \$356.28, there was only one payment or credit toward the Powells’ 2004 taxes entered after the July 5, 2006 date of the notice from the IRS (which indicated a balance of \$22,223.71, *see* Sched. 8 to Pls.’ Opp’n); this

was a \$10,000 entry for an “overpaid credit applied” on July 6, 2006, and attributable to the 2003 tax year. Def.’s Mot., Ex. 2 at 3. If, as the government argues, only \$356.28 of the check for \$12,567 was needed to pay off the balance of 2004 taxes, penalties, and interest, then nearly \$12,000 of the balance disappeared between July 5 and November 6, 2006. According to defendant, this is the result of overpayment credits for the 2003 tax year, “significantly greater than \$10,071,” Def.’s Reply at 8 n.4, that were used to satisfy the 2004 taxes and were essentially backdated in the 2004 Form 4340 to the dates the payments were originally made. *See* Tr. (Mar. 24, 2011) at 42-46.

Although there are precedents from our court treating the section 6511(b)(2) “look-back” periods as jurisdictional, *see Musangayi v. United States*, 86 Fed. Cl. 121, 124-25 (2009); *Thomas v. United States*, 56 Fed. Cl. 112, 118-19 (2003), those cases, like this one, were litigated *pro se* and the jurisdictional nature of the provision may not have been questioned.<sup>1</sup> Since the provision of the tax code which makes section 6511 relevant to our court’s jurisdiction requires only “a claim for refund or credit [that] has been duly filed with the Secretary,” 26 U.S.C. § 7422(a), this seems to implicate only the limitation periods for filing a claim, and not the “look-back” periods. *See* 26 U.S.C. §§ 6511(a), (b)(1).<sup>2</sup> But in any event, in consulting section 7422 the Court’s attention was drawn to a provision which was not mentioned by the government, but which, on its face, appears to bear on the question at hand. Section 7422(d) reads:

**Credit treated as payment.** —The credit of an overpayment of any tax in satisfaction of any tax liability shall, for purpose of any suit for refund of such tax liability so satisfied, be deemed to be a payment in respect of such tax liability *at the time such credit is allowed*.

26 U.S.C. § 7422(d) (emphasis added).

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<sup>1</sup> The tax code provision which limits refunds determined by the United States Tax Court to those that would be allowable under the section 6511 “look-back” periods has, however, been found to be jurisdictional by the Supreme Court. *See Comm’r of Internal Revenue v. Lundy*, 516 U.S. 235, 237 (1996) (concerning 26 U.S.C. § 6512(b)(3)(B)).

<sup>2</sup> The “look-back” periods are not limitations concerning the *filing* of refund claims, but rather limit the amount of allowed refunds. *See* 26 U.S.C. § 6511(b)(2). Thus, the Supreme Court has characterized them as “impos[ing] a ceiling on the amount of credit or refund to which a taxpayer is entitled as compensation for an overpayment of tax,” *Baral v. United States*, 528 U.S. 431, 432 (2000), and called them “substantive limitations” as opposed to “procedural” ones. *United States v. Brockamp*, 519 U.S. 347, 351-52 (1997). A failure to conform a claim to these limitations would seem to more naturally be considered a failure to state a claim upon which relief can be granted rather than a want of jurisdiction. *See Fisher v. United States*, 402 F.3d 1167, 1175-76 (Fed. Cir. 2005).

This provision seems to indicate that the important dates, for purposes of applying the section 6511(b)(2)(B) “look-back” period, are not when the 2003 tax payments were received, but rather when the overpayment credits were transferred to cover 2004 taxes. These dates are not indicated on the Form 4340. *See* Def.’s Mot., Ex. 2. Thus, the document relied upon by the government does not seem to support a challenge to the jurisdictional facts (if, indeed, they are of that nature) regarding plaintiffs’ payment of 2004 taxes. But since section 7422(d) was not addressed by the parties, the Court will allow defendant the opportunity to address its applicability. Defendant may file a supplemental brief addressing the relevance of 26 U.S.C. § 7422(d) to its pending motion, on or by **June 20, 2012**. Plaintiffs may file a supplemental brief responding to the government’s paper, on or by **July 3, 2012**.

**IT IS SO ORDERED.**

s/ Victor J. Wolski

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**VICTOR J. WOLSKI**

Judge