

TAX UPDATE

Ed Zollars, CPA

The Mailbox Rule Comes Up Once Again April 21, 2008



Feed address for Podcast subscription: <http://feeds.feedburner.com/EdZollarsTaxUpdate>

Home page for Podcast: <http://ezollars.libsyn.com>

©2008 Edward K. Zollars, CPA

The TaxUpdate podcast is intended for tax professionals and is not designed for those not skilled in independent tax research. All readers and listeners are expected to do their own research to confirm items raised in this presentation before relying upon the positions presented.

The Podcast and this document may be reproduced freely so long as no fee is charged for the use of this document. Such prohibited use would include using this podcast or document as part of a CPE presentation for which a fee is charged.

This podcast is sponsored by Leimberg Information Services, located on the web at <http://www.leimbergservices.com>. Leimberg Information Services offers email newsletters on tax related matters, as well as access to a library of useful information to tax practitioners that subscribe to their services.

Timely Mailing Rules Again

A topic we've covered more than once appeared again in a Court of Appeals decision, this time with the Third Circuit Court of Appeals weighed in—and not in a way the IRS was happy with. This time the case in question is that of *Philadelphia Marine Trade Ass'n.-Int'l Longshoremen's Association Pension Fund et al. v. Commissioner*, 2008 TNT 74-16.

In this particular case, the fact that the taxpayer established evidence of mailing well prior to the due date for filing the claim for refund caused the Third Circuit to apply the common law mailbox rule as prima facie proof of timely delivery of the document. This case is somewhat unique, as in other cases (including our recent discussion of the result in *Gibson v. Commissioner* from the 10th Circuit) the matter was a mailing on the final date for filing the return—and the result in this case would likely had been different had the taxpayer waited until that date to mail the documents in question.

The Saga of Section 7502

There's little question that §7502 provides a means to prove filing before the IRS, including filing via method that assures the IRS will receive the document after the last for filing. The provision provides

Sec. 7502 Timely mailing treated as timely filing and paying

(a) General rule

(1) Date of delivery

If any return, claim, statement, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue laws is, after such period or such date, delivered by United States mail to the agency, officer, or office with which such return, claim, statement, or other document is required to be filed, or to which such payment is required to be made, the date of the United States postmark stamped on the cover in which such return, claim, statement, or other document, or payment, is mailed shall be deemed to be the date of delivery or the date of payment, as the case may be.

(2) Mailing requirements

This subsection shall apply only if--

(A) the postmark date falls within the prescribed period or on or before the prescribed date--

(i) for the filing (including any extension granted for such filing) of the return, claim, statement, or other document, or

(ii) for making the payment (including any extension granted for making such payment), and

(B) the return, claim, statement, or other document, or payment was, within the time prescribed in subparagraph (A), deposited in the mail in the United States in an envelope or other appropriate wrapper, postage prepaid, properly addressed to the agency, officer, or office with which the return, claim,

statement, or other document is required to be filed, or to which such payment is required to be made.

This provision essentially “excuses” late delivery of the return or payment to the IRS itself by providing that so long as the document is postmarked by the United States Postal service on or before the due date, it will be deemed delivered to the IRS on that date.

If our somewhat eccentric taxpayer decides to deliver the document to the IRS by carrier pigeon, for instance, then the pigeon has to actually deliver the document to the IRS employee before midnight on the last day for filing—or, since the IRS office likely won’t be open at midnight, before the time at which the office closes for that day. That is, Section 7502 only provides protection for late delivery for the limited subset of delivery methods provided.

As well, it’s important to note that to make use of this protection, we must show the date of the postmark applied to the document. Since that document is heading to the IRS, that creates a problem for the taxpayer since they cannot retain the direct evidence (the postmarked envelope). IRC §7502(c)(1) provides a solution to this problem—the use of registered mail:

(c) Registered and certain mailing; electronic filing

(1) Registered mail

For purposes of this section, if any return, claim, statement, or other document, or payment, is sent by United States registered mail--

(A) such registration shall be prima facie evidence that the return, claim, statement, or other document was delivered to the agency, officer, or office to which addressed; and

(B) the date of registration shall be deemed the postmark date.

Note that the registered mail exception is statutory—that is, the IRS was not required to write regulations to enable this option, but rather Congress did so. However, Congress added other options that are enabled, but only as the IRS decided to implement them via regulations. Most notable of these are certified mail and electronic filing, found at §7502(c)(2)

(2) Certified mail; electronic filing

The Secretary is authorized to provide by regulations the extent to which the provisions of paragraph (1) with respect to prima facie

evidence of delivery and the postmark date shall apply to certified mail and electronic filing.

The fact that these provisions are only effective as implemented in regulations was made painfully clear to the taxpayer in the 1960 case of *Boccutto v. Commissioner of Internal Revenue* 277 F.2d 549, 553. In that case the taxpayers had a certified mailing receipt in hand—but their receipt was issued on February 11, 1959. That was after the Congress had added the provision related to certified mail noted above (which came in the *Technical Amendments Act of 1958*) but before the IRS issued regulations implementing the provision in January of 1960. Thus, even though they had a certified mail receipt issued on the due date for filing of their petition with the Tax Court, the actual postmark on the envelope (which was dated the next day) was held to be controlling and their petition was not deemed to be timely filed—though it would have been had the same situation taken place today. Thus, unlike horsehoes, here close does not count.

As well, provisions were added to allow the IRS to expand the list to include certain private delivery services in §7502(f):

(f) Treatment of private delivery services

(1) In general

Any reference in this section to the United States mail shall be treated as including a reference to any designated delivery service, and any reference in this section to a postmark by the United States Postal Service shall be treated as including a reference to any date recorded or marked as described in paragraph (2)(C) by any designated delivery service.

(2) Designated delivery service

For purposes of this subsection, the term "designated delivery service" means any delivery service provided by a trade or business if such service is designated by the Secretary for purposes of this section. The Secretary may designate a delivery service under the preceding sentence only if the Secretary determines that such service—

(A) is available to the general public,

(B) is at least as timely and reliable on a regular basis as the United States mail,

(C) records electronically to its data base, kept in the

regular course of its business, or marks on the cover in which any item referred to in this section is to be delivered, the date on which such item was given to such trade or business for delivery, and

(D) meets such other criteria as the Secretary may prescribe.

(3) Equivalents of registered and certified mail

The Secretary may provide a rule similar to the rule of paragraph (1) with respect to any service provided by a designated delivery service which is substantially equivalent to United States registered or certified mail.

Note that, again, it takes IRS action to enable this section. Remember the case of *Gibson v. Commissioner* we discussed back in February where a taxpayer got a mailing store receipt showing delivery to the store on the last day for filing, but for which the actual transfer to the postal service didn't take place until the next day—the same sort of “horseshoes” problem arose under §7502.

Is §7502(c) the Only Way to Get Prima Facie Proof of Delivery?

As we've discussed before, there is a controversy regarding whether Congress, in enacting §7502(c), make that into the exclusive means of proving timely delivery should the IRS assert that a document was never delivered. The IRS position on this matter is clear—they believe it is the only way to prove delivery, and in the absence of a registered mail receipt, certified mail receipt or an equivalent allowed under §7502(f)(3), the document is deemed to have not been timely delivered.

The Second and Sixth Circuit have agreed with that view. In *Deutsch v. Commissioner* 599 F.2d 44 the Second Circuit held that

Taxpayer argues that section 7502 creates a presumption in favor of the taxpayer and that, if such section does not apply, the taxpayer can prove delivery and timeliness by other evidence without benefit of the presumption. We disagree. The exception embodied in section 7502 and the cases construing it demonstrates a penchant for an easily applied, objective standard. See *Fishman v. Commissioner* 420 F. 2d 491 (2d Cir. 1970). Where, as here, the exception of section 7502 is not literally applicable, courts have consistently rejected testimony or other evidence as proof of the actual date of mailing. See, e.g., *Shipley*

v. Commissioner 572 F. 2d 212, 214 (9th Cir. 1977); *Drake v. Commissioner* 554 F. 2d 736, 738-39 (5th Cir. 1977); *Boccutto v. Commissioner* 277 F. 2d 549, 553 (2d Cir. 1960).

In the 1986 *Miller v. Commissioner* 784 F.2d 728 case the Sixth Circuit explicitly agreed with the Sixth Circuit that §7502 was the exclusive method of proving timely filing.

However, more recently the 8th and 9th Circuits have disagreed with this holding. The 9th Circuit, in *Anderson v. United States* 92-1 USTC ¶150,308, allowed a taxpayer's to submit as evidence the affidavit of a friend that accompanied her to the post office that the return was mailed on September 15, 1986, well before the last date for filing a claim for refund which would have been April 15, 1988. The IRS claimed not have to have received the return until they contacted Anderson in late 1988, and thus denied her refund claim.

The Ninth Circuit notes that "The statute itself does not reflect a clear intent by Congress to displace the common law mailbox rule. Accordingly, we decline to read section 7502 as carving out exclusive exceptions to the old common law physical delivery rule."

In an earlier decision that the Ninth Circuit cites in the *Anderson* decision, the Eight Circuit also concludes that §7502 did not displace the common law mailbox rule, but rather adds to the alternatives the taxpayer has for proving delivery. The *Wood* 909 F.2d 1155 case contains a detailed defense of this view of §7502. The court begins by holding

When interpreting a statute, we must consider the statute in light of judicial concepts existing before it (in this case, the common law presumption of delivery) was enacted. "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Stillians v. Iowa*, 843 F.2d 276, 280 (8th Cir. 1988) (quoting *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494 (1986)). Thus, it is proper to consider that Congress acts with knowledge of existing law, and that "absent a clear manifestation of contrary intent, a newly-enacted or revised statute is presumed to be harmonious with existing law and its judicial construction." *Johnson v. First Nat'l Bank of Montevideo*, 719 F.2d 270, 277 (8th Cir. 1983), cert. denied, 465 U.S. 1012 (1984). Accordingly, for section 7502 to completely displace the common law presumption of delivery, we must find some statutory or legislative indication that Congress so intended.

The Eight Circuit finds no such clear indication in §7502 itself. And based on

that, the Court goes on to conclude:

Thus, as we have indicated, if Congress intended that subsection (c) was to be the exclusive instance in which a presumption of delivery could apply, we think that it would have said so. Given that Congress presumably intended that section 7502 would operate to alleviate hardship, for the benefit of the taxpayer, we think that subsection (c) is better read as a safe harbor which does not exclude application of a presumption of delivery in those cases in which the terms of the statute are otherwise met.

And the *Wood* court goes on to criticize the 2nd and 6th Circuit decisions, noting that “those courts which find that subsection (c) is the exclusive instance in which a presumption can apply cite no legislative history for support.”

It is also important to note that the court also holds that under §7502 “the act of mailing is not significant for purposes of the statute but placement of a postmark is.” This distinction will be important in today’s case.

We Hear from the Third Circuit

The Third Circuit Court of Appeals is a circuit that we’ve noted previously in this document—they were the ones who issued the opinion in *Boccutto* where a taxpayer had “tough luck” by getting a certified mail receipt dated the day before an actual postmark was applied. Thus, some not paying close attention might have believed the Third Circuit agreed with the Second and Sixth positions that §7502 was the exclusive way of proving timely filing—but that ignores the fact that in *Boccutto* the taxpayer was explicitly trying to make use of §7502 in the face of the actual postmark that was date after the final date for filing—and before the IRS had implemented regulations that made certified mailing receipts the deemed postmark date.

In the case of *Philadelphia Marine Trade Ass'n.-Int'l Longshoremen's Association Pension Fund et al. v. Commissioner* 2008 TNT 74-16 the Third Circuit made clear that they were adopting the position of the 8th and 9th Circuits—that is, that §7502 added to, rather than subtracted from, a taxpayer’s options to prove timely filing.

In this case, the taxpayers sent the documents in question by overnight mail on May 8, 2003. The final date for the entity to have filed its refund claim was June 25, 2003. Presumptively, under the common law mailbox rule, a document sent by overnight mail on May 8th would be presumed to have been delivered on May 9. Similarly, a later letter sent by first class mail on June 13th would have been presumed, given the distance involved, to have been delivered on June 14th—or certainly well before June 25, 2003.

The IRS, of course, claims that §7502 displaced the common law mailbox rule, as was found in the *Deustch* and *Miller* decisions. The IRS also cites the Third Circuit's own holding in *Boccuto* where the Third Circuit stated that "[u]nless a taxpayer can fit himself within one of the statutory exceptions, he is bound by this rule."

However in this case, the Third Circuit hold that we are deciding a different issue form the one in *Boccuto*. In *Boccuto*, the taxpayer delivered the document to the Post Office in question on the final day for filing and obtained what was (at that instant) a document that did not fix the postmark date. So when the actual document arrived at its destination with an actual postmark that was dated one day later than the final date for filing, the taxpayer was out of luck because he was seeking to make use of §7502, and therefore had to comply with that provision. The common law mailbox rule would have been useless to the taxpayer, since under that rule the document would have, at best, been presume to have been delivered to its destination after the final date for filing—thus *Boccuto* needed a different rule to apply to get timely filing.

So the Third Circuit concluded that *Boccuto* had not needed to address whether §7502 repealed the common law mailbox rule for tax matters. Now the Court would address that point—and come to same conclusion as the Eighth and Ninth Circuits.

The Court notes

For starters, the text of § 7502 does nothing to affect the mailbox rule in cases such as the one before us. "It is a well-established principle of statutory construction that the common law ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose." *Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983) (internal quotations, brackets, and ellipses omitted). By its terms, § 7502(a) applies only to cases where the pertinent document was delivered to the Government after the filing deadline. Here, by contrast, neither party claims the refund requests were delivered after the filing deadline of June 25, 2003. To repeat, the Fund produced evidence that O'Neill sent the May 8 and June 13 letters by overnight and first class mail, respectively. If that is true, the letters would presumably have arrived well before the June 25 deadline. The Government, meanwhile, claims it has no record of having received the letters at all. The text of § 7502(a), therefore, does not direct a result here. Thus § 7502(c), which limits its application to cases in which § 7502 generally applies, see § 7502(c)(1) ("*For purposes of this section, if any return, claim, statement, or other document, or payment, is sent by United*

States registered mail. . .") (emphasis added), is also inapplicable.

The Court goes on to directly address the argument that Congress intended §7502 to be the exclusive remedy by noting:

Even looking beyond the text, we see no indication that Congress intended to preempt the mailbox rule for taxpayers who do not seek § 7502's protection. As an initial matter, we find nothing in the legislative history of § 7502 to support the preemption argument.⁸ Moreover, as a matter of logic, it is difficult to imagine that Congress, by passing a law that was designed to protect taxpayers who meet § 7502's requirements, would (without so stating) simultaneously seek to roll back the protections for taxpayers that already exist at common law. Congress's intent, we believe, was to supplement, not supplant, means by which taxpayers can timely file documents with the IRS. See *Estate of Wood*, 909 F.2d at 1161.

The IRS Strikes Back (Maybe)

It is important to note that we have proposed regulations, issued back in 2004, where the IRS indicated they were going to attempt to reverse the decisions in the Eighth and Ninth Circuits via regulation. Those proposed regulations, which have not been made final, would modify the regulations under §7502 and add the following

§301.7502-1 Timely mailing of documents and payments treated as timely filing and paying.

* * * * *

(e) * * * (1) * * * Other than direct proof of actual delivery, proof of proper use of registered or certified mail is the exclusive means to establish prima facie evidence of delivery of a document to the agency, officer, or office with which the document is required to be filed. No other evidence of a postmark or of mailing will be prima facie evidence of delivery or raise a presumption that the document was delivered.

It's not clear, given the positions outlined by the Circuits that found that Congress did not repeal the mailbox rule, that they would find this regulation valid. But it is important to note that this regulation has a proposed effective date for any documents filed after September 21, 2004—so that if it was made final, the IRS would argue it applies to documents already filed and those we are filing now,

even in the Third, Eighth, Ninth and Tenth Circuits.

Where Do We Stand?

You may be a bit confused by the cases, but it's not really all that confusing once you sort things out. But it's easy to accidentally overread the exceptions granted by these cases.

The *Philadelphia Marine Trade Association* case likely would not have turned out as well for the taxpayer had they mailed the claim on the final day for doing so—they were saved by a presumption of actual physical delivery of the document to the IRS prior to final date for filing the claim for refund. Such a presumption would not have applied to a document delivered to the USPS on the due date for filing, because you could not presume the USPS would somehow get the document to the IRS on that same day. In that case, the taxpayer would have had to rely on §7502 and, at the very least, been able to show that a postmark was applied at that time (what was shown in the *Estate of Wood*) even if the “more liberal” circuits on this issue.

What it does suggest, though, is that for taxpayers in the circuits that have indicated the mailbox rule survives (the Third, Eight, Ninth and Tenth) it would be prudent to mail documents well enough in advance of the due date to gain the mailbox rule presumption in addition to any protection offered under §7502(c). Taxpayers have been known to misplace certified mail receipts, so it might not be a bad idea to have a second way to get a presumption of filing.

As well, even in those circuits, it's clear that a receipt in compliance with the rules under §7502 provides the best protection for a taxpayer, and clients should be encouraged to get such receipts. Of course, as the *Gibson* case made clear, it's important they get that receipt from the USPS itself, not from some outfit providing mailing services.

And, obviously, clients in any circuit mailing documents on the due date really need to comply with the requirements of §7502 or face the risk of being deemed to have filed the document late.