

ACKNOWLEDGED SIGNIFICANT ADVICE, MAY BE DISSEMINATED

**Office of Chief Counsel
Internal Revenue Service**

**SCA 1998-051
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memorandum

CC:DOM:FS:TL-N-999-98

PROC:BGDusenberry

date: **JUL 20, 1998**

to: District Counsel, Brooklyn CC:NER:BRK
Attention: TKerrigan

from: Assistant Chief Counsel (Field Service) CC:DOM:FS

subject: **Significant Service Center Advice Request
Re: Certificate of Mailing**

This memorandum is in response to your request for Significant Service Center Advice, dated March 4, 1998.

FACTS

The Taxpayer Advocate at the Brookhaven Service Center received an inquiry via facsimile from a tax practitioner who attended a recent tax symposium sponsored by the Service Center. According to the practitioner's notes, the Director of the Service Center stated that there were other acceptable methods to prove mailing besides registered and certified mail. The practitioner indicated that the Director used the certificate of mailing as an example of a less expensive alternative method. Subsequent to the symposium, the practitioner contacted the United States Postal Service and was advised that their employees have been instructed to inform customers that a certificate of mailing is not acceptable proof of mailing with respect to documents sent to the Internal Revenue Service. Therefore, the practitioner requests written clarification of the Internal Revenue Service's position with respect to the use of certificates of mailing for purposes of establishing the timely filing of tax returns.

ISSUE

Whether a U.S. Postal Service Certificate of Mailing (Form 3817) is an acceptable method to prove the date of mailing a tax return for purposes of the timely mailing treated as timely filing provisions of I.R.C. § 7502.

CONCLUSION

Unlike a receipt for certified or registered mail, a U.S. Postal Service Certificate of Mailing (Form 3817) does not conclusively prove the date of mailing of a tax return, and is inadmissible to contradict an untimely postmark appearing on the envelope in which a return is mailed. However, a certificate of mailing is admissible to help establish the mailing date of a tax return if a postmark on the envelope in which a return is mailed is missing or illegible. Finally, depending on the judicial circuit in which taxpayers reside, a certificate of mailing may be inadmissible to prove timely mailing in cases of nondelivery of the return to the Service.

DISCUSSION

I.R.C. § 7502(a) provides, in relevant part, that if a properly addressed, postage prepaid envelope or wrapper containing a return is deposited in the mail in the United States and bears a United States postmark date which is on or before the last date for filing, the postmark date will be deemed to be the filing date, where the return is received after the due date. In general, where a legible United States postmark date appears on the envelope or wrapper no extrinsic evidence may be introduced to prove the time that the postmark stamp was made. Malekzad v. Commissioner, 76 T.C. 963, 967-968 (1981); Shipley v. Commissioner, 572 F.2d 212, 214 (9th Cir. 1977) aff'g T.C. Memo. 1976-383. See also Bloch v. Commissioner, 254 F.2d 277, 279 (9th Cir. 1958) cert. dismissed, 358 U.S. 30 (1958); Estate of Moffat v. Commissioner, 46 T.C. 499, 501-502 (1966).

Section 7502(c) of the Internal Revenue Code sets forth exceptions to this rule. One exception permitted by section 7502(c) applies to registered mail. In the case of registered mail, the date of registration is deemed the postmark date. I.R.C. § 7502(c)(1)(B). Section 7502(c) also excepts certified mail from the general rule. With respect to certified mail, the postmark date on the sender's receipt is deemed the postmark date. I.R.C. § 7502(c)(2); Treas. Reg. § 301.7502-1(c)(2).

I.R.C. § 7502(f), which was added by the Taxpayer Bill of Rights 2, P.L. 104-168, § 1210, provides another exception to the general rule of section 7502. Section 7502(f) authorizes taxpayers to use designated private delivery services to meet the timely mailing/timely filing rule for filing documents and returns.

Taxpayers are required to strictly comply with the statutory requirements in order to obtain the benefits of the timely mailing treated as timely filing provisions of I.R.C. § 7502.

The absence of a showing that a return was sent by registered or certified mail creates a "conclusive statutory presumption" that the postmark date on the envelope is controlling. Estate of Moffat v. Commissioner, supra, 46 T.C. at 502. The use of registered or certified mail allows taxpayers to avoid the hazard that the United States Postal Service will not properly postmark the envelope in which the return was contained. Accordingly, taxpayers who opt to use a certificate of mailing instead of certified or registered mail bear the risk that a return mailed by ordinary mail might bear a postmark date later than the last date prescribed for filing of the return. Since the use of certificates of mailing is not specifically provided for by the statutory language of I.R.C. § 7502, such certificates do not afford taxpayers with the same protections as registered and certified mail. Unlike a registered or certified mail receipt, a timely postmarked certificate of mailing would be inadmissible to contradict an untimely postmark appearing on the envelope in which a return or other document was mailed. See Haaland v. Commissioner, T.C. Memo. 1984-335 [Tax Court explicitly rejected evidence in the form of a certificate of mailing to rebut an untimely postmark stamped on the envelope of a petition].

Treas. Reg. § 301.7502-1(c)(iii) states, in relevant part, that "[i]f the postmark on the envelope or wrapper is not legible, the person who is required to file the document has the burden of proving the time when the postmark was made." Where the postmark is omitted or illegible, the Tax Court has accepted evidence regarding the time of mailing other than a certified mail receipt. See Sylvan v. Commissioner, 65 T.C. 548, 551 (1975), nonacq. 1977-2 C.B. 3; Reugsegger v. Commissioner, 68 T.C. 463, 465 (1977); Novick v. Commissioner, T.C. Memo. 1977-292; Krellman v. Commissioner, T.C. Memo. 1979-367; Felt v. Commissioner, T.C. Memo. 1978-286; Elliot v. Commissioner, T.C. Memo. 1990-257. In this situation, a certificate of mailing may be admitted by a court as support for the contention that a return was mailed on a given date. However, the certificate of mailing would not be conclusive on this point, and a court may request more evidence corroborating the certificate of mailing.

Where a return is lost or undelivered, It is the Service's position that only evidence of registration or certification as provided in section 7502(c) will allow the taxpayer to take advantage of the timely mailing as timely filing provision. The Service takes the position that the statutory language of I.R.C. § 7502 requires actual delivery under I.R.C. § 7502(a) or "prima facie evidence" of delivery by the taxpayer under I.R.C. § 7502(c)(1)(A). Accordingly, absent evidence of registration or certification, taxpayers bear the risk of loss as to all returns which the Service has not actually received. However, the U.S. Circuit Courts of Appeals do not agree respecting this issue.

The Eighth Circuit, in Estate of Wood v. Commissioner, 909 F.2d 1155 (8th Cir. 1990), reh'g denied en banc, 1990 U.S. App. LEXIS 18216 (8th Cir. Oct. 10, 1990), held that the common law presumption of receipt of a properly mailed document is not completely displaced by I.R.C. § 7502.^{1/} Therefore, the taxpayer could rely on the common law presumption that a properly mailed document is actually received and offer proof of the postmark date where the estate tax return was not sent via certified or registered mail and was not actually received by the Service.^{2/} The Court of Appeals held that a certified or registered mail receipt is not the exclusive means of proving the postmark date in the absence of actual delivery of the document. However, the Court acknowledged the narrowness of its holding by stating that the taxpayer must offer direct proof of the postmark date and not merely evidence of mailing in order to obtain the benefit of the timely mailing/timely filing rule.^{3/} Accord, Anderson v. Commissioner, 966 F.2d 487 (9th Cir. 1992)(Section 7502 is not exclusive means of proving timely mailing).^{4/} In these circuits, the common law presumption of delivery continues to exist and is merely supplemented by the safe harbor statutory mail box rule

^{1/} Under the common law "mailbox rule," proof of proper and timely mailing of a document raises a rebuttable presumption that it is timely received by the addressee. Rosenthal v. Walker, 111 U.S. 185, 193-194 (1884); Hagner v. United States, 285 U.S. 427, 430 (1932).

^{2/} In this case, testimony of a postal employee regarding the postmark date stamped on the envelope containing the estate's return and testimony from the return preparer concerning the date on which the return was deposited in the mail were held sufficient to establish that the return was timely mailed and therefore properly filed.

^{3/} Although the Service disagrees with the Eighth Circuit's holding in this case and a direct conflict between the circuits was presented, the Solicitor General declined to authorize certiorari in light of the stated limitations of the holdings and the absence of affirmative evidence of nonreceipt by the Service. See Estate of Wood v. Commissioner, AOD CC-1991-024 (Oct. 22, 1991).

^{4/} Direct evidence that the taxpayer saw postal clerk postmark the envelope and place it in the mail was held sufficient to establish the date of the postmark. Evidence that the taxpayer's return had not been received by the Service was held insufficient to rebut the presumption of timely delivery under the common law mailbox rule. Compare Lewis v. United States, 98-1 U.S.T.C. ¶50,441 (9th Cir. 1998) (direct evidence of application of postmark stamp by postal employee not necessarily required under Anderson holding).

provided for in I.R.C. § 7502(c). Therefore, a certificate of mailing may provide evidence of timely mailing in the Eighth and Ninth Circuits, even where the return or other statement is never received by the Service. .

In contrast, both the Sixth Circuit and Second Circuit have rejected the Common law mailbox rules in situations where a taxpayer is relying on section 7502, and have held that, absent actual delivery of the document, evidence of proper mailing is not admissible except as provided in I.R.C. § 7502(c). Miller v. Commissioner, 784 F.2d 728 (6th Cir. 1986); Carroll v. Commissioner, 71 F.3d 1228 (6th Cir. 1995) cert. denied, 116 S.Ct. 2547 (1996); Surowka v. Commissioner, 909 F.2d 148 (6th Cir. 1990); Deutsch v. Commissioner, 599 F.2d 44 (2d Cir. 1979) cert. denied, 444 U.S. 1015 (1980). Therefore, taxpayers residing in these circuits who do not avail themselves of the safeguards provided in I.R.C. § 7502(c) and fail to send their tax returns by registered or certified mail are precluded from presenting any extrinsic evidence, including presumably a certificate of mailing, to obtain the benefit of section 7502 if the return is not received by the Service.

Section 7502(f) extended the protection of the general rule of section 7502(c) to private delivery services. In Notice 97-26, I.R.B. 1997-17 p.6 (April 28, 1997), the Service designated certain specified delivery services provided by the Airborne Express company, DHL Corporation, Federal Express, and United Parcel Service, and announced that it would accept documents delivered by these companies under the conditions specified in the Notice as timely filed. However, these services are generally more expensive than the services of the United States Postal System.

In order to eliminate the risk that a return mailed by ordinary mail might not bear a postmark dated on or before the last date prescribed for filing or that a properly addressed tax return might be lost in the mail, Congress developed a statutory scheme in I.R.C. § 7502(c) which provides for acceptance of the date of registered mail and the date stamped on the sender's receipt for certified mail as the postmark date. Although the Postal Service will provide, at a lower price than registered or certified mail, a certificate of mailing, this certificate does not have the same indicia of reliability as registered and certified mail.^{5/} Furthermore, a certificate of mailing is not a

^{5/} Unlike registered or certified mail, a certificate of mailing provides evidence of mailing only. In Sylvan v. Commissioner, 65 T. C. 548 (1975), the Tax Court noted:

The statute authorizes the Secretary to provide by regulations the extent to which the rules applicable to

statutorily recognized substitute for certified or registered mail. Therefore, taxpayers who choose to obtain a certificate of mailing from the Postal Service instead of using either certified or registered mail do so at their own peril.

In conclusion, unlike a receipt for certified or registered mail, a certificate of mailing does not conclusively prove the date of mailing of a tax return, and is inadmissible to contradict an untimely postmark appearing on the envelope in which a return is mailed. However, a certificate of mailing may be admissible to help establish the mailing date of a tax return if a postmark on the envelope in which a return is mailed is missing or illegible. Finally, depending on the judicial circuit in which taxpayers reside, a certificate of mailing may be inadmissible to prove timely mailing in cases of nondelivery of the return to the Service. Taxpayers who are unwilling to accept this risk of an untimely postmark or nondelivery of a return should send their returns by certified or registered mail, which allows taxpayers to rely on the registered or certified mail receipt as conclusively establishing the postmark date, and as prima facie evidence of delivery of the return to the Service. See Treas. Reg. §§ 301.7502-1(c)(2);301.7502-1(d)(1).

registered mail also apply to certified mail.* * * However, the certificate of mailing employed by petitioner in this case is not the same as certified mail. Certified mail provides a numbered receipt to the sender. The receipt bears the same number as the certified mail sticker attached to the article. Similarly, a number receipt is issued for registered mail. Certificates of mailing, on the other hand, are generally not numbered. Thus, a certificate of mailing while providing evidence of mailing, does not indicate that a particular item was mailed but only that an item was mailed to an addressee."

Sylvan v. Commissioner, 65 T.C. at 551-552, n. 7. The United States Postal Service's current fee schedule is as follows:

Registered Mail	\$4.85
Certified Mail	\$1.35
Certificate of Mailing	\$0.55

