



But I Left It At the Hotel Desk-The Late Filing Issue
Podcast of January 27, 2007



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Some Things Shouldn't Be Delegated...

A taxpayer learned the above lesson the hard way when she left a Tax Court petition at a hotel front desk to be picked up by a private delivery service on the last day for filing the petition. When the petition arrived at the Tax Court, the electronically generated label placed on the envelope by the private delivery service showed the following day on it. The IRS argued that the Tax Court no longer had jurisdiction in the case because the petition had been filed late—and the Tax Court agreed. The case in question is the case of *Austin v. Commissioner*, TC Memo 2007-11.

Timely Filing Rule Revisited

The issue in this case is governed by the standard timely filing rule we've discussed before found at §7502(a), modified by §7502(f)(1).

The basic postmark rule is described in §7502(a), which provides:

(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.

The provision is modified to allow for private delivery services in §7502(f), which provides:

(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.

The IRS issued Notice 97-26 that expanded on what would qualify as a postmark for a private delivery service, and noted:

SPECIAL RULES FOR DETERMINING POSTMARK DATE: Section 7502(f)(2)(C) requires a PDS to either (1) record electronically to its data base (kept in the regular course of its business) the date on which an item was given to the PDS for delivery or (2) mark on the cover of the item the date on which an item was given to the PDS for delivery. Under section 7502(f)(1), the date recorded or the date marked under section 7502(f)(2)(C) is treated as the postmark date for purposes of section 7502.

This notice provides rules for determining the date that is treated as the postmark date for purposes of section 7502. There is one set of rules for the designated PDSs that qualified for designation because their "postmark date" is recorded electronically to their data bases. There is another set of rules for the designated PDS that qualified for designation because its "postmark date" is marked on the cover of an item.

The delivery service in question in this case was FedEx, and the above notice provides for FedEx the following rules:

An electronically generated label is applied to the cover of all items delivered by FedEx, including those items that already have an airbill attached. The date on which an item is given to FedEx for delivery is marked on the label. There are two types of labels (which are distinguishable from each other). One type of label is generated and applied to an item by a FedEx employee. The other type of label is generated (using computer software and/or hardware provided by FedEx) and applied to an item by a customer.

The date that will be treated as the postmark date for purposes of section 7502 is determined under the following rules:

(1) If an item has a label generated and applied by a FedEx employee, the date marked on that label is treated as the postmark date for purposes of section 7502, *regardless of whether the item also has a label generated and applied by the customer.*

(2) If an item has a label generated and applied by a customer, the date marked on that label is treated as the postmark date for purposes of section 7502 if the item is received within the normal delivery time. (Normal delivery time is one day for FedEx Priority Overnight and FedEx Standard Overnight, or two days for FedEx 2Day.) If an item is not delivered within the normal delivery time, the person

required to file the document or to make the payment must establish (a) that the item was actually either given to, or picked up by, a FedEx employee on or before the due date and (b) the cause of the delay in delivery of the document or payment. These rules are similar to the rules for United States mail that has a postmark made other than by the United States Postal Service. (See Treas. Reg. section 301.7502-1(c)(1)(iii)(b).)

(3) The information recorded electronically to the data base of FedEx (in the regular course of its business) can be used to show that the item was actually either given to, or picked up by, a FedEx employee on or before the due date when (a) an item has a label generated and applied by a customer or (b) an item has a label generated and applied by a FedEx employee, but the date is illegible or otherwise unavailable.

Note that if FedEx applies a label itself with the date, that overrides any other information about the time that the item was filed, including the electronic record that FedEx maintains of when an item was picked up.

The Hotel Clerk is Not FedEx...

Joanne Austin was sent a notice of deficiency by the IRS on February 6, 2006. The 90th day after the mailing of the notice was May 7, 2006—but that was a Sunday. So the deadline for Joann Austin to file a petition with the Tax Court was Monday, May 8, 2006.

Joann was in Baltimore, Maryland on that date attending a trade show and was staying at a Days Inn in Baltimore. She finished her petition on Sunday evening, May 7, 2006 and signed the petition at that time. The next morning she filled in a handwritten FedEx label (dated May 8, 2006) that indicated she wanted “FedEx Priority Overnight—Next business morning” service. At 8:00 am that morning she handed the envelope containing her petition to the front desk clerk at the Days Inn, believing the envelope would be picked up later that day by FedEx—a service many hotels offer to their guests.

The package itself arrived at the Tax Court at 9:09 a.m. on Wednesday, May 10, 2006. It contained an electronically generated label applied by FedEx that was dated May 9, 2006 and indicated that May 10, 2006 was the “Deliver By” date. FedEx’s tracking information indicated that the envelope was picked up at 5:22 pm on Tuesday, May 9, 2006.

But I Did Nothing Wrong

The IRS took the position that the Tax Court no longer had jurisdiction because the petition bore a postmark equivalent that was dated after the last date for filing of the petition.

The taxpayer argued that the fact she gave the package to the hotel clerk the morning of May 8 for pickup by FedEx later that day should qualify under §7502(f)’s private

delivery service rule. The Tax Court did not agree, pointing out that the controlling date was the date applied by FedEx itself to the package—which was the day after the last date for filing the petition.

Note that §7502 is not triggered by when the item is deposited with the Postal Service, but rather by when the postmark is applied—a distinction made even in the cases practitioners often try to rely on in the Eighth and Ninth Circuits when a taxpayer failed to use a method of filing that offers proof of mailing (*Estate of Wood* (909 F.2d 1155) and *Anderson* (966 F.2d 487)). In both of those cases, the taxpayer offered evidence to show when a postmark had been applied, not just that the item had been dropped in a mailbox.

Joanne faces a similar problem here. The Days Inn clerk was not a FedEx employee, so merely handing the document over to that person was not the act of mailing that §7502(a) protects. Rather, Joanne had presumed that this step would lead to the steps necessary to get FedEx to apply a label with the current date. When that didn't happen, the Tax Court held she was out of luck.

The court specifically notes that even if they agreed that she did nothing wrong, the Tax Court has no discretion in this area to override the statute. In a footnote the Tax Court pointed out the distinction between this case and the one of *Estate of Cranor*, (TC Memo 2001-27). In the *Cranor* case the petition was sent by FedEx four days before the due date, but was returned to the sender because he had erroneously checked the “Hold Saturday” box on the form for sending the document. By implication, the court indicates that the key distinction was that in *Cranor* the documentation existed that a FedEx “postmark” was applied in a timely fashion, even if the actual petition did not get to the Tax Court until many days after the deadline for filing.

Lessons

So what do we learn from this? Clearly, one key cautionary lesson from this is that we should be careful that we know the document in question actually made its way to the delivery service directly, rather than using some third party intermediary to get a document to the delivery service. As the Tax Court notes, if the PDS gets its hands on the document and applies the proper “postmark” for that service, we have a fighting chance even if strange happenings take place (such as accidentally checking the wrong box on the airbill). But if we let a third party “take care” of getting the document to the PDS, we will face the consequences if that third party does not manage to get the document to the PDS in time for the “postmark” to be applied.

As well, it also emphasizes the general rule that it's not a good idea to wait until the last day to take care of an issue like this. We have to be aware that deadlines such as this are hard and fast and that you likely will find an argument based on the idea that the filing should be allowed due to “fairness” or “I acted reasonably” are likely to fall on deaf ears. I caution clients that they should assume things will go wrong on that last day, so it's best not to wait until then if it can be avoided or unless there is a truly compelling reason why

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it might be best to delay filing.