October 22, 2005 Podcast
Does Anyone Really Know What Time It Is (or at Least When I Filed)?

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The Supreme Court recently declined review in a Tenth Circuit case[1] that dealt with the issue of proof of timely mailing under §7502, an area of more than a little controversy among the circuits who have split on a key issue. As well, many urban legends have developed about what counts as proof of filing and the IRS is working, via a proposed regulation issued a year ago, to change the ground rules more to their liking, at least in certain circuits.

This week's podcast deals with this area, reviewing the rules and the controversy. What's important is to understand two points—first, how to advise clients prior to filing to assure they have evidence of filing that is beyond reproach (which really is possible) and, second, to understand the areas of controversy so that if you come into a situation after the IRS has begun to allege that a return was not filed or was filed late, you can advise the client about whether the IRS's position is subject to challenge (and outside the Second and Sixth Circuits, for now there's an excellent chance of a successful challenge based on how the Tax Court would rule if the issue was litigated—a fact that's important to know when negotiating the issue with the IRS).

Timely Filing Rule

When an entity handles the number of documents that the IRS does, it's a given that some

1 *Sorrentino,* (383 F.3d 1187)*, cert. denied*

documents will end up being lost or misplaced no matter what procedures are in place. On top of that, the United States Postal Service handles many times more documents than the IRS does and the same rule applies there. That means that's a given that a certain number of taxpayers will mail their return in and either a) it will never actually make it to the IRS Service Center in question or b) be lost internally at the IRS prior to being recorded as being received. In that case, eventually the situation will arise that it will be discovered that the IRS believes the return was never filed—and, if applicable, the various consequences of late filing (penalties, loss of ability to make certain elections, etc.) would apply.

The taxpayer will reply in that case that they did file the return. Now, just as it's a fact that agencies will lose documents, it's also reality that blaming the Postal Service or IRS for losing a document is also a convenient excuse that is used by individuals who, when they were in elementary school, had that dog that liked to eat homework on a daily basis.

Recognizing these facts, Congress provided certain ground rules that can be used to establish both the fact and date of filing. While controversy surrounds whether these are the exclusive means of proving filing, what is clear is that if a taxpayer follows these requirements they do have prima facia proof of filing, moving the burden over to the IRS to prove a return was not filed (a virtually impossible task).

Section 7502

The basic rule is found in Section 7502(a)(1) that provides the postmark applied by the United States Postal Service is deemed to provide the date of filing. That rule provides:

> 7502(a)(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.

This rule is what allows taxpayers to drop the return in the mail on April 15 and have it count as timely filed even though it clearly won't make it to the IRS until after midnight on that final due date.

However, note that this rule requires that the return actually end up being delivered to the IRS ("...*is*, after such period or such date, *delivered* by United States mail to the agency, officer, or office...") which means if the IRS asserts they never received the document, the taxpayer has a problem. Unless the taxpayer was riding along with the tax return on its

trip through the US Postal Service, it will not be possible to prove the delivery.

However, §7502(c) provides a method to obtain prima facia evidence of such delivery, sending the issue back to the IRS to prove the document wasn't actually delivered (a similarly impossible task). §7502(c) provides:

> 7502(c) REGISTERED AND CERTIFIED 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.
>
> (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.

Regulation §301.7502-1(c)(2) and (e)(1) provide the required authorization for certified mail. First, the receipt proves the postmark date as provided by Regulation §301.7502-1 (c)(2):

> (2) REGISTERED OR CERTIFIED MAIL. If the document or payment is sent by U.S. registered mail, the date of registration of the document or payment is treated as the postmark date. If the document or payment is sent by U.S. certified mail and the sender's receipt is postmarked by the postal employee to whom the document or payment is presented, the date of the U.S. postmark on the receipt is treated as the postmark date of the document or payment. Accordingly, the risk that the document or payment will not be postmarked on the day that it is deposited in the mail may be eliminated by the use of registered or certified mail.

And proof of delivery is noted by Regulation §301.7502-1(e)(1):

> (e) DELIVERY.
>
> (1) Except as provided in section 7502(f) and paragraph (d) of this section,

> section 7502 is not applicable unless the document or payment is delivered by U.S. mail to the agency, officer, or office with which the document is required to be filed or to which payment is required to be made. *However, in the case of a document (but not a payment) sent by registered or certified mail, proof that the document was properly registered or that a postmarked certified mail sender's receipt was properly issued and that the envelope was properly addressed to the agency, officer, or office constitutes prima facie evidence that the document was delivered to the agency, officer, or office.*

Some may be concerned by the line noting that the registration doesn't provide proof of delivery of the payment. However, what it appears the IRS is addressing here is that you cannot get out of replacing a lost check by arguing you sent it certified or registered. However, the actual filing is still presumed to have been delivered to the IRS—and generally that is the major issue for protecting the taxpayer's rights.

An urban legend seems to exist among many practitioners (and even some IRS agents) that a return receipt is the key document you need to retain to come under the protection of this provision. If you study the regulation, you'll find no reference whatsoever to a return receipt—rather, the key document is the postmarked receipt received from the Postal Service employee that proves filing. The "green card" may be a "feel good" document, but it is not required to be obtained to get the protection of this provision.

The other significant urban legend is that none of this matters since you can't prove what was in the envelope. Again, this is not relevant—the issue has shifted to the IRS, who now has been deemed to have received the document that was mailed, to show what they received and produce the envelope and document for examination. The issue now becomes one of the believability of the taxpayer's assertion to have mailed the document and, since the IRS will have the envelope, that should be relatively easy to establish in most cases.

For those still not convinced on that point, I would suggest a study of the case law that we'll discuss later. Note that in all cases the IRS did not have the document in question, but the IRS never raised the defense that many CPAs seem convinced renders certified or registered mailing irrelevant—that even if something was mailed, the taxpayer can't prove that something was the tax return in question. If it was this simple to get around the issue, the IRS would never had had to litigate the cases noted below since the proof of mailing issue would have been moot. However, that requires the courts to hold that Congress enacted a total irrelevant provision in the Code at §7502(c), something the courts are loathe to do unless the clear language of the statute is such that no other holding is possible. In this case, it's clear Congress wanted to provide a method to prove filing.

Efiling Proof

The same section and regulation now cover the proof of electronic filing. In Regulation §301.7502-1(d) the IRS provides the following rules for proving the filing of a document filed via efile:

> (d) ELECTRONICALLY FILED DOCUMENTS.
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> (1) IN GENERAL. A document filed electronically with an electronic return transmitter (as defined in paragraph (d)(3)(i) of this section and authorized pursuant to paragraph (d)(2) of this section) in the manner and time prescribed by the Commissioner is deemed to be filed on the date of the electronic postmark (as defined in paragraph (d)(3)(ii) of this section) given by the authorized electronic return transmitter. Thus, if the electronic postmark is timely, the document is considered filed timely although it is received by the agency, officer, or office after the last date, or the last day of the period, prescribed for filing such document.
>
> (2) AUTHORIZED ELECTRONIC RETURN TRANSMITTERS. The Commissioner may enter into an agreement with an electronic return transmitter or prescribe in forms, instructions, or other appropriate guidance the procedures under which the electronic return transmitter is authorized to provide taxpayers with an electronic postmark to acknowledge the date and time that the electronic return transmitter received the electronically filed document.
>
> (3) DEFINITIONS.
>
> (i) ELECTRONIC RETURN TRANSMITTER. For purposes of this paragraph (d), the term electronic return transmitter has the same meaning as contained in section 3.01(4) of Rev. Proc. 2000-31 (2000-31 I.R.B. 146 (July 31, 2000))(see §601.601(d)(2) of this chapter) or in procedures prescribed by the Commissioner.
>
> (ii) ELECTRONIC POSTMARK. For purposes of this paragraph (d), the term electronic postmark means a record of the date and time (in a particular time zone) that an authorized electronic return transmitter receives the transmission of a taxpayer's electronically filed document on its host system. However, if the taxpayer and the electronic return transmitter are located in different time zones, it is the taxpayer's time zone that controls the timeliness of the electronically filed document.

Note the electronic return transmitter and note the electronic return originator (ERO) is

the one whose receipt of the taxpayer's information controls. Since most practitioners outsource that work rather than transmitting directly to the IRS, that means that the entity you submit the electronic return to controls. That means you don't know a return is filed until your transmitter acknowledges receipt and issues you the electronic postmark. Your procedures should insure that you verify the receipt of the electronic postmark rather than just "pressing the button" and then checking the next day to see if the return rejected. As well, if a question arises, the proof of filing will have to come from the electronic return transmitter—and most likely a reference back to their record of having issued the electronic postmark.

You also need to have a backup plan (such as the ability to get extensions paper filed) if for some reason you cannot submit the data to your electronic return transmitter at the end of tax season (hardware failure, internet connectivity problems, transmitter's system down or overloaded). Since the ERO is in control of making sure the return gets filed, this is probably a good argument for cutting off electronic return transmission for clients prior to the last second on the due date.

As well, note that the *taxpayer's* time zone is the controlling factor—so it does no good for a taxpayer in Boston to try and find a way at 1:00 a.m. on April 16th to get an electronic return transmitter in Honolulu to send his/her return. Practitioners may need to note that if you plan to work until midnight on the due date submitting returns electronically, that once midnight passes in the taxpayer's time zone the return is late—so a practitioner in Los Angeles would appear to need to get his New York client's return uploaded to his/her transmitter before 9:00 p.m. Los Angeles time in order for the New York return to be timely.[2]

Exclusivity of §7502(c) Proof of Filing

A controversy has developed over whether §7502(c) and the regulations thereunder provide merely a safe harbor proof of filing or are the exclusive means of proving filing should the IRS claim not to have received a return, at least for mailed returns.[3] Not

2 Of course, that practitioner could submit a paper extension with an open post office in the Los Angeles area at 11:30 p.m. Pacific Time for the same taxpayer and still be in good shape, since for paper returns only the date the postmark is applied counts. That also raises some interesting issues for taxpayers living near the borders of time zones—they may be able to go to the next town and get an hour longer to file their return if that post office is open. But they could not efile at that time.

Personally, I just prefer not to be working at midnight on the due date when I'd need to worry about these matters, but your preference may be different.

3 There haven't yet been any cases I'm aware of involving efiling controversies. This is understandable since the regulations on efiling have only been around for a few years, while the registered/certified mail rules have been around since the 1950s. As well, it is unlikely that the IRS, which is currently on a push to increase voluntary efiling, would push the issue on a questionable efiling except in the most egregious cases where it's clear that fraud has been committed (a clearly forged epostmark).

surprisingly, the IRS position is that the regulations establish the exclusive means of proving filing of the return, so that if the taxpayer does not possess a registered or certified mailing receipt and they show no record of having received the return, it was not filed as a matter of law. The IRS position has been sustained by the Second Circuit[4] and the Sixth Circuit[5] so that for taxpayers that would be subject to their jurisdiction on appeal need to follow the above regulations to the letter or risk that they will be deemed not to have filed their returns.

For purposes of returns that are not yet filed, prudence suggests that whether or not a taxpayer would be subject to the jurisdiction of the Second or Sixth Circuit that the taxpayer strictly comply with the requirements and obtain proof of filing acceptable under §7502(c) (meaning registered mail, certified mail, designated private delivery service where rules have been established granting equivalency with registered or certified mail, or electronic epostmark). The IRS will accept such compliance as prima facia proof of delivery, which moves the risk of nondelivery or IRS mishandling of the return off of the taxpayer and onto the IRS. All practitioners should advise clients of the ability to obtain such close to absolute proof of filing (not 100% perhaps, but as close to a sure thing as you can get unless there is evidence the taxpayer is clearly defrauding the system).

However, sometimes clients don't follow our instructions, and sometimes we'll inherit clients with problems who weren't aware of these options. In those cases, there is some hope outside of the Second and Sixth Circuits. The Eighth Circuit in 1990 in the *Estate of Wood* (909 F.2d 1155) case held that while §7502(c) provides a method of proving filing, other methods of proving filing are acceptable. *Wood* was an appeal of a Tax Court reported opinion, which also means that that Tax Court will follow *Wood* unless the circuit to which the case would be appealed has established a contrary position—meaning the Tax Court will treat this as relevant precedent in all circuits except the Second and Sixth Circuits.

However, it's important to note that the court required that the taxpayer be able to show proof of the application of the postmark, a necessary requirement to invoke §7502(a)(1), and that in this case the taxpayer was able to produce testimony that the postmark was applied. Merely proving the return was mailed was not sufficient.

Once that happened, though, the court allowed a presumption of delivery under the common law mailbox rule, a presumption the IRS needed to overcome with their own evidence (again not likely to be easily obtained).

The Ninth Circuit ruled similarly in the case of *Anderson* (966 F.2d 487). Again the taxpayer was able to offer eyewitness testimony to show the application of the postmark, and then the common law mailbox rule was invoked to grant a presumption of delivery.

In *Sorrentino* (383 F.3d 1187), *cert. denied*, the 10th Circuit illustrates the limitations of

4 *Deutsch v. Commissioner*, (599 F.2d 44), *cert. Denied*

5 *Carroll v. Commissioner*, (71 F3d 1228), *cert. denied*

this holding. The 10th Circuit agreed with the holdings in *Wood* and *Anderson*, which means that certified, registered and electronic postmarks are not the exclusive methods to prove filing under the law. However, the 10th Circuit ruled against the taxpayer, pointing out that the only evidence of mailing he had was his own uncorroborated testimony and that, unlike *Wood* and *Anderson*, there was no evidence of a postmark being applied.

The fact that the Surpeme Court did not hear this case is not necessarily an endorsement of the ability to use other evidence of filing—since Mr. Sorrentino was the losing party, reversing the 10th Circuit on this issue would not have changed the result. In reality, Mr. Sorrentino need the Supreme Court to both endorse the *Wood* and *Anderson* holdings (as the 10th Circuit had) and then rule that the 10th Circuit had misapplied that rule in holding that Sorrentino did not offer sufficient proof to have the case move forward on the question of whether he had actually filed the return. And it's important to note that the Supreme Court declined to review *Deutsch* and *Carroll* as well, cases holding for the exclusivity of §7502(c) for proving filing.

If you have a client who filed their return via a "nonprotected means" and they are not in the Second or Sixth Circuit, you can at least attempt to argue that the court will allow alternative proof of filing as a method to get some relief from any penalties or other negative consequences the IRS is asserting.

The Agency Strikes Back

The IRS last year, about the time the *Sorrentino* case was decided, decided to take matters into their own hands—or at least try to. The IRS has proposed changes to Regulation §301.7502-1(e)(1), adding the following two sentences to the end of that provision:

> (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.*

The proposed regulation goes on to note that it would be effective for documents filed after September 21, 2004 once it becomes effective. So, at least potentially, this rule would apply (or the IRS would claim it applies) to all filings since late last September, even in circuits where the case law indicated the opposite.

While it may be questionable whether the courts will agree the IRS has the authority to issue this regulation, generally I'd prefer to let someone else's client be the one to let the Ninth Circuit rule on this matter.