

The Mailbox Rule and Private Postage Meters

Author: Wearing, Robert, Tax Analysts

The mailbox rule of section 7502, that timely mailing is treated as timely filing, is the subject of many Tax Court opinions, and nearly as many Tax Notes practice articles. Often, Tax Court petitioners rely on the rule to defeat a jurisdictional challenge by the IRS. They attempt to overcome a late-arriving petition by demonstrating timely mailing.

The many mailbox rule cases are not merely a reflection of the fact that many practitioners wait until the last possible moment to file a petition. Instead, the mailbox rule is often the subject of litigation because it is not as simple as the mantra 'timely mailing is timely filing' would suggest. The Tax Court has addressed the application of the mailbox rule to petitions sent using private delivery services, damaged petitions, and lost petitions. Circuit courts have even reached different conclusions on whether there is both a common law and statutory mailbox rule applicable to tax documents.

No aspect of the rule has been a more common subject of Tax Court opinions, however, than its application to mail bearing postmarks from private postage meters. Petitioners have lost almost every one of those cases, typically as a result of their inability to satisfy the requirements of a regulation¹ that requires proof of facts that are, to some extent, self-evident yet quite difficult to prove. Together, the losses have provided little in the way of guidance on what it takes to satisfy the regulation.

A recent case in which the petitioners prevailed, however, sheds some light on the subject. In *Leonard Grossman et ux. v. Commissioner*,² the Tax Court held that a couple's properly addressed petition satisfied the timely mailing, timely filing requirements of section 7502 as it was privately postmarked by the deadline for filing but arrived late because of a U.S. Postal Service (USPS) delay. Grossman comes seven years after the previous case in which a petitioner prevailed under the private postmark regulation.³ Viewed together the cases suggest that petitioners willing to do a little digging may not have too much to worry about if a privately postmarked petition arrives late.

The Mailbox Rule

Generally, filing "is not complete until the document is delivered and received." *United States v. Lombardo*, 241 U.S. 73, 76 (1916). Section 7502 provides a statutory exception to that rule for many tax filings, including the filing of Tax Court petitions. It provides that a properly addressed and postmarked document required to be filed before a prescribed date will be deemed to have been delivered on the date of mailing if it is mailed before, and delivered after, the prescribed date by the USPS.

The general mailbox rule of section 7502(a) only applies to documents bearing USPS postmarks. Regulations under section 7502 have, however, extended the mailbox rule to documents bearing private postage meter postmarks. The regulations use a two-part rule to separate the easy cases from the hard cases, offering something of a safe harbor for documents that narrowly miss the prescribed filing date and setting up more demanding requirements for later-arriving documents.

Reg. section 301.7502-1(c)(1)(iii)(B)(1) provides that the timely mailing, timely filing rule applies to privately postmarked mail if:

¹ Reg. section 301.7502-1(c)(1)(iii)(B)(2).

² T.C. Memo. 2005-164, Doc 2005-14425, 2005 TNT 128-8.

³ *Theodore Jones et ux. v. Commissioner*, T.C. Memo. 1998-197, Doc 98-16949, 98 TNT 103-4.

- (1) the postmark bears a date before the last date prescribed for filing, and
- (2) the document is received not later than the date on which it would have been received had been postmarked with a U.S. Postal Service stamp bearing the last date prescribed for filing.

The regulation takes care of the easy, near-miss cases. The USPS can provide standard delivery service times between any U.S. city and Washington, D.C., making the application of the rule to near-miss filings a mere matter of counting the days.⁴

The regulations then address the more difficult cases of documents that are received more than a few days after the end of the prescribed period, including the standard delivery service time. Under reg. section 301.7502-1(c)(1)(iii)(B)(2), the mailbox rule will apply to those late-arriving documents if the petitioner establishes:

- (1) that the petition was deposited in the mail before the end of the prescribed filing period,
- (2) that the delay was due to a delay in the transmission of the mail, and
- (3) the cause of the delay.

The first requirement seems straightforward. Every private postage meter case under section 7502 involves a timely postmark. Petitioners need only demonstrate that the postmark date was the actual mailing date. And credible testimony from the person mailing the petition should be sufficient.

Satisfying the other requirements, however, doesn't seem so simple. For although it may be possible to prove the occurrence of delays in the transmission of the mail, as a general matter, it is much more difficult to prove that they affected the delivery of a particular piece of mail.

Grossman v. Commissioner

Grossman⁵ involved a late-arriving Tax Court petition bearing a privately metered postmark. The IRS issued Leonard and Melnik Grossman a deficiency notice on January 5, 2004. Under section 6213(a), the couple had 90 days, or until April 5, 2004, to file a petition for redetermination with the Tax Court. The Grossmans' properly addressed petition, bearing a March 30, 2004, postmark from a private postage meter, was sent certified mail and received by the court on May 25, 2004. The IRS moved to dismiss the case for lack of jurisdiction on the basis that the petition was 50 days late.

The Tax Court, citing on the testimony of a USPS analyst that the standard delivery period between the Grossmans' attorney's office in New Jersey and Washington, D.C., is two days, first concluded that the easy rule for privately metered mail was inapplicable. Consequently, the

⁴ Illustrative of the easy cases is *Sable v. Commissioner*, T.C. Memo. 1996-535, Doc 96-31411, 96 TNT 236-16. In *Sable*, the Tax Court determined that the standard mailing period was three days and held that a four-day late petition bearing a private postmark was timely filed under reg. section 301.7502-1(c)(1)(iii)(B)(1), after allowing for Sunday nondelivery.

⁵ *Supra* note 2.

court applied the three-step test of reg. section 301.7502-1(c)(1)(iii)(B)(2).

The Grossmans relied on the testimony of their attorney's office manager, Brenda Bucco, to establish timely mailing. Bucco testified that she prepared the couple's petition for mailing on March 29, entering the date on her mailing log, and handed it to a USPS employee the next day. However, that account differed from that of an affidavit in which Bucco indicated that the petition was mailed on March 29. The IRS used the inconsistency to challenge the credibility of Bucco's testimony.

Bucco addressed the discrepancy, testifying that in preparing the affidavit, she failed to consider that the petition was prepared for the mail the day before the actual mailing. The Tax Court accepted the explanation as reasonable and found that Bucco's testimony was consistent and credible. The court then concluded that the Grossmans beat the April 5 filing date, noting also that a canceled check dated March 30, 2004, and payable to the Tax Court, accompanied the petition.

The court then considered whether the petition's delay was due to a delay in the transmission of the mail, and the cause of the delay. Here, the petitioners relied on a June 9, 2004, letter from the Consumer Affairs & Claims, Central New Jersey Performance Cluster of the USPS. The letter indicated that the petition had been incorrectly scanned and delayed by the USPS from May 13 to May 25, 2004, the date of delivery. The petitioners offered no evidence of a delay in the transmission of the mail between March 30 and May 13.

The IRS also relied on the letter, noting that it read "we can only presume that the [petition] could not have entered the U.S. mail system earlier than May 12, 2004." The letter writer testified that his presumption was based on standard delivery times and indicated that it was impossible to identify the actual mailing date. The IRS argued that the petitioners failed to establish that the delay from April 5 to May 12 was caused by a delay in the transmission of the mail. However, the Tax Court refused to treat the letter writer's presumption as a fact. It concluded that the petition was delayed by USPS errors, citing Bucco's testimony, and the USPS employee's letter and testimony.

What Hasn't Worked

As noted, private postmark petitioners hadn't had much success in Tax Court litigation before Grossman. Leaving aside the cases in which the petitioner failed to produce any evidence at all, here's a brief look at what didn't work and a review of *Theodore Jones et ux. v. Commissioner*,⁶ the most recent case before Grossman in which a petitioner prevailed.

The case law indicates that the regulations' timely mailing requirement is not as easy to satisfy as it seems. Petitioners have routinely relied on the testimony of the person who mailed the petition but have had, at best, mixed results. More often than not the Tax Court has found the testimony unconvincing, pointing to inconsistencies or irregularities and labeling it self-serving or implausible.⁷ As was seen

⁶ *Supra* note 3.

⁷ See, e.g., *Peter R. Little v. Commissioner*, T.C. Memo. 1995-491, Doc 95-9411, 95 TNT 199-16; *Hanna & Assoc. P.C. v. Commissioner*, T.C. Memo. 1997-376, Doc 97-23955, 97 TNT 160-8; *Debra J. Hord v. Commissioner*, T.C. Memo. 2000-147, Doc 2000-11791, 2000 TNT 80-9, *aff'd*, 87 AFTR2d par. 2001-

in Grossman, however, the court will occasionally accept flawed yet credible testimony as satisfying the timely mailing requirement.

Unlike the uniform testimonial approach taken to establish timely mailing, petitioners have offered all sorts of "evidence" of delays in the transmission of the U.S. mail and the cause of the delays. The Tax Court has rejected most.

Petitioners have argued, after having established that a petition was deposited in the U.S. mail before the last day prescribed for filing, that any delay in the delivery of the petition must have been due to a delay in the transmission of the U.S. mail and that the cause of the delay was a problem attributable to the USPS. However, the Tax Court has repeatedly held that this tempting argument fails to satisfy the requirements of the regulation.⁸

The court has held that vague statements about the poor performance of the USPS⁹ and newspaper articles making the same point¹⁰ are insufficient. It has also rejected a petitioner's supposition that weather may have delayed his petition.¹¹

One petitioner offered a detailed explanation of how a statutory holiday had delayed his petition.¹² He testified that increases in the volume of the mail and in the number of regular USPS employees taking vacation resulted in mail delays. He also testified that holiday airline traffic left little room onboard for the mail and asserted that the weather may have played a role in the delay. The Tax Court was not convinced, but suggested that his arguments might have been more convincing had his petition been mailed around Christmas rather than Memorial Day.

Another Petitioner Prevails

Jones¹³ was the exception to the string of IRS victories. In Jones, the Tax Court denied the IRS's motion to dismiss, finding that the petitioners satisfied the regulations' three requirements.

To prove timely mailing, the petitioners in Jones relied on an affidavit from their attorney indicating that he had mailed the petition in the early evening on the last day prescribed for filing. The petitioners' memorandum of law, however, indicated that the attorney mailed the petition sometime after 3 p.m. on the last day for filing. The Tax Court, labeling the statements imprecise but not inconsistent,

651, Doc 2001-7978, 2001 TNT 55-16 (5th Cir. 2001)
(unpublished per curiam opinion).

⁸ Herman W. Beacham v. Commissioner, T.C. Memo. 1996-226, Doc 96-15078, 96 TNT 100-15.

⁹ See, e.g., Charles J. Oswald Jr. v. Commissioner, T.C. Memo. 1995-17, Doc 95-763, 95 TNT 11-19; Roy L. Misskelley et ux. v. Commissioner, T.C. Memo. 1994-299, Doc 94-6150, 94 TNT 126-33.

¹⁰ Jose L. Castro et ux. v. Commissioner, T.C. Memo. 1994-530, Doc 94-9597, 94 TNT 207-13.

¹¹ David Peterson et ux. v. Commissioner, T.C. Memo. 2001-11, Doc 2001-2305, 2001 TNT 15-22.

¹² Orlander Robinson v. Commissioner, T.C. Memo. 2000-146, Doc 2000-11792, 2000 TNT 80-10.

¹³ Supra note 3.

and noting that there was no reason to doubt the attorney's veracity, held that the petitioners had established timely mailing.

To establish a delay in the transmission of the mail and the cause of the delay, the petitioners produced the envelope in which the petition was sent and a letter from the manager of the consumer affairs division of the Houston office of the USPS. The envelope bore two stamped notations reading "Return to Sender Undeliverable as addressed." The consumer affairs manager's letter indicated that "because the envelope was stamped 'return to sender undeliverable as addressed,' this may have been the main cause for delay." The court carefully inspected the envelope's label and, finding no other address concealed under the properly addressed label, concluded that the delay in delivery was due to a delay in the transmission of the mail and was caused by the USPS.

Grossman and Jones demonstrate that private postmark petitioners don't need perfect evidence to avoid a jurisdictional problem. In each case, the Tax Court indicated that the petitioners' evidence of timely mailing was flawed, yet found that it satisfied the regulations' timely mailing requirement. The cases suggest that a consistent account of the circumstances of timely mailing would be more than enough.

The cases also clarify what's needed to satisfy the regulations' evidence of delay requirements. They stress the need for evidence that is specific to the petition at issue. In both Jones and Grossman the petitioners presented letters from the USPS that addressed the specific delivery of the respective petitions. The evidence was quite unlike the evidence of general mail delays relied on by petitioners in the cases in which the IRS prevailed.

The cases also demonstrate that the Tax Court demands very little more than some specific evidence of delay. It isn't necessary to comprehensively retrace and document the route taken by a petition on its way to the court. In Grossman, the petitioners offered specific evidence of a delay spanning the 13 days before the petition arrived at the Tax Court, but no evidence of a delay occurring during the first 43 days after mailing. And in Jones, the USPS letter addressing the petition's delay indicated only that the "Return to Sender" stamp may have been the main cause of delay. Nonetheless, the Tax Court found that the letters were enough to satisfy the regulations.

Practitioners Beware

Although the Tax Court in Grossman was forgiving of Bucco's inconsistent accounts and the petitioners' inability to establish the cause of the entire delay, it cannot be assumed that the court will always reach the same conclusion even in a case with similar facts. The case of *Hanna & Associates P.C. v. Commissioner*¹⁴ illustrates the point.

In *Hanna*, the Tax Court granted the IRS's motion to dismiss for lack of jurisdiction, finding that the petitioner failed to satisfy the three prongs of reg. section 301.7502-1(c)(1)(iii)(B).¹⁵ The privately postmarked petition in *Hanna* arrived 9 days after the filing deadline including the standard delivery period, 39 days earlier than the petition arrived in Grossman.

As was the case in Grossman, the petitioner relied on the testimony of the office manager who mailed the petition to establish timely mailing. And, as in Grossman, there was a discrepancy between the

¹⁴ Supra note 6.

¹⁵ The petitioner in *Hanna* offered no evidence to establish the regulations' evidence of delay requirements.

office manager's testimony and her earlier affidavit. In Hanna, the office manager testified that she mailed the petition by putting it in a mailbox in the basement of her building, while her affidavit indicated that she'd used a mailbox just down the hall from her office. Ultimately, the Tax Court found the office manager's explanation of the discrepancy unconvincing and held that the petitioner had failed to establish timely mailing.¹⁶

Administrative Settlements

Rather than leaving it to a Tax Court judge to evaluate the evidence, late filers would do well to try to get the IRS to follow the pretrial advice it gives its own field attorneys. Doing so could negate two of the regulations' three requirements.

In the Internal Revenue Manual, the IRS cautions its field attorneys that the Tax Court will not lightly dismiss a petition, and actually instructs them not to raise the jurisdictional issue if a taxpayer can informally demonstrate timely mailing.¹⁷ A form letter provided for IRS field attorneys to use in cases in which reg. section 301.7502-1(c)(1)(iii)(B)(2) applies clarifies the meaning of "informal demonstration" and supports the possibility that evidence of timely filing alone could avoid a jurisdictional problem. It states:

[I]f you will send [the IRS field attorney] a letter stating that the petition was actually deposited in the mail before the last pickup from the mailbox on or before the 90th day and showing the time, place and circumstances of the mailing, I will rely on your representation and not raise the jurisdictional issue to the court.¹⁸

Of course, the IRM isn't legally binding on IRS employees, but pressing for the informal resolution of the jurisdictional issue is obviously the way to go if evidence of a delay in the transmission of the mail is unavailable. Although inconsistent accounts such as those of the office managers in Grossman and Hanna would presumably not satisfy the informal requirements, a credible account may well.

Conclusion

Perhaps the IRM has it right when it says that the Tax Court will not lightly dismiss a petition. Jones and Grossman confirm that the court isn't looking for irrefutable evidence of timely mailing and of delay, only some plausible testimony and something from the USPS explaining how the petition may have been delayed. If practitioners start doing a little digging with the USPS, rather than with their Farmer's Almanacs, they might reverse the trend of IRS victories in private postmark mailbox rule cases.

¹⁶ It was not specified in Hanna whether the petitioner had included a check payable to the Tax Court and dated before the end of the filing period with the petition, as was the case in Grossman.

¹⁷ Internal Revenue Manual 35.3.2.3.4.

¹⁸ IRM Exhibit 35.11.1-43.