

## **Pearson v. Comm'r**

United States Tax Court

November 29, 2017, Filed

Docket No. 11084-15

### **Reporter**

2017 U.S. Tax Ct. LEXIS 59 \*; 149 T.C. No. 20

LINCOLN C. PEARSON AND VICTORIA K. PEARSON,  
Petitioners v. COMMISSIONER OF INTERNAL  
REVENUE, Respondent

**Disposition:** An order will be issued denying respondent's motion to dismiss for lack of jurisdiction.

### **Core Terms**

postage, postmark, Postal, mail, meter, Stamps, com, label, USPS, regulations, print, envelope, deposited, provides, prescribed, Service's, customer, https, postoffice, machines, certified mail, affixing, Manual, www, motion to dismiss, jurisdictional, shipping, tracking, parties, online

### **Case Summary**

#### **Overview**

ISSUE: Whether petitioners met the 90-day deadline for filing their petition under the "timely mailed, timely filed" rule set forth in I.R.C. § 7502. HOLDINGS: [1]-The date appearing on the Stamps.com postage label should be regarded as a "postmark not made by the United States Postal Service", I.R.C. § 7502(b); [2]-The envelope containing the petition was timely mailed under the regulations the Secretary had promulgated to govern this situation, regardless of whether Treas. Reg. § 301.7502-1(c)(1)(iii)(B)(1) or (iii)(B)(2) was thought to be applicable. Subdivision (iii)(B)(3), on which the Tax Court relied in *Tilden*, was inapplicable for the reasons stated by the Seventh Circuit in that case; [3]-Because the petition was timely mailed under the Secretary's regulation implementing I.R.C. § 7502(b), it was timely filed under I.R.C. § 6213(a).

#### **Outcome**

An order would be issued denying the Commissioner's motion to dismiss for lack of jurisdiction.

### **LexisNexis® Headnotes**

Governments > Legislation > Interpretation

Tax Law > Federal Tax Administration &  
Procedures > Tax Court > Jurisdiction

#### **HNI [📄] Legislation, Interpretation**

The U.S. Tax Court is a court of limited jurisdiction, and may exercise its jurisdiction only to the extent authorized by Congress; refer to I.R.C. § 7442. In determining whether the Court has jurisdiction over a given matter, the Court and the Courts of Appeals have given the Court's jurisdictional provisions a broad, practical construction rather than a narrow, technical one. When a statutory provision is capable of two interpretations, the Court is inclined to adopt a construction which will permit it to retain jurisdiction without doing violence to the statutory language.

Tax Law > Federal Tax Administration &  
Procedures > Tax Credits & Liabilities > Deficiencies

Tax Law > Federal Tax Administration &  
Procedures > Tax Court > Jurisdiction

#### **HN2 [📄] Tax Credits & Liabilities, Deficiencies**

The U.S. Tax Court's jurisdiction in a deficiency case depends on the issuance of a valid notice of deficiency and a timely filed petition. U.S. Tax Ct. R. 13(a), (c). The Code authorizes the Commissioner, after determining a deficiency, to send a notice of deficiency by certified or registered mail to the taxpayer at his last known address. I.R.C. § 6212(a) and (b). The

taxpayer then has 90 days (150 days if the notice was mailed to a foreign address) to file a petition with this Court for redetermination of the deficiency. I.R.C. § 6213(a). This 90-day filing deadline is jurisdictional. The law is clear that the Tax Court does not have jurisdiction over an untimely petition.

Tax Law > Federal Tax Administration &  
Procedures > Tax Court > Jurisdiction

#### **HN3 [📄] Tax Court, Jurisdiction**

If a taxpayer sends his petition for delivery to the U.S. Tax Court "by United States mail" within the prescribed period for filing the petition, but the Court receives the petition after that period has ended, the date of the United States postmark stamped on the envelope in which the petition is mailed "shall be deemed to be the date of delivery." I.R.C. § 7502(a)(1). This provision "shall apply in the case of postmarks not made by the United States Postal Service only if and to the extent provided by regulations prescribed by the Secretary." I.R.C. § 7502(b). The Secretary has promulgated the regulations anticipated by Congress. Treas. Reg. § 301.7502-1(c). This regulation uses the terms post-mark made by the U.S. Postal Service" and postmark not made by the U.S. Postal Service." Treas. Reg. § 301.7502-1(c)(1)(iii)(B)(3). But the regulation does not define either term or furnish examples of postmarks not made by the U.S. Postal Service.

Tax Law > Federal Tax Administration &  
Procedures > Tax Court > Jurisdiction

#### **HN4 [📄] Tax Court, Jurisdiction**

The 90-day filing period in I.R.C. § 6213(a) is a jurisdictional requirement, as opposed to a "case-processing rule" subject to waiver and equitable tolling.

Tax Law > Federal Tax Administration &  
Procedures > Tax Court > Jurisdiction

#### **HN5 [📄] Tax Court, Jurisdiction**

A Stamps.com postage label does not literally "mark" the entry of mail into the "post." Rather, the date shown on that label indicates the date on which the consumer purchased the postage and electronically generated the label. But both the U.S. Tax Court and the Seventh Circuit in *Tilden* agreed that the date appearing on a Stamps.com postage label should be

regarded as a "postmark not made by the United States Postal Service." I.R.C. § 7502(b).

Administrative Law > Judicial Review > Standards of  
Review > Rule Interpretation

#### **HN6 [📄] Standards of Review, Rule Interpretation**

The Secretary of the Treasury's construction of his own regulations is entitled to deference.

Tax Law > Federal Tax Administration &  
Procedures > Tax Court > Jurisdiction

#### **HN7 [📄] Tax Court, Jurisdiction**

The U.S. Tax Court has recognized that the output of a private postage meter qualifies as a "postmark not made by the United States Postal Service."

Governments > Legislation > Interpretation

Tax Law > Federal Tax Administration &  
Procedures > Tax Court > Jurisdiction

#### **HN8 [📄] Legislation, Interpretation**

Congress made clear in the legislative history that it intended I.R.C. § 7502(b) to apply to the output of "mailing machines or other devices." It is well established that courts should construe legislative enactments to avoid rendering them meaningless.

Tax Law > Federal Tax Administration &  
Procedures > Tax Court > Jurisdiction

#### **HN9 [📄] Tax Court, Jurisdiction**

As the Seventh Circuit explained in *Tilden*, a Stamps.com postage label is the modern equivalent of the output of an old-fashioned postage meter. The court finds no plausible basis for making a legally significant distinction between these two means of affixing postage. The court accordingly accepts as the premise of its analysis that a Stamps.com postage label, like the output of a private postage meter, constitutes a "postmark not made by the United States Postal Service." I.R.C. § 7502(b).

## Syllabus

Under I.R.C. sec. 6213(a), the last day for Ps to petition the Court was Apr. 22, 2015. The Court received their petition via certified mail on Apr. 29, 2015. The envelope containing the petition was properly addressed and had been deposited at a U.S. post office with sufficient postage prepaid through Stamps.com, a USPS-approved commercial vendor. Affixed to the envelope containing the petition was a Stamps.com postage label bearing the date Apr. 21, 2015, the date on which the postage was paid and the label printed. The envelope did not bear a USPS postmark. The USPS entered the envelope into its tracking system for certified mail on Apr. 23, 2015.

1. Held: The date shown on the Stamps.com postage label was a "postmark[]" not made by the United States Postal Service" within the meaning of I.R.C. sec. 7502(b).

2. Held, further, data retrieved from the USPS tracking system for certified mail is not "a postmark made by the U.S. Postal Service" within the meaning of sec. 301.7502-1(c)(1)(iii)(B)(3), Proced. & Admin. Regs.

3. Held, further, Ps' petition was timely mailed under subdiv. (iii)(B)(1) or (2) of sec. 301.7502-1(c)(1), Proced. & Admin. Regs., and was timely filed under I.R.C. sec. 7502(b).

4. Held, further, the Court has jurisdiction over Ps' case. Tilden v. Commissioner, 846 F.3d 882 (7th Cir. 2017), rev'g and remanding T.C. Memo. 2015-188, followed.

**Counsel:** [\*1] Paul W. Jones, for petitioners.

Skyler K. Bradbury, David W. Sorensen, and Robert A. Varra, for respondent.

**Judges:** LAUBER, Judge. MARVEL, FOLEY, VASQUEZ, GALE, THORNTON, GOEKE, HOLMES, KERRIGAN, BUCH, NEGA, PUGH, and ASHFORD, JJ., agree with this opinion of the Court. BUCH, J., concurring. MARVEL, FOLEY, VASQUEZ, GOEKE, HOLMES, PARIS, LAUBER, NEGA, PUGH and ASHFORD, JJ., agree with this concurring opinion. GUSTAFSON and MORRISON, JJ., dissenting.

**Opinion by:** LAUBER

## Opinion

LAUBER, Judge: This case presents a jurisdictional question

identical to that presented by Tilden v. Commissioner, T.C. Memo. 2015-188, rev'd and remanded, 846 F.3d 882 (7th Cir. 2017). On May 29, 2015, the Internal Revenue Service (IRS or respondent) filed a motion to dismiss this case for lack of jurisdiction. We held that motion in abeyance pending resolution of the taxpayer's appeal of our decision in Tilden, in which we had granted a similar motion by the Commissioner. After the U.S. Court of Appeals for the Seventh Circuit handed down its opinion in Tilden, and pursuant to its mandate, we vacated our earlier decision in that case on March 13, 2017, and denied the Commissioner's motion to dismiss.

The instant case would be appealable, absent stipulation to the contrary, to the U.S. Court of Appeals for the Eighth [\*2] Circuit. See sec. 7482(b)(1)(A). Respondent, however, no longer objects to our assumption of jurisdiction. On March 15, 2017, the parties filed a joint status report stating: "Since the facts of the present case substantially match the facts at issue in Tilden, the parties anticipate that the Court will deny respondent's motion to dismiss for lack of jurisdiction."

The parties have correctly anticipated what we will do. We agree in all respects with the Seventh Circuit's analysis and will accordingly deny respondent's motion to dismiss.

### Background

The following facts are derived from the parties' pleadings, motion papers, and the exhibits and declaration attached thereto. These facts are stated solely for the purpose of disposing of the motion and not as findings of fact in this case. See Rule 1(b); Fed. R. Civ. P. 52(a); Cook v. Commissioner, 115 T.C. 15, 16 (2000), aff'd, 269 F.3d 854 (7th Cir. 2001).

On January 22, 2015, the IRS sent petitioners, by certified mail to their last known address, a notice of deficiency for tax years 2010, 2011, and 2012. Petitioners resided in Arkansas at that time and at the time of filing their petition. The notice determined for the years at issue deficiencies aggregating in excess of \$80,000 and accuracy-related penalties under section 6662(a) computed as 20% of those amounts.<sup>1</sup>

Section 6213(a) provides, [\*3] in the case of a notice addressed to a taxpayer within the United States, that the taxpayer may petition this Court "[w]ithin 90 days \* \* \* after

<sup>1</sup> Unless otherwise indicated, all statutory references are to the Internal Revenue Code (Code) in effect for the years at issue, and all Rule references are to the Tax Court Rules of Practice and Procedure. We round all monetary amounts to the nearest dollar.

the notice of deficiency \* \* \* is mailed." For petitioners, this 90-day period expired on April 22, 2015. That day was not a Saturday, Sunday, or legal holiday in the District of Columbia. See sec. 6213(a).

The Court received the petition on Wednesday, April 29, 2015, and filed it that same day. The petition was sent to the Court via certified mail delivery provided by the U.S. Postal Service (USPS). The envelope in which the petition was mailed bore a 20-digit USPS certified mail tracking number. The envelope did not have a USPS postmark, but it did have a "postmark" from Stamps.com, an online postage services provider.<sup>2</sup> Stamps.com enables ordinary consumers to "enjoy the convenience of a traditional postage meter." *Tilden v. Commissioner*, 846 F.3d at 885.

Petitioners have supplied a declaration under penalty of perjury from Katelynn Marshall, an administrative assistant at the law firm representing them. She avers that on April 21, 2015, she created through Stamps.com a postage label with official U.S. postage of \$7.82 (the cost of ordinary postage plus the supplement for certified delivery). [\*4] That label shows the Court's correct address, the certified mail tracking number referenced above, and the date "04/21/2015," reflecting the date on which the label was created.

Ms. Marshall further avers that she affixed this label to an envelope containing the petition and sealed that envelope. According to her declaration, she personally carried the sealed envelope later that day to the U.S. Post Office at 2350 Arbor Lane, Salt Lake City, Utah 84117, and deposited it in the U.S. mail.

Ms. Marshall attached to her declaration a USPS "certified mail receipt" bearing the tracking number referenced above. Written by hand on that receipt are petitioners' names, the words "United States Tax Court" (in the block captioned "Send To"), and the date "4/21/15" (in the block captioned "Postmark Here"). Ms. Marshall avers that she made these notations when she mailed the envelope.

The USPS maintains an online tracking system that enables customers to track the progress of certified mail. The earliest entry in that system for the item bearing the certified mail number referenced above shows its arrival at a Salt Lake City

USPS facility, with ZIP Code 84199, at 5:39 p.m. on April 23, 2015. (That is a different USPS facility [\*5] from the one at which Ms. Marshall mailed the petition; the latter has ZIP Code 84117.) Subsequent entries in the USPS tracking system show that the item left the USPS facility with ZIP Code 84199 at 6:57 p.m. on April 23, 2015, and was delivered to this Court at 11:02 a.m. on April 29, 2015. As noted previously, the Court filed the petition an hour later that day.

The Court requested supplemental briefing from the parties on respondent's motion to dismiss. In a filing dated August 21, 2015, respondent represented that he had contacted a USPS specialist regarding the timing questions presented by this case. That specialist advised respondent's counsel of her determination that it was "highly unlikely the mail piece entered P&DC [the Salt Lake Processing and Distribution Center] on 4/21 and sat for two days before processing." However, on the basis of USPS "logistical data and the time stamp of processing for this certified mail piece," the USPS specialist advised respondent's counsel that "it is the belief of our Salt Lake P&DC Operations Support office that the mail piece in question was most likely deposited and collected between 4:30 pm and 6:10 pm on 4/22." Respondent attached to [\*6] his supplemental response the complete email exchange between the USPS specialist and respondent's counsel.

As noted earlier, the last day for filing the petition in this case was April 22, 2015. On the basis of the information set forth above, respondent concluded that the petition was "most likely deposited \* \* \* with the USPS on April 22, 2015, which is within the time prescribed by sections 6213(a) or 7502." Respondent accordingly joined petitioner in urging "that the Court deny respondent's motion to dismiss for lack of jurisdiction."

## Discussion

### I. The Court's Deficiency Jurisdiction

HNI [↑] The Tax Court is a court of limited jurisdiction, and we may exercise our jurisdiction only to the extent authorized by Congress. See sec. 7442; *Guralnik v. Commissioner*, 146 T.C. 230, 235 (2016); *Moosally v. Commissioner*, 142 T.C. 183, 195-196 (2014). In determining whether we have jurisdiction over a given matter, this Court and the Courts of Appeals have given our jurisdictional provisions a broad, practical construction rather than a narrow, technical one. *Bongam v. Commissioner*, 146 T.C. 52, 55 (2016); *Lewy v. Commissioner*, 68 T.C. 779, 781 (1977). When a statutory provision is capable of two interpretations, "we are inclined to adopt a construction which will permit us to retain jurisdiction without doing violence to the statutory language." *Traxler v.*

<sup>2</sup> Stamps.com is a publicly traded company that provides internet-based postage services. It enables users to buy and print USPS-approved postage directly from their computers. See <http://www.stamps.com/company-info> ("Simply log-in to Stamps.com, print your postage then drop your letters and packages into any mailbox, hand them to your postal carrier or schedule a USPS pick-up right through the software.").

Commissioner, 61 T.C. 97, 100 (1973).

HN2<sup>[↑]</sup> The Court's jurisdiction in a deficiency case depends on the issuance of [\*7] a valid notice of deficiency and a timely filed petition. Rule 13(a), (c); Monge v. Commissioner, 93 T.C. 22, 27 (1989); Normac, Inc. v. Commissioner, 90 T.C. 142, 147 (1988). The Code authorizes the Commissioner, after determining a deficiency, to send a notice of deficiency by certified or registered mail to the taxpayer at his last known address. Sec. 6212(a) and (b). The taxpayer then has 90 days (150 days if the notice was mailed to a foreign address) to file a petition with this Court for redetermination of the deficiency. Sec. 6213(a). This 90-day filing deadline is jurisdictional. See Andrews v. Commissioner, 563 F.2d 365, 366 (8th Cir. 1977) ("The law is clear that the Tax Court does not have jurisdiction over an untimely petition."); Tilden, 846 F.3d at 886-887 (collecting cases); Guralnik, 146 T.C. at 238 ("In cases too numerous to mention, dating back to 1924, we have held that the statutorily-prescribed filing period in deficiency cases is jurisdictional." (citing Satovsky v. Commissioner, 1 B.T.A. 22, 24 (1924))).

## II. Governing Statutory and Regulatory Structure

The question is whether petitioners met the 90-day deadline for filing their petition under the "timely mailed, timely filed" rule set forth in section 7502. HN3<sup>[↑]</sup> If a taxpayer sends his petition for delivery to the Court "by United States mail" within the prescribed period for filing the petition, but the Court receives the petition after that period has ended, the date of the United States postmark stamped on the envelope [\*8] in which the petition is mailed "shall be deemed to be the date of delivery." Sec. 7502(a)(1). This provision "shall apply in the case of postmarks not made by the United States Postal Service only if and to the extent provided by regulations prescribed by the Secretary." Sec. 7502(b).

The Secretary has promulgated the regulations anticipated by Congress. u sec. 301.7502-1(c), Proced. & Admin. Regs. This regulation uses the terms "post-mark made by the U.S. Postal Service" and "postmark \* \* \* not made by the U.S. Postal Service." Id. subpara. (1)(iii)(B)(3). But the regulation does not define either term or furnish examples of postmarks not made by the USPS.

With respect to a postmark not made by the USPS the regulation provides:

- (1) In general.--If the postmark on the envelope is made other than by the U.S. Postal Service--
  - (i) The postmark so made must bear a legible date on or before the last date \* \* \* prescribed for filing the

document \* \* \*; and

- (ii) The document \* \* \* must be received by the agency, officer, or office with which it is required to be filed not later than the time when a document \* \* \* contained in an envelope that is properly addressed, mailed, and sent by the same class of mail would ordinarily be received [\*9] if it were postmarked at the same point of origin by the U.S. Postal Service on the last date \* \* \* prescribed for filing \* \* \*. [Sec. 301.7502-1(c)(1)(iii)(B)(1), Proced. & Admin. Regs.]

If the taxpayer satisfies the first of these requirements but not the second, the regulation provides as follows in subdivision (iii)(B)(2):

- (2) Document or payment received late.--If a document \* \* \* described in paragraph (c)(1)(iii)(B)(1) is received after the time when a document \* \* \* so mailed and so postmarked by the U.S. Postal Service would ordinarily be received, the document \* \* \* is treated as having been received at the time when a document \* \* \* so mailed and so postmarked would ordinarily be received if the person who is required to file the document \* \* \* establishes--
  - (i) That it was actually deposited in the U.S. mail before the last collection of mail from the place of deposit that was postmarked \* \* \* by the U.S. Postal Service on or before the last date \* \* \* pre-scribed for filing the document \* \* \*;
  - (ii) That the delay in receiving the document \* \* \* was due to a delay in the transmission of the U.S. mail; and
  - (iii) The cause of the delay.

## III. The Tilden Case

The taxpayer in Tilden was represented by the same [\*10] counsel representing petitioners, and the facts of the two cases (insofar as they concern our jurisdiction) are virtually identical. The last day for filing the petition in Tilden was April 21, 2015. The envelope in which that petition was mailed had a Stamps.com postage label showing that date. The same administrative assistant averred that she had personally carried the envelope to the same Salt Lake City post office (the one with ZIP Code 84117) and mailed it on April 21, 2015. The petitions in the two cases were received and filed by the Court minutes apart on April 29, 2015.

This Court concluded in Tilden that neither subdivision of the regulation quoted above applied and that the outcome should instead be determined by section 301.7502-1(c)(1)(iii)(B)(3), Proced. & Admin. Regs. That provision applies "[i]f the envelope has a postmark made by the U.S. Postal Service in addition to a postmark not so made." In that event, "the

postmark that was not made by the U.S. Postal Service is disregarded." *Ibid.*

The envelope in *Tilden*, like the envelope here, did not actually have a USPS postmark, but only a Stamps.com postage label showing the date on which the label had been generated. But the record in *Tilden*, like the [\*11] record here, included USPS tracking information showing that "the envelope entered the U.S. mail system on April 23, 2015." *T.C. Memo. 2015-188, 110 T.C.M. (CCH) 314, 316*. This Court concluded that this tracking datum could "serve as the functional equivalent of, or be tantamount to, a USPS postmark." *Id. at 316* (citing *Boulton v. Commissioner, T.C. Memo. 2011-11, 101 T.C.M. (CCH) 1031, 1033-1034*). Invoking *subdivision (iii)(B)(3)* of the regulation, this Court disregarded the Stamps.com postmark and concluded that the petition, deemed to have been postmarked on April 23, 2015, was not "timely mailed." We accordingly granted the Commissioner's motion to dismiss for lack of jurisdiction.

The taxpayer sought reconsideration in *Tilden*, and the Commissioner agreed that reconsideration was warranted. The Commissioner did not dispute that the petition had actually been mailed, as averred by the taxpayer's representative, on April 21, 2015. He further agreed that the petition satisfied the requirements of *subdivision (iii)(B)(1)* of the regulation "by displaying a timely postmark not made by the USPS and arriving within the time first class mail would ordinarily be received in Washington, D.C. from Utah." And he joined the taxpayer in urging that this Court had erred in relying on *subdivision (iii)(B)(3)* of the regulation, [\*12] because the envelope in fact had no USPS postmark. Concluding that the petition for these reasons had been timely mailed and thus timely filed, the Commissioner did not object to the Court's granting the taxpayer's motion for reconsideration, and on such reconsideration, denying the motion to dismiss.

We nevertheless declined to reconsider our opinion. We cited the axiom that "jurisdiction cannot be conferred on this Court by agreement" of the parties. *Dorn v. Commissioner, 119 T.C. 356, 357 (2002); Mohawk Glove Corp. v. Commissioner, 2 B.T.A. 1247 (1925)*. And we concluded that the parties had not shown "why official records of the U.S. Postal Service in the form of USPS Tracking data should not serve as a postmark."

The Seventh Circuit reversed. It began by reaffirming the principle that *HN4* [↑] the 90-day filing period in section 6213(a) is a jurisdictional requirement, as opposed to a "case-processing rule" subject to waiver and equitable tolling. *Tilden, 846 F.3d at 886*. "For many decades," the court stated, "the Tax Court and multiple courts of appeals have deemed §

6213(a) as a whole to be a jurisdictional limit on the Tax Court's adjudicatory competence." *Ibid.* In *Guralnik*, the Court of Appeals noted, this Court "unanimously conclude[d] that filing deadlines for petitions seeking its review are jurisdictional under the Supreme Court's [\*13] current approach." *Ibid.* (citing *Guralnik, 146 T.C. at 238*). Reluctant to disturb this body of precedent, the Seventh Circuit "accept[ed] *Guralnik*'s conclusion and treat[ed] the statutory filing deadline as a jurisdictional one." *Id. at 887*.

While recognizing the rule that "litigants cannot stipulate to jurisdiction," the Court of Appeals pointed out that the parties (absent improper collusion) "may agree on the facts that determine jurisdiction." *Ibid.* (emphasis in original). By the time *Tilden* reached the Seventh Circuit, the Commissioner had conceded that the envelope containing the petition was "handed to the Postal Service on April 21, 2015," the last day for filing. *Ibid.*; see *sec. 301.7502-1(c)(1)(iii)(B)(2)(i)*, *Proced. & Admin. Regs.* (requiring that the item be "actually deposited in the U.S. mail \* \* \* on or before the last date \* \* \* prescribed for filing"). And the Commissioner had acknowledged that "certified mail often takes eight days to reach the Tax Court from Utah." *Tilden, 846 F.3d at 887*; see *sec. 301.7502-1(c)(1)(iii)(B)(1)(ii)*, *Proced. & Admin. Regs.* (requiring that the item have been received not later than the time when an identical document postmarked by USPS "would ordinarily be received").

Given these concessions by the Commissioner, the Seventh Circuit ruled that the only [\*14] basis for dismissing the taxpayer's petition would be the legal conclusion adopted by this Court--namely, that *subdivision (iii)(B)(3)*, which addresses situations where there is "a postmark made by the U.S. Postal Service in addition to a postmark not so made," is "the sole sub[division] entitled to a controlling role." *Tilden, 846 F.3d at 887*. The Court of Appeals had no difficulty rejecting that conclusion, noting that the envelope in which the petition had been mailed "had only one postmark." "The regulation does not ask whether a date that is not a 'postmark' is as good as a postmark. It asks whether there are competing postmarks." *Ibid.* Concluding with a reminder to lawyers about the inadvisability of waiting until the last day to mail a jurisdictional document, the Seventh Circuit held that the petition had been timely mailed and thus timely filed. *Id. at 888*.

#### IV. Analysis

Because we agree with the Seventh Circuit on all relevant points, our analysis can be brief. *HN5* [↑] A Stamps.com postage label does not literally "mark" the entry of mail into the "post." Rather, the date shown on that label indicates the date on which the consumer purchased the postage and electronically generated the label. But both this Court

and [\*15] the Seventh Circuit in *Tilden* agreed that the date appearing on a Stamps.com postage label should be regarded as a "postmark[]" not made by the United States Postal Service." *Sec. 7502(b)*. In conceding that petitioners' petition was timely mailed under the regulations discussed above, respondent necessarily agrees that this is a case in which "the postmark on the envelope is made other than by the U.S. Postal Service." *Sec. 301.7502-1(c)(1)(iii)(B)(1)*, *Proced. & Admin. Regs.* *HN6* [↑] The Secretary's construction of his own regulations is entitled to deference. *Rand v. Commissioner*, 141 T.C. 376, 380-381 (2013) (citing *Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997)).

There is nothing in the legislative history of *section 7502(b)*, or in the regulations promulgated by the Secretary, to suggest that a postage label of this sort should be regarded as something other than a "postmark[]" not made by the United States Postal Service." *Section 7502(b)*, enacted as part of the 1954 Code, ch. 736, *sec. 7502*, 68A Stat. at 896, was originally captioned "Stamp Machine." Congress expressed the rationale for this provision as follows: "Since it is possible to predate postmarks where mailing machines or other devices are used, *subsection (b)* provides that a postmark not made by the United States post office shall be deemed the date of delivery only to the extent permitted by regulations." H.R. Rept. [\*16] No. 83-1337, at A435 (1954).

Our case law reflects this legislative history. Almost 50 years ago, we explained that *section 7502(b)* reflects congressional concern that "postmarks made by private postage meters could bear any date desired by the sender." *Fishman v. Commissioner*, 51 T.C. 869, 872-873 (1969), *affd*, 420 F.2d 491 (2d Cir. 1970). Congress thus "refused to apply the same rules to both metered and unmetered mail." *Ibid.* *HN7* [↑] We have accordingly recognized that the output of a private postage meter qualifies as a "postmark not made by the United States Postal Service." See *Herrera v. Commissioner*, T.C. Memo. 2012-308, 104 T.C.M. (CCH) 540, 544; *Chang v. Commissioner*, T.C. Memo. 1998-298, 76 T.C.M. (CCH) 290, 291.<sup>3</sup>

<sup>3</sup> Deploying a dictionary, the dissent asserts, *see* dissenting op. p. 30, that the term "postmark" must be limited to "an official postal marking on a piece of mail." But if the term were limited to official markings made by the U.S. Postal Service, there could be no such thing as a "postmark[]" not made by the United States Postal Service," and *section 7502(b)* would then have no possible application. *HN8* [↑] Congress made clear in the legislative history that it intended *section 7502(b)* to apply to the output of "mailing machines or other devices." H.R. Rept. No. 83-1337, *supra*, at A435 (1954). It is well established that courts should construe legislative enactments to avoid rendering them meaningless. See *United States v.*

*HN9* [↑] As the Seventh Circuit explained in *Tilden*, 846 F.3d at 885, a Stamps.com postage label is the modern equivalent of the output of an old-fashioned postage meter. We find no plausible basis for making a legally significant distinction between these two means of affixing postage. We accordingly accept as the premise of our analysis that a Stamps.com postage label, like the output of a private postage meter, constitutes a "postmark[]" not made by the United States Postal Service." *Sec. 7502(b)*.

Given this premise, we have no difficulty concluding that the motion to dismiss for lack of jurisdiction must be denied. *Subdivision (iii)(B)(3)* of the regulation, governing competing postmarks, is inapplicable here for the reasons stated [\*17] by the Seventh Circuit in *Tilden*. And the petition was timely mailed regardless of whether we consider *subdivision (iii)(B)(1)* or *subdivision (iii)(B)(2)* of the regulation to be controlling.

With respect to *subdivision (iii)(B)(1)*, the Stamps.com postmark "bear[s] a legible date" (April 21, 2015) which was "on or before the last date \* \* \* prescribed for filing the document" (April 22, 2015). See *sec. 301.7502-1(c)(1)(iii)(B)(1)(i)*, *Proced. & Admin. Regs.* And the Commissioner has acknowledged that "certified mail often takes eight days to reach the Tax Court from Utah." *Tilden*, 846 F.3d at 887. The envelope containing the petition, received by this Court on April 29, 2015, was thus received "not later than the time when a document \* \* \* would ordinarily be received if it were postmarked \* \* \* by the U.S. Postal Service on the last date \* \* \* prescribed for filing." *Sec. 301.7502-1(c)(1)(iii)(B)(1)(ii)*, *Proced. & Admin. Regs.*

Alternatively, if the latter requirement were deemed unsatisfied, the petition would still be timely under *subdivision (iii)(B)(2)*, which applies to a document bearing a non-USPS postmark that is "received late." The critical question under *subdivision (iii)(B)(2)* is whether the document "was actually deposited in the U.S. mail \* \* \* on or before [\*18] the last date \* \* \* prescribed for filing the document." *Sec. 301.7502-1(c)(1)(iii)(B)(2)(i)*, *Proced. & Admin. Regs.*

The last date prescribed for filing the petition was April 22, 2015. Petitioners' representative avers that she actually deposited the envelope in the U.S. mail on April 21, 2015. While unsure about that, respondent agrees that the envelope,

*Menasche*, 348 U.S. 528, 538, 75 S. Ct. 513, 99 L. Ed. 615 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152, 2 S. Ct. 391, 27 L. Ed. 431 (1883)); *Market Co. v. Hoffman*, 101 U.S. 112, 115, 25 L. Ed. 782 (1879) (construing a statute so that "no clause, sentence, or word shall be superfluous, void, or insignificant").



at worst, was "most likely deposited \* \* \* with the USPS on April 22, 2015." Either way, the petition was timely mailed under subdivision (iii)(B)(2).<sup>4</sup>

In sum, we conclude that the date appearing on the Stamps.com postage label should be regarded as a "postmark[]" not made by the United States Postal Service." Sec. 7502(b). The envelope containing the petition was timely mailed under the regulations the Secretary has promulgated to govern this situation, regardless of whether subdivision (iii)(B)(1) or (iii)(B)(2) is thought to be applicable. Subdivision (iii)(B)(3), on which we relied in Tilden, is inapplicable for the reasons stated by the Seventh Circuit in that case. Because the petition was timely mailed under the Secretary's regulation implementing section 7502(b), it was timely filed under section 6213(a).<sup>5</sup>

To reflect the foregoing,

An order will be issued denying respondent's [\*19] motion to dismiss for lack of jurisdiction.

Reviewed by the Court.

MARVEL, FOLEY, VASQUEZ, GALE, THORNTON, GOEKE, HOLMES, KERRIGAN, BUCH, NEGA, PUGH,

<sup>4</sup> If the petition were thought to have been "received late," there is no dispute that the other two requirements of subdivision (iii)(B)(2) were met, i.e., that the late delivery was attributable to a "delay in the transmission of the U.S. mail" that was outside petitioners' control. See sec. 301.7502-1(c)(1)(iii)(B)(2)(ii) and (iii), Proced. & Admin. Regs.

<sup>5</sup> The dissent insists, see dissenting op. p. 34, that the relevant inquiry must be "whether the Stamps.com label is equivalent to a postmark in the sense of verifying the timeliness of a submission." But Congress recognized in 1954 that the output of mailing machines and similar devices would not necessarily verify the timeliness of a submission. H.R. Rept. No. 83-1337, supra at A435. That is why Congress provided, in section 7502(b), that the timely mailing rule "shall apply in the case of postmarks not made by the United States Postal Service only if and to the extent provided by regulations prescribed by the Secretary." The Secretary has issued the anticipated regulations. They require the taxpayer to prove the timeliness of his submission by showing that the non-USPS-postmarked item arrived no later than a USPS-postmarked item would have arrived or (if that test is not met) that the non-USPS-postmarked item "was actually deposited in the U.S. mail" on or before the filing date. See 301.7502-1(c)(1)(iii)(B)(2)(i), Proced. & Admin. Regs. The dissent proposes, see dissenting op. p. 34, a test for timeliness derived from several State court opinions. This seems an odd proposal given Congress' instruction that the timely mailing rule shall apply "to the extent provided by regulations prescribed by the Secretary." Sec. 7502(b).

and ASHFORD, JJ., agree with this opinion of the Court.

Concur by: BUCH

## Concur

BUCH, I., concurring: I join, without reservation, the opinion of the Court. I write separately to expand our statement: "We find no plausible basis for making a legally significant distinction between these two means of affixing postage", see op. Ct. p. 17, referring to a postage meter and a Stamps.com mailing label. A review of the various means of creating and affixing postage makes clear that there is no practicable difference among "official" U.S. Postal Service mailing labels, postage meters, and internet-based postage.

### I. Non-U.S. Postal Service Postmarks

As technology evolves, so must the law. But the law must evolve in a manner that is consistent with the statutes as written by Congress. Fortunately, when it comes to postmarks, Congress explicitly left room in the statute for postmarks created by someone other than the U.S. Postal Service and for agency rulemaking to fill in the details. See sec. 7502(b).

The Code couldn't be any clearer, specifically referring to "postmarks not made [\*20] by the United States Postal Service". Id. It may well be that when Congress first enacted section 7502(b), "postmarks not made by the United States Postal Service" referred to private postage meters that are licensed by the U.S. Postal Service and that have been around since at least the 1920s.<sup>1</sup> But Congress did not limit "postmarks not made by the United States Postal Service" to private postage meters. The statute is clear on its face, and we need not look beyond the statute to conclude that postmarks can include those shown on a Stamps.com mailing label.

If we did look beyond the statute, the little we would find would indicate that "postmarks not made by the United States Postal Service" is not limited to private postage meters. When section 7502(b) was enacted in 1954 its heading was "Stamp Machine". Internal Revenue Code of 1954, ch. 736, sec. 7502(b), 68A Stat. at 806. Congress changed the heading to "Postmarks" in 1966, without elaboration or explanation. Act of Nov. 2, 1966, Pub. L. No. 89-713, sec. 5(a), 80 Stat. at 1107.

<sup>1</sup> For example, Pitney Bowes Inc. is a publicly traded company that has produced private postage meters since the 1920s. See <https://www.pitneybowes.com/us/our-story.html>.



There is little that we can glean from that change. We presume that Congress did not undertake a meaningless act. See 15 W. 17th St. LLC v. Commissioner, 147 T.C. \_\_, \_\_ (slip op. at 48) (Dec. 22, 2016) ("When construing a statute, '[i]t is our duty 'to give effect, if possible, to every clause and word' so as to avoid rendering [\*21] any part of the statute meaningless surplusage.'" (quoting United States v. Menasche, 348 U.S. 528, 538, 75 S. Ct. 513, 99 L. Ed. 615 (1955), and Montclair v. Ramsdell, 107 U.S. 147, 152, 2 S. Ct. 391, 27 L. Ed. 431 (1883))). So we must assume that there was meaning behind the change Congress made to the heading.<sup>2</sup> The only plausible interpretation is that, to the extent the words "stamp machine" would have limited the effect of section 7502(b) to private postage meters, that limit did not survive the 1966 amendment.

## II. Methods of Affixing Postage

Today there are myriad ways to purchase and apply postage, and many of those ways come with preprinted dates. Indeed, whether acquired from the U.S. Postal Service, a licensed meter provider, or an online resource, the mailing labels are nearly identical. And the risk that someone might print a label on one day and mail the item on another is no different.

### A. U.S. Postal Service's Service Counter

The U.S. Postal Service's most traditional services are offered in the post office. Customers can enter a post office and purchase postage from a U.S. Postal Service employee at the service counter. The U.S. Postal Service employee prints a label or postmarks the item indicating the date on which the label or postmark is purchased. The U.S. Postal Service employee can deposit the item or print the label for the customer to [\*22] affix and deposit in the mail.

### B. U.S. Postal Service's Self-Service Kiosk

The U.S. Postal Service's automated postal centers, also known as self-service kiosks, allow customers to access U.S. Postal Service services without the hassle of waiting in line or visiting during normal business hours. Kiosks are self-sufficient, do not require U.S. Postal Service employee assistance, and are available to customers at any time.<sup>3</sup> U.S.

<sup>2</sup> Statutory titles and headings cannot limit the plain meaning of a statute, but they may be used for interpretive purposes. Dixon v. Commissioner, 132 T.C. 55, 81 (2009) (citing Bhd. of R.R. Trainmen v. B&O R.R. Co., 331 U.S. 519, 528-529, 67 S. Ct. 1387, 91 L. Ed. 1646 (1947)).

<sup>3</sup> See U.S. Postal Service Handbook PO-106, Automated Postal Center Program Handbook 121 (available at the American Postal Workers Union website, <http://www.apwu.org/ir-usps-handbooks-manuals>).

Postal Service kiosks "allow[] the public to weigh and rate packages, purchase and print postage and purchase stamps", and eventually deposit in a U.S. Postal Service drop box.<sup>4</sup> Printed postage indicates that date on which the customer uses the kiosk to pay and print postage.

### C. U.S. Postal Service's Click-n-Ship

U.S. Postal Service Click-n-Ship gives customers freedom to buy U.S. Postal Service postage without leaving their homes or offices.<sup>5</sup> Click-n-Ship allows consumers to "Pay, Print & Ship from Anywhere" and advertises that "[w]ith USPS online, your Post Office is where you are."<sup>6</sup> Similar to kiosks, Click-n-Ship allows consumers to "Pay, Print & Ship" without access to a Post Office or U.S. Postal Service employee. Click-n-Ship labels include the date on which [\*23] postage is purchased online.

### D. Postage Meters Licensed by the U.S. Postal Service

Postage meters are authorized by the U.S. Postal Service and print postmarks or labels using licensed machines. See 39 U.S.C. sec. 404(a)(2), (4) (2006); see also 39 C.F.R. sec. 501.2 (2015); U.S. Postal Service, Domestic Mail Manual (DMM), 82 Fed. Reg. 28559 (Jan. 22, 2017).<sup>7</sup> Postage meters print evidence of paid postage directly on an item or on a separate label that can be affixed to an item.<sup>8</sup> The postage meter prints postage indicating the date on which the mark or label was printed. Postage meter marks or labels often contain

<sup>4</sup> U.S. Postal Service Handbook PO-106, 132.1, 132.21, 132.22.

<sup>5</sup> See <https://www.usps.com/business/postage-options.htm>; see also <http://pages.ebay.com/usps/shippingitems/labels.html>. The U.S. Postal Service also offers online services through eBay.com. This relationship helps consumers "[e]liminate trips to the Post Office by printing USPS shipping labels with postage from your desktop."

<sup>6</sup> <https://www.usps.com/ship/online-shipping.htm>.

<sup>7</sup> The U.S. Postal Service's Domestic Mail Manual (DMM) lists four providers authorized to license postage meters: Data-Pac Mailing Systems Corp., FP Mailing Solutions, Neopost Inc., and Pitney Bowes Inc. See DMM sec. 604.4.1.3 (available at <http://about.usps.com/manuals/welcome.htm>); see also <https://www.usps.com/business/postage-options.htm>.

<sup>8</sup> Pitney Bowes Inc. leases postage machines allowing consumers to print labels to affix to packages and print postage directly on envelopes. See <https://www.pitneybowes.com/us/shipping-and-mailing/postage-meters/sendpro-c-200.html> (Pitney Bowes Inc. allows consumers to "[p]rocess daily mail and print postage quickly and accurately" and "[w]eigh packages and print shipping labels right from [the consumer's] system."); see also DMM sec. 604.4.1.2(a) ("Meters may only be leased or rented and may not be sold or resold.").

information such as the authorized company; class of mail; fees paid; originating city, State, and ZIP Code; and permit number.<sup>9</sup> The mark created by a private postage meter has long been recognized by this Court as a postmark created by someone other than the U.S. Postal Service. See *Stotter v. Commissioner*, 69 T.C. 896, 897 (1978) ("Under \* \* \* [section 301.7502-1(c)(1)(iii)(B)], *Proced. & Admin. Regs.*], privately metered mail qualifies for the timely mailing rule of section."); see also *Herrera v. Commissioner*, T.C. Memo. 2012-308, at \*19.

#### E. Authorized PC Providers Licensed by the U.S. Postal Service

The U.S. Postal Service authorizes "PC providers" who are permitted to sell postage online that customers can purchase using their personal computers. See 39 U.S.C. sec. 404(a)(2), (4) (2006); see also 39 C.F.R. sec. 501.2 (2015); [\*24] DMM sec. 604.4.1.4.<sup>10</sup> Stamps.com is a U.S. Postal Service authorized PC provider. See DMM sec. 604.4.1.4. PC providers allow customers to print postage from a computer or mobile device without having to lease a physical postage meter.<sup>11</sup> Once the PC provider receives payment, the customer prints a label that indicates the date on which the customer paid for the postage.

#### III. Printed Postage Indicates the Date of Purchase

None of these methods of affixing postage is inherently more reliable than another. Labels generated by the U.S. Postal Service and by someone other than the U.S. Postal Service are often printed and dated separately from the act of mailing. Dates printed by the U.S. Postal Service, postage meters, and

PC providers do not guarantee the date on which the item is deposited with the U.S. Postal Service. Often, the date is a simple indication of the day a customer purchased postage.

#### IV. Regulatory Backstop

The risk that someone might print a label on one day and mail the item on another was contemplated by the Secretary when promulgating enabling regulations under section 7502(b). See sec. 301.7502-1(c), *Proced. & Admin. Regs.* In general terms, the regulations look at how long it takes to receive an item postmarked by someone other [\*25] than the U.S. Postal Service in contrast to an item deposited with and postmarked by the U.S. Postal Service. See *id. subpara. (1)(iii)(B)(1)*. An item postmarked by someone other than the U.S. Postal Service is filed on the postmark date only if it is received within the same amount of time the item "would ordinarily be received [in] if it were postmarked at the same point of origin by the U.S. Postal Service". *Id. subdiv. (iii)(B)(1)(ii)*. If it is received later than that, the postmark is disregarded unless the following can be established: (i) the item was actually deposited before the last day for filing the document, (ii) the delay was due to delayed transmission in the U.S. mail, and (iii) the cause of the delay. *Id. subdiv. (iii)(B)(2)*.

#### Conclusion

Section 7502(b) allows for "postmarks not made by the United States Postal Service". That phrase is not limited to postage meters. Congress removed from that provision a reference to "stamp machines" more than half a century ago. The Stamps.com postmark at issue in this case is a postmark not made by the United States Postal Service, and there is no statutory basis for adhering to a decades-old notion of what constitutes a postmark.

MARVEL, FOLEY, VASQUEZ, [\*26] GOEKE, HOLMES, PARIS, LAUBER, NEGA, PUGH and ASHFORD, JJ., agree with this concurring opinion.

**Dissent by: GUSTAFSON; GUSTAFSON**

#### Dissent

GUSTAFSON and MORRISON, JJ., dissenting: The Internal Revenue Code uses a "postmark" as a means for verifying the timeliness of a tax-related document required to be submitted by a deadline. See sec. 7502. A "postmark" is "an official postal marking on a piece of mail; *specific*: a mark showing the name of the post office and the date and sometimes the hour of mailing and often serving as the actual and only

<sup>9</sup> See DMM 82 Fed. Reg. 28559 (Jan. 22, 2017) (setting forth requirements for permit design, also known as indicia, under sec. 604.5.3, *Indicia Design, Pagement, and Content*); see also <https://www.usps.com/business/postageoptions.htm> (depicting "Picture Permit Indicia", meter printing, and permit imprints showing printed and metered imprints, know as indicia, on different types of postage).

<sup>10</sup> The U.S. Postal Service's Domestic Mail Manual lists three PC providers who are authorized to sell postage online: Endicia.com, Pitney Bowes Inc., and Stamps.com. See DMM sec. 604.4.1.4; see also <http://www.stamps.com/> (Stamps.com indicates it is an "Approved Licensed Vendor" of the U.S. Postal Service); <http://www.endicia.com/why-usps> (Endicia.com uses "[t]he U.S. Postal Service [as] an essential part of the shipping mix for today's e-commerce businesses").

<sup>11</sup> See <http://endicia.com/> ("Endicia's intuitive electronic postage technologies and services allow you to print U.S. Postal Service shipping labels and stamps right from your desk using a Mac or PC.").

cancellation". Webster's Third New International Dictionary 1773 (1981).<sup>1</sup> Today, however, the Tax Court holds--or rather, somewhat less boldly, "accept[s] as the premise of \* \* \* [its] analysis", see op. Ct. p.17--that a postage label printed by an individual customer on his own printer through the means of an internet vendor (Stamps.com) and placed by himself on his own piece of mail constitutes a "postmark not made by the United States Postal Service". We think this conclusion is unwarranted.

The Court's reasoning, see op. Ct. p.16, seems to boil down to this: When it first enacted section 7502 in 1954, Congress seems to have intended that a stamp made by a postage meter be deemed "a postmark [\*27] not made by the United States Postal Service" (then the "United States Post Office"), sec. 7502(b); and the implementing regulations have been construed to apply to postage meters, see Herrera v. Commissioner, T.C. Memo. 2012-308, \*19. The Court now observes that "a Stamps.com postage label is the modern equivalent of the output of an old-fashioned<sup>2</sup> postage meter", see op. Ct. p.17 (citing Tilden v. Commissioner, 846 F.3d 882 (7th Cir. 2017)),<sup>3</sup> rev'g and remanding T.C. Memo. 2015-188), so that a Stamps.com label is likewise deemed a postmark.

Much is missing from this analysis. Section 7502(b), entitled "Stamp Machine" when first enacted in 1954, did not then and does not now expressly address postage meters. The Court now alludes to "congressional concern" and the "legislative history" of that provision, see op. Ct. p.16, but the majority opinion does not quote or even cite any of that history to explain why a postage meter was thought reliable to any extent (and therefore how anything could now be its

"equivalent").<sup>4</sup> The statute does make explicit that "a postmark not made by the United States Postal Service" will be treated as a postmark--but "only if and to the extent provided by regulations prescribed by the Secretary." Sec. 7502(b). Neither the original regulations, first promulgated in T.D. 6232, 1957-1 C.B. 469, 472-473, nor the current [\*28] regulations, 26 C.F.R. section 301.7502-1(c)(1)(iii)(B), Proced. & Admin. Regs., expressly mention postage meters, and they certainly do not mention Stamps.com labels. The majority attempts to jump this gap by invoking Auer v. Robbins, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997) (Scalia, J.), see op. Ct. p.15, which stands for the proposition that the Secretary's construction of his own regulations is entitled to deference.<sup>5</sup> The majority suggests that in this case the Secretary has construed "postmark \* \* \* made other than by the U.S. Postal Service" in section 301.7502-1(c)(1)(iii)(B)(1) to include a Stamps.com label. But the suggestion is artfully made: "In conceding that petitioners' petition was timely mailed under the regulations discussed above, respondent necessarily agrees that this is a case in which 'the postmark on the envelope is made other

<sup>1</sup> See also to the same effect, The Oxford English Dictionary 2253 (1933 ed., 1971 reprint) ("A mark officially impressed upon letters for various purposes; \* \* \* usually a mark giving the place, date, and hour of dispatch, or of the arrival of the mail").

<sup>2</sup> We think that a truly "old-fashioned" postage meter is the kind that prints directly onto an envelope that is fed through the machine (thus more resembling the post office's postmark stamped onto the envelope), whereas modern postage meters print off a label that is then affixed to the envelope. Nothing in the record supports our impression, nor gives any information about the nature of postage meters when section 7502 was enacted nor their evolution thereafter.

<sup>3</sup> In Tilden the Court of Appeals for the Seventh Circuit did not, like the majority here, see op. Ct. p.17, state that Stamps.com is the "modern equivalent" of a postage meter, but rather stated that Stamps.com provides "a service that supplies print-at-home postage so that everyone can enjoy the convenience of a traditional postage meter." Tilden v. Commissioner, 846 F.3d 882, 885 (7th Cir. 2017) (emphasis added), rev'g and remanding T.C. Memo. 2015-188.

<sup>4</sup> The opinion of the Court cites Fishman v. Commissioner, 51 T.C. 869, 872-873 (1969), aff'd, 420 F.2d 491 (2d Cir. 1970), as "citing House and Senate reports accompanying the 1954 Code", see op. Ct. p.16, which indeed Fishman does. In Fishman, 51 T.C. at 872-873, the Court observed that "Congress was aware that postmarks made by private postage meters could bear any date desired by the sender. For this reason, it refused to apply the same rules to both metered and unmetered mail. H. Rept. No. 1337, to accompany H.R. 8300 (Pub. L. 591), 83d Cong., 2d Sess., p. A435 (1954); S. Rept. No. 1622, to accompany H.R. 8300 (Pub. L. 591), 83d Cong., 2d Sess., p. 615 (1954)." That is, Fishman shows congressional concern about the problems of respecting postage meter dates (and how Congress addressed such concerns); Fishman did not explain, nor does the legislative history explain, what it is about postage meter dates that inclined Congress to respect them at all.

<sup>5</sup> But see United Student Aid Funds, Inc. v. Bible, U.S. , , 136 S. Ct. 1607, 1608, 195 L. Ed. 2d 241 (2016) (Thomas, J., dissenting from the denial of certiorari) ("Any reader of this Court's opinions should think that the doctrine is on its last gasp. Members of this Court have repeatedly called for its reconsideration in an appropriate case. \* \* \* And rightly so"); Perez v. Mortg. Bankers Ass'n, 575 U.S. , , 135 S. Ct. 1199, 1210-1211, 191 L. Ed. 2d 186 (2015) (Alito, J., concurring in part and concurring in the judgment); id. at 1213-1225 (Thomas, J., concurring in the judgment); Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 615, 133 S. Ct. 1326, 185 L. Ed. 2d 447 (2013) (Roberts, C.J., concurring); id. at 616 (Scalia, J., concurring in part and dissenting in part); Talk America, Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 67-69, 131 S. Ct. 2254, 180 L. Ed. 2d 96 (2011) (Scalia, J. concurring) ("[W]hile I have in the past uncritically accepted that rule, I have become increasingly doubtful of its validity").

than by the U.S. Postal Service." See op. Ct. p.15 (emphasis added). We do not find in the Commissioner's briefs a statement giving this construction of the regulation. It appears the majority would grant Auer deference to an implication in or a logical inference from the Commissioner's brief, but we do not believe the Auer doctrine goes so far.

Thus, neither the regulations, nor Herrera, nor Tilden, nor the Court's opinion [\*29] today explains why the output of a postage meter is the equivalent of a Webster's postmark, and none of them explains in what sense Stamps.com might be the equivalent of a postage meter. Presumably Stamps.com is "the modern equivalent" of a postage meter in the sense of its "convenience" to the postal customer, see Tilden v. Commissioner, 846 F.3d at 885, but our focus must instead be on the question whether the Stamps.com label is equivalent to a postmark in the sense of verifying the timeliness of a submission. On that subject the Court's opinion is silent.

If we look beyond the regulations that the Secretary has prescribed, beyond the arguments of the parties, and outside the record of this case, a more discriminating analysis might be possible. A long line of cases has held that a marking produced by a private postage meter should be considered a postmark. Gutierrez v. Indus. Claim Appeals Office, 841 P.2d 407, 409 (Colo. App. 1992); Frandrup v. Pine Board Warehouse, 531 N.W.2d 886, 889 (Minn. Ct. App. 1995); Bowman v. Administrator, 30 Ohio St. 3d 87, 30 Ohio B. 234, 507 N.E.2d 342, 344 (Ohio 1987); Haynes v. Hechler, 182 W. Va. 806, 392 S.E.2d 697, 700 (W. Va. 1990); Chevron U.S.A., Inc. v. Dep't of Revenue, 2007 WY 43, 154 P.3d 331, 337 (Wyo. 2007). These courts have reasoned that the sender who uses a private postage meter is under an obligation to mail the item on the same day that is marked by the postage meter on the envelope. Gutierrez, 841 P.2d at 409; Frandrup, 531 N.W.2d at 889; Bowman, 507 N.E.2d at 344; Haynes, 392 S.E.2d at 699; Chevron U.S.A., Inc., 154 P.3d at 337. Congruent with that line of cases is our Opinion in Leventis v. Commissioner, 49 T.C. 353 (1968), in which the issue was whether a document was received later than the date when a document would "ordinarily" [\*30] have been received. We recognized "the date on the postage meter stamp as the postmark date". Id. at 356. We did not explicitly state our reasoning for that conclusion, but we did explain that the U.S. Postal Service's Domestic Mail Manual required that--

metered mail will not be postmarked by the Post Office canceling device except when the wrong date appears in the meter stamp, if the wrong date does appear on the meter stamp, the envelope will be postmarked through the Post Office canceling machine to show the correct date; and that the metered mail will be examined while being routed for distribution to determine that it is properly prepared, which examination may be made by a

selected check of the pieces as they are distributed.

Id. at 354. If this procedure described in Leventis is still in use by the USPS<sup>6</sup>--an issue about which the opinion of the Court in this case is silent--then that would seem to be a possible reason to treat the meter date as having some reliable relation to the mailing date and therefore as giving some verification of the timeliness of the submission.

If such procedures are the reason that a postage meter date can reasonably be treated like a postmark, then the next question is [\*31] whether Stamps.com involves equivalent procedures and assurances. On that question the record in this case is also silent. In deciding cases we operate under constraints (the rules of evidence and, in particular, Rule 201 ("Judicial Notice") of the Federal Rules of Evidence) that would prevent us from finding facts on the basis of our own internet research, which discloses that the Stamps.com website has the following question and answer:<sup>7</sup>

Am I required to send my package on the date that is printed on my shipping label?

As required by the USPS, shipping labels must be mailed

<sup>6</sup> It appears that the relevant portion of the Domestic Mail Manual is section 604, "Postage Payment Methods and Refunds". This is available on the internet at <https://pe.usps.com/text/dmm300/604.htm>

<sup>7</sup> Accessible at [https://stamps.custhelp.com/app/answers/detail/a\\_id/303/~/-am-i-required-to-send-my-package-on-the-date-that-is-printed-on-my-shipping](https://stamps.custhelp.com/app/answers/detail/a_id/303/~/-am-i-required-to-send-my-package-on-the-date-that-is-printed-on-my-shipping). It appears from [stamps.com/conditions/](https://stamps.com/conditions/) that a Stamps.com customer enters into an online agreement, by which he agrees (in para. 12) that Stamps.com labels "with a designated mailing date, expire after that date (USPS transactions expire pursuant to the Code of Federal Regulations). USPS misprinted or unused labels must be destroyed or returned to the USPS, as provided in the Domestic Mail Manual (see Section 11)", and agrees (in para. 14) that

[b]y and as a result of accepting these Terms, you are also entering into an Agreement with the United States Postal Service (USPS) in accordance with the Domestic Mail Manual (DMM) 604.4, Postage Payment Methods, Postage Meters and PC Postage Products (Postage Evidencing Systems or PES). You accept responsibility for control and use of your account and the PES printed therefrom. You agree and certify that: (i) you will comply with all laws and regulations applicable to USPS services, including, without limitation, the provisions of the Domestic Mail Manual and the International [\*32] Mail Manual \* \* \*

On the record of this case, we do not know whether petitioners entered into any such agreement, and we do not know whether such an agreement would be enforceable. Cf. Specht v. Netscape Comm'ns Corp., 306 F.3d 17 (2d Cir. 2002).

on the date that is specified on the label. \* \* \*

It appears to us that, if a date printed on a postage meter label or on a Stamps.com label could count as a postmark, it would have to be because the sender is obliged to mail the item on the date appearing on the label--an obligation as to which the opinion of the Court is silent. Otherwise, the date simply gives information about when the postage was purchased, not when the item was mailed. A mere receipt for the purchase of postage is not a "postmark".

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End of Document

## **Williams v. Comm'r**

United States Tax Court

April 6, 2017, Filed

Docket No. 13829-15L.

### **Reporter**

T.C. Memo 2017-58 \*; 2017 Tax Ct. Memo LEXIS 59 \*\*: 113 T.C.M. (CCH) 1277

TED LAWRENCE WILLIAMS, Petitioner v.  
COMMISSIONER OF INTERNAL REVENUE, Respondent

The Commissioner's motions were granted.

**Disposition:** An appropriate order and decision will be entered.

### **LexisNexis® Headnotes**

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### **Core Terms**

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levy, frivolous, notice, collection, taxpayer's, notice of deficiency, last known address, liabilities, underpaid tax, summary judgment motion, returns, mailed, collection action, mailing a notice, examining agent, attachments, Appeals, summary judgment, original return, good cause, correspondence, requirements, supplemental, suspension, hearings, suspend

Tax Law > Federal Tax Administration &  
Procedures > Summary Judgment > Burdens of Proof

Tax Law > Federal Tax Administration &  
Procedures > Summary Judgment > Standards for  
Summary Judgment

### **Case Summary**

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#### **Overview**

**HOLDINGS:** [1]-Petitioner (P) was not entitled to challenge his underlying tax liabilities for tax years 2003 and 2004; [2]-P had not refuted the Commissioner's evidence that he mailed the notice of deficiency to P's last known address. Commissioner exercised reasonable care and diligence in mailing the notice of deficiency to P; [3]-IRS made a valid assessment of the tax liabilities at issue and the settlement officer adequately verified that the requirements of any applicable law or administrative procedure had been met; [4]-Finding no abuse of discretion in any respect, the court would grant summary judgment for the Commissioner and sustain the proposed collection action; [5]-The imposition of a \$5,000 penalty under I.R.C. § 6673 was appropriate because P was on notice that his frivolous arguments could subject him to monetary penalties; [6]-Lifting the levy suspension was appropriate.

#### **HNI Summary Judgment, Burdens of Proof**

Summary judgment is designed to expedite litigation and to avoid unnecessary and expensive trials. A motion for summary judgment may be granted where the pleadings and other materials show that there is no genuine dispute as to any material fact and that a decision may be rendered as a matter of law. U.S. Tax Ct. R. 121(b). The burden is on the moving party to demonstrate that no genuine issue as to any material fact remains and that he is entitled to judgment as a matter of law.

Civil Procedure > Judgments > Summary  
Judgment > Evidentiary Considerations

Tax Law > Federal Tax Administration &  
Procedures > Summary Judgment > Burdens of Proof

#### **HN2 Summary Judgment, Evidentiary Considerations**

In all summary judgment cases, the evidence is viewed in the light most favorable to the nonmoving party. However, the

#### **Outcome**

## Williams v. Comm'r

nonmoving party is required to go beyond the pleadings and by his own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); also U.S. Tax Ct. R. 121(d).

Tax Law > ... > Tax Credits & Liabilities > Levy & Distraint > Due Process Hearings

Tax Law > ... > Tax Credits & Liabilities > Levy & Distraint > US Treasury Authority

Tax Law > ... > Tax Credits & Liabilities > Levy & Distraint > Notice Requirement

### **HN3 [📌] Levy & Distraint, Due Process Hearings**

I.R.C. § 6331(a) authorizes the Secretary to levy upon property and property rights of a taxpayer who fails to pay a tax within 10 days after notice and demand. Before the Secretary may levy upon the taxpayer's property, the Secretary must first notify the taxpayer of the Secretary's intent to levy. I.R.C. § 6331(d)(1). The Secretary must also notify the taxpayer of his right to a collection due process (CDP) hearing. I.R.C. § 6330(a)(1). If the taxpayer requests a CDP hearing, the hearing is conducted by the Office of Appeals. I.R.C. § 6330(b)(1). At the hearing the taxpayer may raise any relevant issue relating to the unpaid tax or the proposed collection action. I.R.C. § 6330(c)(2)(A). Once the settlement officer makes a determination, the taxpayer may appeal to the U.S. Tax Court for review. I.R.C. § 6330(d)(1).

Tax Law > ... > Tax Court > Standards of Review > De Novo Standard of Review

Tax Law > ... > Tax Credits & Liabilities > Levy & Distraint > Due Process Hearings

### **HN4 [📌] Standards of Review, De Novo Standard of Review**

Where the validity of the underlying tax liability is at issue, the U.S. Tax Court reviews the matter de novo. A taxpayer may challenge the underlying tax liability during a collection due process (CDP) hearing if he did not receive a statutory notice of deficiency for the liability or did not otherwise have the opportunity to dispute the liability. I.R.C. § 6330(c)(2)(B). The court will consider an underlying tax liability on review only if the taxpayer properly raised the issue during the CDP hearing; refer to Treas. Reg. § 301.6330-1 (f)(2), Q&A-F3. A

taxpayer did not properly raise an underlying liability if he did not present the settlement officer with any evidence regarding the liability after being given a reasonable time. Treas. Reg. § 301.6330-1(f)(2), Q&A-F3.

Tax Law > ... > Tax Court > Standards of Review > Abuse of Discretion

Tax Law > ... > Tax Credits & Liabilities > Levy & Distraint > Due Process Hearings

### **HN5 [📌] Standards of Review, Abuse of Discretion**

The Commissioner's determination to proceed with collection is reviewed under an abuse of discretion standard. An abuse of discretion occurs if the Office of Appeals exercises its discretion arbitrarily, capriciously, or without sound basis in fact or law. The court does not conduct an independent review and substitute its judgment for that of the settlement officer (SO). If the settlement officer follows all statutory and administrative guidelines and provides a reasoned, balanced decision, the court will not reweigh the equities. Following a collection due process hearing the SO must determine whether to sustain the proposed levy. In making that determination, I.R.C. § 6330(c)(3) requires the SO to consider: (1) whether the requirements of any applicable law or administrative procedure have been met; (2) any issues appropriately raised by the taxpayer; and (3) whether the collection actions balance the need for the efficient collection of taxes and the legitimate concern of the taxpayer that any collection action be no more intrusive than necessary.

Tax Law > ... > Tax Credits & Liabilities > Levy & Distraint > Due Process Hearings

### **HN6 [📌] Levy & Distraint, Due Process Hearings**

As part of the duty to verify that the requirements of any applicable law or administrative procedure have been met, the settlement officer must verify that the IRS made a valid assessment. I.R.C. § 6330(c)(1). An assessment is not valid unless it is duly preceded by the mailing of a notice of deficiency to the taxpayer's last known address. I.R.C. § 6213(a).

Tax Law > ... > Tax Credits & Liabilities > Deficiencies > Address for Notices

### **HN7 [📌] Deficiencies, Address for Notices**



Absent clear and concise notice of a change of address, a taxpayer's last known address is the address shown on the taxpayer's return that was most recently filed at the time that the notice was issued; refer to Treas. Reg. § 301.6212-2(a). In deciding whether the Commissioner mailed a notice to a taxpayer at the taxpayer's last known address, the relevant inquiry pertains to the Commissioner's knowledge rather than to what may in fact be the taxpayer's most current address. The burden falls on the taxpayer to give clear and concise notification to the Commissioner of a change in address.

Tax Law > ... > Tax Credits &  
Liabilities > Deficiencies > Address for Notices

### **HN8** [📄] **Deficiencies, Address for Notices**

After the Commissioner becomes aware of a taxpayer's change of address, he must exercise reasonable care and diligence in ascertaining and mailing the notice of deficiency to the correct address.

Tax Law > ... > Tax Credits & Liabilities > Civil  
Penalties > Costs & Sanctions

### **HN9** [📄] **Civil Penalties, Costs & Sanctions**

I.R.C. § 6673(a)(1) authorizes the court to require a taxpayer to pay a penalty to the United States in an amount not to exceed \$25,000 whenever it appears to the court that the taxpayer instituted or maintained the proceeding primarily for delay or that the taxpayer's position in the proceeding is frivolous or groundless.

Tax Law > ... > Tax Credits & Liabilities > Levy &  
Distrain > Due Process Hearings

### **HN10** [📄] **Levy & Distrain, Due Process Hearings**

A taxpayer's request for a collection due process hearing automatically suspends the levy process "for the period during which such hearing, and appeals therein, are pending." I.R.C. § 6330(e)(1); Treas. Reg. § 301.6330-1(g)(2), Q&A-G1 (The suspension period continues until the expiration of the time for seeking judicial review or upon exhaustion of any rights to appeals following judicial review). This suspension, however, shall not apply to a levy action while an appeal is pending if the underlying tax liability is not at issue in the appeal and the court determines that the Secretary has shown good cause not to suspend the levy. I.R.C. § 6330(e)(2).

Tax Law > ... > Tax Credits & Liabilities > Levy &  
Distrain > Due Process Hearings

### **HN11** [📄] **Levy & Distrain, Due Process Hearings**

I.R.C. § 6330 does not include a definition of the term "good cause". The court has held, however, that the Commissioner may show good cause that a levy should not be suspended where the taxpayer used the collection review procedure to espouse frivolous and groundless arguments and otherwise needlessly delay collection.

**Counsel:** [**\*\*1**] Ted Lawrence Williams, Pro se.

Jeremy D. Cameron, for respondent.

**Judges:** VASQUEZ, Judge.

**Opinion by:** VASQUEZ

## **Opinion**

### **MEMORANDUM OPINION**

**VASQUEZ, Judge:** In this collection due process (CDP) case, petitioner seeks review, pursuant to section 6330(d)(1),<sup>1</sup> of the determination by the Internal [**\*\*2**] Revenue Service (IRS or respondent) to proceed with collection of his unpaid Federal income tax liabilities for 2003 and 2004. Respondent has moved: (1) for summary judgment under Rule 121, contending that his determination to sustain the proposed collection action was proper as a matter of law; (2) to impose a penalty against petitioner pursuant to section 6673; and (3) to remove the suspension of the proposed levy pursuant to section 6330(e)(2). For the reasons stated below, we will grant respondent's motions.

### **Background**

The following facts are based on the parties' pleadings and motion papers, including the attached affidavits and exhibits. See Rule 121(b).

Petitioner, a resident of Florida at the time he filed the petition, is a tax protester who has not filed a Federal income

<sup>1</sup> Unless otherwise indicated, all section references are to the Internal Revenue Code in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure.

tax return since 2000. In 2006 respondent began an examination for petitioner's 2003 and 2004 tax years. In 2007 the examining agent drove to an address in Smithfield, Utah (Smithfield address), which IRS records indicated [\*\*2] was petitioner's last known address. Because the Smithfield address did not appear to be a residential location, the examining agent used a postal tracer research procedure offered by the U.S. Postal Service. The postal tracer indicated that petitioner received mail by general delivery at the ZIP Code of the Smithfield address. The examining agent [\*\*3] subsequently consulted the Accurant database, which indicated that the Smithfield address was petitioner's last known address.

On September 20, 2007, the examining agent mailed to petitioner a notice of deficiency determining deficiencies of \$31,991 for 2003 and \$31,914 for 2004 and additions to tax pursuant to sections 6651(a)(1) and (2) and 6654 for both tax years. This notice of deficiency was addressed to petitioner at the Smithfield address. The examining agent also mailed a duplicate notice of deficiency to petitioner at an address in Jacksonville, Florida, which he had found on a third-party information return. Petitioner did not challenge the deficiency notice in this Court, and the determined deficiencies therein were subsequently assessed.

On September 19, 2014, respondent issued to petitioner a Final Notice, Notice of Intent to Levy and Notice of Your Right [\*\*3] to a Hearing (levy notice). Petitioner timely requested a CDP hearing. In his CDP hearing request he stated the following:

Audit reconsideration being filed upon receipt of *FOIA* [*Freedom of Information Act*] requests. Never received determination letters for "taxable years" 2003 and 2004, as this information was sent to an unknown address. The correct address was last noted in a correspondence to the IRS dated 2007 which should have been updated. Audit reconsideration is due to potential procedural and administrative defects.

[\*\*4] Petitioner did not check any of the boxes denoting a request for a collection alternative in his CDP hearing request.

Petitioner's case was transferred to Settlement Officer (SO) Peter Salinger in the Office of Appeals. By letter dated January 13, 2015, SO Salinger informed petitioner: "Since the assessments in question are a result of returns prepared under the Substitute for Return program you also have the opportunity to submit original returns for these years to refute the assessments that were made." SO Salinger also requested a copy of the 2007 correspondence petitioner referenced in his CDP hearing request. During a subsequent telephone conversation he warned [\*\*4] petitioner about the

consequences of raising frivolous arguments.<sup>2</sup>

On March 20, 2015, SO Salinger received from petitioner a document entitled "Notice of Dispute" with several attachments.<sup>3</sup> This document contained [\*\*5] frivolous arguments except for a request that the conference be held by telephone and a restatement of petitioner's position that the notice of deficiency for 2003 and 2004 was "improperly delivered via certified mail to an unknown physical location, infra; thus, never timely received by Petitioner Williams." The attachments contained frivolous arguments and did not seek collection alternatives or raise any other permissible challenges to the proposed levy. Nowhere in this submission was there a copy of the purported 2007 correspondence establishing that petitioner had notified the IRS of an address different from that used on the notice of deficiency. Although petitioner failed to submit a copy of his purported 2007 correspondence, SO Salinger allowed him to raise the issue of liability because he believed petitioner might not have received the notice of deficiency.

SO Salinger advised petitioner that he could contest his underlying tax liabilities by filing original [\*\*5] tax returns for 2003 and 2004. SO Salinger also notified petitioner that he needed to file his 2011, 2012, and 2013 returns. SO [\*\*6] Salinger asked petitioner to provide him with the requested tax returns by April 15, 2015.

On April 9, 2015, SO Salinger received from petitioner a document entitled "Amended Notice of Dispute" with several

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<sup>2</sup> Arguments listed as frivolous in Notice 2010-33, 2010-17 I.R.B. 609, include the following positions: (1) that a "taxpayer's income is excluded from taxation when the taxpayer rejects or renounces United States citizenship because the taxpayer is a citizen exclusively of a State", (2) that "[o]nly certain types of taxpayers are subject to income and employment taxes, such as employees of the Federal government, corporations, nonresident aliens, or residents of the District of Columbia or the Federal territories", and (3) that "[t]he United States Tax Court is an illegitimate court or does not, for any purported constitutional or other reason, have the authority to hear and decide matters within its jurisdiction." Petitioner advanced such arguments at his CDP hearings and before this Court.

<sup>3</sup> Included among the attachments were copies of (1) a Notice of Federal Tax Lien Filing and Your Right to a Hearing Under Section 6320 (lien notice), dated October 14, 2014, concerning petitioner's unpaid Federal income tax for 2003 and 2004 and (2) a CDP hearing request pertaining to the lien notice, mailed by petitioner to respondent on November 7, 2014. Because the petition references only the levy notice, we need not concern ourselves with the lien notice or any determination under secs. 6320 and 6330 in connection therewith. See Murphy v. Commissioner, 125 T.C. 301, 308 n.1 (2005), aff'd, 469 F.3d 27 (1st Cir. 2006).

attachments, none of which were the requested tax returns or the purported 2007 correspondence. Instead, petitioner repeated many of the frivolous arguments he had previously raised. He also failed to request any collection alternatives.

Respondent subsequently issued a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, in which the proposed levy was sustained. Petitioner timely filed a petition with this Court in which he repeated many of the frivolous arguments he had raised in the CDP hearing. Thereafter, respondent filed a motion for summary judgment, to which petitioner objected.

This Court held a hearing on respondent's summary judgment motion in Jacksonville, Florida. During the hearing petitioner continued to advance frivolous arguments. He also filed a frivolous motion, which we denied. We gave petitioner an opportunity to address **[\*\*6]** respondent's motion for summary judgment with nonfrivolous arguments. When petitioner refused to do so, we terminated the hearing and reserved decision on respondent's motion.

**[\*7]** After further review, we denied respondent's summary judgment motion because it was unclear from the administrative record whether SO Salinger had verified that the notice of deficiency was mailed to petitioner's last known address. We remanded petitioner's case to the Office of Appeals for a supplemental hearing on that issue and retained jurisdiction.

On remand petitioner's case was reassigned to SO James P. Feist. SO Feist reviewed the examination file and concluded that the IRS had sent the notice of deficiency to petitioner's last known address. In a letter to petitioner dated October 28, 2016, SO Feist explained how he had reached his conclusion and attached the documents on which he relied. SO Feist also told petitioner that: (1) the opportunity to contest his underlying liabilities by submitting original returns for 2003 and 2004 remained open to him; (2) the opportunity to request a collection alternative remained open to him; and (3) the continued assertion of frivolous arguments could lead to the imposition **[\*\*7]** of monetary penalties.<sup>4</sup> SO Feist gave petitioner until November 28, 2016, to provide him with responsive documents.

**[\*8]** On December 2, 2016, SO Feist received a "Declaration" from petitioner reiterating petitioner's frivolous position that he is under no legal duty to pay Federal income

tax. The "Declaration" contained several attachments, none of which was an original return for 2003 or 2004. Thereafter, respondent issued a supplemental notice of determination sustaining the proposed levy.

On January 4, 2017, respondent moved for summary judgment and for a section 6673 penalty against petitioner. Respondent also filed a motion to remove the suspension of the proposed levy pursuant to section 6330(e)(2). In a written response, petitioner objected to respondent's motions.

## Discussion

### I. Motion for Summary Judgment

We first address respondent's summary judgment motion. HN1<sup>[↑]</sup> Summary judgment is designed to expedite litigation and to avoid unnecessary and expensive trials. Shiosaki v. Commissioner, 61 T.C. 861, 862 (1974). A motion for summary judgment may be granted where the pleadings and other materials show that there is no genuine dispute as to any material fact and that a decision may be rendered as a matter of law. Rule 121(b); Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), affd, 17 F.3d 965 (7th Cir. 1994). The burden is on the moving party to demonstrate **[\*\*8]** that no genuine issue as to any **[\*9]** material fact remains and that he is entitled to judgment as a matter of law. FPL Grp., Inc. & Subs. v. Commissioner, 116 T.C. 73, 74-75 (2001).

HN2<sup>[↑]</sup> In all summary judgment cases, the evidence is viewed in the light most favorable to the nonmoving party. Bond v. Commissioner, 100 T.C. 32, 36 (1993). However, the nonmoving party is required "to go beyond the pleadings and by \* \* \* [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (quoting rule 56(e) of the Federal Rules of Civil Procedure); see also Rule 121(d); Rauenhorst v. Commissioner, 119 T.C. 157, 175 (2002); FPL Grp., Inc. & Subs. v. Commissioner, 115 T.C. 554, 559-560 (2000).

In his opposition to respondent's summary judgment motion, petitioner challenged his own status as a "taxpayer" and this Court's jurisdiction, among other frivolous arguments. He did not identify any specific facts showing that there is a genuine issue for trial. We therefore conclude that there are no material facts in dispute and that this case is appropriate for summary adjudication.

### A. Jurisdiction

<sup>4</sup> One of the attachments to the October 28, 2016, letter was a copy of an IRS document entitled "The Truth About Frivolous Tax Arguments", which addresses many of the arguments petitioner raised in this proceeding.

**HN3** [↑] Section 6331(a) authorizes the Secretary to levy upon property and property rights of a taxpayer who fails to pay a tax within 10 days after notice and demand. **[\*10]** Before the Secretary may levy upon the taxpayer's property, the Secretary must first notify the taxpayer of the Secretary's intent to levy. Sec. 6331(d)(1). The **[\*9]** Secretary must also notify the taxpayer of his right to a CDP hearing. Sec. 6330(a)(1).

If the taxpayer requests a CDP hearing, the hearing is conducted by the Office of Appeals. Sec. 6330(b)(1). At the hearing the taxpayer may raise any relevant issue relating to the unpaid tax or the proposed collection action. Sec. 6330(c)(2)(A). Once the SO makes a determination, the taxpayer may appeal to this Court for review. Sec. 6330(d)(1).

#### B. Petitioner's Underlying Tax Liabilities

**HN4** [↑] Where the validity of the underlying tax liability is at issue, we review the matter de novo. Sego v. Commissioner, 114 T.C. 604, 610 (2000); Goza v. Commissioner, 114 T.C. 176, 181-182 (2000). A taxpayer may challenge the underlying tax liability during a CDP hearing if he did not receive a statutory notice of deficiency for the liability or did not otherwise have the opportunity to dispute the liability. Sec. 6330(c)(2)(B); see also Montgomery v. Commissioner, 122 T.C. 1, 9-10 (2004). The Court will consider an underlying tax liability on review only if the taxpayer properly raised the issue during the CDP hearing. Giamelli v. Commissioner, 129 T.C. 107, 115 (2007); see also sec. 301.6330-1 (f)(2) [\*11], Q&A-F3, Proced. & Admin. Regs. A taxpayer did not properly raise an underlying liability if he did not present the SO with any evidence regarding the liability after being given a reasonable time. See sec. 301.6330-1(f)(2), Q&A-F3, Proced. & Admin. Regs.

Petitioner is not entitled to challenge his underlying tax liabilities for **[\*10]** tax years 2003 and 2004 because he did not properly raise them during his initial CDP hearing and his supplemental CDP hearing. Petitioner failed to present any evidence regarding the liabilities after being given a reasonable time. During his initial CDP hearing SO Salinger gave petitioner several months to file original returns for 2003 and 2004. At the supplemental CDP hearing SO Feist gave petitioner one month to file original returns for 2003 and 2004. Both times, petitioner failed to do so, choosing instead to raise frivolous arguments. Because petitioner failed to meaningfully challenge the underlying tax liabilities at his CDP hearings, they are not before this Court.

#### C. Respondent's Administrative Determinations

We now turn to **HN5** [↑] respondent's determination to proceed with collection, which we review under an abuse of

discretion standard. See Sego v. Commissioner, 114 T.C. at 610; Goza v. Commissioner, 114 T.C. at 182. An abuse of discretion occurs if the Office of Appeals exercises its discretion **[\*12]** "arbitrarily, capriciously, or without sound basis in fact or law." Woodral v. Commissioner, 112 T.C. 19, 23 (1999). The Court does not conduct an independent review and substitute its judgment for that of the SO. Murphy v. Commissioner, 125 T.C. 301, 320 (2005), aff'd, 469 F.3d 27 (1st Cir. 2006). If the SO follows all statutory and administrative guidelines and provides a reasoned, **[\*11]** balanced decision, the Court will not reweigh the equities. Link v. Commissioner, T.C. Memo. 2013-53, at \*12.

Following a CDP hearing the SO must determine whether to sustain the proposed levy. In making that determination, section 6330(c)(3) requires the SO to consider: (1) whether the requirements of any applicable law or administrative procedure have been met; (2) any issues appropriately raised by the taxpayer; and (3) whether the collection actions balance the need for the efficient collection of taxes and the legitimate concern of the taxpayer that any collection action be no more intrusive than necessary. See Lunsford v. Commissioner, 117 T.C. 183, 184 (2001); Diamond v. Commissioner, T.C. Memo. 2012-90, 2012 Tax Ct. Memo LEXIS 9, \*6.

**HN6** [↑] As part of the duty to verify that the requirements of any applicable law or administrative procedure have been met, the SO must verify that the IRS made a valid assessment. See sec. 6330(c)(1); Hoyle v. Commissioner, 131 T.C. 197, 202-203 (2008). An assessment is not valid unless it is duly preceded by the **[\*13]** mailing of a notice of deficiency to the taxpayer's last known address. Sec. 6213(a); Hoyle v. Commissioner, 131 T.C. at 202-203.

After reviewing the examination file, including a copy of the notice of deficiency, SO Feist concluded that the notice of deficiency was mailed to petitioner's last known address and that the requirements of applicable law or administrative procedure had been met. Petitioner, however, argues that respondent failed to satisfy **[\*12]** the verification requirement; petitioner's general argument, as we understand it, is that respondent did not establish that the address on the notice of deficiency was his last known address. We disagree.

We have held that **HN7** [↑] absent clear and concise notice of a change of address, a taxpayer's last known address is the address shown on the taxpayer's return that was most recently filed at the time that the notice was issued. Abeles v. Commissioner, 91 T.C. 1019, 1035 (1988); see also sec. 301.6212-2(a), Proced. & Admin. Regs. In deciding whether the Commissioner mailed a notice to a taxpayer at the taxpayer's last known address, the relevant inquiry "pertains

to \* \* \* [the Commissioner's] knowledge rather than to what may in fact be the taxpayer's most current address." *Frieling v. Commissioner*, 81 T.C. 42, 49 (1983). The burden falls on the taxpayer to give clear and concise notification to the Commissioner of a change in address. [\*14] *Alta Sierra Vista, Inc. v. Commissioner*, 62 T.C. 367, 374 (1974), *aff'd without published opinion*, 538 F.2d 334 (9th Cir. 1976).

Petitioner has not refuted respondent's evidence that he mailed the notice of deficiency to petitioner's last known address. While he contends that he did not reside at the Smithfield address, petitioner has not specified where the IRS should have mailed the notice of deficiency. He has neither [\*13] alleged nor shown that his 2000 return (the last one he filed) reported a different address. Nor has he offered any evidence that he gave the IRS "clear and concise notification" of a different address. Furthermore, the administrative record shows that the examining agent made a substantial effort to ascertain petitioner's correct address, a task made all the more difficult by petitioner's deliberate failure to file returns. Accordingly, we hold that respondent exercised reasonable care and diligence in mailing the notice of deficiency to petitioner. See *Monge v. Commissioner*, 93 T.C. 22, 33 (1989) *HN8* [↑] ("[A]fter respondent becomes aware of a taxpayer's change of address, he must exercise reasonable care and diligence in ascertaining and mailing the notice of deficiency to the correct address."); *Alta Sierra Vista, Inc. v. Commissioner*, 62 T.C. at 374. We also hold that the IRS made a valid assessment of the tax liabilities at issue and that SO Feist adequately verified that the requirements of any applicable law or administrative procedure had been met.

[\*15] Other than denying receipt of the notice of deficiency, petitioner has not advanced a nonfrivolous basis for us to determine that SO Feist abused his discretion in sustaining the proposed levy. Petitioner did not request collection alternatives [\*14] during his CDP hearings and failed to provide the SOs with the financial information and delinquent tax returns they had requested. Finding no abuse of discretion in any respect, we will grant summary judgment for respondent and sustain the proposed collection action.

## II. *Section 6673* Penalty

We now consider respondent's motion to impose a penalty against petitioner pursuant to *section 6673*. Respondent argues that sanctions are warranted because petitioner advanced frivolous arguments throughout the CDP hearings and this proceeding. We agree with respondent and will impose a penalty against petitioner in the amount of \$5,000 pursuant to *section 6673*.

*HN9* [↑] *Section 6673(a)(1)* authorizes the Court to require a

taxpayer to pay a penalty to the United States in an amount not to exceed \$25,000 whenever it appears to the Court that the taxpayer instituted or maintained the proceeding primarily for delay or that the taxpayer's position in the proceeding is frivolous or groundless. Throughout this proceeding, petitioner has taken a multitude of [\*16] frivolous and groundless positions characteristic of tax protesters despite numerous warnings.<sup>5</sup>

The imposition of a \$5,000 penalty is appropriate because petitioner was on notice that his frivolous arguments [\*15] could subject him to monetary penalties. This Court previously imposed a *section 6673* penalty against petitioner, sua sponte, for making frivolous arguments. See *Williams v. Commissioner*, T.C. Memo. 2002-111. Furthermore, during the initial CDP hearing and the supplemental CDP hearing SO Salinger and SO Feist advised petitioner that his arguments were frivolous and could subject him to penalties.

## III. *Motion To Permit Levy*

Finally we consider respondent's motion to permit levy. The effect of granting this motion would be to allow the IRS to levy immediately in an effort to collect petitioner's tax liabilities discussed above, without waiting for the decision in this case to become final.

*HN10* [↑] A taxpayer's request for a CDP hearing automatically suspends the levy process "for the period during which such hearing, and appeals therein, are [\*17] pending." *Sec. 6330(e)(1)*; *sec. 301.6330-1(g)(2)*, Q&A-G1, *Proced. & Admin. Regs.* ("The suspension period continues until \* \* \* the expiration of the time for seeking judicial review or upon exhaustion of any rights to appeals following judicial review."). This suspension, however, "shall not apply to a levy action while an appeal is pending if the underlying tax liability is not at issue in the appeal and the court determines that the Secretary has [\*16] shown good cause not to suspend the levy." *Sec. 6330(e)(2)*; see *Burke v. Commissioner*, 124 T.C. 189, 196 (2005).

For the reasons stated *supra* part I.B., petitioner's underlying tax liabilities are not at issue. Accordingly, the sole question is whether respondent has shown "good cause not to suspend the levy" during the appeal process. See *sec. 6330(e)(2)*.

*HN11* [↑] *Section 6330* does not include a definition of the

<sup>5</sup> We will not painstakingly address petitioner's assertions "with somber reasoning and copious citation of precedent; to do so might suggest that these arguments have some colorable merit." *Crain v. Commissioner*, 737 F.2d 1417, 1417 (5th Cir. 1984) (per curiam); see also *Whuck v. Commissioner*, 136 T.C. 498, 501-513 (2011).

term "good cause". We have held, however, that the Commissioner may show good cause that a levy should not be suspended where the taxpayer "used the collection review procedure to espouse frivolous and groundless arguments and otherwise needlessly delay collection." Burke v. Commissioner, 124 T.C. at 196-197.

Respondent has shown that for good cause the levy should not be suspended. Throughout this proceeding, petitioner advanced frivolous arguments [\*18] despite numerous warnings not to do so. We therefore find that petitioner has used the collection review procedure to espouse frivolous and groundless arguments and to otherwise delay collection. Under these circumstances, lifting the suspension of the levy is appropriate.

In reaching our holdings, we have considered all arguments made, and to the extent not mentioned, we consider them irrelevant, moot, or without merit.

To reflect the foregoing,

An appropriate order and [\*\*17] decision will be entered.

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## **Tilden v. Comm'r**

United States Court of Appeals for the Seventh Circuit

October 6, 2016, Argued; January 13, 2017, Decided

No. 15-3838

### **Reporter**

846 F.3d 882 \*, 2017 U.S. App. LEXIS 697 \*\*, 2017-1 U.S. Tax Cas. (CCH) P50,130; 119 A.F.T.R.2d (RIA) 441; 2017 WL 129115

Liabilities > Deficiencies > Delivery of Notices

ROBERT H. TILDEN, Petitioner-Appellant, v.  
COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.

**Prior History:** [\*\*1] Appeal from the United States Tax Court. No. 11089-15 — Robert N. Armen, Jr., Special Trial Judge.

*Tilden v. Comm'r, T.C. Memo 2015-188, 2015 Tax Ct. Memo LEXIS 192 (T.C., 2015)*

### **Core Terms**

postmark, envelope, mail, jurisdictional, parties, last day, regulation, tracking, days, filing deadline, staff

### **Case Summary**

#### **Overview**

**HOLDINGS:** [1]-26 C.F.R. § 307.7502-1(c)(iii)(B)(3) specified what happened if an envelope had both a private postmark and a postmark from the U.S. Postal Service, and the taxpayer's envelope had only one postmark; [2]-Subsection (B)(3) did not make anything turn on a date as reliable as an official postmark, but made the outcome turn on the date of an official postmark; [3]-There was no evidence that the Postal Service was treating data tracking as a form of postmark.

#### **Outcome**

Judgment reversed and remanded.

### **LexisNexis® Headnotes**

#### **HN1 [📄] Deficiencies, Delivery of Notices**

Taxpayers living in the United States have 90 days to file a petition asking the Tax Court to review a notice of deficiency sent by the Commissioner of Internal Revenue, 26 U.S.C.S. § 6213(a).

Tax Law > ... > Administration > Place & Time for Filing Returns > Time to File Returns

#### **HN2 [📄] Place & Time for Filing Returns, Time to File Returns**

Although 26 U.S.C.S. § 6213(a) requires petitions to be filed within 90 days, another statute treats mailing as filing, 26 U.S.C.S. § 7502. Section 7502(a) makes the date of the postmark dispositive. Section 7502(b) adds that the mailing-as-filing rule shall apply in the case of postmarks not made by the United States Postal Service only if and to the extent provided by regulations prescribed by the Secretary.

Tax Law > ... > Administration > Place & Time for Filing Returns > Time to File Returns

#### **HN3 [📄] Place & Time for Filing Returns, Time to File Returns**

26 C.F.R. § 301.7502-1(c)(1)(iii)(B)(1) reads: If the postmark on the envelope is made other than by the U.S. Postal Service—(i) The postmark so made must bear a legible date on or before the last date, or the last day of the period, prescribed for filing the document or making the payment; and (ii) The document or payment must be received by the agency, officer, or office with which it is required to be filed not later than the time when a document or payment contained in an envelope that is properly addressed, mailed, and sent by the same class of mail would ordinarily be received if it were postmarked at the same point of origin by the U.S. Postal



Service on the last date, or the last day of the period, prescribed for filing the document or making the payment.

Tax Law > ... > Administration > Place & Time for Filing Returns > Time to File Returns

#### **HN4[⬇]** Place & Time for Filing Returns, Time to File Returns

26 C.F.R. § 301.7502-1(c)(iii)(B)(2) reads: If a document or payment described in paragraph (c)(1)(iii)(B)(1) is received after the time when a document or payment so mailed and so postmarked by the U.S. Postal Service would ordinarily be received, the document or payment is treated as having been received at the time when a document or payment so mailed and so postmarked would ordinarily be received if the person who is required to file the document or make the payment establishes—(i) That it was actually deposited in the U.S. mail before the last collection of mail from the place of deposit that was postmarked (except for the metered mail) by the U.S. Postal Service on or before the last date, or the last day of the period, prescribed for filing the document or making the payment; (ii) That the delay in receiving the document or payment was due to a delay in the transmission of the U.S. mail; and (iii) The cause of the delay.

Tax Law > ... > Administration > Place & Time for Filing Returns > Time to File Returns

#### **HN5[⬇]** Place & Time for Filing Returns, Time to File Returns

26 C.F.R. § 301.7502-1(c)(iii)(B)(3) reads: If the envelope has a postmark made by the U.S. Postal Service in addition to a postmark not so made, the postmark that was not made by the U.S. Postal Service is disregarded, and whether the envelope was mailed in accordance with this paragraph (c)(1)(iii)(B) will be determined solely by applying the rule of paragraph (c)(1)(iii)(A) of this section.

Tax Law > ... > Tax Credits & Liabilities > Deficiencies > Delivery of Notices

#### **HN6[⬇]** Deficiencies, Delivery of Notices

26 U.S.C. § 6213(a) provides, among other things: The Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition. It would be very hard to read § 6213(a) as a whole to distinguish these remedies from others, such as ordering the Commissioner to redetermine the

deficiency. For many decades the Tax Court and multiple courts of appeals have deemed § 6213(a) as a whole to be a jurisdictional limit on the Tax Court's adjudicatory competence. The Tax Court may not disregard the parties' agreement that a particular petition has been timely filed. True, litigants cannot stipulate to jurisdiction. But they may agree on the facts that determine jurisdiction.

**Counsel:** For ROBERT H. TILDEN, Petitioner - Appellant: Paul William Jones, Attorney, STOEL RIVES, LLP, Salt Lake City, UT.

For COMMISSIONER OF INTERNAL REVENUE, Respondent - Appellee: Regina S. Moriarty, Attorney, Robert W. Metzler, Attorney, DEPARTMENT OF JUSTICE, Tax Division, Appellate Section, Washington, DC; Gilbert Steven Rothenberg, Attorney DEPARTMENT OF JUSTICE, Office of the Attorney General, Washington, DC.

**Judges:** Before WOOD, Chief Judge, and EASTERBROOK and MANION, Circuit Judges.

**Opinion by:** EASTERBROOK

### **Opinion**

**[\*884]** EASTERBROOK, *Circuit Judge*. **HN1[⬆]** Taxpayers living in the United States have 90 days to file a petition asking the Tax Court to review a notice of deficiency sent by the Commissioner of Internal Revenue. 26 U.S.C. § 6213(a). Robert Tilden got such a notice covering his tax years 2005, 2010, 2011, and 2012. The last day to seek review was April 21, 2015. The Tax Court received Tilden's petition on April 29, 2015, and dismissed it as untimely. The Commissioner has confessed error—properly so, we conclude.

**HN2[⬆]** Although § 6213(a) requires petitions to be filed within 90 days, another statute treats mailing as filing. 26 U.S.C. § 7502. Section 7502(a) makes the date of the postmark **[\*\*2]** dispositive. Section 7502(b) adds that the mailing-as-filing rule "shall apply in the case of postmarks not made by the United States Postal Service only if and to the extent provided by regulations prescribed by the Secretary." That matters to Tilden, because his lawyer's staff did not put a stamp on the envelope, and the Postal Service did not apply a postmark. **[\*885]** Instead the staff purchased postage (both first-class mail and the supplement for certified delivery) from Stamps.com, a service that supplies print-at-home postage so that everyone can enjoy the convenience of a traditional postage meter. The staff printed a label from Stamps.com; it is dated April 21, 2015, and a member of the staff states that she

## Tilden v. Comm'r

delivered the envelope to the Postal Service in Salt Lake City, Utah, on that date. Tilden contends that this makes the filing timely under HN3 [↑] 26 C.F.R. §301.7502-1(c)(1)(iii)(B)(1), which reads:

If the postmark on the envelope is made other than by the U.S. Postal Service—

(i) The postmark so made must bear a legible date on or before the last date, or the last day of the period, prescribed for filing the document or making the payment; and

(ii) The document or payment must be received by the agency, officer, or office with which it [\*\*3] is required to be filed not later than the time when a document or payment contained in an envelope that is properly addressed, mailed, and sent by the same class of mail would ordinarily be received if it were postmarked at the same point of origin by the U.S. Postal Service on the last date, or the last day of the period, prescribed for filing the document or making the payment.

In the Tax Court the Commissioner accepted Tilden's contention that the envelope had been delivered to the Postal Service on April 21 but invoked the next principal division, (B)(2):

HN4 [↑] If a document or payment described in paragraph (c)(1)(iii)(B)(1) is received after the time when a document or payment so mailed and so postmarked by the U.S. Postal Service would ordinarily be received, the document or payment is treated as having been received at the time when a document or payment so mailed and so postmarked would ordinarily be received if the person who is required to file the document or make the payment establishes—

(i) That it was actually deposited in the U.S. mail before the last collection of mail from the place of deposit that was postmarked (except for the metered mail) by the U.S. Postal Service on or before the last date, or [\*\*4] the last day of the period, prescribed for filing the document or making the payment;

(ii) That the delay in receiving the document or payment was due to a delay in the transmission of the U.S. mail; and

(iii) The cause of the delay.

By relying on (B)(2) the IRS was supposing that eight days

(April 21 to 29) is more than the Postal Service ordinarily takes to deliver certified mail from Utah to Washington, D.C., which would knock out the use of (B)(1) as well. But the Tax Court concluded that both sides had picked the wrong part of the regulation. It thought that the right part is (B)(3), which tells us:

HN5 [↑] If the envelope has a postmark made by the U.S. Postal Service in addition to a postmark not so made, the postmark that was not made by the U.S. Postal Service is disregarded, and whether the envelope was mailed in accordance with this paragraph (c)(1)(iii)(B) will be determined solely by applying the rule of paragraph (c)(1)(iii)(A) of this section.

The Tax Court conceded that the Postal Service had not placed a postmark on the envelope. It also observed (what is uncontested) that the envelope had been entered into the Postal Service's tracking system for certified mail on April 23, and the judge thought this just as good as a postmark, [\*\*5] which meant that April 23 was the date of filing. That was two days late, so the court dismissed the petition. T.C. Memo 2015-188 [\*\*886] (Sept. 22, 2015).

Seeking reconsideration, Tilden observed that the parties had not raised the possibility that tracking data must be treated as a "postmark made by the U.S. Postal Service". The IRS joined Tilden in contending that the judge had been mistaken; abandoning its earlier position, the IRS asked the Tax Court to apply (B)(1) and deem both of its subsections satisfied. But the judge denied the motion, stating that because the 90-day limit in §6213(a) is jurisdictional the court is not obliged to accept the parties' agreement.

At oral argument in this court the judges and counsel discussed whether any of §6213, §7502, or §301.7502-1 creates a rule that is properly called "jurisdictional" under the Supreme Court's current approach to distinguishing truly jurisdictional limits—which a court must enforce even if not raised by the parties, whether or not the litigants agree that a filing is proper—from case-processing rules, which are subject to waiver and forfeiture. Compare United States v. Kwai Fun Wong, 135 S. Ct. 1625, 191 L. Ed. 2d 533 (2015) (filing deadlines under the Federal Tort Claims Act are not jurisdictional), and Irwin v. Department of Veterans Affairs, 498 U.S. 89, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990) (all filing deadlines for suits against the United States [\*\*6] are presumptively subject to equitable tolling, as truly jurisdictional deadlines are not), with John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 128 S. Ct. 750, 169 L. Ed. 2d 591 (2008) (deadline for filing suit in the Court of Federal Claims is jurisdictional), and Bowles v. Russell, 551 U.S. 205, 127 S. Ct. 2360, 168 L. Ed. 2d 96 (2007) (deadline for filing a

notice of appeal in civil litigation is jurisdictional). The parties' briefs in this court cited many appellate decisions calling §6213 jurisdictional, but those decisions precede the Supreme Court's recent cases or fail to analyze their significance. We deferred consideration of the appeal while the parties filed supplemental memoranda on the issue. We have also considered the Tax Court's en banc ruling in *Guralnik v. CIR*, 146 T.C. 230, 146 T.C. No. 15 (June 2, 2016), which unanimously concludes that filing deadlines for petitions seeking its review are jurisdictional under the Supreme Court's current approach.

*Kwai Fun Wong* tells us that (a) filing deadlines are presumptively not jurisdictional, but (b) Congress can make them so, without necessarily using magic words such as "jurisdiction". 135 S. Ct. at 1632. As it happens, however, §6213(a) does use the magic word. *HN6* [↑] It provides, among other things: "The Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency [\*\*7] has been filed and then only in respect of the deficiency that is the subject of such petition." Tilden does not want either an injunction or a refund; he has yet to pay the assessed deficiencies. But it would be very hard to read §6213(a) as a whole to distinguish these remedies from others, such as ordering the Commissioner to redetermine the deficiency. For many decades the Tax Court and multiple courts of appeals have deemed §6213(a) as a whole to be a jurisdictional limit on the Tax Court's adjudicatory competence. See, e.g., *Patmon and Young Professional Corp. v. CIR*, 55 F.3d 216, 217 (6th Cir. 1995); *Keado v. United States*, 853 F.2d 1209, 1212, 1218-19 (5th Cir. 1988); *Pugsley v. CIR*, 749 F.2d 691, 692 (11th Cir. 1985); *Andrews v. CIR*, 563 F.2d 365, 366 (8th Cir. 1977); *Foster v. CIR*, 445 F.2d 799, 800 (10th Cir. 1971). We think that it would be imprudent to reject that body of precedent, which (given *John R. Sand & Gravel*) places the Tax [\*\*887] Court and the Court of Federal Claims, two Article I tribunals, on an equal footing. So we accept *Guralnik's* conclusion and treat the statutory filing deadline as a jurisdictional one. But it does not follow that the Tax Court may disregard the parties' agreement that a particular petition has been timely filed. True, litigants cannot stipulate to jurisdiction.

But they may agree on the facts that determine jurisdiction. See, e.g., *Kenosha v. Bruno*, 412 U.S. 507, 93 S. Ct. 2222, 37 L. Ed. 2d 109 (1973); *Railway Co. v. Ramsey*, 89 U.S. (22 Wall.) 322, 323, 22 L. Ed. 823 (1875). For example, if in a suit under the diversity jurisdiction, 28 U.S.C. §1332, the parties agree that the plaintiff is domiciled [\*\*8] in Illinois and that the defendant is incorporated in Delaware and has its principal place of business in Texas, a district court need not, indeed must not, look behind that agreement unless the judge

suspects that the allegations are collusive. See 28 U.S.C. §1359. The Tax Court did not suspect that Tilden and the Commissioner are colluding to expand its jurisdiction; to the contrary, the Commissioner initially denied that Tilden's petition was timely. So the judge did not have a sound reason to doubt that the envelope was indeed handed to the Postal Service on April 21, 2015, as the Commissioner has conceded throughout. And now that the Commissioner has acknowledged that all requirements of (B)(1) have been met—not only deposit on April 21 but also that certified mail often takes eight days to reach the Tax Court from Utah—the only basis for dismissing Tilden's petition would be a legal conclusion that (B)(3) is the sole subsection entitled to a controlling role.

On that subject we agree with the parties that the Tax Court was mistaken. Part (B)(3) of the regulation specifies what happens if an envelope has both a private postmark and a postmark from the U.S. Postal Service. Tilden's envelope had [\*\*9] only one postmark. The regulation does not ask whether a date that is not a "postmark" is as good as a postmark. It asks whether there are competing postmarks.

To say "A is as good as B" is not remotely to show that A is B. "Vanilla ice cream is as good as chocolate" does not mean that a customer who orders chocolate must accept vanilla, just because the customer likes both. They are still different. Subsection (B)(3) does not make anything turn on a date as reliable as an official postmark. It makes the outcome turn on the date of an official postmark. If the Postal Service were to treat tracking data as a form of postmark, that might inform our reading of the regulation, but we could not find any evidence that the Postal Service equates the two.

For what it may be worth, we also doubt the Tax Court's belief that the date an envelope enters the Postal Service's tracking system is a sure indicator of the date the envelope was placed in the mail. The Postal Service does not say that it enters an item into its tracking system as soon as that item is received—and the IRS concedes in this litigation that the Postal Service did not do so for Tilden's petition, in particular. Recall that the Commissioner has [\*\*10] acknowledged that the envelope was received by the Postal Service on April 21. It took two days for the Postal Service to enter the 20-digit tracking number into its system, a step taken at a facility in zip code 84199, approximately ten miles away from the Arbor Lane post office (zip 84117) where the envelope was handed in.

Although the taxpayer thus prevails on this appeal, we have to express astonishment that a law firm (Stoel Rives, LLP, of Salt Lake City) would wait until the last possible day and then mail an envelope without an official postmark. A [\*\*888] petition for review is not a complicated document; it could

## Tilden v. Comm'r

have been mailed with time to spare. And if the last day turned out to be the only possible day (perhaps the firm was not engaged by the client until the time had almost run), why use a private postmark when an official one would have prevented any controversy? A member of the firm's staff could have walked the envelope to a post office and asked for hand cancellation. The regulation gives taxpayers another foolproof option by providing that the time stamp of a private delivery service, such as FedEx or UPS, is conclusive. 26 C.F.R. §301.7502-1(c)(3). Stoel Rives was taking an unnecessary risk with [\*\*11] Tilden's money (and its own, in the malpractice claim sure to follow if we had agreed with the Tax Court) by waiting until the last day and then not getting an official postmark or using a delivery service.

The judgment of the Tax Court is reversed, and the case is remanded for a decision on the merits.

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## **Taylor v. Comm'r**

United States Tax Court

April 28, 2016, Filed

Docket No. 6989-15.

### **Reporter**

T.C. Memo 2016-81 \*; 2016 Tax Ct. Memo LEXIS 78 \*\*: 111 T.C.M. (CCH) 1371

WILLIAM THOMAS TAYLOR, Petitioner v.  
COMMISSIONER OF INTERNAL REVENUE, Respondent

**Disposition:** An appropriate order of dismissal for lack of jurisdiction will be entered.

### **Core Terms**

notice, last known address, mailing a notice, mailed, taxpayer's, notice of deficiency, lack of jurisdiction, change of address

### **Case Summary**

#### **Overview**

**ISSUE:** Whether the dismissal of this case should be based on petitioner's failure to file a timely petition under *I.R.C. § 6213(a)* or on the Commissioner's failure to issue a valid notice of deficiency under *I.R.C. § 6212*. **HOLDINGS:** [1]-Petitioner failed to produce evidence that would corroborate his testimony or establish the date on which the change of address was submitted. Thus, the notice of deficiency was valid because it was sent to petitioner at his last known address; [2]-Accordingly, because he did not file his petition within the prescribed period of *I.R.C. § 6213(a)*, the court lacked jurisdiction to redetermine the deficiency and the case had to be dismissed.

#### **Outcome**

An appropriate order of dismissal for lack of jurisdiction was entered.

### **LexisNexis® Headnotes**

Tax Law > ... > Tax Credits &  
Liabilities > Deficiencies > Address for Notices

Tax Law > Federal Tax Administration &  
Procedures > Tax Court > Jurisdiction

Tax Law > ... > Tax Credits &  
Liabilities > Deficiencies > Tax Court Redetermination

#### **HN1 [📌] Deficiencies, Address for Notices**

The U.S. Tax Court's jurisdiction to redetermine a deficiency depends upon the issuance of a valid notice of deficiency and a timely filed petition. *U.S. Tax Ct. R. 13(a), (c)*. *I.R.C. § 6212(a)* expressly authorizes the Commissioner, after determining a deficiency, to send a notice of deficiency to the taxpayer by certified or registered mail. A notice of deficiency is sufficient for jurisdictional purposes if the Commissioner mails the notice of deficiency to the taxpayer's last known address. *I.R.C. § 6212(b)(1)*. If the notice is mailed to the taxpayer at the taxpayer's last known address, actual receipt of the notice by the taxpayer is immaterial. In turn, the taxpayer has 90 days (or 150 days if the notice is addressed to a person outside the United States) from the date that the notice is mailed to file a petition for redetermination of the deficiency. *I.R.C. § 6213(a)*; refer also to *I.R.C. § 7502* (treating timely mailing as timely filing).

Tax Law > Federal Tax Administration &  
Procedures > Tax Court > Jurisdiction

Tax Law > ... > Tax Credits &  
Liabilities > Deficiencies > Tax Court Redetermination

#### **HN2 [📌] Tax Court, Jurisdiction**

If jurisdiction is lacking because of the Commissioner's

failure to issue a valid notice of deficiency, the U.S. Tax Court will dismiss on that ground, rather than for lack of a timely filed petition.

Tax Law > ... > Tax Credits &  
Liabilities > Deficiencies > Address for Notices

Tax Law > Federal Tax Administration &  
Procedures > Tax Court > Burdens of Proof

### **HN3** [📄] **Deficiencies, Address for Notices**

Absent clear and concise notice of a change of address, a taxpayer's last known address is the address shown on the taxpayer's return that was most recently filed at the time that the notice was issued. *Treas. Reg. § 301.6212-2(a)*. In deciding whether the Commissioner mailed a notice to a taxpayer at the taxpayer's last known address, the relevant inquiry pertains to the Commissioner's knowledge rather than to what may in fact be the taxpayer's most current address. The burden of proving that the notice was not sent to the taxpayer at the taxpayer's last known address is on the taxpayer. (In the instant case), the notice of deficiency was mailed to petitioner at his last known address unless petitioner can demonstrate: (1) he provided the Commissioner with clear and concise notice of a change of address or (2) before the mailing of the notice of deficiency the Commissioner knew of a change in petitioner's address and did not exercise due diligence in ascertaining his correct address.

**Counsel:** [\*\*1] William Thomas Taylor, Pro se.  
Randall B. Childs, for respondent.

**Judges:** VASQUEZ, Judge.

**Opinion by:** VASQUEZ

## **Opinion**

### MEMORANDUM OPINION

VASQUEZ, **Judge:** This matter is before the Court on respondent's motion to dismiss for lack of jurisdiction on the ground that the petition was not filed [\*\*2] within the time prescribed by *section 6213(a)* or *section 7502*.<sup>1</sup> As explained below, we will grant respondent's motion to dismiss.

<sup>1</sup> Unless otherwise indicated, all section references are to the Internal Revenue Code in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure.

### **Background**

At the time he filed the petition, petitioner resided in Florida. In September 2011 petitioner moved from his address at 2221 Westcreek Lane 31, Houston, Texas (Westcreek Lane address), to 1025 Dulles Avenue, Stafford, Texas (Dulles Avenue address). On March 2, 2012, respondent mailed petitioner a notice of deficiency for 2009 by certified mail addressed to petitioner at the Westcreek Lane address. The Westcreek Lane address was the address reported on petitioner's 2010 Federal income tax return (2010 return) filed April 4, 2011. The 2010 return was the last return filed before the mailing of the notice of deficiency.

Petitioner moved [\*\*2] to Florida in September 2012. On November 12, 2012, petitioner filed his Federal income tax return for 2011 (2011 return). On that return, petitioner reported an address in St. Augustine, Florida.

On March 13, 2015, petitioner filed a petition with this Court seeking redetermination of his tax liability for 2009. The petition arrived at the Court in an envelope bearing a U.S. Postal Service postmark dated March 6, 2015.

[\*3] Respondent moves to dismiss for lack of jurisdiction on the ground that the petition was not timely filed. Petitioner argues that respondent failed to mail the notice of deficiency to his last known address.

### **Discussion**

**HN1** [📄] This Court's jurisdiction to redetermine a deficiency depends upon the issuance of a valid notice of deficiency and a timely filed petition. See *Rule 13(a), (c)*; *Monge v. Commissioner*, 93 T.C. 22, 27 (1989); *Normac, Inc. v. Commissioner*, 90 T.C. 142, 147 (1988). *Section 6212(a)* expressly authorizes the Commissioner, after determining a deficiency, to send a notice of deficiency to the taxpayer by certified or registered mail. A notice of deficiency is sufficient for jurisdictional purposes if the Commissioner mails the notice of deficiency to the taxpayer's last known address. See *Sec. 6212(b)(1)*; *Frieling v. Commissioner*, 81 T.C. 42, 52 (1983). If the notice is mailed to the taxpayer at the taxpayer's last known address, actual receipt of the [\*\*3] notice by the taxpayer is immaterial. See *King v. Commissioner*, 857 F.2d 676, 679 (9th Cir. 1988), affg 88 T.C. 1042 (1987); *Yusko v. Commissioner*, 89 T.C. 806, 810 (1987); *Frieling v. Commissioner*, 81 T.C. at 52. In turn, the taxpayer has 90 days (or 150 days if the notice is addressed to a person outside the United States) from the date that the [\*4] notice is mailed to file a petition for redetermination of the deficiency. See *sec. 6213(a)*; see also *sec. 7502* (treating timely mailing as

## Taylor v. Comm'r

timely filing).

Respondent mailed the notice of deficiency to petitioner at the Westcreek Lane address on March 2, 2012. The petition arrived at the Court in an envelope postmarked March 6, 2015, and was filed by the Court on March 13, 2015. Over 1,000 days elapsed between respondent's mailing of the notice of deficiency and petitioner's filing of the petition. Thus, the petition was neither mailed nor filed before the expiration of the 90-day statutory period for filing a timely petition. Accordingly, it follows that we must dismiss this case for lack of jurisdiction. However, in view of petitioner's contention that the notice of deficiency was not mailed to his last known address, the issue for decision is whether the dismissal of this case should be based on petitioner's failure to file a timely petition under section 6213(a) or on respondent's failure to issue a valid notice of deficiency **[\*\*4]** under section 6212. HN2<sup>(↑)</sup> If jurisdiction is lacking because of respondent's failure to issue a valid notice of deficiency, we will dismiss on that ground, rather than for lack of a timely filed petition. Pietanza v. Commissioner, 92 T.C. 729, 735-736 (1989), aff'd without published opinion, 935 F.2d 1282 (3d Cir. 1991); Weinroth v. Commissioner, 74 T.C. 430, 435 (1980); Keeton v. Commissioner, 74 T.C. 377, 379-380 (1980).

**[\*5]** We have held that HN3<sup>(↑)</sup> absent clear and concise notice of a change of address, a taxpayer's last known address is the address shown on the taxpayer's return that was most recently filed at the time that the notice was issued. King v. Commissioner, 857 F.2d at 681; Abeles v. Commissioner, 91 T.C. 1019, 1035 (1988); sec. 301.6212-2(a), Proced. & Admin. Regs. In deciding whether the Commissioner mailed a notice to a taxpayer at the taxpayer's last known address, the relevant inquiry "pertains to \* \* \* [the Commissioner's] knowledge rather than to what may in fact be the taxpayer's most current address." Frieling v. Commissioner, 81 T.C. at 49. The burden of proving that the notice was not sent to the taxpayer at the taxpayer's last known address is on the taxpayer. See Yusko v. Commissioner, 89 T.C. at 808.

Respondent mailed the notice of deficiency to the address reported on petitioner's 2010 return--the last return petitioner filed before the mailing of the notice. Consequently, the notice of deficiency was mailed to petitioner at his last known address unless petitioner can demonstrate: (1) he provided respondent with clear and concise notice **[\*\*5]** of a change of address or (2) before the mailing of the notice of deficiency respondent knew of a change in petitioner's address and did not exercise due diligence in ascertaining his correct address. See Keeton v. Commissioner, 74 T.C. at 382; **[\*6]** Alta Sierra Vista, Inc. v. Commissioner, 62 T.C. 367, 374 (1974), aff'd without published opinion, 538 F.2d 334 (9th Cir. 1976).

Nothing in the record suggests that petitioner gave respondent clear and concise notice of his change of address from the Westcreek Lane address to the Dulles Avenue address. Nor does anything in the record suggest that respondent knew about that change of address. Petitioner testified that when he moved from the Westcreek Lane address to the Dulles Avenue address in September 2011 he filed an appropriate change of address form with the U.S. Postal Service. However, petitioner failed to produce evidence that would corroborate his testimony or establish the date on which the change of address was submitted. Thus, we find that the notice of deficiency was valid because it was sent to petitioner at his last known address. Accordingly, because petitioner did not file his petition within the prescribed period of section 6213(a), we lack jurisdiction to redetermine the deficiency and the case must be dismissed.

In reaching our holding, we have considered all arguments **[\*\*6]** made, and to the extent not mentioned above, we find them to be moot, irrelevant, or without merit.

**[\*7]** To reflect the foregoing,

An appropriate order of dismissal for lack of jurisdiction will be entered.

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End of Document



## **Tilden v. Comm'r**

United States Tax Court

September 22, 2015, Filed

Docket No. 11089-15.

### **Reporter**

T.C. Memo 2015-188 \*; 2015 Tax Ct. Memo LEXIS 192 \*\*, 110 T.C.M. (CCH) 314

ROBERT H. TILDEN, Petitioner v. COMMISSIONER OF  
INTERNAL REVENUE, Respondent

Tax Law > Federal Tax Administration &  
Procedures > Tax Court > Jurisdiction

**Subsequent History:** Reversed by, Remanded by Tilden v.  
Comm'r, 2017 U.S. App. LEXIS 697 (7th Cir., Jan. 13, 2017)

Tax Law > Federal Tax Administration &  
Procedures > Tax Court > Procedural Matters

**Disposition:** An order granting respondent's motion and  
dismissing this case for lack of jurisdiction will be entered.

**HN1** [📄] **Tax Credits & Liabilities, Deficiencies**

### **Core Terms**

postmark, mailed, envelope, Tracking, Postal, certified mail,  
timely filed, com, notice, provides, prescribed, notice of  
deficiency, motion to dismiss, instant case, last day, delivery,  
last date, redetermination, argues, bears, label

The U.S. Tax Court is a court of limited jurisdiction, and it  
may exercise jurisdiction only to the extent authorized by  
Congress. I.R.C. § 7442. The Court's jurisdiction to  
redetermine a deficiency in income tax depends on the  
issuance of a valid notice of deficiency and a timely filed  
petition. U.S. Tax Ct. R. 13(a), (c).

### **Case Summary**

Tax Law > ... > Tax Credits &  
Liabilities > Deficiencies > Delivery of Notices

### **Overview**

**HOLDINGS:** [1]-Taxpayer's petition was not timely filed  
pursuant to I.R.C. § 7502 because the Stamps.com "postmark"  
upon which he relied was superseded by USPS Tracking data,  
which tracking data served as a postmark and was therefore  
conclusive in determining whether the petition was timely  
mailed pursuant to Treas. Reg. § 301.7502-1(c)(1)(iii)(B)(3).

Tax Law > Federal Tax Administration &  
Procedures > Tax Court > Procedural Matters

Tax Law > ... > Administration > Place & Time for Filing  
Returns > Time to File Returns

### **Outcome**

Government's motion granted.

**HN2** [📄] **Deficiencies, Delivery of Notices**

I.R.C. § 6212(a) expressly authorizes the IRS Commissioner,  
after determining a deficiency, to send a notice of deficiency  
to the taxpayer by certified or registered mail. The taxpayer,  
in turn, has 90 days (or 150 days if the notice is addressed to a  
person outside the United States) to file a petition with the  
Tax Court for redetermination of the contested deficiency.  
I.R.C. § 6213(a). By virtue of I.R.C. § 7502, a petition that is  
timely mailed may be deemed to be timely filed.

### **LexisNexis® Headnotes**

Tax Law > ... > Tax Credits &  
Liabilities > Deficiencies > General Overview

Tax Law > Federal Tax Administration &

Tilden v. Comm'r

Procedures &gt; Tax Court &gt; Procedural Matters

Tax Law > ... > Administration > Place & Time for Filing  
Returns > Time to File Returns**HN3[📄] Tax Court, Procedural Matters**See Treas. Reg. § 301.7502-1(c)(1)(iii)(B)(1).Tax Law > Federal Tax Administration &  
Procedures > Tax Court > Procedural MattersTax Law > ... > Administration > Place & Time for Filing  
Returns > Time to File Returns**HN4[📄] Tax Court, Procedural Matters**See Treas. Reg. § 301.7502-1(c)(1)(iii)(B)(2).Tax Law > Federal Tax Administration &  
Procedures > Tax Court > Procedural MattersTax Law > ... > Administration > Place & Time for Filing  
Returns > Time to File Returns**HN5[📄] Tax Court, Procedural Matters**See Treas. Reg. § 301.7502-1(c)(1)(iii)(B)(3).Tax Law > Federal Tax Administration &  
Procedures > Tax Court > Procedural MattersTax Law > ... > Administration > Place & Time for Filing  
Returns > Time to File Returns**HN6[📄] Tax Court, Procedural Matters**

With respect to Treas. Reg. § 301.7502-1(c)(1)(iii)(B)(3), the "rule of paragraph (c)(1)(iii)(A) of this section" appears in Treas. Reg. § 301.7502-1(c)(1)(iii)(A), and, as immediately relevant, provides that the USPS postmark is conclusive in determining whether the document was timely mailed. If the postmark does not bear a date on or before the last date, or the last day of the period, prescribed for filing the document or making the payment, the document or payment is considered not to be timely filed or paid, regardless of when the document or payment is deposited in the mail. Treas. Reg. § 301.7502-1(c)(1)(iii)(A).

Tax Law > Federal Tax Administration &  
Procedures > Tax Court > Procedural MattersTax Law > ... > Administration > Place & Time for Filing  
Returns > Time to File Returns**HN7[📄] Tax Court, Procedural Matters**

The Tax Court has expressly decided that USPS Track & Confirm data, which represents official records of the U.S. Postal Service, can serve as the functional equivalent of, or be tantamount to, a USPS postmark. After all, both USPS Tracking data and the more traditional postmark are products of the USPS, and nothing would suggest that the former is not as reliable and accurate as the latter when it comes to determining the time of mailing. The U.S. Postal Service Track and Confirm service provides reliable data from a neutral third-party source that is not susceptible to manipulation by the parties.

Tax Law > Federal Tax Administration &  
Procedures > Tax Court > Procedural MattersTax Law > ... > Administration > Place & Time for Filing  
Returns > Time to File Returns**HN8[📄] Tax Court, Procedural Matters**

As Treas. Reg. § 301.7502-1(c)(1)(iii)(A) makes clear, the sender who relies upon the applicability of I.R.C. § 7502 assumes the risk that the postmark will bear a date on or before the last date, or the last day of the period, prescribed for filing the document. The regulation goes on to advise that such risk may be avoided by using registered mail or by using certified mail and having the sender's receipt postmarked by the postal employee to whom the document is presented. Similarly, Treas. Reg. § 301.7502-1(c)(2) advises that 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. Such risk may also be avoided through the judicious use of a designated delivery service. I.R.C. § 7502(f)(2)(C); Treas. Reg. § 301.7502-1(c)(3).

**Counsel:** [\*\*1] Paul W. Jones, for petitioner.

Skyler K. Bradbury, for respondent.

**Judges:** ARMEN, Special Trial Judge.**Opinion by:** ARMEN

## Opinion

P's petition for redetermination was delivered to the Court by the U.S. Postal Service (USPS) 98 days after R mailed the notice of deficiency. The envelope containing the petition bore a mailing label generated by P that included a "postmark" by Stamps.com of the 90th day. The envelope also bore a certified mail sticker with a tracking number. Although the envelope did not bear a USPS postmark, USPS Tracking data for the envelope, which data provides information regarding the flow of mailpieces through the mail system from arrival through delivery, reflected an arrival date of the 92d day and a delivery date of the 98th day.

R filed a motion to dismiss for lack of jurisdiction on the ground that the petition was not timely filed.

Held: The Stamps.com "postmark" is disregarded in favor of USPS Tracking data. *Boulbee v. Commissioner, T.C. Memo. 2011-11*; *sec. 301.7502-1(c)(1)(iii)(B)(3), Proced. & Admin. Regs.*

[\*2] Held, further, the petition was not timely mailed and was therefore not timely filed. R's motion will be granted.

### MEMORANDUM OPINION

ARMEN, Special Trial Judge: This action is one for redetermination of deficiencies and accuracy-related penalties for 2005 and [\*2] 2010 through 2012.<sup>1</sup> *See secs. 6213(a), 6662(a), 6665(a); Rules 20(a), 34(a)(1).*<sup>2</sup>

Presently pending before the Court is respondent's Motion To Dismiss For Lack Of Jurisdiction, filed June 8, 2015. In his motion respondent moves to dismiss this case "upon the ground that the petition was not filed within the time prescribed by *sections 6213(a) or 7502*". On June 30, 2015, petitioner filed a Response to respondent's motion. In his Response petitioner objects to the granting of respondent's motion, arguing that a Stamps.com "postmark" is [\*3] "evidence of a timely filed petition pursuant to Reg. *§301.7502-1*." The parties further elaborated on their respective positions, with respondent filing a Reply to petitioner's Response and petitioner filing a Response to

respondent's Reply.

At the time that the petition was filed, petitioner resided in the State of Wisconsin.

### Background

On January 21, 2015, respondent sent by certified mail duplicate notices of deficiency to petitioner. [\*3]<sup>3</sup> At least one, if not both, of the notices was received by petitioner.

The 90th day after the mailing of the notices of deficiency was April 21, 2015, which was a Tuesday and not a legal holiday in the District of Columbia.

Petitioner sought to challenge respondent's deficiency and penalty determinations by appealing to this Court. *See sec. 6213(a)*. The "Petition For Redetermination Of Deficiency (Regular Tax Court Case)" was received by the [\*4] Court in the late morning of Wednesday, April 29, 2015, and filed shortly before noon of that day. The petition was sent via the U.S. Postal Service (USPS) by first-class mail. The envelope containing the petition bears a mailing label generated by a clerical employee in the office of petitioner's counsel, which label includes a "postmark" by "Stamps.com" [\*4] of April 21, 2015.<sup>4</sup> The envelope also bears a certified mail sticker with a 20-digit tracking number.<sup>5</sup> The envelope does not bear

<sup>3</sup> Except as to the four-digit extension to the five-digit ZIP Code, one of the two addresses is the same as petitioner's current mailing address as alleged by him in paragraph 1 of his petition filed April 29, 2015.

Also, a copy of only one of the notices of deficiency is in the record, and it is dated January 21, 2015 (and not January 22, 2015, as alleged by respondent in the motion that is now before the Court).

<sup>4</sup> Stamps.com Inc. is a publicly traded company (NASDAQ: STMP) that is headquartered in El Segundo, California, and that provides Internet-based postage services. The company's online postage service provides a user the ability to buy and print USPS-approved postage directly from the user's computer. *See <http://www.stamps.com/company-info/>*. "Simply log-in to Stamps.com, print your postage then drop your letters and packages into any mailbox, hand them to your postal carrier or schedule a USPS pick-up right through the software." *See <http://www.stamps.com/postage-online/post-office/>*.

<sup>5</sup> It would appear that the certified mail sticker was applied to the envelope by the same clerical employee in the office of petitioner's counsel. Regardless, PS Form 3800, Certified Mail Receipt, was not postmarked by a USPS employee. Rather, a clerical employee in the office of petitioner's counsel handwrote the date "4/21/15" in the portion of the "receipt" where a USPS employee would otherwise have postmarked it.

<sup>1</sup> The sum of the deficiency and penalty placed in dispute does not exceed \$50,000 for any of the four calendar years in issue. *See I.R.C. sec. 7443A(b)(3)*.

<sup>2</sup> Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986, as amended, and all Rule references are to the Tax Court Rules of Practice and Procedure.

a USPS postmark.

Although petitioner is a resident of the State of Wisconsin, the office of petitioner's counsel is located in Salt Lake City, Utah. A clerical [\*\*5] employee in the office of petitioner's counsel mailed the envelope containing the petition at a post office in Salt Lake City.

[\*5] The USPS web site ([www.USPS.com](http://www.USPS.com)) provides information regarding the flow of mailpieces through the mail system from arrival through delivery. Such information is made possible through tracking numbers that are assigned to individual mailpieces. As stated above, the envelope containing the petition in the instant case bears a 20-digit tracking number. Plugging that number into the tracking tool at the USPS web site (USPS Tracking, or formerly USPS Track & Confirm) yields tracking information regarding the mailpiece in question. Thus, the first entry reflects an arrival date and time of April 23, 2015, at 2:48 p.m. at a USPS facility in Salt Lake City, Utah 84199, and the last entry reflects a delivery date and time of April 29, 2015, at 11:02 a.m. at Washington, D.C. 20217. The latter ZIP Code, 20217, is the Court's dedicated ZIP Code.

As previously stated, respondent filed his Motion To Dismiss For Lack Of Jurisdiction on June 8, 2015. In his motion, respondent relies on USPS tracking information in arguing that the petition was not timely filed with the Court. [\*\*6] Petitioner objects to the granting of the motion, and in his Response filed June 30, 2015, he argues that the envelope containing the petition "bears a postmark date within the time for filing". In support of that argument, petitioner cites section 301.7502-1(c)(1)(iii)(B), Proced. & Admin. Regs., for the proposition that a postmark "which, although not made by the U.S. Postal Service still complies with [\*6] the timely mailing/timely filing rules of I.R.C. §7502." In his Reply filed July 21, 2015, respondent challenges petitioner's reliance on the regulation, and in his Response filed August 3, 2015, petitioner defends it.

#### Discussion

HN1 [↑] The Tax Court is a court of limited jurisdiction, and it may exercise jurisdiction only to the extent authorized by Congress. See sec. 7442; Naftel v. Commissioner, 85 T.C. 527, 529 (1985). The Court's jurisdiction to redetermine a deficiency in income tax depends on the issuance of a valid notice of deficiency and a timely filed petition. Rule 13(a), (c); Monge v. Commissioner, 93 T.C. 22, 27 (1989); Normac, Inc. v. Commissioner, 90 T.C. 142, 147 (1988).

HN2 [↑] Section 6212(a) expressly authorizes the

Commissioner, after determining a deficiency, to send a notice of deficiency to the taxpayer by certified or registered mail. The taxpayer, in turn, has 90 days (or 150 days if the notice is addressed to a person outside the United States) to file a petition with this Court for redetermination [\*\*7] of the contested deficiency. Sec. 6213(a). By virtue of section 7502, a petition that is timely mailed may be deemed to be timely filed.

In the instant case there is no issue regarding the validity of the duplicate notices of deficiency, and the parties agree that whether the Court has, or lacks, jurisdiction turns on whether the petition was timely filed. The parties also agree [\*\*7] that the 90-day, and not the 150-day, filing window applies because neither notice was addressed to a person outside the United States.

It is clear that respondent sent the notices of deficiency to petitioner by certified mail on January 21, 2015, as demonstrated by the USPS Form 3877, Firm Mailing Book For Accountable Mail, that was attached as an exhibit to respondent's motion to dismiss. See Magazine v. Commissioner, 89 T.C. 321, 327 n.8 (1987) (holding that USPS Form 3877 represents direct evidence of the date of mailing of the notice of deficiency); see also Clough v. Commissioner, 119 T.C. 183, 187-188 (2002) (overruling various challenges by a taxpayer to the introduction into evidence of a certified mail list--the equivalent of a USPS Form 3877--by the Commissioner). The 90th day after the date of mailing was Tuesday, April 21, 2015, which was not a legal holiday in the District of Columbia. See sec. 7503. However, the petition was not [\*\*8] received and filed by the Court until Wednesday, April 29, 2015, the 98th day after the date that the notices were mailed. Thus, the petition was not timely filed and respondent's motion must be granted unless the petition is deemed to have been timely filed by virtue of having been timely mailed.

#### [\*8] A. Petitioner's Position

Petitioner argues that the petition was timely mailed and therefore timely filed. In that regard petitioner argues that the Stamps.com "postmark" appearing on the mailing label affixed to the envelope in which the petition was mailed constitutes a "postmark" that is governed by section 301.7502-1(c)(1)(iii)(B)(1), Proced. & Admin. Regs. That section provides as follows:

HN3 [↑] (B) Postmark made by other than U.S. Postal Service.--(1) In general.--If the postmark on the envelope is made other than by the U.S. Postal Service--  
(i) The postmark so made must bear a legible date on or before the last date, or the last day of the period,

prescribed for filing the document or making the payment; and

(ii) The document or payment must be received by the agency, officer, or office with which it is required to be filed not later than the time when a document or payment contained in an envelope that is properly addressed, [\*\*9] mailed, and sent by the same class of mail would ordinarily be received if it were postmarked at the same point of origin by the U.S. Postal Service on the last date, or the last day of the period, prescribed for filing the document or mailing the payment.

#### B. Respondent's Position

Respondent counters by arguing that "the Stamps.com shipping label used by petitioner in this case includes only the date of the purchase [and] does not indicate the place or date of sending or receipt." In addition, respondent argues that the governing regulation is not the one relied on by petitioner but rather is [\*\*9] section 301.7502-1(c)(1)(iii)(B)(2), *Proced. & Admin. Regs.*, which provides as follows:

**HN4[↑]** (B) Postmark made by other than U.S. Postal Service.--\*\*\*

\*\*\*\*\*

(2) Document or payment received late.--If a document or payment described in paragraph (c)(1)(iii)(B)(1) is received after the time when a document or payment so mailed and so postmarked by the U.S. Postal Service would ordinarily be received, the document or payment is treated as having been received at the time when a document or payment so mailed and so postmarked would ordinarily be received if the person who is required to file the document or make the payment establishes-- [\*\*10]

(i) That it was actually deposited in the U.S. mail before the last collection of mail from the place of deposit that was postmarked (except for the metered mail) by the U.S. Postal Service on or before the last date, or the last day of the period, prescribed for filing the document or making the payment;

(ii) That the delay in receiving the document or payment was due to a delay in the transmission of the U.S. mail; and

(iii) The cause of the delay.

In respondent's view, petitioner has failed to satisfy the three requirements of section 301.7502-1(c)(1)(iii)(B)(2)(i) through (iii), *Proced. & Admin. Regs.* See, e.g., *Ernest v. Commissioner, T.C. Memo. 2002-23*.

#### C. Analysis

In the Court's view, the jurisdictional issue for decision is controlled not by section 301.7502-1(c)(1)(iii)(B)(1), *Proced. & Admin. Regs.*, as argued by petitioner, nor by section 301.7502-1(c)(1)(iii)(B)(2), *Proced. & Admin. Regs.*, as [\*\*10] argued by respondent, but rather by section 301.7502-1(c)(1)(iii)(B)(3), *Proced. & Admin. Regs.* The latter section provides as follows:

**HN5[↑]** (3) U.S. and non-U.S. postmarks.--If the envelope has a postmark made by the U.S. Postal Service in addition to a postmark not so made, the postmark that was not made by the U.S. Postal Service is disregarded, and whether the envelope was mailed in accordance with this paragraph (c)(1)(iii)(B) will be determined solely by applying [\*\*11] the rule of paragraph (c)(1)(iii)(A) of this section.

**HN6[↑]** The "rule of paragraph (c)(1)(iii)(A) of this section" appears in section 301.7502-1 (c)(1)(iii)(A), *Proced. & Admin. Regs.*, and, as immediately relevant, provides that the USPS postmark is conclusive in determining whether the document was timely mailed.<sup>6</sup> See *Sanchez v. Commissioner, T.C. Memo. 2014-223* (holding mark from Stamps.com disregarded in favor of USPS postmark).

Admittedly, in the instant case no postmark made by the USPS appears on the envelope in which the petition was mailed to the Court. However, USPS Tracking (formerly USPS Track & Confirm) reflects that the envelope entered the U.S. mail system on April 23, 2015. In *Boulbee v. Commissioner, T.C. Memo. 2011-11, 2011 WL 94744, at \*5*, **HN7[↑]** the Court expressly decided that USPS Track &

[\*\*11] Confirm data, which represents "official records of the U.S. Postal Service", can serve as the functional equivalent of, or be tantamount to, a USPS postmark. See also sec. 7502(f) (regarding the treatment [\*\*12] of private delivery services and the use of corporate records electronically written to a database as a postmark). After all, both USPS Tracking data and the more traditional postmark are products of the USPS, and nothing would suggest that the former is not as reliable and accurate as the latter when it comes to determining the time of mailing. See id. As we stated in *Boulbee v. Commissioner, T.C. Memo. 2011-11, 2011 WL 94744, at \*5*, "The U.S. Postal Service Track and Confirm service provides reliable data from a neutral third-party source that is not

<sup>6</sup> If the postmark does not bear a date on or before the last date, or the last day of the period, prescribed for filing the document or making the payment, the document or payment is considered not to be timely filed or paid, regardless of when the document or payment is deposited in the mail." Sec. 301.7502-1(c)(1)(iii)(A), *Proced. & Admin. Regs.* (emphasis added).

susceptible to manipulation by the parties." See also Abeles v. Commissioner, 91 T.C. 1019, 1034-1035 (1988) (regarding adapting the law to reflect technological advancements).

Petitioner argues that USPS Tracking data does not accurately reflect either where or when the envelope first entered the USPS mailstream. But this is no different from the argument made in other cases that the USPS failed to promptly place a traditional postmark on an envelope containing a petition either because the postmarking was performed at a postal facility other than the one where the envelope was placed into the mailstream or because the USPS was dilatory in postmarking the envelope. E.g., Drake v. Commissioner, 554 F.2d 736 (5th Cir. 1977) [\*12] (holding that a petition mailed on the 90th day from a post office [\*\*13] in Galveston, Texas, but postmarked in Houston on the following day, which "regional" postmarking led to the delay in postmarking, was nevertheless untimely, thereby justifying the dismissal of the case), aff'g an unpublished order of this Court; Sanchez v. Commissioner, T.C. Memo. 2014-223 (holding that a postmark made by the USPS in Salt Lake City, Utah, was definitive notwithstanding the fact that the petition was mailed from Bountiful, Utah, some 10 miles distant).

HN8 [↑] As section 301.7502-1(c)(1)(iii)(A), Proced. & Admin. Regs., makes clear, "the sender who relies upon the applicability of section 7502 assumes the risk that the postmark will bear a date on or before the last date, or the last day of the period, prescribed for filing the document". The regulation goes on to advise that such risk may be avoided by using registered mail or by using certified mail and having the sender's receipt postmarked by the postal employee to whom the document is presented. Similarly, section 301.7502-1(c)(2), Proced. & Admin. Regs., advises that "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." See Brown v. Commissioner, T.C. Memo. 1982-165 (holding that in the case of certified mail, such risk may be eliminated only if the [\*13] sender's [\*\*14] receipt is postmarked by a USPS employee). Such risk may also be avoided through the judicious use of a designated delivery service. See sec. 7502(f)(2)(C); sec. 301.7502-1(c)(3), Proced. & Admin. Regs.; Notice 2004-83, 2004-2 C.B. 1030.<sup>7</sup>

In the instant case, the "sender's receipt for certified mail" was not postmarked by a USPS employee but rather was handwritten by an employee of petitioner's counsel.

Therefore, sending the petition by certified mail afforded petitioner no guarantee of a timely postmark, and he assumed the risk that the postmark would bear a date on or before the last day of the 90-day period prescribed for filing the petition. Unfortunately for petitioner, the Stamps.com "postmark" upon which he relies is superseded by USPS Tracking data, which tracking data serves as a postmark, see Boulton v. Commissioner, T.C. Memo. 2011-11, and is therefore conclusive in determining whether the petition was timely mailed, see sec. 301.7502-1(c)(1)(iii)(B)(3), Proced. & Admin. Regs. In the instant case, USPS Tracking data demonstrates that the petition was not timely mailed.

#### [\*14] Conclusion

The petition in this case was neither filed nor mailed within the requisite 90day period. Accordingly, the Court is constrained [\*\*15] to grant respondent's motion to dismiss. However, it bears mention that although petitioner cannot pursue his case in this Court, he is not without a judicial remedy. Specifically, petitioner may pay the tax, file a claim for refund with the Internal Revenue Service, and, if his claim is denied, sue for a refund in the appropriate Federal District Court or the U.S. Court of Federal Claims. See McCormick v. Commissioner, 55 T.C. 138, 142 n.5 (1970); see also Weber v. Commissioner, 138 T.C. 348, 366-367 (2012).

To give effect to the foregoing,

An order granting respondent's motion and dismissing this case for lack of jurisdiction will be entered.

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End of Document

<sup>7</sup> The substance of Notice 2004-83, 2004-2 C.B. 1030, now appears in Notice 2015-38, 2015-21 I.R.B. 984, which was effective May 6, 2015, after the petition in the instant case was filed.