**Scene 2**

**Narrator:** Fast forward and after the petition was filed, the case gets assigned by the Respondent to Ms. H. Burger. Ms. Burger thinks it is not clear that the petition was timely mailed and files a *Motion to Dismiss* the Petition, which motion is set before Judge A. Tragg of the Tax Court. We join the scene when Judge Tragg calls the case…..

**J. Tragg:** The next case is *Paul Drake v. Commissioner*, Docket Number 2018-77. Respondent has filed a *Motion to Dismiss* for lack of jurisdiction on the basis that Mr. Drake’s petition was not timely filed under IRC sections 6213(a) or 7502. Petitioner has filed a response to respondent’s motion alleging that the Petition was mailed on the 90th day for filing the petition, March 13, 2018, and under IRC section 7502 which states that timely mailing will be treated as timely filing, the Petition was timely filed. I see that petitioner counsel, Mr. Mason, has attached as *Exhibit A* to Mr. Drake’s *Opposition to the Motion to Dismiss* the affidavit of Mr. Dell, Street, an employee in Mr. Mason’s office, regarding the circumstances of the mailing of the Petition from Boise, Idaho where Mr. Mason’s office is located, to the Court. Since it’s your motion Mr. Burger, I’ll hear from you first.

**Burger:** Thank you Judge. May it please the Court, as spelled out in our Motion to Dismiss, the Notice of deficiency, attached as **Exhibit A** to the *Respondent’s Motion to Dismiss*, was mailed to Petitioner’s last known address in Boise, Idaho. Petitioner, Mr. Drake, is not contending that the notice was mailed to an incorrect address, nor has he claimed that he didn’t receive the notice. As your Honor can see from the notice, the 90th day for filing a timely Petition with this court was March 13, 2018. We have also attached a copy of the envelope in which the Petition was sent which shows that the Petition was sent with a postmark generated by Stamps.com and not the U.S. postal service. The Stamps.com postmark on that envelope is March 13, 2018. There is also a U.S. postal service certified mail receipt card attached to the envelope. That card has the date “March 13, 2018” handwritten in as the date mailed. There is no other indication that this envelope was mailed certified mail, such as a USPS postage mark upon certified mail being accepted.

Stamps.com is a company that provides postal services to businesses whereby a postmark can be generated at the office of the person mailing a package, rather than at the Post Office itself. Consequently, the business or, here, the taxpayer, can generate a postmark with a date that is *before* the date that the letter or package upon which the Stamps.com postage is physically placed into the mail with the US postal service. We submit there is no proof of timely filing of the Petition in this case, whether by Stamps.com or by any other means, so our Motion must be granted and the Petition must be dismissed.

**J. Tragg:** Mr. Mason, do you concede this point, about how Stamps.com operates?

**P. Mason:** I’m not actually sure about that particular point, but I think that is probably the case.

**J. Tragg:** Well since you can’t dispute it and it’s your envelope and postmark, I’m going to consider what Mr. Burger noted about the Stamps.com postmark on the envelope as being, *itself*, inadequate to show proof of timely mailing, and give you a chance to further address the situation when you respond Mr. Mason.

**P. Mason:** Thank you, your Honor. We welcome the chance to “address” that point – no pun intended, your Honor.

**J. Tragg:** Understood Mr. Mason. Continue Ms. Burger.

**Burger:** Thank you, your Honor. Even though there is no US postal service postmark, the certified mail card has a tracking number. A customer, or the government here, can check on the status of the package or letter being mailed with that number. The tracking information can be obtained on the US postal service website, [www.USPS.com](http://www.USPS.com). We checked this tracking number on the website and have included with our *Motion to Dismiss*, as **Exhibit B**, a copy of the tracking information. As your Honor can see from this exhibit, it shows that the Petition entered the U.S. Postal System on March 15, 2018, two (2) days after the date of postage on the Stamps.com mark. That would mean the Petition was not timely, absent any other probative evidence of timely filing, which is lacking here. The USPS tracking record also shows that the Petition was delivered to this court on March 21, 2018, which is the same date reflected on the Court’s records as having received it. The Petitioner has provided no legally cognizable Affidavit showing when the Petition was actually mailed nor, failing that, any cognizable proof of how long it customarily takes an envelope mailed in Boise to arrive at the Tax Court in Washington. So, the Petition must be dismissed as untimely.

**P. Mason:** Judge, I object to both Mr. Burger’s statement about what is included on the US postal service website as well as to the attached **Exhibit B**, as being hearsay and without authentication.

**J. Tragg:** I think I’ll allow this one Mr. Mason. I’m looking at **Exhibit B** and compared the number on the tracking system with the number on the envelope you mailed the petition in and they match. Continue Mr. Burger.

**Burger:** Thank you, your Honor. As we stated in our *Motion to Dismiss*, and in the Court’s records, the envelope with the Stamps.com postmark and the handwritten date on the certified mail card both say March 13, 2018. However, the Petition was not received at the Court until March 21, 2018, eight (8) days after Petitioner contends it was mailed. We submit that the Petitioner has not provided any legally cognizable evidence of how long it takes for a letter to travel from Boise, Idaho to DC. We believe that this time is likely actually **shorter** than 8 days; perhaps only 6-days. Meaning, that, if the Petition was actually received on March 21, 2018, which is not contested, that it was most likely mailed on March 15, 2018, two days **late.** That date, moreover, isconsistent with the USPS records which show that the package first entered the USPS System only on March 15, 2018, two days after the time in which Mr. Drake could Petition this Court had ended. Or, at best, assuming it took only 7-days for mailing, which is not conceded, that would mean itself that the Petition was mailed on March 14, 2018, but that date would still be too late. We submit that the Petition was not timely filed and must be dismissed. There is simply no legally cognizable Affidavit, nor any evidence presented to the Court here by the Petitioner, which would treat justify the Court in treating Mr. Drake’s Petition as timely filed.

**J. Tragg**: Mr. Mason, how do you respond?

**P. Mason:** Judge, you can take judicial notice that everything in Boise, Idaho is slow -- the traffic, folks walking around, time itself seems to tick away at a slower pace. That extends to how fast the post-office there marks mail filed in the night drop box as having been entered into the USPS system. It certainly is not unexpected that any mail coming out of the main post office in Boise would take 8 days to reach Washington, not the shorter 6 or 7-day mailing period that the government simply *speculates* about in its argument to the Court, without any supporting evidence whatsoever.

**J. Tragg:** Counselor, I agree that things are slower around Boise than DC, but I’m thinking, Mr. Mason, that it’s ultimately your burden, as Petitioner’s counsel, to show that it actually takes 8 days for a package mailed in Boise to arrive in Washington, as you argue. Instead of some shorter time frame, as the government submits. Mr. Mason, what else do you have on that point?

**P. Mason:** Judge,there is legal precedent in support of Mr. Drake’s position here, almost on all fours factually – *Tilden v. Commissioner*, a Tax Court memorandum opinion entered in 2015, T.C. Memo 2015-188, later reversed, in a Seventh Circuit ruling later adopted by this Court in *Pearson v. Commr*., last Fall, 149 T.C. No. 20 (Nov. 29, 2017). In *Tilden*, the petitioner had mailed a petition with a Stamp.com postmark and there was no US postal service postmark. The date on the Stamps.com postmark was the 90th day of the notice of deficiency. The letter was mailed from Salt Lake City, Utah and took 8 days to travel from Utah to the Tax Court in DC. Judge Armen of this Court originally granted the Respondent’s motion to dismiss, finding that the petition was not timely mailed and thus not timely filed. Judge Armen held, in that regard, that this issue is governed by Treasury regulation 301.7502-1(c)(1)(iii)(B)(3),which provides as follows:

*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.*

Judge Armen went on to point out that the "rule of paragraph (c)(1)(iii)(A) of that reg. provides that the USPS postmark is conclusive in determining whether the document was timely mailed. He also stated that, in *Tilden*, there was no US postal service postmark on the envelope in which the petition was mailed to the Court. And he relied on the USPS Tracking information which showed that the envelope entered the U.S. mail system on *after* the due date of the petition.

Judge Armen relied on the case of *Boultbee v. Commissioner*, T.C. Memo. 2011-11,where this Court 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. Referring to section 7502(f) (regarding the treatment of private delivery services and the use of corporate records electronically written to a database as a postmark), Judge Armen noted the suspect nature of private postmark services such as Stamp.com as quoted from *Boultbee,* where this court stated "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**." And he also referred to the 1988 tax court of *Abeles v. Commissioner*, 91 T.C. 1019, 1034-1035 (1988) (regarding adapting the law to reflect technological advancements).

**Very importantly, however, Judge Armen’s ruling was later reversed by the 7th Circuit**. And, the 7th Circuit’s ruling was later adopted, by this Court, in *Pearson v. Commr*. And, in the course of the Tilden litigation, the government ultimately admitted that it took 8 days for a package mailed in Salt Lake City to arrive in Washington, D.C. Surely, Boise being further West than Salt Lake City, if anything, it might take longer than 8 days for a package mailed in Boise to arrive in Washington, D.C. The government’s contention here, that it might take a shorter period of time, is not well grounded. Thus, here, your Honor, Mr. Drake must prevail, as his Petition arrived at the Court within the 8-days, if not even more, that a packaged mailed from Boise to Washington, D.C. would arrive. It’s as simple as that.

Moreover, beyond the crucial admission by the in *Tilden*, which Mr. Drake asks the Court to take judicial notice of, the accompanying affidavit of my administrative assistant, Dell Street, itself shows that the petition was timely mailed on March 13, 2018. Mr. Street says, clearly, that I gave him the signed Petition that day, that he stamped the mailing envelope via Stamps.com that day, and filled out a certified mail receipt, dated March 13, 2018 also. And, finally, that he mailed the package at the post-office in Boise after work.

**J. Tragg**: Yes, that’s correct, in *Pearson* we did decide to follow the 7th Circuit’s position in Tilden. And, I do appreciate that Boise is West of Salt Lake City.

**Burger:** May I respond, your Honor?

**Tragg:** Proceed, Mr. Burger.

 **Burger:** The Respondent very much disagrees with Mr. Drake’s argument on these points, as just presented to you by Mr. Mason. First, as to the Affidavit of Mr. Street, which was **Exhibit 1** to Mr. Drake’s *Opposition* to our *Motion to Dismiss*, that Affidavit in no way does it show that the Petition was timely mailed to this Court on or before midnight, March 13, 2018, local time. The Affidavit simply says that Mr. Mason handed the Petition to Mr. Street, signed by Mr. Mason, on that day, with instructions to mail it before the post office closed at midnight. Mr. Street’s affidavit states clearly that he saw Mr. Mason sign the petition and that he personally placed the Stamp.com postmark and certified mail card on the envelope and he wrote the date on that card, March 13th, on the card. Respondent does not contest any of those assertions.

At the same time, however, no-where does Mr. Street’s Affidavit say, clearly, *that Mr. Street actually dropped the Petition in the box at the Post-office before midnight local time*. Rather, Mr. Street only believes that he did so, but was not wearing a watch so can’t say for sure. He was in a hurry to get home after work and just dropped it in the slot inside the post office. **What matters here is NOT the time the Petition was signed by Mr. Mason, nor handed by Mr. Mason to Mr. Street thereafter, but, rather, when the Petition was actually mailed to the Court.** Thus, the Street Affidavit does not sufficiently establish that the Petition was timely mailed.

Turning to Mr. Drake’s alternative argument, based on the appellate decision in *Tilden*, as later adopted by this Court in *Pearson*, we acknowledge that in *Tilden*, on which Mr. Mason and Petitioner rely, there was a **Stipulation** by the government that it normally takes 8 days for a package mailed from Salt Lake to reach the Court in Washington, D.C. Here, however, *the government has made no such stipulation*, and Boise, which has a smaller post office, and a smaller population, can be expected to move quicker, not slower, in marking packages dropped off at night into the USPS system. In that regard, the USPS records log the Petition package into the Postal System on March 15, 2018, *two days late*. Moreover, we all know that the speed of the Postal Service is always improving as technology evolves and we should all expect that time mailing times have become faster since the time of the petition at issue in *Tilden*. Indeed, our evidence, from the USPS system, shows it took the Petition only 6-days to arrive at the Court, not the longer 8-days that Mr. Mason and his client argue for.

Most importantly, it is the Petitioner, not the government, which must produce legally cognizable evidence of how long it takes for a package mailed in Boise to reach Washington, D.C. And, this case is not like Tilden as the government has never conceded that it normally takes 8-days for a package mailed in Boise to reach Washington, D.C.

Petitioner simply has not met its burden and the Petition must be dismissed as untimely.

**J. Tragg:** I think I have enough to make a decision and I should have something out soon.