As the World Turns: Court Rebuffs Novel Spin on International Tax Filing Rules

By Hale E. Sheppard

Introduction

Recent New Year's Eve celebrations may have inadvertently helped taxpayers understand a tricky tax issue. Television programs covering the festivities nowadays do not limit themselves to the legendary dropping of the ball in Times Square; rather, they scan the globe showing events the world over. Thanks to the division of the globe into time zones and the rotation of the earth, the networks could theoretically extend coverage 24 hours straight. In all cases, New Zealand is one of the first places to launch fireworks, throw confetti, blow horns, make toasts, kiss loved ones or carry out other traditions. This is because the country is situated just west of the "international dateline." Established over a century ago for purposes of standardizing time, the "international dateline" is an imaginary line on the earth's surface, running from the North Pole to the South Pole through the Pacific Ocean, which separates two consecutive calendar days. It is a starting point, if you will. The calendar day to the west of the line (where New Zealand is located) is always one day earlier than to the east of it (where the United States is located). This fact was key in a recent tax case, *Dietsche*, which underscores the importance of filing deadlines in tax disputes, particularly those involving international taxpayers.

Hale E. Sheppard, B.S., M.A., J.D., LL.M., LL.M.T., is a shareholder in the Atlanta office of Chamberlain Hrdlicka specializing in tax audits, tax appeals, tax litigation and tax collection defense. You can reach Hale by phone at (404) 658-5441 or by e-mail at *hale.sheppard@chamberlainlaw.com*.

Overview of the Law

Filing Deadlines Aplenty

Effectively administering a complex tax system requires deadlines. Even if a taxpayer is aware of the relevant cut-off dates, he may still miss them if he

fails to grasp the key terms. One such term is "file," which is found throughout the tax code. Take the following examples. Generally, an individual taxpayer must "file" his federal income tax return by April 15 of each year.[1] If the taxpayer later discovers that he overpaid his taxes, he must "file" a claim for refund within three years from the time the original return was "filed" or two years from when the taxes at issue were paid, whichever period expires later.[2] On the other hand, in situations where the IRS alleges that the taxpayer underpaid his taxes and issues him a Notice of Deficiency, he ordinarily must "file" a petition with the U.S. Tax Court within 90 days.[3] Were the Tax Court to hold in the IRS's favor at trial, the taxpayer could challenge this initial ruling by "filing" a Notice of Appeal within 90 days after the Tax Court decision has been officially entered.[4]

The concept of filing appears straightforward enough on its face, but, as with most things in the tax arena, it is deceptively convoluted. Additionally, complications are bound to increase as the IRS and the Tax Court encounter more and more international matters. To appreciate the evolving issues, one must first understand the relevant rules.

A Look at the Original Mailbox Rule

Code Sec. 7502 contains the "mailbox rule," which is commonly known as the timely-mailing-equals-timely-filing rule. This provision generally states that when a taxpayer properly *sends* certain documents *before* the deadline, but the IRS or Tax Court does not *receive* such documents until *after* the deadline, the date on which the taxpayer sent the documents is treated as the date that the document was "filed."[5] The relevant statutory language is as follows:

> If any return, claim, statement, or other document required to be filed ... within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue laws is, after such period or such date, delivered by United States mail to the agency, officer, or office with which such return, claim, statement, or other document is required to be filed, [then] the date of the United States postmark stamped on the cover in which such return, claim, statement, or other document ... is mailed shall be deemed to be the date of delivery. ...[6]

Two aspects of the preceding rule are noteworthy for purposes of this article. First, the term "other document" expressly includes any document filed with the Tax Court, including a Petition (filed in response to a Notice of Deficiency from the IRS) or Notice of Appeal (filed in response to an unfavorable ruling in the Tax Court).[7] Second, the statutory rule is limited to documents sent by the U.S. Postal Service; it does *not* contemplate documents sent by foreign postal agencies. Lest there be any doubt in this regard, Code Sec. 7502(b) states that the mailbox 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" promulgated by the IRS.[8] The regulations expand on this point, explaining that a document must be deposited "with the domestic mail service of the U.S. Postal Service."[9]

The Tax Court issued a number of decisions that were adverse to taxpayers based on the restricted mailbox rule, as originally enacted in 1954.[10] The clearest case on the issue of foreign postmarks was, perhaps, *Donehey*. In granting the IRS's motion to dismiss the case because the taxpayer's Petition was filed late, the Tax Court in *Donehey* explained that "the provisions of Section 7502 contemplate that the envelope be deposited in the mail in the United States, meaning that the envelope is deposited with the domestic mail service of the U.S. Postal Service [and] Section 7502 does not apply to any document that is deposited with the mail service of any other country."[11]

Internationalization of the Mailbox Rule

The world has changed considerably since the standards in Code Sec. 7502 were originally enacted in 1954, and the IRS and Congress have changed with it. For instance, the IRS issued Policy Statement 2-9 in 1967 acknowledging the reality that tax administration was becoming more globalized. It provided that "returns mailed by taxpayers in foreign countries will be accepted as timely if postmarked on or before midnight of the last day prescribed for filing."[12] The IRS's position was subsequently memorialized in Rev. Rul. 80-218, which stated the following:

> United States federal tax returns mailed by taxpayers in foreign countries will be accepted as timely filed if they bear an official postmark dated on or before midnight of the last date prescribed for filing, including any extension of time for such filing.[13]

While helpful to taxpayers located abroad, Rev. Rul. 80-218 had its limitations. Indeed, this IRS pronouncement expressly stated that it did *not* extend to claims, statements or other documents. In other words, the amplified mailbox rule only applied to "federal tax returns," and not to "other documents" filed with the Tax Court by overseas taxpayers, such as Petitions or Notice of Appeals.[14]

It is interesting to note that the IRS's administrative position, as described in Rev. Rul. 80-218, was later called into question by its own actions. In *Pekar*, the IRS asserted a late-filing penalty against an overseas taxpayer whose federal income tax return arrived after the due date, even though it was filed abroad on the due date.[15] The Tax Court upheld the penalty, no doubt relying in part on the legal brief submitted by the IRS concerning the status of the law. Shortly thereafter, the IRS issued Technical Advice Memorandum 200012085 in response to an inquiry from one of its foreign-based representatives. The IRS admitted in this pronouncement that it "mistakenly took the position" in *Pekar* that the taxpayer filed a delinquent return because of the limited scope of Code Sec. 7502 and "mistakenly sought the imposition" of a penalty. Consistent with this approach, the IRS then released Action on Decision 2002-04, wherein the IRS indicated that it had filed a motion with the Tax Court requesting that the opinion in *Pekar* be modified to follow the IRS policy stated in Rev. Rul. 80-218 and confirmed that the IRS would not adhere to the opinion in *Pekar* on the issue of whether late-filing penalties apply in similar situations.

In 1996, Congress recognized that the original rules in Code Sec. 7502 had fallen behind the times, and that the antiquated notions were causing unintended problems for taxpayers. The legislative history characterized the issue in the following way:

> There are many private delivery companies operating today which meet the U.S. Postal Service's ability to deliver documents quickly and securely. Every year, many taxpayers needlessly run afoul of the present-law rule because they make a reasonable assumption that using a private delivery service is adequate to show timely filing of their tax returns.[16]

To rectify the situation, Congress enacted Code Sec. 7502(f). This new provision expanded the mailbox rule to situations in which the taxpayer utilizes a "designated delivery service;" that is, one approved by the IRS.[17] Code Sec. 7502(f) initially applied to domestic delivery services, but was later broadened to encompass global services, too. Eligible carriers are referred to as "designated international delivery services."[18]

Most recently, the IRS issued Rev. Rul. 2002-23, which accomplished three things: (1) It reaffirmed the IRS's earlier position in Policy Statement 2-9 and Rev. Rul. 80-218 that the mailbox rule applies to a "federal tax return" mailed by a taxpayer in a foreign country if it bears an official postmark of such country dated on or before the deadline; (2) it expanded the earlier rule to claims for refund, statements, and other documents sent to the IRS from abroad; and (3) it clarified that the mailbox rule would not apply to foreign postmarked documents filed with the Tax Court (such as Petitions and Notices of Appeal), unless they are properly sent by a "designated international delivery service" in accordance with Code Sec. 7502(f).[19] With respect to the last item, Rev. Rul. 2002-23 provides the following guidance:

> The concept of filing appears straightforward enough on its face, but, as with most things in the tax arena, it is deceptively convoluted.

> Timely filing treatment, however, will not apply to foreign postmarked documents filed with the United States Tax Court, such as petitions and notices of appeal, unless given to a designated international delivery service ...[20]

> A federal tax return, claim for refund, statement, or other document required or permitted to be filed with the Service or with the United States Tax Court that is given to a designated international delivery service before midnight on the last date prescribed for filing shall be deemed timely ...[21]

Novel Mailbox Theory in Recent Case

The complex nature of the mailbox rule, especially in the international context, is illustrated by a recent case, *Dietsche*.[22] The IRS issued a Notice of Deficiency to the taxpayer, claiming that she owed

additional taxes because of the disallowance of the foreign earned income exclusion she claimed on her federal tax returns for 2004 and 2005. The IRS argued, in essence, that the taxpayer was not entitled to the tax benefit because she was working in Antarctica during the years in question, which is not considered a "foreign country" for these purposes. The taxpayer filed a timely Petition with the Tax Court, in which she disputed the IRS's proposed adjustments on the basis that she was a resident of New Zealand during the relevant period. The IRS then filed an Answer with the Tax Court, followed by a Motion for Summary Judgment. The Tax Court issued an "Order and Decision," granting the IRS's motion and thus dispensing with the case.[23]

Soon thereafter, the taxpayer sent two letters to the Tax Court disputing the ruling. The Tax Court rules allow a party to file a motion within 30 days of a Decision, asking the Tax Court to vacate or revise a particular Decision, with or without a new trial or further trial on the matter.[24] Pursuant to this authority, and granting certain latitude to a *pro se* taxpayer, the Tax Court recharacterized the taxpayer's letters as a Motion to Vacate or Revise Decision Embodying Cross Motion for Summary Judgment. After considering the arguments raised by the taxpayer, though, the Tax Court issued an Order denying her motion on September 16, 2008.[25]

All applicable authorities (including the tax code, regulations, Tax Court Rules, and Federal Rules of Appellate Procedure) state that a prerequisite to appealing a Tax Court decision is "filing" a proper Notice of Appeal within 90 days after such decision is entered.[26] In *Dietsche*, the 90-day period expired on December 15, 2008.

The taxpayer, undeterred by the rejection at trial, sent a Notice of Appeal to the Tax Court from New Zealand using a "designated international delivery service," DHL Express. The postmark on the envelope was dated December 16, 2008 (*i.e.*, 91 days after the Tax Court decision was entered), and the Notice of Appeal arrived at the Tax Court on December 18, 2008 (*i.e.*, 93 days after the Tax Court decision was entered). The case was then routed to the U.S. Court of Appeals for the District of Columbia. The government, through the U.S. Department of Justice, lodged a motion to dismiss the taxpayer's appeal on the basis that it was untimely. The taxpayer opposed this motion, arguing that the Notice of Appeal was timely filed under the mailbox rule.

The taxpayer pointed out that while it was December 16, 2008, in New Zealand at the time she sent the package, this was actually December 15, 2008, in the United States because New Zealand is located "across the international dateline." As explained above, the "international dateline" is an imaginary line, from the North Pole to the South Pole through the Pacific Ocean, which separates two consecutive calendar days. The calendar day to the west of the line (where New Zealand is located) is one day earlier than to the east of it (where the United States is located). Moreover, the capital of New Zealand, Wellington, is 18 hours ahead of Washington, D.C., where the Tax Court is located. Based on this logic, the taxpayer contended that the Notice of Appeal was timely filed thanks to the mailbox rule and the rotation of the planet.

Strictly construing the mailbox rule and the statutory language of Code Sec. 7502(a), the Appellate Court indicated that the pivotal item was the "date of the postmark." Since the foreign postmark was dated December 16, 2009 (*i.e.*, 91 days after the Tax Court decision was entered), the Appellate Court found that the mailbox rule did not apply and the Notice of Appeal, therefore, was not timely "filed" in a timely manner.[27]

Conclusion

The result in *Dietsche* was detrimental to the taxpayer in that case, yet it stands to benefit *other* taxpayers and their advisors. Specifically, it affords an opportunity to review the mailbox rule, discover how this unique rule has evolved to address international issues and foreign postmarks, and gauge the court's threshold for novel arguments. Many a tax dispute has been won (or lost) on procedure; therefore, appreciating the abundance of "filing" deadlines and the special rules associated therewith is absolutely crucial for success against the IRS.

Endnotes

1 Code Sec. 6072(a).
2 Code Sec. 6511(a).
3 Code Sec. 6213(a). The 90-day period is extended to 150 days if the Notice of Deficiency is addressed to a taxpayer outside the United States.
4 Code Sec. 7482; Code Sec. 7483; Reg. §301.7483-1; Tax Court Rule 190(a), Federal Rule of Appellate Procedure 13.
5 Code Sec. 7502(a), (d)(1).
6 Code Sec. 7502(a)(1).
7 Reg. §301.7502-1(b)(1)(iii).
8 Code Sec. 7502(b).
9 Reg. §301.7502-1(c)(1)(ii).
10 *See, e.g., L. Cespedes*, 33 TC 214, Dec.

Endnotes

23,833 (1959) (noting that the Petition was not delivered to the Tax Court until 152 days after the Notice of Deficiency and "[t]here is no United States postmark stamped on the cover in which the Petition was mailed"); *Electronic Automation Systems, Inc.*, 35 TCM 1183, Dec. 33,995(M), TC Memo. 1976-270 (explaining that "[w]hile it was mailed and bears a Canadian postmark ... there is no timely United States postmark as clearly required by statute"); *S. Malkiel*, 55 TCM 855, Dec. 44,778(M), TC Memo. 1988-214; *P.J. Pekar*, 113 TC 158, Dec. 53,525 (1999) (stating that "the timely-mailing-timely filing rule of Section 7502(a), however, does not apply to foreign postmarks [and] it is well established that foreign postmarks do not effectively cause the filing date of a document to be the postmark date").

[11] *J. Donehey,* 72 TCM 389, Dec. 51,505(M), TC Memo. 1996-376.

[12] I.R.M. §1.2.12.1.3 (July 27, 1967) (IRS Policy Statement 2-9).

[13] Rev. Rul. 80-218, IRB 1980-32, 12, 1980-2 CB 386; *See also* IRS General Counsel Memorandum 38295 (1980), explaining why the IRS has authority to accept foreign postmarked documents as timely under Code Sec. 6081, not Code Sec. 7501, and why the IRS can exercise such authority *via* revenue rulings, not regulations.

[14] Rev. Rul. 80-218, IRB 1980-32, 12, 1980-2 CB 386.

[15] *Pekar*, *supra* note 10, 113 TC, at 167–68.

[16] H.R. Rep. No. 104-506, 104th Cong., 2d Sess., (March 28, 1996), at 51.

[17] P.L. 104-168, Section1210 (1996).

[18] *See* IRS Notice 2004-83.

[19] Rev. Rul. 2002-23, IRB 2002-18, 811, 2002-1 CB 811.

[20] *Id. See also*, IRM § 21.8.1.1.17 (10-01-2007), IRM § 21.8.2.1.4 (10-01-2007), IRM § 25.6.1.6.15 (04-01-2007).

[21] *Id. See also*, IRM § 21.8.1.1.17 (10-01-2007), IRM § 21.8.2.1.4 (10-01-2007), IRM § 25.6.1.6.15 (04-01-2007).

[22] *Dietsche,* Tax Court Docket No. 001373-08.

[23] *Dietsche*, Tax Court Docket No. 001373-08, Order and Decision dated July 30, 2008.

[24] Tax Court Rule 162.

[25] *Dietsche*, Tax Court Docket No. 001373-08, Order dated September 16, 2008.

[26] Code Sec. 7483; Reg. §301.7483-1; Tax Court Rule 190(a), Federal Rule of Appellate Procedure 13.

[27] *Dietsche*, 2009 WL 2568735, 104 AFTR 2d 2009-7379.