

DOCKET ENTRIES

Docket No. 011089-15

INDEX

Robert H. Tilden

v. COMMISSIONER OF INTERNAL REVENUE

SHORT RECORD
No. 15-3838
Filed: 12/22/2015

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NO.	DATE	EVENT	FILINGS AND PROCEEDINGS	ACT/STAT DTE	SERVED	M
0001	04/29/2015	PF	PETITION FILED by Petr. Robert H. Tilden: FEE PAID		R 05/04/2015	
0002	04/29/2015	RQT	REQUEST FOR PLACE OF TRIAL AT SALT LAKE CITY, UT by Petr. Robert H. Tilden		R 05/04/2015	
0003	06/08/2015	M004	MOTION FOR ASSIGNMENT OF JUDGE by Resp. (NO OBJECTION)	DNM 09/23/2015	P 06/08/2015	
0004	06/08/2015	M073	MOTION TO DISMISS FOR LACK OF JURISDICTION by Resp. (EXHIBITS) (OBJECTION)	ORD 09/25/2015	P 06/08/2015	
0005	06/09/2015	O	ORDER PETR. BY 6-30-15 FILE AN OBJECTION TO RESP. MOTION TO DISMISS FOR LACK OF JURISDICTION. RESP'S. MOTION FOR ASSIGNMENT OF JUDGE SHALL BE HELD IN ABEYANCE.		B 06/10/2015	
0006	06/30/2015	RSP	RESPONSE TO MOTION TO DISMISS FOR LACK OF JURISDICTION by Petr. Robert H. Tilden (C/S 06/30/15) (EXHIBITS)		R 06/30/2015	
0007	07/13/2015	OAJ	ORDER THAT CASE IS ASSIGNED TO S.T. JUDGE ARMEN . SOLELY FOR THE PURPOSE OF DISPOSING OF RESP. MOTION TO DISMISS FOR LACK OF JURISDICTION		B 07/14/2015	
0008	07/20/2015	O	ORDER RESP. BY 8-5-15 FILE A REPLY TO PETR'S. RESPONSE TO MOTION TO DISMISS FOR LACK OF JURISDICTION		B 07/20/2015	
0009	07/21/2015	REPL	REPLY TO RESPONSE TO MOTION TO DISMISS FOR LACK OF JURISDICTION by Resp. (EXHIBIT)		P 07/21/2015	
0010	07/21/2015	O	ORDER PETR. BY 8-3-15 FILE A RESPONSE TO RESP. REPLY TO RESPONSE TO MOTION TO DISMISS FOR LACK OF JURISDICTION.		B 07/22/2015	
0011	08/03/2015	RSP	RESPONSE TO REPLY TO RESPONSE TO MOTION TO DISMISS FOR LACK OF JURISDICTION by Petr. Robert H. Tilden (C/S 08/03/15) (EXHIBITS)		R 08/03/2015	

NO.	DATE	EVENT	FILINGS AND PROCEEDINGS	ACT/STAT/DTE	SERVED	M
 0012	09/22/2015	MOP	MEMORANDUM OPINION, S.T. JUDGE ARMEN T.C. MEMO. 2015-188. (AN ORDER GRANTING RESP'S. MOTION AND DISMISSING THIS CASE FOR LACK OF JURISDICTION WILL BE ENTERED).		B 09/22/2015	
 0013	09/23/2015	DNM	DENIED AS MOOT MOTION FOR ASSIGNMENT OF JUDGE by Resp.		B 09/23/2015	
 0014	09/25/2015	OD	ORDER OF DISMISSAL ENTERED, S.T. JUDGE ARMEN. RESP. MOTION TO DISMISS FOR LACK OF JURISDICTION IS GRANTED AND THIS CASE IS DISMISSED.		B 09/25/2015	
 0015	10/22/2015	M028	MOTION FOR RECONSIDERATION OF FINDINGS OR OPINION PURSUANT TO RULE 161 by Petr. Robert H. Tilden (C/S 10/22/15) (OBJECTION)	ORD 12/03/2015	R 10/22/2015	
 0016	10/22/2015	M031	MOTION FOR REVIEW BY THE FULL COURT by Petr. Robert H. Tilden (C/S 10/22/15) (OBJECTION)	DNM 10/27/2015	R 10/22/2015	
 0017	10/26/2015	NODC	NOTICE OF DOCKET CHANGE OF MOTION TO VACATE OR REVISE PURSUANT TO RULE 162 BY PETR. ROBERT H. TILDEN FILED 10/22/2015. THE DOCKET ENTRY TEXT WAS CHANGED TO REFLECT MOTION FOR REVIEW BY THE FULL COURT.		B 10/27/2015	
 0018	10/27/2015	DNM	DENIED MOTION FOR REVIEW BY THE FULL COURT by Petr. Robert H. Tilden		B 10/28/2015	
 0019	10/27/2015	O	ORDER RESP. BY 11/17/15 FILE A RESPONSE TO PETR'S. MOTION FOR RECONSIDERATION OF FINDINGS OR OPINION PURSUANT TO RULE 161.		B 10/28/2015	
 0020	11/16/2015	RSP	RESPONSE TO MOTION FOR RECONSIDERATION OF FINDINGS OR OPINION PURSUANT TO RULE 161 by Resp.		P 11/16/2015	
 0021	11/18/2015	NODC	NOTICE OF DOCKET CHANGE OF RESPONSE TO ORDER DATED 10/27/2015 BY RESP. FILED 11/16/2015. THE DOCKET ENTRY TEXT WAS CHANGED OR CORRECTED TO REFLECT RESPONSE TO MOTION FOR RECONSIDERATION OF FINDINGS OR OPINION PURSUANT TO RULE 161.		B 11/18/2015	
 0022	12/03/2015	O	ORDER PETR'S. MOTION FOR RECONSIDERATION OF FINDINGS OR OPINION PURSUANT TO RULE 161 IS DENIED		B 12/03/2015	
APPELLATE PROCEEDINGS						
 0023	12/21/2015	NOAP	NOTICE OF APPEAL BY PETR(S). TO U.S.C.A. 7TH CIR. (FEE PAID).		B 12/22/2015	
 0024	12/22/2015	NOFC	NOTICE OF FILING W/ COPY OF NOT. OF APP. SENT TO THE PARTIES.		B 12/22/2015	

**US TAX COURT
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Case: 15-3838

Document: 1-1

Filed: 12/22/2015



**US TAX COURT
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(3 of 39)

DEC 21 2015

DEC 21 2015

ROBERT H. TILDEN

Petitioner(s)

PAPER FILED

v.

Docket No. 11089-15

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Notice of Appeal

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Armen

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UNITED STATES TAX COURT
INTAKE # 5

2015 DEC 21 AM 10:00

BY: 
DEPUTY CLERK

Paul W. Jones, Esq.
Tax Court Bar #JP0098
4766 S. Holladay Blvd.
Salt Lake City, Utah 84117
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IN THE UNITED STATES TAX COURT

ROBERT H. TILDEN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

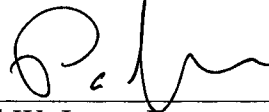
NOTICE OF APPEAL

Docket Number 011089-15

Notice is hereby given that Robert H. Tilden hereby appeals to the United States Court of Appeals for the Seventh Circuit from the decision of this Court, the Order of Dismissal, entered in the above-captioned proceeding on the 25th day of September, 2015 relating to Respondent's Motion to Dismiss for Lack of Jurisdiction filed on June 8, 2015 (the "Order"). The Order is based upon the Court's Memorandum Opinion (T.C. Memo. 2015-188) which was entered by the Court on September 22, 2015.

Petitioner resided in Milwaukee, Wisconsin, at the time the petition was filed. Accordingly, appellate venue properly lies in the United States Court of Appeals for the Seventh Circuit.

By



Paul W. Jones, Esq.

Tax Court Bar #JP0098

4766 S. Holladay Blvd.

Salt Lake City, Utah 84117

Telephone: (801) 930-5101

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing NOTICE OF APPEAL was served on counsel for Respondent, by mailing the same on December 11, 2015 in a postage paid wrapper addressed to:

Skyler K. Bradbury
150 Social Hall Ave
Suite 313A
Social Hall Plaza Building
Salt Lake City, UT, 84111

This is to further certify that the original of the aforementioned paper filed electronically with the Court on December 11, 2015.



Paul W. Jones, Esq.

Tax Court Bar #JP0098

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4766 S. HOLLADAY BLVD
HOLLADAY, UT 84117

Case: 15-3838

Document: 1-1

Filed: 12/22/2015

Pages: 36

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WASHINGTON DC 20217-0001



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U.S. Tax Court docket # 11089-15



UNITED STATES TAX COURT

WASHINGTON, DC 20217

December 22, 2015

CLERK OF THE COURT

ROBERT H. TILDEN,)	
)	
Petitioner,)	
)	
v.)	Docket No. 11089-15.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent.)	

NOTICE OF FILING OF NOTICE OF APPEAL

TO:

Gino J. Agnello, Clerk
 U.S. Court of Appeals
 for the Seventh Circuit
 U.S. Courthouse and Federal
 Office Building
 219 South Dearborn St., Rm. 2722
 Chicago, IL 60604

William J. Wilkins
 Chief Counsel
 Internal Revenue Service
 1111 Constitution Avenue NW
 Washington, DC 20224

Paul W. Jones
 Hale & Wood, PLLC
 4766 S. Holladay Blvd.
 Salt Lake City, Utah 84117

The United States Court of Appeals for the Seventh Circuit and the parties are hereby notified that on December 21, 2015, the petitioner filed a Notice of Appeal from the decision of the Tax Court. A copy of that Notice of Appeal is herewith served upon you.

The parties are hereby notified that the original papers constituting the record of the case in the United States Tax Court include any transcripts of proceedings. The record on appeal will be sent to the United States Court of Appeals on January 20, 2016.

Counsel for the Commissioner of Internal Revenue are **GILBERT S. ROTHENBERG, CHIEF, APPELLATE SECTION, TAX DIVISION, UNITED STATES DEPARTMENT OF JUSTICE, P.O. BOX 502, WASHINGTON, D.C. 20044, UPON WHOM SERVICE OF DOCUMENTS AND PAPERS IN PROCEEDINGS IN THE COURT OF APPEALS IS TO BE MADE**, and William J. Wilkins, Chief Counsel, Internal Revenue Service.

Robert R. Di Trolio
Clerk of the Court

Enclosures: Certified Copy of Notice of Appeal and Docket Entries.

Fee Paid: Yes No

Amount Paid: \$505.00

SERVED DEC 22 2015

UNITED STATES TAX COURT
WASHINGTON, DC 20217

ROBERT H. TILDEN,)	
)	
Petitioner,)	SYM
)	
v.)	Docket No. 11089-15.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
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Respondent)	
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ORDER

On September 22, 2015, the Court filed and served its Memorandum Opinion as T.C. Memo. 2015-188. Therein the Court held that the petition was not timely mailed and was therefore not timely filed. Three days later, on September 25, 2015, the Court entered an Order Of Dismissal For Lack Of Jurisdiction granting respondent’s Motion To Dismiss For Lack Of Jurisdiction filed June 8, 2015, and dismissing this case on the ground that the petition was not timely filed.

On October 22, 2015, petitioner filed a Motion For Reconsideration Of Findings Or Opinion Pursuant to Rule 161¹ and represented therein that counsel for respondent objects to its granting. Thereafter, pursuant to the Court’s Order dated October 27, 2015, respondent filed a Response to petitioner’s motion on November 16, 2015. Surprisingly, respondent states in his Response that “respondent does not object to the Court’s granting petitioner’s motion for reconsideration of

¹ Rule references are to the Tax Court Rules of Practice and Procedure.

Rule 161 provides in relevant part that “Any motion for reconsideration of an opinion or findings of fact, with or without a new or further trial, shall be filed within 30 days after a written opinion * * * [has] been served * * * .” The Court’s other relevant Rule regarding post-trial proceedings is Rule 162, which provides that “Any motion to vacate or revise a decision, with or without a new or further trial, shall be filed within 30 days after the decision has been entered, unless the Court shall otherwise permit.”

findings or opinion pursuant to T.C. Rule 161 and denying respondent's motion to dismiss for lack of jurisdiction."²

The fact that respondent may now have lost confidence in his own motion is of no moment. After all, it is axiomatic that the Tax Court is a court of limited jurisdiction and that it may exercise jurisdiction only to the extent expressly authorized by statute. See I.R.C. sec. 7442; Breman v. Commissioner, 66 T.C. 61, 66 (1976). It is equally axiomatic that jurisdiction cannot be conferred on this Court by agreement of the parties. E.g., Dorn v. Commissioner, 119 T.C. 356, 357 (2002). Indeed, the Court can -- and should -- question its jurisdiction when there is reason to do so. Id. These principles are not new. E.g., Appeal of Mohawk Glove Corporation, 2 B.T.A. 1247 (1925) ("Although the Commissioner admitted in his answer the jurisdiction of the Board, we cannot take jurisdiction where it does not exist by statute."). In Kane v. Commissioner, T.C. Memo. 1989-272, the Court cited Mohawk Glove Corp. and stated as follows:

[N]o admission or agreement of the parties can confer jurisdiction on this Court where no jurisdiction exists. * * * The Tax Court is a court of limited jurisdiction. Unless the statutory requirements conferring jurisdiction on the Court have been met, we lack jurisdiction over the case. This principle has been enunciated in numerous cases throughout the history of this Court and is too well-established to require citation of authority.


In addition to the foregoing principles regarding jurisdiction, the Court notes that respondent makes no reasoned argument in his Response to petitioner's motion why Boulton v. Commissioner, T.C. Memo. 2011-11, which is one of the lynchpins of the Court's Tilden opinion, is incorrect or why official records of the U.S. Postal Service in the form of USPS Tracking data should not serve as a postmark.

² Respondent's position has evolved over the course of this case. Thus, in his Motion To Dismiss For Lack Of Jurisdiction filed June 8, 2015, respondent argued that the petition was not timely filed, and he relied on USPS Tracking data to demonstrate that the petition was not timely mailed. Then, after petitioner objected to the granting of his motion, respondent argued in his Reply filed July 21, 2015, that the petition did not arrive at the Court in the usual mailing time and that petitioner failed to demonstrate when the petition was actually deposited in the mail, that the delay in the receipt of the petition was due to a delay in the transmission of the mail, and the cause of the delay. See 301.7502-1(c)(1)(iii)(B)(2), Proced. & Admin. Regs. Now, in response to petitioner's motion for reconsideration, respondent reverses course and accepts petitioner's view that the petition was timely mailed and was therefore timely filed.

In his motion for reconsideration, petitioner makes no persuasive argument that Boulton v. Commissioner, T.C. Memo. 2011-11, has no application to the present case nor that official records of the U.S. Postal Service in the form of USPS Tracking data should not serve as a postmark.

Premises considered, it is hereby

ORDERED that petitioner's Motion For Reconsideration Of Findings Or Opinion Pursuant to Rule 161, filed October 22, 2015, is denied.

A handwritten signature in black ink, appearing to read "Robert N. Armen, Jr.", with a stylized flourish at the end.

Robert N. Armen, Jr.
Special Trial Judge

Dated: Washington, D.C.
December 3, 2015

**UNITED STATES TAX COURT
WASHINGTON, DC 20217**

ROBERT H. TILDEN,)	
)	
Petitioner,)	
)	
v.)	Docket No. 11089-15.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
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Respondent)	
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ORDER OF DISMISSAL FOR LACK OF JURISDICTION

In order to give effect to the Court’s Memorandum Opinion, filed September 22, 2015, as T.C. Memo. 2015-188, it is hereby

ORDERED that respondent’s Motion To Dismiss For Lack Of Jurisdiction, filed June 8, 2015, is granted and this case is dismissed on the stated ground because the petition was not timely filed.



Robert N. Armen, Jr.
Special Trial Judge

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ROBERT H. TILDEN

Petitioner(s)

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

ELECTRONICALLY FILED

Docket No. 11089-15

**MOTION FOR RECONSIDERATION OF FINDINGS OR OPINION
PURSUANT TO RULE 161**

CERTIFICATE OF SERVICE

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IN THE UNITED STATES TAX COURT

ROBERT H. TILDEN, an Individual,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

**PETITIONER'S MOTION FOR
RECONSIDERATION**

Docket Number 11089-15

Petitioner respectfully moves this Court pursuant to Rule 161 for reconsideration of a findings of fact and conclusions of law from its opinion dated September 22, 2015 that held (1) The Stamps.com "postmark" is disregarded in favor of USPS Tracking data. *Boulbee v. Commissioner*, T.C. Memo. 2011-11; sec. 301.7 502-1 (c)(1)(iii)(B)(3), *Proced. & Admin. Regs.*; and (2) the petition was not timely mailed and was therefore not timely filed. R's motion will be granted.

The Tax Court will grant a motion for reconsideration upon a showing of unusual circumstances or substantial error. See, e.g., *Vaughn v. Commissioner*, 87 T.C. 164, 166-167 (1986); *Procter & Gamble Co. v. Commissioner*, T.C. Memo 1990-638, *aff'd*, 961 F.2d 1255

(6th Cir. 1992). The Tax Court may also reconsider its opinions when it has misapplied the law, leading the court to the wrong result. See *Hartman v. Commissioner*, T.C. Memo 2008-124.

In this case, Petitioner respectfully requests that the Court reconsider its opinion in T.C. Memo. 2015-188 as Petitioner argues the Tax Court has therein made a substantial error and/or misapplied the law.

In support of this motion petitioner hereby states as follows:

1. The Court's Memorandum Opinion holds that the legal positions advanced by both the Petitioner and the Respondent are not applicable. Rather, the Court held that Reg. §301.7502-1(c)(1)(iii)(B)(3) along with *Boulbee v. Commissioner*, T.C. Memo. 2011-11 are the controlling legal authorities that should be applied. Petitioners argue (1) that if the Court considered the applicability of legal arguments not advanced by either party it should have still found that the Tax Court has jurisdiction under the common-law mailbox rule; (2) the plain language of Reg. §301.7502-1(c)(1)(iii)(B)(3) is inapplicable to this case even utilizing the factual findings of the Court's Memorandum Opinion; and (3) the holdings of *Boulbee v. Commissioner*, T.C. Memo. 2011-11 are misapplied to the factual findings of the case.

The Common-law Mailbox Rule

2. Even if a petitioner taxpayer cannot establish timely filing under IRC¹ § 7502, the petitioner may be able to invoke the common-law mailbox rule. When a document is properly mailed, the court will presume that the U.S. Postal Service delivered the document to the

¹ Internal Revenue Code of 1986, as amended

addressee in the usual time. See *Philadelphia Marine v. Commissioner*, 101 AFTR2d 1759 (3rd Cir. 4/14/08).

3. There is a split among the Circuit Courts of Appeal on the question of whether the timely mailed, timely filed rule creates the only exceptions to the physical delivery rule. The Eighth, Ninth, and Tenth Circuits have held that the exceptions set forth in IRC § 7502 (i.e., certified or registered mail as evidence of timely delivery or a postmark before or on the due date as equivalent to timely delivery) are not the only exceptions to the physical delivery rule. According to case law of these Circuit Courts, even if a taxpayer does not come within the procedural requirements of the statutory timely mailed, timely filed rule, a taxpayer still may be able to establish timely mailing through circumstantial evidence, thereby raising a rebuttable presumption of timely receipt by the Tax Court (or the IRS in case of tax filings and payments) (the “common-law mailbox rule”). See *Estate of Wood v. Commissioner*, 909 F.2d 1155 (8th Cir. 1990); *Anderson v. United States*, 966 F.2d 467 (9th Cir. 1992); *Sorrentino v. U.S.*, 383 F.3d 1187 (10th Cir. 2005)).

4. The Second and Sixth Circuits have held that §7502 preempts the common-law mailbox rule. *Deutsch v. Commissioner*, 599 F.2d 44 (2d Cir. 1979), cert. denied, 444 U.S. 1015 (1980);

Miller v. United States, 784 F.2d 728 (6th Cir. 1986) (per curiam). However, this petitioner does not appeal to either the Second or Sixth Circuit.²

5. However, the Courts that allow the common-law mailbox rule have found that direct evidence of mailing, such as an affidavit from the person who mailed the document, or even circumstantial evidence, such as proof of customary mailing practices in the sender's office, is sufficient evidence of actual mailing to invoke the common-law mailbox rule. See, for example, *Anderson v. United States*, 966 F.2d 487, 491 (9th Cir. 1992) (testimony of taxpayer, coupled with corroborating testimony of friend as to mailing, sufficient to comply with common law presumption of delivery); *Curry v. Commissioner*, 571 F.2d 1306, 1309-1310 (4th Cir. 1978) (“abundant” evidence of attempted compliance with mailing requirements supported holding that petition was timely mailed); See also *Jones v. Commissioner*, T.C. Memo 1998-197; *Grossman v. Commissioner*, T.C. Memo. 2005-164; and *Sable v. Commissioner*, T.C. Memo. 1996-535.

6. Petitioner provided ample evidence in his *Response to Motion to Dismiss for Lack of Jurisdiction* filed on 6/30/15 and in his *Response to Reply to Response to Motion to Dismiss for Lack of Jurisdiction* filed on 08/03/2015 that his petition was deposited at the United States Post Office located at 2350 Arbor Ln, Salt Lake City, UT 84117 on April 21, 2015.

7. Once the Tax Court found that IRC § 7502 did not apply, it should have considered whether or not the common-law mailbox rule applied.

² The Tax Court is bound to follow any “Court of Appeals decision which is squarely on point where appeal from our decision lies to that Court of Appeals and that court alone.” *Golsen v. Commissioner*, 54 T.C. 742, 757 (1970), affd 445 F.2d 985 (10th Cir. 1971).

8. Pursuant to the common-law mailbox rule the taxpayer's petition in this case should be deemed timely filed.

The Applicability of Reg. §301.7502-1(c)(1)(iii)(B)

9. The Tax Court's Memorandum Opinion does not properly apply the plain language of Reg. §301.7502-1(c)(1)(iii)(B).

10. It is important to note that Reg. §301.7502-1 is a "legislative regulation." There are three types of Treasury regulations: (1) legislative, (2) interpretative, and (3) procedural. Legislative regulations generally are issued pursuant to a specific grant of authority from Congress, directing the Treasury to fill gaps in a statute. Interpretative regulations generally are issued pursuant to Treasury's general authority to issue rules and regulations under IRC §7805(a).

11. The statute to which Reg. §301.7502-1(c)(1)(iii)(B) directly relates is IRC §7502(b), which states, "Postmarks." "This section 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."

12. The test for the validity of legislative regulations is whether the interpretation or method is within the delegation of authority given to the Secretary. *Rowan v. United States*, 452 U.S. 247, 253 (1981). In this case the delegation is unambiguously given in IRC §7502(b).

13. The U.S. Supreme Court has recognized that it "must defer to Treasury Regulations that implement the congressional mandate in some reasonable manner." *Commissioner v. Portland Cement Co. of Utah*, 450 U.S. 156, 169 (1981) (citations and internal quotation marks omitted).

See also *Boulez v. Commissioner*, 810 F.2d 209 (1987) (stating that it “defies common sense” to infer that Secretary’s delegates may waive requirements stated in regulations). In short, if a legislative regulation is valid the Court is bound to follow its plain language.

14. The full text of Reg. § 301.7502-1(c)(1)(iii)(B) is this:

(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, 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.

(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—

(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.

(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 the rule of paragraph (c)(1)(iii)(A) of this section.

15. The plain language of the Tax Court's Opinion findings makes it clear that Reg. §301.7502-1(c)(1)(iii)(B)(3) does not apply in this case. The Court states, "in the instant case no postmark made by the USPS appears on the envelope in which the petition was mailed to the Court." See T.C. Memo. 2015-188, Page 10.

16. This factual finding of the Court invalidates the use of the Reg. § 301.7502-1(c)(1)(iii)(B)(3) because the Court found there is no US postmark on the envelope. The plain language of Reg. § 301.7502-1(c)(1)(iii)(B)(3) requires that the postmark be on the envelope. See Reg. § 301.7502-1(c)(1)(iii)(B)(1).

17. This factual finding also acknowledges that the envelope does bear a non-U.S. "postmark." This means that, at a minimum, the Court should have evaluated the evidence submitted against the plain language of Reg. § 301.7502-1(c)(1)(iii)(B)(1) and, if applicable, Reg. § 301.7502-1(c)(1)(iii)(B)(2).

18. The Petitioner's *Response to Motion to Dismiss for Lack of Jurisdiction* filed on 6/30/15 and his *Response to Reply to Response to Motion to Dismiss for Lack of Jurisdiction* filed on 08/03/2015 specifically provides and addresses the evidence as applied to both Reg. § 301.7502-1(c)(1)(iii)(B)(1) and (2).

19. Further, the cases of *Grossman v. Commissioner*, T.C. Memo. 2005-164 and *Theodore Jones et ux. v. Commissioner*, T.C. Memo. 1998-197 are good examples of privately postmarked petitions that have analyzed Reg. § 301.7502-1(c)(1)(iii)(B) and found, upon the proof proffered, that petitions were timely mailed/filed pursuant to IRC § 7502 when Non-U.S. private postmarks were utilized.

20. Perhaps most importantly, the US Supreme Court stated in *Gould v. Gould*, 245 U.S. 151, 153 (1917) that “[i]n [the] case of doubt...[statutes levying taxes] are construed most strongly against the government, and in favor of the citizen.”

21. *Murphy v. IRS*, 493 F.3d 170, 179 (D.C. Cir. 2007) states, “an ambiguity in the meaning of a revenue-raising statute should be resolved in favor of the taxpayer”, citing, among other authorities, *Gould*). *Royal Caribbean Cruises, Ltd. v. United States*, 108 F.3d 290, 294 (11th Cir. 1997) states, interpreting statutory terms in question, that “consistent with the general rule of construction that ambiguous tax statutes are to be construed against the government and in favor of the taxpayer”, also citing, among other authorities, *Gould*).

22. The Petitioner has provided credible evidence that Reg. § 301.7502-1(c)(1)(iii)(B)(1) applies here. The interpretation and construction that Reg. § 301.7502-1(c)(1)(iii)(B)(3) applies in the factual circumstances of this case demonstrates that the Court favored the government in construing the regulation rather than the taxpayer. Such a result is specifically contrary to the rules of statutory construction of tax statutes, as cited above. Indeed, this Court should construe Reg. § 301.7502-1(c)(1)(iii)(B) in a manner that favors the taxpayer and not the government.

23. The Petitioner respectfully requests that the Tax Court reconsider its Opinion in T.C. Memo. 2015-188 and find that the plain language of Reg. § 301.7502-1(c)(1)(iii)(B) requires an analysis of the evidence presented as applied to Reg. § 301.7502-1(c)(1)(iii)(B)(1) and, if applicable, Reg. § 301.7502-1(c)(1)(iii)(B)(2).

24. The Petitioner argues that if the Court engages in this analysis the Court will find the taxpayer's petition was timely mailed/filed pursuant to IRC § 7502.

The Applicability of *Boulbee v. Commissioner*, T.C. Memo. 2011-11.

25. In the Opinion here at issue, T.C. Memo. 2015-188, the case of *Boulbee v. Commissioner*, T.C. Memo. 2011-11 is cited for the proposition that “the 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.”

26. Because the USPS Track & Confirm data “can serve” as a postmark does not require the Court to treat it as a postmark. The *Boulbee* case was attempting to determine when a petition from foreign jurisdiction entered the United States postal system. This is not factual circumstance that occurred here.

27. Given the statutory construction citations listed above, this Court should not find that the USPS Track & Confirm data is a postmark in this case.

28. In the case of *Boulbee* the Court construes the USPS Track & Confirm data to be a postmark in a way that favors the taxpayer (finding that the petition entered the US Postal system

timely). Basically the court found the earliest evidence of the date the envelope entered the U.S. Postal system.

29. In the context of the instant case, the ambiguous construction of what a “postmark” is in the domestic mailing context should also be construed in favor of the taxpayer. See *Gould v. Gould*, 245 U.S. 151, 153 (1917); *Murphy v. IRS*, 493 F.3d 170, 179 (D.C. Cir. 2007); *Royal Caribbean Cruises, Ltd. v. United States*, 108 F.3d 290, 294 (11th Cir. 1997).

30. To put a finer point on this assertion, in this case the evidence clearly shows that the envelope containing the taxpayer’s petition did not enter the US Postal System where the USPS Track & Confirm data was first scanned.

31. The *Boulbee* case has clear application to foreign cases where a postmark would not be applied to the face of an envelope. However, a domestically mailed envelope is mailed pursuant to written US Postal Service postmarking policies.

32. In this case, Petitioner specifically cited to the United States Postal Service Handbook PO-408 - Area Mail Processing, Section 1-1.3 “Postmarks”, which states, “Postmarks are not required for mailings bearing a permit, meter, or precanceled stamp for postage, nor to pieces with an indicia applied by various postage evidencing systems.” Thus, when a stamps.com postmark is present it is the policy of US Postal Service not to apply its own postmark.

33. In other words, the Court does not have to presume that the Tracking Data substitutes for a postmark when it is the policy of the United States Postal Service to treat the private postmark

as an equivalent postmark. To put it yet another way, the earliest evidence the envelope entered the US Postal system is private postmark which the US Postal Service has a policy of relying on.

34. This information, coupled with the case law that statutory construction should favor the taxpayer, should lead this Court to apply *Boulbee* only to factual circumstances where the USPS Track & Confirm data is needed to determine entry into the US Postal system from foreign postal systems or where the US Postal system would not treat another postmark as being equivalent to its own.

35. Because the US Postal Service considers private postmarks as equivalent the Court should reconsider its Opinion in T.C. Memo. 2015-188 that *Boulbee v. Commissioner*, T.C. Memo. 2011-11 does not apply to presume the USPS Track & Confirm data is a postmark in the instant factual circumstances. This is especially true where the regulation at issue requires the postmark to be upon the envelope itself. See Reg. § 301.7502-1(c)(1)(iii)(B)(1).

36. The Court should reconsider its Opinion and find that the taxpayer's petition was timely mailed/filed.

Counsel for Respondent's Objection.

37. A copy of this motion has been provided to counsel for Respondent. Counsel for Respondent informed Petitioner's counsel that Respondent objects to this motion for reconsideration.

WHEREFORE, it is respectfully requested that the Court reconsider and revise its opinion to provide that either, (1) the common law mailbox rule applies and the taxpayer's petition is timely

filed, or alternatively; (2) Reg. § 301.7502-1(c)(1)(iii)(B)(1) applies the taxpayer's petition is timely mailed/filed; or alternatively (3) Reg. § 301.7502-1(c)(1)(iii)(B)(1) and (2) applies and the taxpayer's petition is timely mailed/filed. Petitioner also respectfully requests that the Court reconsider the application of *Boulton v. Commissioner*, T.C. Memo. 2011-11 to this case in that the Court should not presume the USPS Track & Confirm data is a postmark when the US Postal Service considers private postmarks as equivalent to their own.

By 

Paul W. Jones, Esq.

Tax Court Bar #JP0098

4766 S. Holladay Blvd.

Salt Lake City, Utah 84117

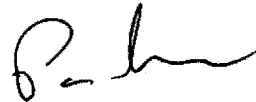
Telephone: (801) 930-5101

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing PETITIONER'S MOTION FOR RECONSIDERATION was served on counsel for Respondent, by mailing the same on October 22, 2015 in a postage paid wrapper addressed to:

Skyler K. Bradbury
Office of Chief Counsel, IRS
150 Social Hall Avenue
Suite 313A
Salt Lake City, UT 84111

This is to further certify that the original of the aforementioned paper filed electronically with the Court on October 22, 2015.



Paul W. Jones, Esq.
Tax Court Bar #JP0098

**US TAX COURT
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**US TAX COURT
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JUN 8 2015

ROBERT H. TILDEN

Petitioner(s)

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

ELECTRONICALLY FILED

Docket No. 11089-15

MOTION TO DISMISS FOR LACK OF JURISDICTION

UNITED STATES TAX COURT

ROBERT H. TILDEN,)
)
 Petitioner,)
)
 v.) Docket No. 11089-15
)
 COMMISSIONER OF INTERNAL REVENUE,) Filed Electronically
)
 Respondent.)

MOTION TO DISMISS FOR LACK OF JURISDICTION

RESPONDENT MOVES that this case be dismissed for lack of jurisdiction upon the ground that the petition was not filed within the time prescribed by sections 6213(a) or 7502 of the Internal Revenue Code.

IN SUPPORT THEREOF, respondent respectfully states:

1. The notice of deficiency dated January 22, 2015, upon which the above-entitled case is based, was sent to petitioner's last known address, the address shown in the notice of deficiency, by certified mail on January 21, 2015, as shown by the postmark date stamped on PS Form 3877, a copy of which is attached hereto as Exhibit A.

2. The 90-day period for timely filing a petition with this Court from the notice of deficiency expired on April 21, 2015, which date was not a Saturday, a Sunday, or a legal holiday in the District of Columbia.

Docket No. 11089-15 - 2 -

3. The petition was filed with the Tax Court on April 29, 2015, which date is 98 days after the mailing of the notice of deficiency.

4. The copy of the petition served upon respondent bears no postmark on the cover of the envelope in which the petition was mailed to the Tax Court.

5. But the cover of the envelope in which the petition was mailed to the Tax Court does bear a United States Postal Service (USPS) Certified Mail tracking number: 7014 2120 0002 7505 1935.

6. Based on the tracking information provided by the website of the USPS, the USPS received the package in which the petition was mailed to the Tax Court on April 23, 2015—two days after the 90-day period expired. Attached as Exhibit B is a copy of the tracking information provided by the USPS website and printed on May 29, 2015.

7. The petition was not filed with the Court within the time prescribed by sections 6213(a) or 7502 of the Internal Revenue Code.

8. Counsel for petitioner objects to the granting of this motion.

Docket No. 11089-15

- 3 -

WHEREFORE, it is prayed that this motion be granted.

WILLIAM J. WILKINS
Chief Counsel
Internal Revenue Service

Date: JUN 8 2015

By: Mark H. Howard

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CHARLES B. BURNETT

Associate Area Counsel (Salt Lake City)

(Small Business/Self-Employed)

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IRS APPEALS OKC

406 297 4938

P.002

IRS Appeals Office
 Mail Stop: 8000OKC
 15 N. Robinson, Ste 939
 Oklahoma City, OK 73102

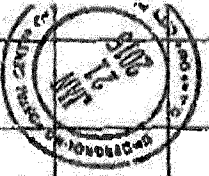
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Check type of mail or service:

- Certified
- COO
- Delivery Confirmation
- Express Mail
- Insured
- Registered Delivery (International)
- Registered Mail
- Return Receipt for Merchandise
- Signature Confirmation

(If insured or a
 certificate of mailing
 or for guaranteed
 copies of the bill)
 Return Receipt
 Date of Receipt

Article Number	Postage	Fee	Handling Charge	Actual Value if Registered	Insured Value	Date Sent if COO	DC Fee	SC Fee	SH Fee	SD Fee	RA Fee
1. <i>7009 2250 0001 7144 6322</i> Mr. Robert H. Tilden 2736 North Palmer Street Milwaukee, Wisconsin 53212-2422	off										
2. <i>7009 2250 0001 7144 6918</i> Mr. Robert H. Tilden, Jr. 2234 North Booth Street Upper Milwaukee, Wisconsin 53212-2402	off										
3. <i>7009 2250 0001 7144 65</i>											
4. <i>7009 2250 0001 7144 68</i>											
5. <i>7009 2250 0001 7144 68</i>											
6. <i>7009 2250 0001 7144 68</i>											
7. <i>7009 2250 0001 7144 692</i>											
8. <i>7009 2250 0001 7144 692</i>											



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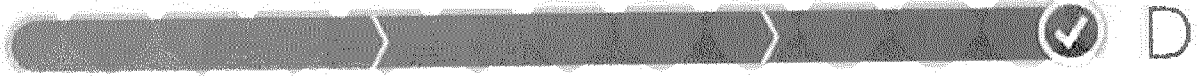


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Updated Delivery Day: Thursday, April 30, 2015

Product & Tracking Information

Postal Product:

Features:

Certified Mail™

DATE & TIME	STATUS OF ITEM	LOCATION
April 29, 2015 , 11:02 am	Delivered	WASHINGTON, DC 20217
Your item was delivered at 11:02 am on April 29, 2015 in WASHINGTON, DC 20217		
April 29, 2015 , 9:14 am	Arrived at Unit	WASHINGTON, DC 20018
April 23, 2015 , 6:57 pm	Departed USPS Facility	SALT LAKE CITY, UT 84199
April 23, 2015 , 2:48 pm	Arrived at USPS Facility	SALT LAKE CITY, UT 84199

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Tracking (or receipt) number

10/1/15

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UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604



Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

NOTICE OF CASE OPENING

December 22, 2015

No. 15-3838	ROBERT H. TILDEN, Petitioner - Appellant v. COMMISSIONER OF INTERNAL REVENUE, Respondent - Appellee
Originating Case Information:	
District Court No. 011089-15 IRS (Tax Court) Clerk/Agency Rep Robert R. Di Trolio Case filed: 12/22/2015 Case type: tax/rvw.t Fee status: Paid Date NOA rc'd-AC: 12/22/2015	

The above-captioned appeal has been docketed in the United States Court of Appeals for the Seventh Circuit.

Deadlines:

<u>Appeal No.</u>	<u>Filer</u>	<u>Document</u>	<u>Due Date</u>
15-3838	Robert H. Tilden	Docketing statement due	12/29/2015
15-3838	Robert H. Tilden	Appellant's brief	02/01/2016

NOTE: This notice is issued to counsel of record, in furtherance of the revised *Circuit Rule 3(d)*, to provide necessary information regarding this appeal. Please verify this notice for accuracy. Counsel are encouraged to provide a fax and/or e-mail address to the court. If any corrections are necessary, please indicate those corrections on this notice and return it to the Clerk's Office within ten (10) days.

THIS NOTICE SHALL NOT ACT AS A SUBSTITUTE FOR MOTIONS FOR NON-INVOLVEMENT / SUBSTITUTION OF COUNSEL. COUNSEL ARE STILL REQUIRED TO FILE THE APPROPRIATE MOTIONS.

Important Scheduling Notice!

Notices of hearing for particular appeals are mailed shortly before the date of oral argument. Criminal appeals are scheduled shortly after the filing of the appellant's main brief; civil appeals after the filing of the appellee's brief. If you foresee that you will be unavailable during a period in which your particular appeal might be scheduled, please write the clerk advising him of the time period and the reason for such unavailability. Session data is located at <http://www.ca7.uscourts.gov/cal/calendar.pdf>. Once an appeal is formally scheduled for a certain date, it is very difficult to have the setting changed. See Circuit Rule 34(e).

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UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Chicago, Illinois 60604



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Phone: (312) 435-5850
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NOTICE OF DOCKETING - Short Form

December 22, 2015

To: Robert R. Di Trolio
Clerk of Court

The below captioned appeal has been docketed in the United States Court of Appeals for the Seventh Circuit:

Appellate Case No: 15-3838

Caption:
ROBERT H. TILDEN,
Petitioner - Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent - Appellee

District Court No: 011089-15
Clerk/Agency Rep Robert R. Di Trolio

If you have any questions regarding this appeal, please call this office.