No. 15-3838

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ROBERT H. TILDEN,
Petitioner-Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Appeal From The United States Tax Court

In Docket No. 11089-15

The Honorable Robert N. Armen, Jr., Presiding

OPENING BRIEF OF APPELLANT

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Appellate Court No: 15-3838

Short Caption: Robert H. Tilden v. Commissioner of Internal Revenue

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Attorney's Signature: /s/ Paul W. Jones Date: 12/29/15

Attorney's Printed Name: Paul W. Jones

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STATEMENT OF JURISDICTION

Jurisdiction of this Court on appeal is accorded under 26 U.S.C. § 7482(a)(1), as an appeal of a final decision of the Tax Court. That section provides in pertinent part that "The United States Courts of Appeals (other than the United States Court of Appeals for the Federal circuit) shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury[.]"

The notice of appeal was timely filed on December 11, 2015, from the Tax Court's final order and decision dated September 25, 2015 (R. 14:1)[1], which disposed of all parties' claims (the "Order"). The Order was entered based upon the Tax Court's Memorandum Opinion (T.C. Memo 2015-188) dated September 22, 2015 (R. 12:1-14) (the "Memo Opinion").

Also relevant to this jurisdictional statement per Federal Rules of Appellate Procedure 13 is the following. After the Order, on October 22, 2015, the Petitioner-Appellant filed a *Motion for Reconsideration of Findings or Opinion Pursuant to Rule 161* (R. 15:1-14) requesting that the Tax Court[2] reconsider its Memo Opinion and set aside its Order. On November 11, 2015 the Respondent-Appellee filed a *Response to Motion for Reconsideration of Findings or Opinion Pursuant to Rule 161* (R. 20: 1-10), wherein the Respondent-Appellee agreed with the Petitioner-Appellant's Motion for Reconsideration, acknowledged that Petitioner-Appellant's Tax Court petition was timely filed, and asked the Tax Court to deny its initial *Motion to Dismiss for Lack of*

[1] References to "R.__:__" refers to the "record on appeal" sent to this Court on January 21, 2016 from the United States Tax Court by Stephanie A. Servoss and specifically references first the docket number and then page number of items filed upon the United States Tax Court record of this case.
[2] The term "Tax Court" refers herein specifically to the United States Tax Court.

Jurisdiction (R. 4: 1-11). Despite the eventual agreement of the parties that the facts of this case show that Tax Court does have jurisdiction to hear the Petitioner-Appellant's Petition, the Tax Court denied the Petitioner-Appellant's Motion for Reconsideration through an order dated December 3, 2015 (R. 22: 1-3).

Petitioner-Appellant's appeal was timely filed from both the Tax Court's September 25, 2015 and December 3, 2015 orders. However, pursuant to Federal Rules of Appellate Procedure 13(a)(1)(B) the time to file a notice of appeal in this appeal runs from the Tax Court's December 3, 2015 order.

STATEMENT CONCERNING ORAL ARGUMENT

Oral argument in this case would be useful to clarify any questions or issues this Court may have concerning this appeal. This is a case of first impression as it relates to the holdings of the Memo Opinion and impacts jurisdictional issues of many current and future cases before the Tax Court. Petitioner-Appellant's Counsel is aware that the Tax Court has deferred rulings in at least five docketed Tax Court cases across the United States pending the outcome of this appeal. Therefore, oral argument would be prudent to assure that the arguments and merits of this appeal are clear to this Court.

STATEMENT OF THE ISSUE

APPELLANT'S ISSUE: Did the United States Tax Court Err in Granting the Respondent-Appellee's *Motion to Dismiss for Lack of Jurisdiction*?

STATEMENT OF THE CASE

A. Facts Relevant To The Issue on Appeal

The facts that underlie this appeal are undisputed. The Internal Revenue Service sent a Notice of Deficiency dated January 21, 2015 to the Appellant-Petitioner on January 21, 2015. (R. 1: 9; 4: 6). The Notice of Deficiency assessed deficiencies of tax and penalties against the Petitioner-Appellant for the tax years 2005, 2010, 2011, and 2012. (R. 1: 9). To appeal these deficiencies to the Tax Court, the Petitioner-Appellant's Petition[3] was due on or by April 21, 2015. (R. 1: 9). The Petition was mailed by Katelynn Marshall on April 21, 2015 via certified mail to the "United States Tax Court, 400 Second St NW, Washington DC 20217-0001" with a certified mail tracking number of "7014 2120 0002 7505 1935". (R. 1: 44; 6: 11-15; 11: 11; 20: 5-6, 8-9). The Petition's envelope does not bear a postmark from the United States Postal Service. (R. 1: 44; 20: 7; 12: 10). However, the Petition's envelope does bear a postmark from Stamps.com indicating a date of mailing of April 21, 2015. (R. 1: 44). Katelynn Marshall also made a note of the date of mailing of April 21, 2015 on the certified mailing receipt that she retained at her desk at Appellant-Petitioner's Counsel's office. (R. 6: 12, 15).

The postmarks made by Stamps.com and by Katelynn Marshall both legibly indicated the date of April 21, 2015 which is the last day prescribed for filing the Petition with the Tax Court. (R. 1: 44; 6: 12, 15). The Petition was received by the Tax Court not later than the time when a petition contained in an envelope that is properly addressed, mailed, and sent by the same class of mail would ordinarily be received by the Tax Court if it were postmarked at the same point of origin by

[3] The Tax Court petition of the Appellant-Petitioner mailed by Katelynn Marshall (R. 1: 1-44) is referred to herein as the "Petition".

the U.S. Postal Service on the last day prescribed for a petition to the Tax Court. (R. 11: 6-8, 13; 20: 6, 8-9).

The Petition was mailed from the United States Postal Service located at 2350 Arbor Ln, Salt Lake City, UT 84117. (R. 6:11). The tracking log of the United States Postal Service shows the Petition envelope was first scanned by the United States Postal Service on May 23, 2015 at the United State Postal Service's Sort Facility located at 1760 W 2100 S, Salt Lake City, UT 84199 which is 10 miles from the location from where it was originally mailed. (R. 4: 8).

Katelynn Marshall telephoned the United States Post Office located at 2350 Arbor Ln, Salt Lake City, UT 84117 to inquire about the notation on the USPS Tracking report for the certified mailing receipt number 70142120000275051935. (R. 6: 12). The earliest dated notation on the USPS Tracking report for the certified mailing receipt number 70142120000275051935 provides a notation as follows "April 23, 2015, 2:48 pm" and "Arrived at USPS Facility" and "SALT LAKE CITY, UT 84199." (R. 6: 12). Katelynn Marshall was told by a postal employee at the United States Post Office located at 2350 Arbor Ln, Salt Lake City, UT 84117 that this notation does not indicate the origin of mailing, but rather it indicates that the certified mailing label affixed to the envelope with tracking number 70142120000275051935 was first scanned at the United States Postal Service Sort Facility located at 1760 West 2100 S, Salt Lake City, UT 84199. (R. 6: 12). Katelynn Marshall was told that it is routine for postal employees not to scan a certified tracking label at the United States Post Office located at 2350 Arbor Ln, Salt Lake City, UT 84117 when the postage is generated by Stamps.com. (R. 6: 13). United States Postal Service Handbook PO-408 - Area Mail Processing, Section 1-1.3, titled "Postmarks" 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." (R. 11: 6). Thus, it appears that when a Stamps.com postmark is present it is the policy of US Postal Service not to apply its own postmark. (R. 11: 6).

Katelynn Marshall did not mail the Petition for the Taxpayer from the United States Postal Service Sort Facility located at 1760 W 2100 S, Salt Lake City, UT 84199. (R. 6: 13). The zip code 84199 is dedicated only to the United States Postal Facility located at 1760 West 2100 South, Salt Lake City, UT 84199. (R. 6: 13). The initial notations on the USPS Tracking report for 70142120000275051935 do not represent the origin of the mailing of the Petition because Katelynn Marshall mailed the Petition for the Appellant-Petitioner from the United States Post Office located at 2350 Arbor Ln, Salt Lake City, UT 84117. (R. 6: 13). Katelynn Marshall mailed the Petition to the Tax Court on April 21, 2015. (R. 6: 13).

B. Relevant Procedural History and Rulings.

The Respondent-Appellee filed a *Motion to Dismiss for Lack of Jurisdiction* on June 8, 2015. (R. 4: 1-11). Upon the moving papers filed thereafter by the parties, the Tax Court, through Judge Robert N. Armen, Jr., issued its Memo Opinion dated September 22, 2015 (R. 12:1-14) and the Order dated September 25, 2015 dismissing the Petitioner-Appellant's Petition as being untimely filed (R. 14:1). After the Order, on October 22, 2015, the Petitioner-Appellant filed a *Motion for Reconsideration of Findings or Opinion Pursuant to Rule 161* (R. 15:1-14) requesting that the Tax Court reconsider its Memo Opinion and set aside its Order. On November 11, 2015 the Respondent-Appellee filed a *Response to Motion for Reconsideration of Findings or Opinion Pursuant to Rule 161* (R. 20: 1-10), wherein the Respondent-Appellee agreed with the Petitioner-Appellant's Motion for Reconsideration, acknowledged that Petitioner-Appellant's Tax Court

petition was timely filed, and asked the Tax Court to deny its initial *Motion to Dismiss for Lack of Jurisdiction* (R. 4: 1-11). Despite this belated agreement of the parties that the facts of this case show that Tax Court does have jurisdiction to hear the Petitioner-Appellant's Petition, the Tax Court denied the Petitioner-Appellant's *Motion for Reconsideration* through its order dated December 3, 2015 (R. 22: 1-3).

STANDARD OF REVIEW

This Court reviews the Tax Court's factual determinations and the application of legal principles to factual determinations for clear error, and legal determinations de novo. *Square D Co. & Subsidiaries v. Commissioner*, 438 F.3d 739, 743 (7th Cir. 2006). Whether the Tax Court erred in granting the Appellee-Respondent's *Motion to Dismiss* is a question of law and is therefore reviewed de novo. See *Acute Care Specialists II v. United States*, 727 F.3d 802, 806 (7th Cir. 2013); *Commonwealth Plaza Condo. Ass'n v. City of Chicago*, 693 F.3d 743, 745 (7th Cir. 2012).

SUMMARY OF THE ARGUMENTS

This brief contains the following arguments that show that 26 U.S.C. § 7502 and the regulations thereunder show the Petition was timely filed and that the Tax Court has jurisdiction to hear the Petition. The arguments are these: (1) jurisdiction in the Tax Court should be analyzed broadly in a manner that will allow the Tax Court to retain jurisdiction; under this standard Treas. Reg. §301.7502-1(c)(1)(iii)(b)(3) does not apply; (2) Treas. Reg. §301.7502-1(c)(1)(iii)(B)(1) is undisputedly applicable to the Petitioner's jurisdiction before the Tax Court in this case; (3) The Tax Court's decisions leading up to this case improperly make law and therefore exceed the Tax Court's authority.

ARGUMENTS

I. Jurisdiction in the Tax Court Should Be Analyzed Broadly In A Manner That Will Allow the Tax Court to Retain Jurisdiction; Under This Standard Treas. Reg. §301.7502-1(c)(1)(iii)(B)(3) Does Not Apply.

The Tax Court always has jurisdiction to determine whether it has jurisdiction. See *Cooper v. Commissioner*, 135 T.C. 70, 73 (2010). In this case it is clear that the Tax Court has jurisdiction to hear the Petition pursuant to 26 U.S.C. § 7502 and the regulations thereunder. The Tax Court erred in finding that it did not have jurisdiction to hear the Petitioner-Appellant's Petition.

The Tax Court in *Lewy v. Commissioner*, 68 T.C. 779, 781 (1977) stated, "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." The Tax Court in *Traxler v. Commissioner*, 61 T.C. 97, 100 (1973) held, that when a statutory provision is capable of multiple interpretations that the Court should be "inclined to adopt a construction which will permit us to retain jurisdiction without doing violence to the statutory language." The Tax Court recently stated in *Bongam v. Commissioner*, 146 T.C. 4 (2016) that it "allow[s] taxpayers the greatest opportunity, consistently with the statutory language, to obtain jurisdiction in our Court."

The Tax Court erred in granting the Commissioner's *Motion to Dismiss* as 26 U.S.C. § 7502 and the regulations thereunder clearly show that the Petition was timely filed and that the Tax Court has jurisdiction to hear the Petition. The Tax Court in this case applied a standard which is the polar opposite its holdings in *Lewy*, *Traxler*, and *Bongam* as it sought out a statutory and regulatory construction that denied, rather than permitted, the Tax Court's jurisdiction to hear the Petition. In fact, instead of following the plain language of 26 U.S.C. § 7502 and Treas. Reg.

§301.7502-1 the Tax Court applied law that it, rather than Congress or the Treasury (through permissible rulemaking), created to reach a result that impermissibly narrows its jurisdiction.

Under the 26 U.S.C. §7502 timely mailing/timely filing rule, when a Tax Court petition is mailed to the Tax Court and the envelope is postmarked with a date that is either the filing deadline or an earlier date and the petition is received by the Tax Court after the filing deadline, the petition is deemed timely filed. See 26 U.S.C. § 7502 and Treas. Reg. §301.7502-1. Both the Appellant and Appellee agree that the facts of this case show that the timely mailed/timely filed rule of 26 U.S.C. §7502 and Treas. Reg. §301.7502-1 is met in this case. This means that the Petition was timely mailed and filed and that the Tax Court has jurisdiction to hear the Petition.

The Tax Court, however, disagrees in one specific way—the application of the postmark regulations found in Treas. Reg. §301.7502-1(c)(1)(iii)(B) titled "Postmark Made By Other Than U.S. Postal Service." Both the Appellant and Appellee agree that Treas. Reg. §301.7502-1(c)(1)(iii)(B)(1) applies in this case and that the Tax Court thereby has jurisdiction to hear the Petition. However, the Tax Court in its Memo Opinion and Order held that Treas. Reg. §301.7502-1(c)(1)(iii)(B)(3) titled "U.S. And Non-U.S. Postmarks" is the correct portion of the regulation that applies to this case and because of that, the Tax Court held that it does not have jurisdiction to hear the Petition.

Treas. Reg. §301.7502-1(c)(1)(iii)(B)(3) reads (emphasis added):

> 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 unambiguous and plain language of Treas. Reg. §301.7502-1(c)(1)(iii)(B)(3) requires that

BOTH postmarks (US and non-US) be found upon the Petition envelope. The undisputed facts of this case are that no US Postal Service postmark appears on the Petition envelope. However, instead of applying the facts of this case to the regulations, the Tax Court applied a legal fiction that it created to treat US Postal tracking data as a postmark that supersedes the postmark that is found upon the Petition's envelope. The Tax Court made this finding even though its Memo Opinion expressly states and concedes that, "[t]he envelope does not bear a USPS postmark" (R. 12: 4) and that "[a]dmittedly, in the instant case no postmark made by the USPS appears on the envelope in which the petition was mailed to the Court." (R. 12: 10).

It was a clear error for the Tax Court to find that Treas. Reg. §301.7502-1(c)(1)(iii)(B)(3) applies in this case. The Memo Opinion made the specific finding that a US Postal Service postmark does not appear on the envelope. Therefore, Treas. Reg. §301.7502-1(c)(1)(iii)(B)(3) cannot apply in this case on its unambiguous and plain language. The application of Treas. Reg. §301.7502-1(c)(1)(iii)(B)(3) is especially erroneous given the Tax Court's holdings in *Lewy*, *Traxler*, and *Bongam* that indicate the Tax Court should "allow[ ] taxpayers the greatest opportunity, consistently with the statutory language, to obtain jurisdiction in our Court." *Bongam v. Commissioner*, 146 T.C. 4 (2016). Therefore, this Court should reverse the Tax Court's Order and Memo Opinion based upon its misapplication of Treas. Reg. §301.7502-1(c)(1)(iii)(B)(3) as its own factual findings shows that a US Postal Service postmark does not appear on the Petition envelope.

II. Treas. Reg. §301.7502-1(c)(1)(iii)(B)(1) Is Undisputedly Applicable To The Petitioner's Jurisdiction Before The Tax Court In This Case.

The Tax Court's Memo Opinion does not properly apply the plain language of Treas. Reg. §301.7502-1(c)(1)(iii)(B). It is important to note that Treas. 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). The statute to which Treas. Reg. §301.7502-1(c)(1)(iii)(B) directly relates is 26 U.S.C. §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." Thus, it is a legislative regulation.

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

The full text of Treas. 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.

A. Treas. Reg. §301.7502-1(c)(1)(iii)(B)(1) Undoubtedly Applies In This Case.

The requirements of Treas. Reg. §301.7502-1(c)(1)(iii)(B)(1) are met under the undisputed facts of this case. The Stamps.com postmark bears a legible date on the last day prescribed for filing the Petition with the Tax Court. (R. 1: 44). It is undisputed that the Petition was received by the Tax Court not later than the time when a petition contained in an envelope that is properly addressed, mailed, and sent by the same class of mail would ordinarily be received by the Tax

Court if it were postmarked at the same point of origin by the U.S. Postal Service on the last day prescribed for a petition to the Tax Court. (R. 11: 6-8, 13; 20: 6, 8-9).

Thus, the Tax Court's analysis should have concluded that Treas. Reg. §301.7502-1(c)(1)(iii)(B)(1) applies to this case and that the Stamps.com postmark upon the Petition envelope is a "postmark" pursuant to 26 U.S.C. §7502(b). It was an error to not have so concluded.

B. Treas. Reg. § 301.7502-1(c)(1)(iii)(B)(2) Does Not Apply In This Case.

The requirements of Treas. Reg. §301.7502-1(c)(1)(iii)(B)(2) are applicable when a petition arrives beyond the time a petition "would ordinarily be received" by the Tax Court. Both parties agree and the Tax Court's Memo Opinion does not dispute that the Petition in this case arrived at the Tax Court within a time frame that "would ordinarily be received" by the Tax Court from the April 21, 2016 postmarked date. (R. 20: 6).

Although, the Respondent-Appellee originally made arguments that address this portion of the regulation the Respondent-Appellee eventually agreed that it does not apply in this case. Thus, it is undisputed that Treas. Reg. §301.7502-1(c)(1)(iii)(B)(2) does not apply to this case.

C. Treas. Reg. § 301.7502-1(c)(1)(iii)(B)(3) Does Not Apply In This Case.

As discussed in Section I above, the unambiguous and plain language of the Tax Court's Memo Opinion findings makes it clear that Treas. Reg. §301.7502-1(c)(1)(iii)(B)(3) does not apply in this case. The Memo Opinion definitively finds, "The envelope does not bear a USPS postmark." (R. 12: 4) The Memo Opinion also states, "Admittedly, in the instant case no postmark made by the USPS appears on the envelope in which the petition was mailed to the Court." (R. 12: 10). These factual findings of the Tax Court expressly invalidate the use of the Treas. 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 Treas. Reg. § 301.7502-1(c)(1)(iii)(B)(3) requires that the postmark be upon the envelope. See Treas. Reg. § 301.7502-1(c)(1)(iii)(B)(1) and (3). Thus, it is undisputed that Treas. Reg. § 301.7502-1(c)(1)(iii)(B)(3) does not apply in this case.

D. Private Postmarks Are Recognized To Establish Timely Filed Petition.

Both Congress, through 26 U.S.C. §7502(b), and the Treasury, through Treas. Reg. § 301.7502-1(c)(1)(iii)(B) unambiguously contemplate and allow the use of private postmarks in the timely mailed/filed rules of 26 U.S.C. §7502 and its regulations. The statutes and rules as to their use is clearly defined and is unambiguous.

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

It should also be well taken that United States Postal Service Handbook PO-408 - Area Mail Processing, Section 1-1.3, titled "Postmarks" 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." (R. 11: 6). It should be equally plausible, from an evidentiary standard, that the U.S. Postal Service recognized the Stamps.com postmark as a reliable indicia of the mailing date as reason why (1) a USPS postmark did not need to be applied to the Petition envelope and (2) the initial scanning of the Petition envelope was not done at the origin of its mailing.

In addition to the Tax Court's holdings in *Lewy*, *Traxler*, and *Bongam* that indicate the Tax Court should "allow[ ] taxpayers the greatest opportunity, consistently with the statutory language, to obtain jurisdiction in our Court," 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." *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*).

The Petitioner has provided credible evidence that Treas. Reg. § 301.7502-1(c)(1)(iii)(B)(1) applies here as the record demonstrates. The interpretation and construction applied by the Tax Court that Treas. Reg. § 301.7502-1(c)(1)(iii)(B)(3) is controlling given the factual circumstances of this case demonstrates that the Tax 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 Treas. Reg. § 301.7502-1(c)(1)(iii)(B) in a manner that favors the taxpayer and not the government.

Perhaps more to the point is the fact that the statutes and regulations are not ambiguous. Therefore the Tax Court should not have stretched an interpretation of the regulation to exclude the Petition from its jurisdiction. A plain reading of Treas. Reg. § 301.7502-1(c)(1)(iii)(B)(3) by the Tax Court dictates a result that it is inapplicable to this case.

Therefore, this Court should reverse the Tax Court's Order based upon its misapplication of Treas. Reg. §301.7502-1(c)(1)(iii)(B)(3) as its own finding shows that a US Postal Service postmark does not appear on the Petition envelope. This Court should find that Treas. Reg. §301.7502-1(c)(1)(iii)(B)(1) applies in this case and order the Tax Court to deny the Respondent-Appellee's *Motion to Dismiss*.

III. Tax Court's Decisions Leading Up to This Case Improperly Create Law and Therefore Exceed The Tax Court's Authority.

The Tax Court's Memo Opinion relies heavily (and perhaps entirely) upon Judge Armen's authored memorandum opinion in *Boultbee v. Commissioner*, T.C. Memo 2011-11. In *Boultbee* the Tax Court was evaluating extrinsic evidence as to when a petition mailed from a foreign country entered the postal system of the United States. In *Boultbee* the Tax Court stated,

> we regard the U.S. Postal Service Track and Confirm data as tantamount to, and/or the functional equivalent of, a U.S. Postal Service postmark. See sec. 7502(f) (regarding the treatment of private delivery services and the use of corporate records electronically written to a database); cf. *Abeles v. Commissioner*, 91 T.C. 1019, 1034-1035 (1988) (regarding adapting the law to reflect technological advancements). Accordingly, we hold that the petition in this case was timely filed and that we do have jurisdiction to hear petitioner's case.

The Tax Court in *Quarterman v. Commissioner*, T.C. Memo 2011-258, a memorandum opinion authored by Judge Armen, *Boultbee* was raised and discussed in the context of determining when a petition mailed from a foreign country entered the postal system of the United States. But because no US Postal Service tracking data appears to be available in *Quarterman* it apparently had no bearing on the outcome in that decision.

Finally, in *Tilden v. Commissioner*, T.C. Memo. 2015-188 the Tax Court, through Judge Armen's authored opinion, applied the holding of *Boultbee* to the domestically mailed Petition and

stated, "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." (R. 12: 10-11) The Memo Opinion goes on to hold, "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 *Boultbee v. Commissioner*, T.C. Memo. 2011-11, and is therefore conclusive in determining whether the petition was timely mailed…" (R. 12: 13).

The Petitioner acknowledges that USPS Tracking data can be useful in providing extrinsic evidence of when a piece of mail entered the US Postal system. But that should be the limit of the Tax Court's use of the tracking data. It should be treated by the Tax Court only as a piece of evidence and not improperly made into newly inserted language of 26 U.S.C. § 7502 and/or its related Treasury regulations.

It is a long standing principle that extrinsic evidence is admissible to prove the date of mailing where an envelope lacks a postmark or the postmark is illegible. See *Mason v. Commissioner*, 68 T.C. 354, 355-556 (1975); *Hendley v. Commissioner*, T.C. Memo. 2000-348. However, in this case the envelope does not lack a legible postmark. Rather, it bears a legible non-US postmark that is authorized by 26 U.S.C. § 7502(b) and Treas. Reg. §301.7502-1(c)(1)(iii)(B)(1) to be treated as a "postmark" for the overall purposes of 26 U.S.C. § 7502. The Tax Court is improperly using *Boultbee* as newly enacted portion of 26 U.S.C. § 7502(b) and Treas. Reg. §301.7502-1(c)(1)(iii)(B)(3) rather than applying the undisputed evidence of this case to the already existing language of the statute Congress enacted and the regulation that the Treasury properly promulgated with expressed permission of Congress. Thus, the Tax Court's Memo Opinion goes too far and impermissibly legislates when it had no authority to do so.

The Tax Court's holding in *Tilden* improperly creates a law or rule that US Postal tracking data is to be treated as postmark upon an envelope, that even though it is not found on the face of the envelope, will still supersede non-US postal postmarks. This rule will only ever reduce the Tax Court's jurisdiction to hear petitions. Apart from being counter to the Tax Court's holdings in *Lewy*, *Traxler*, and *Bongam* to provide the "greatest opportunity, consistently with the statutory language, to obtain jurisdiction in our Court"; the rule is an impermissible legislative act by an Article I Court that should be left to the Congress or the Treasury (through its regulation and rulemaking authority as discussed above). Such legislative acts are not authorized acts of the Tax Court.

In *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) the Supreme Court held that "There is no federal general common law." *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). This Court in *Seggerman Farms Inc., et al. v. Commissioner*, 308 F.3d 803 (7th Cir. 2002) stated, "An intrusion by the judiciary into what is constitutionally a function within the exclusive scope of the legislature would raise serious issues relating to the separation of powers." This Court also stated "Internal Revenue Code provisions dealing with deductions, exemptions, and exclusions are matters of legislative grace." *Lavonna J. Stinson Estate v. U.S.*, 214 F.3d 846 (7th Cir. 2000). "Our task is to 'discern the will of Congress and to apply it to the particular facts of the case.'" *Illinois Dep't of Pub. Aid v. Sullivan*, 919 F.2d 428, 431 (7th Cir. 1990).

Petitioner finds it especially ironic that the Tax Court comparatively cites 26 U.S.C. § 7502(f) in *Boutlbee* in supporting its conclusion that it can make such a law or rule. In discussing 26 U.S.C. § 7502(f) in a recent case, *Eichelburg v. Commissioner*, T.C. Memo. 2013-269, the Tax Court stated (emphasis added):

> We acknowledge that the result we reach may seem harsh. Notice 2004-83, supra, was issued nine years ago; private delivery companies may have since initiated delivery services resembling those listed in Notice 2004-83, supra; and many taxpayers may be unaware of the nuanced differences among these services. However, **this Court may not rely on general equitable principles** to expand the statutorily prescribed time for filing a petition. See *Austin v. Commissioner*, T.C. Memo. 2007-11 (citing *Woods v. Commissioner*, 92 T.C. 776, 784-785 (1989)). The statute gives us jurisdiction under the "timely mailed, timely filed" rule only if a private delivery service has been "designated by the Secretary." Sec. 7502(f)(2). Because FedEx Express Saver has not been so designated, our hands are tied.

In analyzing 26 U.S.C. 7502(f) the Tax Court has rigidly refused to allow specific delivery services not enumerated by the Secretary of the Treasury to benefit from the timely mailed/filed rule of 26 U.S.C 7502 because it lacks the equitable powers to do so. See also *Scaggs v. Commissioner*, T.C. Memo. 2012-258; *Sanders v. Commissioner*, T.C. Summary Opinion 2014-47; *Guralnik v. Commissioner*, 146 T.C. 15 (2016). Yet, in *Boultbee* the Tax Court finds that it has such equitable authority to narrow its jurisdiction to enact a new rule that that US Postal tracking data treated as postmark, even though it is not the face of the envelope, will still supersede non-US postal postmarks. This act was an improper legislative act carried out by the Tax Court and is not within its scope of authority.

The Tax Court is an Article I Court which Congress created through statutes and conferred upon it only the powers authorized by statute. See generally 26 U.S.C. §§ 7441 to 7491. None of these statutes authorize the Tax Court to make the law, engage administrative rulemaking for the Dept. of the Treasury, or to narrow its jurisdiction. The Memo Opinion and Order in Tilden impermissibly crosses such lines. Therefore, this Court should reverse the Tax Court's September 22, 2015 Memo Opinion and September 25, 2015 Order and order the Tax Court to deny the Respondent-Appellee's *Motion to Dismiss* as the Respondent-Appellee has requested.

CONCLUSION

For the reasons recited in the forgoing Opening Brief, Appellant respectfully requests that this Court reverse the Tax Court's September 22, 2015 Memo Opinion and September 25, 2015 Order dismissing the Petitioner-Appellant's Petition as they are erroneous and order that the Tax Court has jurisdiction to hear the Petitioner-Appellant's Petition.

Dated this 10th day of June, 2016

STOEL RIVES, LLP

/s/ Paul W. Jones

Paul W. Jones
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,984 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in Times New Roman, 12 point.

Dated: 6/10/16 /s/ Paul W. Jones

CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) are included in the Appendix.

Dated: 6/10/16 /s/ Paul W. Jones

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2016 the Brief and Short Appendix of Appellant was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

The following participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

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Appendix

REQUIRED SHORT APPENDIX
Pursuant to 7th Cir. R. 30(a)

KVC

T.C. Memo. 2015-188

UNITED STATES TAX COURT

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

Docket No. 11089-15. Filed September 22, 2015.

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. Boultbee v. Commissioner, T.C. Memo. 2011-11; sec. 301.7502-1(c)(1)(iii)(B)(3), Proced. & Admin. Regs.

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

Paul W. Jones, for petitioner.

Skyler K. Bradbury, for respondent.

MEMORANDUM OPINION

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

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

[1] 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).

[2] 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.

[*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] 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

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[3] 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).

[*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" of April 21, 2015.[4] The envelope also bears a certified mail sticker with a 20-digit tracking number.[5] The envelope does not bear 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 employee in the office of petitioner's counsel mailed the envelope containing the petition at a post office in Salt Lake City.

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[4] 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/.

[5] 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.

[*5] The USPS web site (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. 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

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).

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 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 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:

> (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 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:

> (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--
>
> (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:

> (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.

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.[6] 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 Boultbee v. Commissioner, T.C. Memo. 2011-11, 2011 WL 94744, at *5, the Court expressly decided that USPS Track &

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[6] "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).

[*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 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 Boultbee v. Commissioner, 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 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.

[*12] 1977) (holding that a petition mailed on the 90th day from a post office 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).

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 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.[7]

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 Boultbee 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.

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[7] 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.

[*14] Conclusion

The petition in this case was neither filed nor mailed within the requisite 90-day period. Accordingly, the Court is constrained 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.

UNITED STATES TAX COURT
WASHINGTON, DC 20217

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

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.

(Signed) Robert N. Armen, Jr.
Special Trial Judge

Entered: **SEP 25 2015**

SERVED Sep 25 2015

UNITED STATES TAX COURT
WASHINGTON, DC 20217

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

O R D E R

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 161[1] 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."

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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 Boultbee 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.

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[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 Boultbee 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.

(Signed) Robert N. Armen, Jr.
Special Trial Judge

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