LR #2

ELECTRONIC MAILBOX RULE: Revise the Mailbox Rule to Include All Time-Sensitive Documents and Payments Electronically Transmitted to the IRS

PROBLEM

Currently, the "statutory mailbox rule" in Internal Revenue Code (IRC) § 7502 does not apply to the electronic transmission of many time-sensitive documents and payments to the IRS. The rule provides that if a time-sensitive document or payment arrives late but is postmarked on or before the due date, the postmark date is treated as the date the IRS receives the document or payment. Further, IRC § 7502(c) provides that registered or certified mail, or methods deemed substantially equivalent by the Secretary of Treasury, is *prima facie* evidence of delivery. The rule applies to documents and payments sent through the U.S. Postal Service, designated private delivery services, and electronic return transmitters.[1] However, the statute and regulations thereunder do not extend the rule to other forms of electronic transmission. Taxpayers can electronically submit documents in several ways, including: faxing, posting a document to an online account, or emailing documents to a secure e-mailbox. Taxpayers can also electronically submit payments to the IRS either online or by phone with such payment options as (1) Direct Pay, where funds are debited from the taxpayer's bank account; (2) credit or debit card payments; and (3) the Electronic Federal Tax Payment System (EFTPS).[2]

The IRS is moving forward with plans to provide more opportunities for taxpayers to use self-service tools and interact with the IRS digitally. While taxpayers will continue to have the option to submit documents and payments through the U.S. Postal Service and designated delivery services to invoke the statutory mailbox rule, some taxpayers may electronically submit their time-sensitive documents and payments completely unaware that the rule does not apply to protect them. This issue will only be exacerbated when the IRS launches the "self-correction" feature on the taxpayer online account application that is planned to enable taxpayers to submit documents electronically.[3] Therefore, taxpayer rights will be impaired if the IRS cannot apply the statutory mailbox rule to the electronic submission of time-sensitive documents and payments.[4]

EXAMPLE

The IRS levied on taxpayer's individual retirement account on January 2, 2017 to satisfy a $10,000 tax liability from tax year 2009. On August 15, 2017, Taxpayer entered into an installment agreement to fully satisfy the liability. On September 15, 2017, Taxpayer faxed to the IRS a written wrongful levy claim. Taxpayer called the IRS on October 15, 2017 to check the status of the claim and learned that the IRS has no record of receiving the faxed wrongful levy claim. Taxpayer has a copy of the faxed claim and a fax confirmation sheet, showing that it was timely faxed, but he is told that such copies do not prove that he actually submitted the document to the IRS. Taxpayer is also told that any attempt to

1 Internal Revenue Code (IRC) § 7502(e).

2 https://www.irs.gov/payments (last visited Nov. 8, 2017).

3 *See* IRS, *Working Draft: IRS Future State: The Path Traveled and the Road Ahead* 9 (Dec. 2016), https://www.irs.gov/pub/newsroom/future_state_102v2.pdf (last visited Oct. 4, 2017).

4 National Taxpayer Advocate 2016 Annual Report to Congress 26-27 (Special Focus: IRS Future State: The National Taxpayer Advocate's Vision for a Taxpayer-Centric 21st Century Tax Administration).

resubmit the claim will be rejected because he did not submit the claim within nine months of the date of the levy, as required under IRC § 6343.[5]

RECOMMENDATION

Revise IRC § 7502(c)(2) to authorize the Secretary of Treasury to provide by regulation the extent by which the statutory mailbox rule applies to the electronic transmission of time-sensitive documents and payments, in addition to the electronic filing of tax returns.

PRESENT LAW

The "statutory mailbox rule" is set forth in IRC § 7502. Section 7502(a)(1) provides that, if the requirements set forth in the section are met, a document or payment is deemed to be filed or paid on the date of the postmark stamped on the envelope. If the postmark date is on or before the last day of the period prescribed for filing the document or making the payment, the document or payment is considered timely-filed or paid even if it is received after the due date. Sections 7502(b) and (c) provide that the provision applies to documents sent by U.S. postal mail, private delivery services, and electronic filing through an electronic return transmitter.

IRC § 7502(c)(2) provides that the Secretary of Treasury is authorized to provide by regulations the extent to which this statutory mailbox rule applies to certified mail or electronic filing. Treasury Regulation § 301.7502-1(d) provides that a document filed electronically with an electronic return transmitter (as defined in Revenue Procedure 2000-31, § 3.01(4)) in the manner and time prescribed by the Commissioner of Internal Revenue is deemed to be filed on the date of the electronic postmark, if such date is on or before the due date. Section 3.01(4) Revenue Procedure 2000-31 provides that a "transmitter" "transmits electronic tax return information directly to the Service."[6]

In *Pearson v. Commissioner*, the Tax Court, sitting *en banc*, held that postage bought over the internet that is affixed to an envelope creates a private postmark as of the date of purchase for purposes of the regulations issued under IRC § 7502 . The court also held that internal tracking data of the U.S. Postal Service (USPS) is not treated as a USPS postmark for purposes of those regulations.[7]

REASONS FOR CHANGE

Traditionally, taxpayers primarily communicated with the IRS by mail, phone, or face-to-face interactions. However, IRS plans are well under way to increase digital interactions with taxpayers. Such increased digital interactions include the following:

- **The Online Account Application.** The IRS has launched and continues to further develop capabilities for the online taxpayer account application. Future capabilities include the

5 Effective December 22, 2017, the nine-month period in IRC § 6343 has been extended to two years. The two-year period applies to levies made after that date or to levies for which the previous nine-month period had not yet expired as of the date of enactment. Pub. L. No. 115-97; § 11071 (2017).

6 Rev. Proc. 2000-31, 2000-31 I.R.B. 146 (July 31, 2000).

7 *Pearson v. Comm'r*, 149 T.C. No. 20 (Nov. 29, 2017) (The taxpayer used Stamps.com, a U.S. Postal Service approved commercial vendor).

ability of taxpayers to self-correct, which is expected to enable taxpayers and their authorized representatives to submit documents online.[8]

- **Faxed Documents.** The IRS has a Servicewide policy for the acceptance of faxes in routine tax administration operations and the list of forms that the IRS will accept by fax is extensive.[9] In 2015, the IRS eliminated any dollar thresholds previously required to accept by fax consents to assess additional tax, taxpayer closing agreements, and consents to extend the time to assess tax.[10]
- **Taxpayer Digital Communications.** Several organizations within the IRS, including TAS and Small Business/Self-Employed Exam, conducted a pilot of the Taxpayer Digital Communication (TDC) Secure Messaging system. TDC enables taxpayers to send and receive electronic webmail, along with certain digital documents, through a secure portal.[11]
- **Electronic Payments.** Taxpayers can make payments to the IRS in a variety of ways, including such electronic methods as credit and debit card payments, online Direct Pay, and EFTPS.[12]

Both taxpayers and the IRS will realize many benefits with increased digital interaction. Taxpayers will benefit from the availability of more modern, fast, and convenient methods to submit documents and payments. The IRS will benefit from quicker processing times and reduced resources devoted to answering phones and opening mail. However, the IRS needs to plan for the risks associated with the electronic submission of documents and payments. In particular, there is a risk that the IRS will not properly receive the digital transmission. For example, the faxed document may sit on a fax machine and never get delivered to the proper IRS employee. Aside from any potential IRC § 6103 disclosure violations on the part of the IRS, the taxpayer may be harmed if the document is time-sensitive.[13] In such case, the taxpayer may have the burden to prove that the IRS received the document by a certain deadline. Calling the IRS to confirm receipt may be good business practice and alleviate concerns, but the taxpayer still has nothing in writing to prove that the IRS received the document on a certain date.

Taxpayers also face this problem when making electronic payments. For example, if a taxpayer makes an electronic payment at 6 p.m. on April 15, the IRS may not actually receive the payment until April 16.[14] The taxpayer has a confirmation of payment from April 15, but IRC § 7502 does not protect the taxpayer under these circumstances, and the payment would be deemed late. Considering that the government receives the funds earlier in the digital scenario than if the taxpayer mailed a check at the

8 *Draft IRS Compliance Concept of Operations (CONOPS)* 3, 19-22 (June 8 2014), on file with TAS; IRS, *Working Draft: IRS Future State: The Path Traveled and the Road Ahead* 9 (Dec. 2016), https://www.irs.gov/pub/newsroom/future_state_102v2.pdf (last visited Oct. 4, 2017).

9 Memorandum for Division Commissioners; Chief, Criminal Investigation; Chief, Appeals; National Taxpayer Advocate from Deputy Commissioner for Services and Enforcement, Revision of Policy for Use of Fax Submissions (Nov. 15, 2015).

10 The broadened fax policy relates to the following documents: Form 866, *Agreement as to Final Determination of Tax Liability*; Form 870, *Waiver of Restrictions on Assessment & Collection of Deficiency in Tax & Acceptance of Overassessment*; Form 906, *Closing Agreement on Final Determination Covering Specific Matters*; Form 4549, *Income Tax Examination Changes*; Form 872, *Consent to Extend the Time to Assess Tax*; and Form SS-10, *Consent to Extend the Time to Assess Employment Taxes*. Memorandum for Division Commissioners; Chief, Criminal Investigation; Chief, Appeals; National Taxpayer Advocate from Deputy Commissioner for Services and Enforcement, Revision of Policy for Use of Fax Submissions (Nov. 15, 2015).

11 Luca Gattoni-Celli, *IRS Plans to Launch Secure Messaging Pilots for Exams, TAS*, Tax Notes Today (Feb. 2, 2017).

12 https://www.irs.gov/payments (last visited Nov. 9, 2017).

13 IRC § 6103 provides that the IRS must keep returns and return information confidential, except when disclosure is authorized by law.

14 Effective September 11, 2017, the Department of Treasury amended its regulation governing the use of the Automated Clearing House (ACH) by federal agencies. As of September 15, 2017, ACH debits are eligible for same-day processing. Submissions made by 2:45 p.m. EST would be settled by 5:00 p.m. EST. 31 C.F.R. Part 210.

post office on April 15, it makes no sense that the government would penalize the taxpayer for choosing an electronic payment option.[15]

Based on discussions with the IRS's Office of Chief Counsel, it is TAS's understanding that the IRS's position regarding digital transmissions of documents, such as through fax and email, does not invoke the mailbox rule. Therefore, the date the taxpayer sends it is irrelevant, even with a proof of transmittal. The IRS will only look to the date the IRS actually receives it. The rationale behind this decision, as articulated to the National Taxpayer Advocate by the Office of Chief Counsel, is that people can modify the dates on fax machines and computers.[16]

Therefore, as currently enacted, the statutory mailbox rule in IRC § 7502 does not apply to these electronic transmissions of documents or payments to the IRS. If the IRS wants to encourage taxpayers to use digital methods of document submission and payment, taxpayers should have the same protections when they submit electronically as they do when they mail a document or check through the U.S. Postal Service or a designated delivery service. Even the Tax Court in *Pearson v. Commissioner* recognized the need to bring the statutory mailbox rule into the 21st century. The court, sitting *en banc*, held that postage bought over the internet and affixed to an envelope creates a private postmark as of the date of purchase for purposes of the regulations issued under IRC § 7502.[17]

In fact, without an electronic version of the statutory mailbox rule, practitioners might hesitate to send any time-sensitive documents or payments electronically for fear of committing malpractice. Moreover, unrepresented or unsophisticated taxpayers may be harmed because they assume the date of sending a digital document or payment will control. Using a digital method could compromise taxpayer rights and protections, especially the *right to challenge the IRS's position and be heard*. It also impacts the taxpayer's *right to a fair and just tax system* because the electronic transmission of documents and payments facilitates the timely submission of documents and payments.[18] Accordingly, it is essential that IRC § 7502 address this issue to encourage taxpayers and their representatives to interact digitally with the IRS.

EXPLANATION OF RECOMMENDATION

In order to encourage taxpayers to use electronic methods to transmit documents, they need assurances that the statutory mailbox rule applies. Accordingly, Congress should revise IRC § 7502(c)(2) to authorize the Secretary of Treasury to provide by regulations the extent to which the statutory mailbox rule applies to the electronic submission of time-sensitive documents and payments.[19] That is, the regulations should clearly state that the statutory mailbox rule applies to the electronic transmissions of documents and payments in addition to the electronic filing of forms through an electronic return transmitter. The regulations should also provide the extent to which the confirmation or receipt of electronic transmission affords the same protections as a postmark from the U.S. Postal Service or

15 *See* Letter from U.S. Senator Charles E. Schumer to Doug Shulman (Nov. 18, 2010) (on file with TAS).

16 Meeting with IRS Office of Chief Counsel on Mailbox Rule (Feb. 8, 2016).

17 *Pearson v. Comm'r*, 149 T.C. No. 20 (Nov. 29, 2017).

18 Pursuant to the taxpayer's *right to a fair and just tax system*, taxpayers have the right to expect the tax system to consider facts and circumstances that might affect their underlying liabilities, ability to pay, or ability to provide information timely. Taxpayers have the right to receive assistance from TAS if they are experiencing financial difficulty or if the IRS has not resolved their tax issues properly and timely through its normal channels. *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights.

19 Congress should also revise IRC § 7502(d)(3) to add at the end a reference to electronically submitted documents and payments as permitted by regulations prescribed by the Secretary of Treasury.

another designated delivery service. Further, the regulations should provide the means by which a taxpayer can electronically transmit the document and receive a receipt or confirmation which is *prima facie* evidence that the IRS received the document or payment on the date reflected on the receipt. For example, if the IRS cannot rely upon a date generated by the taxpayer's own fax machine, the regulations should provide the IRS the flexibility to issue administrative guidance providing options for the taxpayer by listing designated commercial faxing services. Consideration should be given to taxpayers in more rural geographic locations where it may be difficult to travel to such commercial faxing services. In addition, the IRS can develop the online account application to provide a date-stamped confirmation of receipt that the taxpayer can rely upon as evidence of IRS receipt.

In drafting the administrative guidance and policy regarding fax confirmations, it is important to note that criminal penalties under IRC § 7206 for falsifying records would apply to these electronic submission receipts and confirmations in the same manner as they would to other taxpayer records. Therefore, the IRS should consider allowing taxpayers to use their own personal fax machines and require the taxpayer to make a statement, signed under penalties of perjury, about the accuracy of the date stamp on the fax confirmation if the date of IRS receipt becomes an issue.