Carroll v. Commissioner: Narrow Judicial Interpretations of Internal Revenue Code' § 7502 May Cause Increased Burden on Taxpayers

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CARROLL v. COMMISSIONER: NARROW JUDICIAL INTERPRETATIONS OF INTERNAL REVENUE CODE§ 7502 MAY CAUSE INCREASED BURDEN ON TAXPAYERS

The marvel of all history is the patience with which men and women submit to burdens unnecessarily laid upon them by their governments.

I. INTRODUCTION

"The Carroll case is just one of the latest reminders that if you live in second or sixth circuits it can be very dangerous to file your [federal income tax] return using U.S. regular mail...." Although most of the tax law is enacted and amended by Congress, significant tax law has developed through judicial interpretation of ambiguously-worded statutes. The Federal Circuit Courts of Appeal decisions interpreting these statutes frequently conflict, creating a split of authority and possible inconsistent results for taxpayers based solely upon their choice of residence. Internal Revenue Code (hereinafter I.R.C.) § 7502, "Timely mailing treated as timely filing" (hereinafter referred to as the statutory "mailbox rule"), has engendered such a split in authority relating to the judicial construction of the term "filed" and the application of a common law pre-

1. Unless otherwise noted, all section references in this Note are to the Internal Revenue Code (I.R.C.) of 1986 as amended.

2. See James M. Poterba, Who Bears the Lifetime Tax Burden?, 46 NATIONAL TAX REVIEW 539 (1993) (reviewing Don Fullerton and Diane Lim Rogers book of the same title (1993) and arguing that analysts of tax policies should measure any positive and negative effects of these policies over a taxpayer's lifetime rather than only on an annual basis).

3. Attributed to William E. Borah.

4. Tom Herman, Tax Report, WALL ST. J., Jan. 17, 1996, at 1 (commenting that the Supreme Court or Congress should address the issue so all taxpayers will be treated consistently).


6. According to the Golsen Rule as established in Golsen v. Commissioner, 54 T.C. 742, 757 (1970), aff'd 445 F. 2d 985 (10th Cir. 1971), the Tax Court must follow the court of appeals that has direct jurisdiction [usually established by taxpayer's residence] over the taxpayer in question and the Tax Court may only decide a case on its own interpretation if the court of appeals that has jurisdiction over the taxpayer has not ruled on the matter. The split results when circuit courts disagree on tax issues and the Tax Court (a national court) is bound by that court of appeals that has direct jurisdiction over the taxpayer in question: thus, the Tax Court may reach opposite decisions, based upon identical facts, for taxpayers based solely upon the taxpayer's geographical area. Kenneth Ryesky, Analysis Of The Split Authority On Proof Of A Postmark Under Internal Revenue Code § 7502, 21 U. DAYTON L. REV. 379, 415 n.4 (1996).

7. See text of I.R.C. § 7502 at note 31 infra. This section is commonly referred to as the I.R.C.'s "mailbox rule," although the critical element in this statute is the application of a postmark rather than the depositing of the envelope in the mail. Id § 7502 (a).
umption of delivery upon proof of mailing to that statute. 9

In Carroll v. Commissioner, 10 the United States Court of Appeals for the Sixth Circuit upheld the minority viewpoint that the statute repeals the common law presumption of delivery in all cases other than those where the taxpayer used registered or certified mail. 11 Thus, taxpayers who do not send tax documents using registered or certified mail must bear the risk of non-delivery. 12 Critics of this decision contend that the court misinterpreted the I.R.C. 13 As a result of the court’s narrow interpretation, taxpayers may suffer substantial tax losses and penalties even when a document is lost through no fault of their own. 14

Generally, this Casenote analyzes the Carroll court’s decision to remain in the minority of circuits in relation to the issue presented. Part II discusses the statutory history and case law decisions that have affected it. 15 Part III examines the facts of the case, procedural history, and holding of the majority. 16 Part IV will examine the Carroll court’s analysis of established precedent on this ambiguous section and the merits of the arguments of other courts that have adopted a broader interpretation of I.R.C. § 7502. 17 Moreover, this Note will investigate the purpose of § 7502 and how the results in Carroll are inconsistent with Congress’ intent that all taxpayers should be treated uniformly. Finally, the implications of the court’s narrow interpretation will be weighed against the possible evidentiary burdens that may result from adoption of the broader interpretation. 18

8. United States v. Lombardo, 241 U.S. 73, 76 (1916) (noting that the term “filed” was never defined by Congress and utilizing the etymology of the word in order to apply its ordinary meaning in interpreting a federal criminal statute).
9. The presumption was that a properly mailed document would actually be received in due course by the addressee and this presumption was routinely applied by federal circuit courts in tax cases. Carroll v. Commissioner, 71 F. 3d 1228, 1230 (6th Cir. 1995), cert. denied 116 S. Ct. 2547 (1996). The critical element evoking the rule, whose origins began in contract cases, was the depositing of the envelope in the mailbox. See note 26 infra and accompanying text. See generally Kenneth H. Ryesky, Mailing Is Filing Only If Proof Of Mailing Is Incontrovertible, 54 TAX’N FOR ACCT. 153 (1995).
10. Carroll, 71 F. 3d at 1228.
11. Id. at 1229.
12. See infra Section III C. and accompanying text.
13. See infra notes 81-82 and accompanying text.
14. See infra note 19 and accompanying text.
15. See infra notes 19-56 and accompanying text.
16. See infra notes 57-91 and accompanying text.
17. See infra notes 92-124 and accompanying text.
18. See infra notes 125-157 and accompanying text.
II. BACKGROUND

Determining when a document is "filed" is important to taxpayers for three reasons: (1) the late filing of a tax return may subject the taxpayer to failure to file, negligence, and substantial understatement penalties; (2) the late filing of a separate election form may result in a possible assessment of deficiency by the Commissioner; and (3) the delayed filing of a Tax Court petition will result in the matter being dismissed due to lack of jurisdiction. However, what actually constitutes "filed" has been the subject of much debate.

A. Definition of "Filed" Prior to Enactment of I.R.C. § 7502

Prior to 1954, tax documents were considered "filed" when physically delivered to and actually received by the Internal Revenue Service. Similarly, Tax Court petitions were "filed" when actually delivered to the Court. The practical result of this "actual-receipt rule" was that taxpayers had to mail their documents sufficiently in advance of the expiration of the filing period to ensure the documents reached the appropriate official before the due date. Moreover, the taxpayer ran the risk of delays or mishandling by the post office.

To reduce the harshness and inequities created by the "actual-receipt rule", federal courts routinely applied a common law "mailbox rule": a presumption that properly mailed documents would actually be received in due course by the

21. I.R.C. § 6213(a)(1989) provides that the Court acquires jurisdiction only if the taxpayer files a petition with the Court for redetermination of deficiency within 90 days after the notice of deficiency (as authorized in § 6212) is mailed. See also Foerster v. Commissioner, 41 T.C.M. (CCH) 775 (1981) (granting Commissioner's motion to dismiss for lack of jurisdiction when taxpayer's petition was never received by the Tax Court and taxpayer failed to use registered or certified mail).

22. United States v. Lombardo, 241 U.S. 73, 76 (1916) ("Filing is not complete until the document is delivered and received.") (applying the ordinary meaning of the word); See also Gates v. State, 28 N. E. 373 (N.Y. 1891) ("shall file" means to deliver to the office, and not send through the United States mails).

23. Poynor v. Commissioner, 81 F. 2d 521 (C.C.A. 1936) ("A paper is filed when it is delivered to the Court.")

24. The time interval varied depending on the taxpayer's geographic location. See e.g. Sylvan v. Commissioner, 65 T.C. 548, 551 (1975) ("Timely filing depended on the vicissitudes of the mail. . . ."); nonacq. 1977-2 C.B.

25. The actual receipt rule served to eliminate concerns with evidentiary problems and who would bear the risk of time and delay in the mails. See Lombardo, 241 U.S. at 78 ("Anything less than delivery leaves the filing a disputable fact, and although convenient, would result in a clash of oral testimonies and confusion"); ("If just depositing mail at the post office is filing, at what instant in time does this occur and who bears the risk of time or delay in transportation."). Id. at 79.

26. Hagner v. United States, 285 U.S. 427, 430 (1932) ("The rule is well settled that proof that a letter properly directed was placed in a post office creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed.") (quoting Rosenthal v. Walker, 111 U. S. 185, 193 (1884)); See also Estate of
addressee. Thus, proof of timely mailing would suffice. The regular time was a normal interval of two or three days and usually not same-day delivery, unless that in fact was the norm. Of course, the presumption is not conclusive and may be rebutted by specific evidence that the documents were never received by the proper government office.

B. Enactment of I.R.C. § 7502

Recognizing the inequities of the “actual receipt rule” and the inconsistent measures taken by courts to address these inequities, Congress enacted I.R.C. § 7502, the statutory “mailbox rule.” One Commentator believes this

Wood v. Commissioner, 92 T.C. 793, 798 (1989) (en banc) (“[A]bsent contrary proof of irregularity, proof of a properly mailed document creates a presumption that the document was delivered and was actually received by the person to whom it was addressed.”), aff’d 909 F. 2d 1155 (8th Cir. 1990).


28. Rosenthal, 111 U. S. at 193 (“[T]he presumption so arising is not a conclusive presumption of law, but a mere inference of fact founded on the probability that the officers of the government will do their duty in the usual course of business...”). See also Arkansas Motor Coaches v. Commissioner, 198 F. 2d 189, 192 (8th Cir. 1952), where a Tax Court petition was delivered 7 days later than usual, the majority of the court felt that the taxpayer should not be denied its day in court due to the negligence of government employees — whether they were Postal or Internal Revenue Service employees. Cf. Lee Brick and Tile Co. v. United States, 132 F.R.D. 414, 421 (M.D.N.C. 1990) where the taxpayer must not only show strong evidence of mailing, but also produce evidence that the government failed to receive the document in question because the government enjoys a “presumption of regularity in administering its tasks”.


30. See, e.g., Arkansas Motor Coaches v. Commissioner, 198 F. 2d 189, 192 (8th Cir. 1952).

31. I.R.C. § 7502 (“Timely mailing treated as timely filing” provides:

(a) General rule.

(1) Date of delivery. If any return, claim, statement, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue laws is, after such period or such date, delivered by the United States mail to the agency, officer, or office with which such return, claim, statement, or other document is required to be filed, or to which such payment is required to be made, the date of the United States postmark stamped on the cover in which such return, claim, statement, or other document, or payment, is mailed shall be deemed to be the date of delivery or the date of payment, as the case may

(b) Mailing requirements. This subsection shall apply only if —

(App) the postmark date falls within the prescribed period or on or before the 36.

See supra notes 22-25 and accompanying text.

prescribed date —

(i) for the filing (including any extension granted for such filing) of the return,
rule should be more accurately referred to as the "postmark rule." In 1996, § 7502 was amended to allow the timely mailing provisions to apply to items delivered by private delivery services.

The general rule is that a document is considered filed when it is physically delivered to and actually received by the IRS. I.R.C. § 7502 (a)(1) provides a statutory exception to the "actual receipt rule." Under this exception, a document delivered by the Postal Service after the filing deadline but post-

claim, statement, or other document, or

(ii) for making the payment (including any extension granted for making such payment), and

(B) the return, claim, statement, or other document, or payment was, within the time prescribed in subparagraph (A), deposited in the mail in the United States in an envelope or other appropriate wrapper, postage prepaid, properly addressed to the agency, officer, or office with which the return, claim, statement, or other document is required to be filed, or to which such payment is required to be made.

(b) Postmarks.

This section shall apply in the case of postmarks no made by the United States Postal Service only if and to the extent provided by regulations prescribed by the Secretary.

(c) Registered and certified mailing.

(i) Registered mail. For purposes of this section, if any such return, claim, statement, or other document, or payment, is sent by United States registered mail —

(A) such registration shall be prima facie evidence that the return, claim, statement, or other document was delivered to the agency, officer, or office to which addressed, and

(B) the date of registration shall be deemed the postmark date.

(2) Certified mail. The Secretary is authorized to provide by regulations the extent to which the provisions of paragraph (1) of this subsection with respect to prima facie evidence of delivery and the postmark date shall apply to certified mail.

32. Kenneth Ryesky, Analysis Of The Split Authority, supra note 6, at 383 (emphasizing that the existence of a postmark is the critical element in determining whether § 7502 applies as statutory relief from the actual receipt rule); See also Estate of Wood v. Commissioner, 909 F. 2d 1155, 1161 (8th Cir. 1990) ("The act of mailing is not significant for the purposes of [I.R.C. § 7502] but placement of a postmark is."); In re George, 57 N.Y.S. 2d 494, 496 (N.Y. Sup. 1945) ("An envelope mailed is not an envelope postmarked. The two operations are separate and distinct.").

33. See discussion infra in Part II.C. of text and accompanying notes.

34. Deutsch v. Commissioner, 599 F. 2d 44, 46 (2d Cir. 1979), cert. denied, 444 U.S. 1015 (1980); Washton v. United States, 13 F. 3d 49, 50 (2d Cir. 1993).

35. See note 31 supra for text of section.

36. See note 31 supra for text of section.
marked prior to the deadline, is deemed to have been received on the date of the postmark. Congress further stated in § 7502 (c)(1)(A) that proof that a document had been sent by registered mail would constitute prima facie evidence of delivery to the IRS. Unfortunately the statute is silent on how to prove "delivery" of a lost document when the taxpayer uses regular mail rather than registered mail. It is precisely the issue of what constitutes delivery under §7502 that has caused the controversy and a split of authority. The Second and Sixth Circuits have adopted the IRS's position that actual delivery of the mail is a prerequisite for the application of § 7502. No extrinsic evidence of postmark other than documentary evidence of registered or certified mail is allowed to prove delivery. The majority of the federal circuits, however, either allow extrinsic evidence of postmark other than documentary evidence of registered or certified mail under §7502(a) or apply the common law "mailbox rule".

37. See note 31 supra for text of section.
38. See note 31 supra for text of section.
39. See note 31 supra for text of section.
40. Carroll v. Commissioner, 71 F. 3d 1228, 1230-1231 (6th Cir. 1995), cert. denied 116 S. Ct. 2547 (1996). Whether the common law presumption of delivery upon proof of mailing still applies following the enactment of I.R.C. § 7502 is not clear. Id. The IRS takes the position that absent an actual postmark on the envelope, the taxpayer can prove a timely mailing only by producing a receipt for registered or certified mail. Ryesky, Analysis Of The Split Authority, supra note 6, at 393. In addition, most courts have concluded that the common law presumption no longer applies to tax returns and so taxpayer must comply with provisions of § 7502 to prove delivery. Id. But see Estate of Wood, 909 F. 2d at 1158 (squarely rejecting the proposition that § 7502 means that delivery of mail which the IRS cannot locate can be proven only by producing a receipt for registered or certified mail). Even in circuits that allow extrinsic evidence other than a receipt for registered or certified mail, however, the taxpayer is basically still held to the provisions of § 7502: the extrinsic evidence is allowed in to prove evidence of a postmark to satisfy § 7502(a). Ryesky, Analysis Of The Split Authority, supra note 6, at 415 n.26.
41. Deutsch v. Commissioner, 599 F. 2d 44, 46 (2d Cir. 1979) (holding that where petition to U.S. Tax Court was never received, petition was considered to have never been actually delivered, and therefore section 7502(a) was not applicable, taxpayer was not allowed to prove delivery and timeliness by testimony or other evidence offered as proof of actual date of mailing.), cert. denied, 444 U.S. 1015 (1980).
42. Surowka v. United States, 909 F. 2d 148, 150 (6th Cir. 1990) (holding that where return was never received by the IRS, taxpayer's failure to send their return by registered mail precluded them from relying on circumstantial evidence to prove their return was timely filed). But see BMC Bankcorp v. United States, 59 F. 3d 170, available at 1995 WL 363387 (6th Cir. 1995) (expressing concern over lack of accountability of the IRS on the mishandling of tax returns).
43. The IRS, in circuits where the court of appeals do not allow extrinsic evidence of a postmark, regularly takes the position that section 7502 (c) restricts the taxpayer to producing only documentary evidence of a registered or certified mailing such as a postal receipt to establish delivery. See e.g., Washton v. United States, 13 F. 3d 49, 50 (2d Cir. 1993); United States v. Cope, 680 F. Supp. 912, 917 (W.D. Ky. 1987).
allowing presumption of delivery to satisfy the requirement of delivery under § 7502(a). As a result, the common law "mailbox rule" continues to coincide with the statute and is not replaced by it. I.R.C. § 7502 is completely silent as to the result of a lost document sent by regular United States mail, creating a statutory interpretation problem for the courts.

Other infrequent approaches taxpayers use to rebut the IRS's hard-line position include: (1) Equitable estoppel theory: the taxpayer relied on an IRS official's misrepresentations to the taxpayer's detriment; (2) "Reasonable cause" under I.R.C. section 6651: The taxpayer relied on the representations of his own attorney or accountant; and (3) unconstitutional denial of due process: The taxpayer argues that it is a denial of due process to bar extrinsic evidence other than a receipt for registered or certified mail.

44. Surowka, 909 F.2d at 150; Miller v. United States, 784 F.2d 728, 730 (6th Cir. 1986).
45. Anderson v. United States, 966 F.2d 487 (9th Cir. 1992) (holding that § 7502, allowing taxpayer to prove timely filing on basis of timely mailing notwithstanding date of physical delivery of tax return, was not exclusive means of proving timely mailing and filing and did not bar admission of extrinsic evidence to prove timely delivery).
46. Estate of Wood v. Commissioner, 909 F.2d 1155 (8th Cir. 1990).
47. Id. (holding that under statute providing that if document is postmarked within prescribed time for filing, but received late, document will be considered to have been timely filed, presumption of delivery can be used to satisfy requirement of delivery). Cf. Harper v. Internal Revenue Service, 153 B.R. 84, 85 (Bankr. N.D. Ga. 1993) (recognizing common law presumption of delivery but requiring taxpayer to raise presumption by producing evidence of a high probative value, and testimony of the taxpayer, alone, was not enough to raise the presumption).
48. Carroll v. Commissioner, 71 F.3d 1228, 1231 (6th Cir. 1995), cert. denied 116 S. Ct. 2547 (1996). See also discussion in text at Part IV.A. infra. See generally, Lorraine D. Chatman, Walden v. Commissioner: What Relief Is Available To Taxpayers Whose Tax Return Is Lost By The United States Postal Service?, 42 TAX LAW. 735 (1989) (identifying the split in the circuits concerning timely delivery and recommending that Congress and the courts should incorporate a reasonableness inquiry when faced with the possible inequities that may result when a tax return, timely deposited in the United States mail, but not sent by certified or registered mail, is lost by the Postal Service).
49. Heckler v. Community Health Services, 467 U.S. 51, 60 (1984) (denying relief to taxpayer because equitable estoppel is not usually available against the government on the same terms as against private parties, at the very least some affirmative misconduct by the government agent must be shown); United States v. Guy, 978 F.2d 934 (6th Cir. 1992) (denying taxpayer relief from assessment of deficiency reasoning that those who deal with the government are expected to know the law and may not rely on the representation [especially oral] of government agents contrary to the law).
50. Section 6651 negligence penalty applies to the failure to file tax returns by their due date unless taxpayer can demonstrate "reasonable cause" for the failure to file. Treas. Reg. § 301.6651-1(c)(1)(1989) specify that a taxpayer may show "reasonable cause" by demonstrating that he "exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time. . . ." The Treasury Regulations also give eight examples sufficient to constitute "reasonable cause" within the section one of which includes unavoidable postal delays.
51. United States v. Boyle, 469 U.S. 241, 249 (1985) (holding that an executor's good-
C. 1996 Amendment of the 1986 Tax Code – The "Taxpayer Bill of Rights 2" to Allow for Increased Taxpayer Protections

Congress has amended I.R.C. § 7502 by adding the new subsection (f) which allows documents delivered by private delivery companies to qualify as mailed items for purposes of § 7502. Prior to this enactment, items that were delivered by private delivery services did not qualify as a mailed document within the ambit of § 7502 despite judicial commentary that these services

faith reliance upon an agent to file his estate tax return did not constitute "reasonable cause" within the meaning of § 6651 because the taxpayer himself was fully capable of meeting the required standard of ordinary business care and prudence and a taxpayer should only be relieved of penalty under this section when circumstances were beyond his control).

52. Deutsch v. Commissioner, 599 F. 2d 44, 46 (2d Cir. 1979) (holding that it was not a denial of due process to limit evidence allowed because of administrative convenience and the option of the taxpayer to find effective redress by paying deficiency, filing a claim for a refund, and if claim is denied commencing an action in Federal District Court to recover the tax paid), cert. denied. 444 U.S. 1015 (1980). See also Phillips v. Commissioner, 283 U.S. 589, 595 (1931).

53. Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 120, 1996 U.S.C.C.A.N. (110 Stat.) 1474 (to be codified at I.R.C. § 7502(f)) (effective July 30, 1996). The House Ways and Means Committee Report explained that many private delivery companies meet U.S. Postal Services standards to deliver documents quickly and securely, and that the Secretary of the Treasury is given authority to expand the "timely-mailing as timely-filing" rule include a designated delivery service which must be "designated" as such by the Secretary based upon the criteria specifically listed in I.R.C. § 7502(f)(2) and similar authority with respect to private delivery services' equivalents to U.S. mail registered and certified mail. H. Rep. No. 104-506 to be reprinted in 1996 U.S.S.C.A.N.


(1) In general. Any reference in this section to the United states mail shall be treated as including a reference to any designated delivery service, and any reference in this section to a postmark by the United States Postal Service shall be treated as including a reference to any date recorded or marked as described in paragraph (2)(C) by any designated delivery service.

(2) Designated delivery service. For purposes of this subsection, the term "designated delivery service" means any delivery service provided by a trade or business if such service is designated by the Secretary for purposes of this section. The Secretary may designate a delivery service under the preceding sentence only if the Secretary determines that such service —

(A) is available to the general public,

(B) is at least as timely and reliable on a regular basis as the United States mail,

(C) records electronically to its data base, kept in the regular course of its business, or marks on the cover in which any item referred to in this section is to be delivered, the date on which such item was given to such trade or business for delivery, and

(D) meets such other criteria as the Secretary may prescribe.

(3) Equivalents of registered and certified mail. The Secretary may provide a rule
were on par with those of the U.S. Postal Service.\textsuperscript{55}

However, Congress did not amend § 7502 to clarify any of the ambiguities and differences in interpretation of the statute relating to the common law presumption of delivery or to the kind of evidence allowed to prove “delivery” of a tax document.\textsuperscript{56}

III. STATEMENT OF THE CASE

A. Facts

James R. Carroll purchased all the stock of Volunteer Corporation in November 1986. On January 21, 1987, Carroll, as an officer and consenting stockholder of Volunteer, signed IRS election form 2553 to elect S-corporation\textsuperscript{57} status for Volunteer.\textsuperscript{58} Carroll mailed the election form by U.S. Postal Service regular mail in a properly addressed envelope bearing adequate postage that same day.\textsuperscript{59}

\textsuperscript{55} Petrulis v. Commissioner, 938 F. 2d 78 (7th Cir. 1991); Blank v. Commissioner, 76 T.C. 400 (1981). Pugsley v. Commissioner, 749 F. 2d 691, 693 (11th Cir. 1985).

\textsuperscript{56} See note 54 supra. The omission of any clarifying language on point may be used by courts in the future interpretation of § 7502. Those courts supporting the IRS’ position may apply an analysis analogous to the canon of construction \textit{expressio unius, exclusio alterius}: § 7502 (c) expressly mentions that proof of mailing by registered and certified mail is allowed. If the legislature had wanted to clarify the matter it would have done so with this latest amendment. \textit{See generally} Michael Livingston, \textit{What’s Blue And White And Not Quite As Good As A Committee Report: General Explanations And The Role Of “Subsequent” Tax Legislative History,} 11 AM. J. TAX POL’Y 91 (1994) (recommending that courts should apply a practical approach when evaluating subsequent tax legislative history focusing on the individual circumstances and facts of each case).

\textsuperscript{57} Id. Each shareholder of an S corporation records his own pro rata share of corporate items of income, deduction, loss, and credit on his own form 1040 in his tax year in which the corporation’s tax year ends (commonly referred to as pass-through income and loss items). I.R.C. § 1366(a) (1989). Thus, the S corporation and its shareholders avoid the double taxation experienced by a C corporation when tax is paid on profits at the corporate level, and also on dividends paid to the shareholder at the shareholder’s level.

\textsuperscript{58} Form 2553 “Election by a Small Business Corporation” must be filed by a qualified corporation, with the unanimous consent of all shareholders, on or before the 15th day of the 3rd month of its tax year in order for the election to be effective beginning with the year when made (in this case due date would be no later than March 16, 1987). I.R.C. § 1362(a), (b) (1989); Treas. Reg. § 1.1362-2(b), (c)(1989). The election form was prepared by taxpayer’s accounting firm. Carroll v. Commissioner, 1994 WL 223053, at *1, aff’d 71 F.3d 1228 (6th Cir. 1995), Cert. denied 116 S.Ct. 2547 (1996).

\textsuperscript{59} Carroll v. Commissioner, 1994 WL 223053, at *1. Carroll made a note to his secretary that the form had to be mailed that same day and his secretary prepared an envelope addressed to the IRS service center in Memphis and affixed the necessary postage. The secretary then gave the envelope to another employee who made a special trip to mail it by dropping it in a
Carol and his wife filed joint returns for the tax year, and included a loss of approximately $58,000 from the corporation on their return. The claimed loss from 1987 was carried over to their 1988 joint return.

The IRS disallowed the 1988 loss claimed from Volunteer on the grounds that there had been no S-election form filed for Volunteer for 1987. The disallowance of the loss resulted in a finding of tax deficiency for 1988.

Although there is no evidence that the IRS Memphis Service Center ever received Volunteer's election form, the IRS did provide Volunteer with a preprinted address label, which included a new employer identification number (EIN) for the use on Volunteer's 1987 tax return. The issuance of the new EIN raised a question about the receipt of the election form.

B. Procedural History

Carroll and his spouse filed a petition in the Tax Court seeking a redetermination of the deficiency. The Tax Court conducted an evidentiary hearing and found as a fact, that the S-corporation election form had been mailed to the IRS on January 21, 1987. The IRS does not dispute the accuracy of this factual finding. However, the IRS contended that because the original form could not be located in the IRS's postal box at the Knoxville post office, the EIN was not valid.

The IRS argued that because the Tax Court refused to apply § 7502 “mailbox rule” or the common law presumption of delivery, the Carrolls suffered a deficiency of $22,479.25. Carroll argued that the EIN was compelling evidence that the Form 2553 was received by the IRS and relied on an unpublished opinion of the Court, Trimarco v. United States, No. 91-3453, 1992 WL 28082 (6th Cir. 1992), wherein the taxpayer mailed both an S corporation election form and an EIN request form to the IRS. Although the IRS claimed never to have received the election form, it issued the EIN and the Sixth Circuit Court inferred that the taxpayer's election form did not miscarry in the mails. Unfortunately for Carroll, the Court found that his case was not like that of Trimarco because Carroll did not mail the EIN request form with the election form, and issuance of the number did not prove receipt of the election form.

Carroll v. Commissioner, 1994 WL 223053, at *1 (U.S. Tax Ct. 1994). Taxpayers were still residents of Knoxville when they filed their petition.

The Tax Court found that the taxpayer had provided considerable evidence that the form was mailed basically because of the meticulous records kept by the taxpayer's personal secretary: the testimony rose above mere habit evidence. Id at *4. See also note 59 supra.
not be located, there was no proof that the document had been postmarked on
before the deadline and thus actually delivered to the IRS.\textsuperscript{69}

Carroll argued that the preprinted label attached to Volunteer's 1987 form
1120s proved that the original form was actually delivered to the IRS.\textsuperscript{70} The Tax
Court rejected this argument, noting that the taxpayer had never shown that the
original election form was the only (or even the most likely reason) why the IRS
would have sent the preprinted label attached to Volunteer's 1987 Form 1120s.\textsuperscript{71}
The Tax Court also held that the form was not timely filed because Carroll had
insufficient evidence to prove timely filing under § 7502 as interpreted by the
Sixth Circuit.\textsuperscript{72} Although the Carrolls could prove they mailed the envelope,
their evidence was insufficient to prove evidence of a postmark, and thus they
could not invoke § 7502.\textsuperscript{73}

The Carrolls appealed the Tax Court's decision to the United States Court
of Appeals for the Sixth Circuit.\textsuperscript{74} The Sixth Circuit Court affirmed the decision
of the Tax Court holding that the common law "mailbox rule" did not apply to
the taxpayer because § 7502 repealed the presumption of delivery, unless the
taxpayer used registered or certified mail.\textsuperscript{75}

\textbf{C. Reasoning of The Appeals Court}

The issue before the court was whether the common law "mailbox rule"
applies to a document sent to the IRS by regular first-class mail.\textsuperscript{76}

The court discussed the pre-1954 "actual receipt rule" and the common law
"mailbox rule" and how the enactment of section 7502 altered those rules.

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\textsuperscript{69} As stated in Salmi v. Secretary of Health and Human Services, 774 F.2d 685, 689 (6th Cir. 1985): "a panel of that court cannot overrule the decision of another panel and the prior decision remains controlling authority unless an inconsistent decision of the U.S. Supreme Court requires modification of the decision or the sixth circuit court sitting en banc overrules the prior decision."

\textsuperscript{70} Carroll, 1994 WL 223053, at *5. See Miller v. United States, 784 F. 2d 728, 730 (6th Cir. 1986) (rejecting applicability of common law "mailbox rule" with presumption of delivery); Surowka v. United States, 784 F. 2d 148, 150 (6th Cir. 1990) (holding that § 7502 creates the only exceptions to physical delivery rule). \textit{Contra} Estate of Wood v. Commissioner, 92 T.C. 793, 798 (1989) (holding that the common law presumption, that proof of a properly mailed document is received applies in § 7502 cases and that § 7502(c) creates a "safe harbor" for taxpayers who file by registered or certified mail but that a taxpayer, to obtain the benefit of § 7502 must offer more than just evidence of mailing).


\textsuperscript{72} Id. at 1229.

\textsuperscript{73} Carroll, 1994 WL 223053, at *5. See also notes 31-38 supra and accompanying text.

\textsuperscript{74} Carroll, 71 F. 3d at 1231.

\textsuperscript{75} See note 40 supra.
by allowing a document postmarked before or on the filing date but delivered after that date to relate back to postmark date.\textsuperscript{77}

The court noted that the statute is silent on whether a taxpayer who uses regular mail and whose document is lost can get relief under § 7502 because that taxpayer cannot offer any direct proof that the document had been postmarked on or before the due date or that the document was actually delivered to the IRS.\textsuperscript{78}

In an attempt to answer the question of whether § 7502 repealed the common law “mailbox rule” in all cases other than those where registered or certified mail was used,\textsuperscript{79} the court examined the reasoning of the leading cases upholding the retention of the common law “mailbox rule.”\textsuperscript{80} In doing so, the Eighth Circuit’s \textit{Estate of Wood v. Commissioner}\textsuperscript{81} and the Ninth Circuit’s \textit{Anderson v. United States},\textsuperscript{82} both interpret § 7502 broadly. The court then compared\textsuperscript{83} these cases with the leading Sixth Circuit cases on point, \textit{Miller v. United States}\textsuperscript{84} and \textit{Surowka v. United States}.\textsuperscript{85}

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\item \textsuperscript{80} \textit{Carroll}, 71 F. 3d at 1230.
\item \textsuperscript{81} 92 T.C. 793, 797-799 (1989) (en banc), aff’d 909 F. 2d 1155 (8th Cir. 1990). On similar facts, the \textit{Wood} court rejected the IRS’s argument that registered or certified mail was the exclusive means of proving delivery and concluded that using registered or certified mail was only a “safe harbor” because Congress would have known of this common law presumption yet it did not express its intent to exclude other methods either in the Code nor in the statute’s legislative history. Thus, “delivery” could be also be shown by applying the common law presumption of delivery. The Eighth Circuit agreed and pointed out that the common law presumption of delivery existed before § 7502 and the statute did not replace it. \textit{See also} \textit{Midatlantic Nat’l Bank v. New Jersey Dep’t. of Environmental Protection}, 474 U.S. 494 (1986) (stating that “[t]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes the intent specific”).
\item \textsuperscript{82} 966 F. 2d 487, 491 (9th Cir. 1992) (citing both \textit{Miller} and \textit{Surowka} as unpersuasive and upholding the “mailbox rule” based upon a plain reading of the statute: there was no clear displacement of the common law presumption reflected in the statute itself).
\item \textsuperscript{83} \textit{Carroll}, 71 F. 3d at 1230.
\item \textsuperscript{84} 784 F. 2d 728 (1986). On similar facts, the \textit{Miller} court did not agree that the use of registered or certified mail was only a “safe harbor” and reasoned that public policy demanded an objective “bright line” standard and that the only exceptions to the physical delivery rule were: (1) where the IRS receives the document with an applied postmark prior to the deadline date; or (2) the use of registered or certified mail and the date of registration or certification is also not later than the deadline date. In effect, for purposes of the § 7502 exceptions, filing is complete at the time a mailing is postmarked, regardless of the time of actual delivery. \textit{Id.} at 1232. \textit{See also} \textit{Deutsch v. Commissioner} at 46 (construing § 7502 as requiring “an easily applied, objective standard”).
\item \textsuperscript{85} 909 F. 2d 148 (6th Cir. 1990) (interpreting \textit{Miller} as limiting “circumstantial proof” of timely filing where neither of the aforementioned exceptions to § 7502 applied because the exceptions make filing complete on the postmark date. The date of delivery, whether actual or provided by the common law presumption, is irrelevant and therefore evidence concerning the delivery date would be inadmissible). \textit{Carroll}, 71 F. 3d at 1232.
\end{itemize}
Although acknowledging that the Eighth and Ninth Circuits agree on the issue, the court concluded that the Sixth Circuit would continue to follow its own precedents. To underscore this point, the court emphasized that it had recently been asked to reconsider Miller and Surowka in an en banc hearing but had declined to do so. The court also briefly addressed and then dismissed Carroll’s argument that regardless of the abandonment of the “mailbox rule,” the preprinted label provided “compelling evidence” that his form was received by the IRS. Finally, the court affirmed the Tax Court’s assessment of deficiency but the court’s tone was decidedly apologetic when it noted that the taxpayers involved in the case were victims of their own geography.

Undeterred by the court’s decision, Carroll petitioned the U.S. Supreme Court for a writ of certiorari. However, the Court denied the writ.

86. Carroll, 71 F. 3d at 1232. See supra note 72.
87. Id at 1232. In BMC Bankcorp v. United States, No. 94-5842, 1995 WL 363387 (6th Cir. 1995), the Court considered the issue of whether a taxpayer who did not come within the terms of § 7502 could avail himself of the common law presumption of delivery where documents were properly mailed to the IRS and a three-judge panel upheld precedent that clearly required an abandonment of the common law presumption. The taxpayer petitioned for a rehearing en banc, but the number of judges voting in favor of a rehearing, including the author of the Carroll opinion Judge Nelson, were in the minority. Id. See also the rules concerning Sixth Circuit precedent, supra at note 72.
88. Carroll, 71 F. 3d at 1233. The taxpayers relied on the Court’s unpublished opinion in Trimarco v. United States, 1992 WL 28082 (6th Cir. 1992) where the taxpayer mailed the IRS both an S-corporation form and an application for an employer identification number. The Carroll court distinguished that case from the case at bar because in this case the election form was not accompanied by a EIN request and therefore issuance of the number did not prove receipt of the election form. Carroll, 71 F. 3d at 1233.
89. Carroll, 71 F. 3d at 1233. (emphasizing that if the taxpayers resided outside of the jurisdiction of the Second and Sixth Circuit courts the presumption of delivery would have provided a different result).
90. See generally Supreme Court Rule 10(1) in Stern, Gressman & Shapiro, Supreme Court Practice 890 (6th ed., 1986).
91. Carroll v. Commissioner, 116 S. Ct. 2547 (1996). See Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950) (declaring that a denial of a petition for certiorari is not a decision on the merits). See also Ryesky, Analysis Of The Split Authority, supra note 6, at 396 (commenting that federal taxation is considered to be such a complex and technical area of the law that even the most erudite judges admit difficulty in interpreting taxation statutes); Commissioner v. Idaho Power Co., 418 U.S. 1 (1974) (Douglas J., dissenting) (observing that the U.S. Supreme Court is not well-equipped in resolving tax disputes due to the technical nature of taxation, the expansion of the I.R.C., the “proliferation of decisions,” and the Court’s inability to develop expertise in the area due to their relative inexperience).
92. See generally James W. Colliton, Standards, Rules And The Decline Of The Courts In The Law Of Taxation, 99 Dick. L. Rev. 265, 265 (1995) (arguing that the tax law has evolved from being governed by broad standards to being dominated by specific rules, and that as a result of this evolution, power has shifted away from the courts and to the U.S. Congress).
93. Carroll, 71 F. 3d at 1228-1233.
IV. ANALYSIS

A. Statutory Interpretation

In upholding the Sixth Circuit’s narrow interpretation of § 7502, the Carroll court was confronted with the application of an ambiguously-worded statute. Although the court discussed the broad interpretation of the Wood and Anderson cases and compared these cases to the court’s own binding precedents, Miller and Surowka, they did not explicitly delve into the underlying purpose of section 7502. Further, the court never compared the result in the Carroll case, a denial of the invocation of the common law mailbox rule, with this underlying purpose. Instead the court combined a cursory plain reading of § 7502(a) and 7502(c) with the interpretations of those sections in the cases previously mentioned to support their conclusion that Congress did not intend to revoke the common law presumption of delivery. The court did not mention the legislative history of section 7502.

In Wood, the Tax Court allowed extrinsic evidence of a mailing where the IRS never received the taxpayer’s federal estate tax return. The court examined the plain meaning of § 7502(c) which declares that if any such document is sent U.S. registered mail, such registration will be prima facie evidence that the document was delivered to the appropriate agency. Indeed, the
language regarding registered and certified mailing is highly discretionary: if
the use of registered or certified mail is the taxpayer's only salvation as the IRS
suggests, why is this not listed under § 7502(a)(2) "mailing requirements" rather
than in a separate subsection? 101 The court also examined the legislative history
of the section and concluded that neither the plain meaning of § 7502 nor its legis-
latve history indicates that Congress intended to repeal the common law pre-
sumption of delivery. 102 The court further concluded that the rules of § 7502 are
compatible with presumption of delivery because the presumption only works
as an evidentiary tool in determining that a document is delivered, while the
statute changes the filing date from date of delivery to the date of mailing. 103

In Anderson, the Ninth Circuit also allowed extrinsic evidence of mailing
where the IRS never received a taxpayer's individual federal tax return. 104 The
court specifically noted that the purpose of § 7502 was to alleviate the harsh-
ness of the old actual-receipt rule, which left taxpayers at the mercy of the U.S.
Postal Service. 105 The Court's plain reading of the section revealed that §
7502(c) only applies if a document was sent by registered or certified mail 106 and
the court agreed with Wood that the enactment of § 7502 did not repeal the com-
mon law presumption of delivery. 107

In Miller, the Sixth Circuit held that the only exceptions to the physical
delivery rule are those found in § 7502, 108 and therefore a taxpayer who did not
use registered or certified mail and whose refund claim was never received by
the IRS could not claim any other relief. 109 Like the court in Anderson, 110 the

103. Id. The court believed the question of delivery is distinct from the question of whether
a timely mailing is a timely filing and a timely postmark is what must be proven to invoke §
7502 relief. Id.
105. Id. at 490.
106. Id. at 491. The court justified this conclusion with the same reasoning used by the
Eightth Circuit in Wood: absent a clear mandate from Congress, pre-existing judicial
constructions will be maintained. Id.
107. Miller v. United States, 784 F. 2d 728, 728 (6th Cir. 1986).
108. Miller, 784 F. 2d at 728.
109. See note 105 supra and accompanying text.
110. Miller, 784 F. 2d at 730.
111. Id. at 731. The court effectively reconstrues the purpose of § 7502. Id. Instead of
providing relief to taxpayers for inconsistent postal service deliveries, the purpose is to provide
a bright-line standard for courts and taxpayers to follow. Id. If section 7502 is not literally
applicable, the court will deny extrinsic evidence as proof of mailing. Id. at 732. Cf. Shipley
v. Commissioner, 572 F. 2d 212 (9th Cir. 1977) (construing the purpose of § 7502 and
applicable regulations as favoring tangible evidence of the date of mailing over oral testimony).
See also discussion of policy concerns at Part IV.B., infra.
112. See notes 107-111 supra and accompanying text.
Sixth Circuit stated the purpose of enactment of § 7502 was to alleviate inequities in mail delivery.\footnote{113} Unlike Anderson, however, the Sixth Circuit refused to apply the common law presumption of delivery because the exceptions in § 7502 are "exclusive and complete."\footnote{112}

In Surowka, the Sixth Circuit relied on Miller\footnote{114} to hold that § 7502 provides the only exceptions to the actual-receipt rule and that a taxpayer who does not send his return by registered or certified mail is precluded from relying on extrinsic evidence to prove timely filing of his return.\footnote{115} The Sixth Circuit distinguished Wood, noting that the Sixth Circuit does not apply the common law presumption of delivery.\footnote{116}

An independent examination of Treasury Department Regulations reveals that they are worded similarly to the statute and are therefore just as ambiguous as to who bears the risk of non-delivery.\footnote{117} The IRS publications to taxpayers and the actual instructions to tax form 1040\footnote{118} are equally ambiguous.

Moreover, an independent examination of the legislative history\footnote{119} of

\begin{itemize}
  \item Surowka v. United States, 909 F. 2d 148, 148 (6th Cir. 1990).
  \item See also Bruder v. Commissioner, 57 T.C.M. 873, 874 (1989) (holding that presumption of delivery does not apply to cases appealable to the Sixth Circuit because the circuit had previously rejected the applicability of any such presumption).
  \item See e.g., Estate of Wood v. Commissioner, 92 T.C. 793, 797 (1989) (en banc) (interpreting Treas. Reg. § 301.7502-1(c)(2), Procedural & Administrative Regulations, as explaining the taxpayer’s risk in sending a document by first class mail instead of registered or certified mail is that the document will not be postmarked on the day it is deposited in the mail). \textit{But see e.g.}, Walden v. Commissioner, 90 T.C. 947, 952 (1988) (interpreting the same regulation to mean the taxpayer must assume the risk of non-delivery of their document to the IRS).
  \item See generally IRS, Publication 17, Your Federal Income Tax (1995) (published annually) which is relied upon by taxpayers and tax practitioners to provide guidance in properly preparing their individual returns. The ambiguity in this particular publication received judicial interpretation in Alexander v. United States, 93-1 T.C. (CCH) § 50,288 (1993), wherein the court found that the parlance in that publication was inconsistent with the IRS’s position that registered and certified mail are the exclusive means of proof under I.R.C. § 7502 and the court chastised the IRS to make the language more explicit.
  \item See \textit{When Should I File?}, INTERNAL REVENUE SERVICE, 1995 1040 INSTRUCTIONS 9 (1995). The instructions do not even include a separate heading relating to mailing the return: they just warn that filing is "no later than APRIL 15, 1996."
  \item See Sylvan v. Commissioner, 65 T.C. 548, 552 (1975), wherein the court allowed evidence of mailing to support a timely filing of petition to Tax Court. The majority declared

\end{itemize}
I.R.C. § 7502 creates similar confusion by enabling each side of the split in authority to cull support for their position. One Commentator on the subject of legislative intent as it applies to the timely-filing rules contends that a reading of committee reports on a subsequent amendment to the code section reveals that the legislature intended that evidence be allowed to prove the existence of a filing and that those courts who construe § 7502(c) as preempting the common law “mailbox rule” are conducting a legal, rather than a factual, inquiry.

Thus, an investigation of the statutory language of § 7502, that section’s relevant legislative history, and case law interpreting that section, reveals that those circuits adopting a broad interpretation of the statute attempt to go beyond a literal construction. These courts define the statute’s purpose and interpret the statute, in light of pre-existing judicial presumptions, to achieve the statute’s purpose. The Second and Sixth circuits, however, attempt a literal application of the plain meaning of the statute. Because the language of the code section, regulations, and its legislative history are so ambiguous, and tax legislation itself is such a political topic, are there other reasons the court should consider when interpreting § 7502?

that the legislative history supporting the section revealed that Congress had only considered the case where a postmark was affixed (however illegibly) but had not considered the case where no postmark was affixed, and the Court believed that had Congress considered that circumstance, it would have allowed evidence in to support existence of a postmark. The dissent in the same case, however, felt that the same passages supported their contention that Congress’ intent was that a postmark date is required to make section 7502 applicable in the first place. See H. Rept. No. 1337, 83rd Cong., 2d Sess. 615 (1954); S. Rept. No. 1622, 83rd Cong., 2d Sess. 615 (1954).


121. See notes 98-106 and accompanying text, supra.

122. See notes 98-106 and accompanying text, supra.

123. See notes 107-114 and accompanying text, supra.


125. Surowka v. United States, 909 F. 2d 148, 150 (6th Cir. 1990); Miller v. United States, 784 F. 2d 728 (6th Cir. 1986); Deutsch v. Commissioner, 599 F. 2d 44, 46 (2d Cir. 1979) (noting that Courts construing I.R.C. S7502 narrowly are looking for an “easily applied, objective standard”). See also note 111 supra.

126. In Re Lilley, 152 B.R. 715, 716 (Bankr. E.D. Pa. 1993) (describing the IRS as acting in primarily in its own interests while waiting for the court to subsequently determine the propriety of their actions).

B. Policy Reasons, Bureaucratic Behavior, and Credibility Problems

Underlying the issue in the Carroll case is a balancing of interests: the court's interest in applying a bright-line rule that bolsters judicial economy;\(^\text{125}\) the IRS' interest in upholding an uncompromising position that maximizes tax assessments;\(^\text{126}\) and the taxpayer's interest in minimizing tax burdens and in holding the IRS as accountable as a private citizen would be.\(^\text{127}\) While the additional cost of registered or certified mail may not be a great burden on most taxpayers, the burden of enhanced filing requirements does not foster the American system of voluntary taxpayer compliance.\(^\text{128}\)

However, a broad interpretation of § 7502\(^\text{129}\) upholding the common law presumption of delivery and allowing proof other than registered or certified mail raises credibility problems for the court and administrative problems for the IRS. These concerns were raised in the seminal case, United States v. Lombardo, that warned of evidentiary difficulties and burdens on the Court.\(^\text{130}\) Indeed, many of the courts who upheld the narrow interpretation of §7502 may have done so because the other evidence presented lacked credibility.\(^\text{131}\) Taxpayer claims may be biased. However, this problem could be avoided by requiring corroborating evidence to enhance the credibility of the taxpayer's testimony.\(^\text{132}\)

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128. See DONALD C. ALEXANDER, COMMISSIONER IRS, DIRECTIVE: IRS ORGANIZATION AND FUNCTIONS S1111.1 (Mar. 25, 1974) (stating that voluntary tax compliance is a "key element of the IRS mission").

129. Hess v. Commissioner, No. 22332-85, 22334-85, 1989 WL 88928 *8 (U.S. Tax Ct. 1989) (asserting that the purpose of I.R.C. §7502(c) is to favor documentary evidence of mailing date over oral testimony).

130. 241 U.S. 73, 76 (1916) (asserting that to allow such evidence would result in confusion and "the clash of oral testimonies"); See also note 25 supra.


132. See e.g., Estate of Wood v. Commissioner, 909 F. 2d 1155, 1161 (8th Cir. 1990) (credible corroboration includes the testimony of the postal employee who applied the postmark); Anderson v. United States, 966 F. 2d 487 (9th Cir. 1992) (testimony of a disinterested witness who saw taxpayer enter post office with envelope and exit without it successfully corroborated taxpayer's testimony).


134. See generally James W. Colliton, Standards, Rules And The Decline Of The Courts In The Law Of Taxation, 99 DICK. L. REV. 265, 265 (1995) (describing the process by which tax law has evolved: enactment, confusion, litigation, and further enactment to clarify the original statute).

135. See discussion at Part IV.B. in text supra. and accompanying notes.

136. See discussion of the Taxpayer Bill of Rights 2 in text at Part II.C. supra and accom-
C. Other Items to Consider That May Resolve Issue or Render It Moot

Although the increased use of electronic filing of IRS documents may render the interpretation of § 7502 a moot issue, electronic filing is not without its problems and is unlikely to be utilized by small companies or low-income taxpayers due to the cost of computers and related software.\(^\text{133}\)

Congress itself may decide to amend the statute to clarify the matter or the Supreme Court may decide to grant a writ of certiorari for another case based upon similar facts.\(^\text{134}\) Further, credibility problems in courts that now allow extrinsic evidence of a postmark other than a receipt for registered or certified mail may cause changes of opinion in those courts.\(^\text{135}\)

Unfortunately, the recent amendment to I.R.C. § 7502 did not address the issue of the admission of extrinsic evidence other than a postmark or on the repeal of the common law "mailbox rule."\(^\text{136}\) Unless the Congress or the U.S. Supreme Court decides to squarely address this issue the split in authority will continue, leaving the taxpayer at the mercy of his geographic location.

V. RESOLUTIONS

Although the Carroll court felt bound by Sixth Circuit precedent to uphold the IRS' "irrebuttable the presumption of nondelivery"\(^\text{137}\) interpretation of I.R.C. §7502, it also recognized the inequity of the result.\(^\text{138}\) The Supreme Court may finally agree to consider issue,\(^\text{139}\) or Congress may rewrite § 7502 to clarify the


\(^\text{138}\) Carroll v. Commissioner, 71 F. 3d, 1233 (6th Cir. 1995). The Court stated "[i]f the Carrolls] had been residents of any state other than Tennessee, Kentucky, Ohio, Michigan, Connecticut, New York, or Vermont, the Tax Court would have allowed them to invoke the presumption of delivery and would have decided this case in their favor. Because the Carrolls live in Tennessee, however, the presumption of delivery does not work for them. Having failed to use registered or certified mail when they sent the Form 2553 to the IRS, the Carrolls must pay an additional $22,000 in taxes." Id

\(^\text{139}\) The legal tool of statutory interpretation has garnered much attention since the appointment of Justice Antonin Scalia to the Supreme Court. Deborah A. Geier, Commentary: Textualism and Tax Cases, 66 Temp. L. Rev. 445, 447 (1993) (examining Scalia's brand of "new textualism" and hypothesizing that he may not summarily defer to the IRS' interpretation of a statute because his style of interpretation relies on the common meaning of words and does not include selecting a result first and then justifying it with text outside of the statute). Ms. Geier believes that a uniform approach to statutory interpretation is imprudent because there are times when a textualist, originalist or dynamic approach may be warranted to reach an equitable result. Id at 488. But see Carlos E. Gonzalez, Reinterpreting Statutory Interpretation, 74 N.C. L. REV., 585, 588 (1996) (arguing that legal scholars have neglected the field of statutory interpretation and that recent Supreme Court decisions reveal a lack of a uniform theory of interpretation).
One Commentator believes the most expeditious solution would be for the IRS and the Tax Court to issue regulations that would fairly balance the court's evidentiary burdens against the unfair burdens of the taxpayers.

A. Recommendations for an Equitable Evidentiary Standard

In order to develop an evidentiary standard that would equalize these burdens, I.R.C. § 7502(c)(1)(A) should be examined in conjunction with the common-law rules to resolve the ambiguity. These common-law readings range from the "restrictive to the expansive." The Wood court's restrictive interpretation of that section required near-definitive proof of a postmark in order to invoke the common-law presumption of delivery. An expansive interpretation of that section would interpolate the common-law presumption of delivery automatically upon presentation of a registered mail receipt, leaving the courts to develop an evidentiary standard concerning the credibility of other extrinsic evidence.

So what kind of extrinsic evidence is credible enough? It has already been stated that more than the taxpayer's naked assertion that his document was mailed should be required. The facts and circumstances of each case must be examined. Sufficient corroborating evidence could include: testimony from a third-party confirming the mailing.

140. Congress could amend I.R.C. § 7502 to add a new subsection specifically addressing the taxpayer's evidentiary burdens. See, e.g. I.R.C. § 534 (1994) which addresses the burden of proof on a corporation that allegedly has accumulated an improper surplus.

141. The IRS's power to issue interpretive regulations stems from I.R.C. § 7805(a)(1994) where Congress directs the Treasury Department to "prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to the internal revenue." The Tax Court's authority to promulgate rules of practice and procedure stems from I.R.C. § 7453 (1994).

142. Ryesky, supra note 6 at 407-408 (encouraging the IRS and the Tax Court to take the "initiative to issue regulations" to address the issue in order to circumvent the need for Supreme Court review).


144. Id.

145. Wood, 92 T.C. 793, 797.

146. Bamonte, supra note 143 at 155.


148. Wood, 92 T.C. 793 (postal employee who applied the postmark); Anderson, 966 F. 2d at 487 (disinterested witness who saw taxpayer enter and leave post office).

149. Lee Brick and Tile, at 414.

150. Bamonte, supra note 143 at 156. Ironically the IRS has been allowed to prove a certified mailing with extrinsic evidence of its own mailing procedures, a standard they would not allow a taxpayer to follow even if they had credible evidence of a regular pattern of business conduct. Ryesky, supra note 6, at 403.

151. LeFebre V. Commissioner, 830 F. 2d 417, 419 (1st Cir. 1987); Taylor v. Commissioner, 771 F. 2d 478, 479-80 (11th Cir. 1985).
receipt by other authorities of other documents that rely on IRS requirements,\textsuperscript{149} or intimations that the IRS did not follow its own recordkeeping procedures.\textsuperscript{150}

Other refinements may include differentiating between taxpayer status or type of document being filed. For example, the most unjust results appear to occur when a taxpayer is assessed penalties because his tax return was lost in the mail. Where the taxpayer is appealing an IRS deficiency finding in Tax Court, however, demanding stringent evidence of a postmark may be considered just one of many procedural requirements.\textsuperscript{151} Also, the level of sophistication of the taxpayer,\textsuperscript{152} or of the return\textsuperscript{153} could be taken into account.

B. Existing Tools Within the I.R.C.

As mentioned previously, taxpayers in circumstances like those of Carroll have unsuccessfully attempted to abate penalties and interest for failure to timely file tax returns by invoking I.R.C. § 6651(a)(2) "reasonable cause" relief.\textsuperscript{154} Perhaps the IRS could broaden the circumstances evoking relief under this section to include the case where a taxpayer could produce credible evidence that his tax document was postmarked, but through no fault of his own, it was never received by the IRS.\textsuperscript{155} Moreover, I.R.C. § 6404 allows the IRS to abate penalties for their own errors and delays.\textsuperscript{156} This section could amel-
iorate the harsh results for taxpayers whose returns are not timely filed due to mishandling by the IRS. Finally, the doctrine of substantial compliance [similar to substantial performance in contract law] has been developed in tax law to avoid the pitfalls associated with making tax elections. 157

VI. CONCLUSION

Due to the enactment of an ambiguously-worded statute, the federal circuit courts of appeals are divided on the issue of what evidence may be shown to prove timely filing of tax documents. Carroll is just one of the latest cases supporting the minority’s narrow interpretation of I.R.C. § 7502. Even though the Sixth Circuit felt bound by clear precedent to uphold its position, the court’s decision exhibited overt remorse for the plight of taxpayers who used regular, U.S. mail and whose document was lost due to no fault of their own.

Although the language of §7502 is unclear, the Sixth Circuit’s narrow interpretation in Carroll is inconsistent with the plain meaning of that section, which if read as a whole, does not list registered or certified mail as a requirement for application of relief for the taxpayer.

Also, the court’s decision is inconsistent with the purpose of § 7502. The section was enacted to treat all taxpayers uniformly by providing relief from the inequities in the mail resulting from their respective geographic locations.

Until Congress clarifies the ambiguous language of §7502 or the U.S. Supreme Court provides the definitive interpretation of the statute, the split in authority between the Federal Circuit Courts of Appeal will persist. Those taxpayers residing in the second and sixth circuits will continue to suffer the burden of proof if a return is lost and the taxpayer cannot produce a receipt for registered or certified mail. Ironically, these taxpayers will continue to be victims of their own geography- just the dilemma §7502 was enacted to resolve.

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compliance doctrine Cf. I.R.C. § 2032A (d)(3)(B) (1994) which includes substantial compliance language allowing a taxpayer reasonable period of time (not exceeding 90 days) after notification of deficient filing for correction.