

Pursuant to Tax Court Rule 50(f), orders shall not be treated as precedent, except as otherwise provided.

UNITED STATES TAX COURT  
WASHINGTON, DC 20217

PA

KIMBERLY WARREN & LESLIE WARREN, )  
 )  
 Petitioners, )  
 )  
 v. ) Docket No. 21532-13.  
 )  
 COMMISSIONER OF INTERNAL REVENUE, )  
 )  
 Respondent )

**ORDER OF DISMISSAL FOR LACK OF JURISDICTION**

This case, seeking redetermination of a deficiency of tax, is scheduled to be tried at the Court’s session in Columbia, South Carolina, commencing on September 8, 2014. However, the case is now before the Court on respondent’s Motion to Dismiss for Lack of Jurisdiction, filed November 14, 2013. The petition was filed untimely, and we will grant the motion.

Background

On June 3, 2013, respondent sent to petitioners Kimberly Warren and Leslie Warren, by certified mail, notices of deficiency pursuant to 26 U.S.C. § 6212(a), determining a deficiency in Kimberly Warren’s 2009 and 2010 income tax, and Leslie Warren’s 2010 income tax, plus additions to tax and penalties for both petitioners. The deadline of “September 3, 2013” was printed on the notice of deficiency as the “Last Date to Petition Tax Court”.

The Warrens mailed to this Court a petition that bears a signature date of September 3, 2013 (the last day for filing). The petition, like the notice of deficiency attached to it, shows a Tennessee address for the Warrens, and we infer that they reside in that State.

**SERVED Aug 22 2014**

The Warrens allege, and we assume, that they duly deposited their petition into the U.S. Mail on September 3 and that the subsequent delay in the delivery of the petition must therefore be attributable to the handling and processing of the petition.

The petition was received by the Court on September 16, 2013--thirteen calendar days after the due date. However, the envelope bearing petitioners' petition does not bear any postmark.

In sum, the petition was due September 3, 2013, was delivered to the Court by U.S. Mail, and was received by the Court, without any postmark, on September 16, 2013. Respondent therefore moved the Court to dismiss the petition for lack of jurisdiction.

### Discussion

Pursuant to section 6213(a), petitioners' petition challenging the determinations was due to be "file[d]" in this Court "[w]ithin 90 days ... after the notice of deficiency ... is mailed"--i.e., no later than Tuesday, September 3, 2013. The Warrens' petition did not arrive by that date. However, under section 7502, when a petition is delivered by mail after the due date, "the date of the United States postmark ... shall be deemed to be the date of the delivery".

The Warrens argue that timely mailing is timely filing, and that they should not be responsible for the untimely delivery of the petition, because they dated it September 3, 2013, and posted it at the local post office with proper postage on that date. Petitioners further argue that they are not responsible for any delay in the delivery nor for the lack of a postmark on their envelope. Finally, petitioners argue that section 6213(a) or section 7502 does not require the petition to be filed in this Court within the 90 day statutory period.

Contrary to petitioners' argument, section 6213(a) does require that, for a petition to be timely it must be filed within 90 days of the date of the statutory notice of deficiency. Section 7502(a) does create a "mailbox rule" that allows filing to be accomplished by mailing, but it provides that if a document required to be filed within a prescribed time period is delivered after the prescribed time period, the date of the postmark is treated as the date of delivery. This rule does not help the Warrens, since their envelope was not postmarked. Additionally, section 7502(c)(1) provides that the postmark date for a document sent via registered mail or certified mail is prima facie evidence of delivery of the

document, and that in the case of registered mail, the date of registration shall be deemed the postmark date. However, the Warrens used regular mail, not certified or registered mail, so this rule likewise does not help them. In instances in which a document was shown to be mailed but the envelope is missing, this Court has allowed a party to submit evidence to prove the date of the now-missing postmark. See Estate of Wood v. Commissioner, 92 T.C. 793 (1989), aff'd, 909 F.2d 1155 (8<sup>th</sup> Cir. 1990). But in this case, the envelope and postmark are not missing; we have the envelope, and it bears no postmark.

This Court has previously held, more permissively, that the “mailbox rule” of section 7502(a) is, in effect, a safe harbor and that a taxpayer can otherwise show timely filing without a postmark merely by proving that he really did mail the document by the due date, see Sylvan v. Commissioner, 65 T.C. 548, 553-554 (1975); and some other courts have followed this view, see, e.g., Curry v. Commissioner, 571 F.2d 1306, 1309 (4<sup>th</sup> Cir. 1978). However, because the Warrens reside in Tennessee, an appeal of this case would lie in the United States Court of Appeals for the Sixth Circuit, see 26 U.S.C. sec. 7482(b)(1)(A); 28 U.S.C. sec. 41; and we are therefore bound in this case to apply the law as interpreted by that Circuit, see Golsen v. Commissioner, 54 T.C. 742, 756-757 (1970), aff'd on other grounds, 445 F.2d 985 (10<sup>th</sup> Cir. 1971).

The Sixth Circuit has held “that the only exceptions to the physical delivery rule for the filing of tax returns are contained in section 7502”, Surowka v. United States, 909 F.2d 148, 150 (6<sup>th</sup> Cir.1990); see also Deutsch v. Commissioner, 599 F.2d 44, 46 (2<sup>d</sup> Cir.1979). Thus, in the Sixth Circuit “only a taxpayer who can produce a postmark ... or who used registered or certified mail ... can obtain the benefits of the presumption that material mailed on time has been received on time.” Schentur v. United States, 4 F.3d 994, 1993 WL 330640 at \*6 (6<sup>th</sup> Cir. 1993) (Nelson, J., concurring) (internal citations omitted).

Similarly, the Sixth Circuit has consistently rejected taxpayers’ attempts to introduce extrinsic evidence to establish that a document was timely filed. See Stocker v. United States, 705 F.3d 225, 234 (6<sup>th</sup> Cir. 2013) (rejecting taxpayer’s arguments that it should be permitted to introduce extrinsic evidence of timely mailing and holding that taxpayer’s method of proof was limited to the two exceptions to physical delivery stated in section 7502). See also Surowka, 909 F.2d at 150; Carroll v. Commissioner, 71 F.3d 1228, 1229 (6<sup>th</sup> Cir. 1995), aff'g T.C. Memo. 1994-229; Miller v. United States, 784 F.2d 728, 730 (6<sup>th</sup> Cir.1986). The opinion in Carroll, 71 F.3d at 1229, stated the Sixth Circuit law on this issue:

“In this circuit, a taxpayer who sends a document to the IRS by regular mail, as opposed to registered or certified mail, does so at his peril”.

The envelope containing the petition did not bear a postmark (as is required to meet the mailing-as-filing rule of section 7502(a)(1)), and the Warrens did not mail the petition via registered or certified mail (as is required to meet the deemed-postmark rule of section 7502(c)(1)(B)). Absent a postmark or petitioners' use of registered or certified mail, they are not entitled to a presumption of timely delivery. Sixth Circuit law precludes petitioners from introducing extrinsic evidence outside of section 7502 to demonstrate that the petition was timely filed. In short, the petition mailed on September 3, 2014 and received by this Court on September 16, 2013, was untimely filed because it did not bear a postmark and because it was not mailed using registered or certified mail.

We point out the following to the Warrens: Rule 162 permits a party to file a motion to vacate a decision within 30 days after the decision has been entered. If the Warrens wish to move the Court to reconsider this order (e.g., by presenting additional legal authorities, or by showing that they resided other than in the Sixth Circuit when they filed their petition), then they may appear at the calendar call in Columbia on September 8, 2014, and make an oral motion for the Court to vacate the decision. In the ordinary course this case would not be called (since it will have been dismissed), so if they intend to make such a motion, then they should arrive early on September 8 and should advise both the IRS counsel and the Court's trial clerk that they are there and wish to make a motion.

It is therefore

ORDERED that the Court's previous order of April 17, 2014 (setting respondent's motion to dismiss for a hearing) is hereby vacated. It is further

ORDERED that respondent's Motion to Dismiss for Lack of Jurisdiction, filed November 14, 2013, is granted, and this case is dismissed for lack of jurisdiction on the ground that the petition was not filed within the time prescribed by 26 U.S.C. §§ 6213(a).

**(Signed) David Gustafson  
Judge**

ENTERED: **AUG 22 2014**