

J.R.

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

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TIMOTHY PATRICK PEABODY & )  
NADINE PEABODY, )

Petitioners, )

v. )

COMMISSIONER OF INTERNAL )  
REVENUE, )

Respondent. )

Docket Nos. 3156-13,  
17507-14.

**ORDER**

Petitioners move the Court to dismiss Docket No. 17507-14<sup>1</sup> for lack of jurisdiction, alleging that the Internal Revenue Service’s statutory notice of deficiency for their 2009 taxable year was untimely issued to them under section 6501(a),<sup>2</sup> which generally requires that respondent assess the tax imposed (or send a notice of deficiency) within three years after a taxpayer files a return. As explained herein, we deny petitioners’ motion.

**Background**

On July 10, 2014, following an examination of petitioners’ joint Federal income tax return for 2009 (2009 return), the Internal Revenue Service (IRS) issued a notice of deficiency to petitioners, determining a deficiency of \$250,509

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<sup>1</sup>On December 16, 2014, the Court consolidated Docket No. 17507-14 and Docket No. 3156-13 for trial, briefing, and opinion. Petitioners do not challenge our jurisdiction over their petition in Docket No. 3156-13, which involves their 2010 taxable year. Hereinafter, all references to “this case” refer to Docket No. 17507-14.

<sup>2</sup>Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the year at issue, and all Rules references are to the Tax Court Rules of Practice and Procedure. Some monetary amounts are rounded to the nearest dollar.

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in their Federal income tax for 2009. In this same notice of deficiency, the IRS also determined an addition to tax pursuant to section 6651(a)(1) of \$62,605 and an accuracy-related penalty pursuant to section 6662(a) of \$50,102 for 2009. The adjustments are based on petitioners' failure to (1) report as income additional gross receipts from two businesses and (2) substantiate various claimed business expenses, and the denial of a net operating loss carryover because the loss was attributable solely to nonbusiness expenses.

Petitioners timely petitioned this Court for redetermination of the deficiency, the addition to tax, and the accuracy-related penalty. In their petition, along with broadly challenging respondent's determinations, petitioners alleged that "[t]he IRS agent's notice of audit findings included a statement that he was closing the case because the period of limitations was going to run on October 14, 2014", and that the agent made "grossly disproportionate findings of income and no corresponding expenses" to "punish" them "for not executing an extension for him to make his findings within 3 years of \* \* \* [their] filing date of 10/10/10."

On July 8, 2015, after the Court held a telephone conference with the parties to discuss the status of this case, respondent filed a status report. Therein, respondent contended that he is "confident" that the July 10, 2014, notice of deficiency was timely issued to petitioners. In support of that contention, respondent attached copies of (1) petitioners' "original filed" 2009 return and (2) the envelope in which they mailed that return.<sup>3</sup> The items of income and the deductions reported on this attached return accords with respondent's assertions in the July 10, 2014, notice of deficiency. The first page of the return has a stamp indicating that the IRS' Austin, Texas, Service Center received the return on October 31, 2011. The second page of the return has both petitioners' signatures, next to each of which appears to be the handwritten date October 13, 2010, but neither date is completely legible--in particular, the date for Mr. Peabody's signature appears to have been originally October 13, 2011, with the '1' scrawled over to appear as a '0'. Below their signatures in the "Paid Preparer's Use Only" section is typed the name and address of petitioners' paid preparer, E. Wayne Lytle, and the date October 18, 2011, but the signature line for the paid preparer is blank. Regarding the attached envelope in which petitioners mailed the return,

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<sup>3</sup>Respondent also attached a copy of the July 10, 2014, notice of deficiency to his status report.

that envelope bears the address “IRS, PO Box 149338, Austin, Texas 78714-9338” with a postmark of October 28, 2011.

On August 3, 2015, in response to respondent’s status report, petitioners filed a motion to dismiss for lack of jurisdiction. Therein, petitioners disputed the date respondent contends they mailed their 2009 return, thus alleging that the July 10, 2014, notice of deficiency was untimely and that this case should be dismissed. According to petitioners, Mr. Lytle prepared and filed an extension of time to file their 2009 return on April 14, 2010, and that the return was completed by him on October 15, 2010. They further asserted that they picked up their completed 2009 return from Mr. Lytle on October 15, 2010, and then signed and mailed it that same day, using a pre-addressed stamped envelope from him, to the IRS’ Fresno, California, Service Center. In support of their assertions, petitioners attached in pertinent part (1) copies of an email, an invoice, and filing instructions from Mr. Lytle, (2) a copy of the first two pages of what they contend is their 2009 return that they timely filed, (3) a sworn declaration of Mr. Peabody, and (4) a sworn declaration of Mr. Lytle.

The email from Mr. Lytle is dated October 15, 2010, and is addressed to “peabody law”, i.e., presumably to Mr. Peabody, who is an attorney, at his law practice. The email has the subject line “09 - Please let me know if it is a go[]” and indicates there is an attached document titled “PEABODY1.PDF” (which document petitioners have not included with their motion). The text of the email simply states “Thanks so much.” The invoice, also dated October 15, 2010, is to petitioners for “Services Rendered for Preparation of 2009 Federal and State Tax Returns” in the amount of \$265. The invoice is stamped “PAID 12/16/2010”. The filing instructions are addressed to petitioners but are undated and direct in pertinent part that “the [2009] return should be signed and dated by” them and “mail[ed] as soon as possible to” respondent’s Fresno, California, Service Center.

Regarding the two pages of the 2009 return that petitioners attached to their motion, the items of income, taxes and credits, payments, and refund reflected on those pages match these same items reflected on petitioners’ 2009 return that respondent attached to his status report. On the second page, it has both petitioners’ signatures but the handwritten date next to each signature clearly is October 15, 2010. Additionally, below their signatures in the “Paid Preparer’s Use Only” section, Mr. Lytle’s name and address, together with the date October 15, 2010, are typed but Mr. Lytle has not signed there.

Mr. Peabody's declaration reiterates that petitioners mailed their 2009 return (as prepared by Mr. Lytle) to the IRS' Fresno, California, Service Center on October 15, 2010, using a pre-addressed stamped envelope Mr. Lytle provided to them. The declaration also attempts to provide context for the two aforementioned documents respondent attached to his status report. The declaration recites that in 2011 they mailed to the IRS' Austin, Texas, Service Center a second Federal income tax return for 2009 in response to a letter from the IRS stating that they "owed money from 2009" and requesting that they provide a copy of their 2009 return. The declaration further recites that the discrepant dates on petitioners' 2009 return attached to respondent's status report support petitioners' account of what happened, i.e., that this return was a copy requested from Mr. Lytle and that he duly printed for petitioners on October 18, 2011. The declaration does not address the discrepancies between the dates of petitioners' signatures on the two returns.

Consistent with Mr. Peabody's declaration, the declaration of Mr. Lytle recites that (1) he prepared and filed an extension of time to file petitioners' 2009 return on April 14, 2010; (2) he completed the preparation of that return on October 15, 2010, and later that day petitioners picked up the return and mailed it to the IRS; and (3) he presented a bill for those services to petitioners, which they paid in December 2010. The declaration does not address the circumstances regarding the two aforementioned documents respondent attached to his status report.

On August 27, 2015, respondent filed an objection to petitioners' motion, contending that petitioners have failed to provide sufficient evidence to show that they filed their 2009 return before October 31, 2011 and that respondent has provided overwhelming evidence that petitioners' 2009 return was filed on October 31, 2011. In support of his contentions, respondent attached (1) a sworn declaration of Revenue Agent Daniel Marinoff, who conducted the examination of petitioners' 2009 return, (2) a certified copy of Form 4340, Certificate of Assessments, Payments, and Other Specified Matters, for petitioners' 2009 taxable year, and (3) the two aforementioned documents he attached to his status report.

The declaration of Mr. Marinoff recites in pertinent part the following. Mr. Marinoff was the only Revenue Agent assigned to conduct the examination of petitioners' 2009 return. Mr. Marinoff commenced that examination on August 15, 2012, and during the examination he requested a copy of petitioners' 2009 return. In early 2013 Mr. Peabody provided to Mr. Marinoff a copy of petitioners'

2009 return. Mr. Marinoff ended the examination in June 2014 and requested that a notice of deficiency be sent to petitioners for 2009. Mr. Marinoff notified petitioners that, according to IRS records, their 2009 return was filed on October 31, 2011. Petitioners did not provide any information to him proving that their 2009 return was filed in 2010.

The Form 4340 shows that on April 15, 2010, petitioners executed an extension of time until October 15, 2010, to file their 2009 return and that this return was not filed until October 31, 2011. The form further shows that on November 28, 2011, the tax petitioners reported on this return was assessed and the refund they also reported on the return was issued to them. The form also shows that on July 25 and September 19, 2011, delinquency notices were sent to petitioners.

On September 9, 2015, petitioners filed a reply to respondent's objection, contending that respondent "cannot disprove" that they mailed their 2009 return in October 2010. According to petitioners, the documents offered by respondent "are erroneous and self-serving" and the overwhelming evidence shows that their 2009 return was filed in October 2010. With their reply, petitioners included in pertinent part another declaration of Mr. Peabody, as well as a copy of an unsigned letter from Mr. Peabody to Mr. Marinoff dated March 24, 2014. This declaration recounts how Mr. Peabody was told during the examination of petitioners' 2009 return that he may have been the victim of identity theft as petitioners' Federal income tax returns for 2009, 2011, and 2012 had been rejected due to previously filed returns by unknown persons. The declaration (and the March 24, 2014, letter) also recites that Mr. Marinoff had requested petitioners to execute an extension of the period of limitations during the examination but since this request came in February 2014, at which time they believed the period of limitations had already expired, they duly refused to execute the extension and asked that no further activities occur with respect to their 2009 return.

### Discussion

The Tax Court, like all Federal courts, is a court of limited jurisdiction; our jurisdiction and its extent are explicitly provided by statute. Sec. 7442; Naftel v. Commissioner, 85 T.C. 527, 529 (1985); Breman v. Commissioner, 66 T.C. 61, 66 (1976). However, we have jurisdiction in any case to determine whether we have jurisdiction over that case. Kluger v. Commissioner, 83 T.C. 309, 314 (1984).

This Court's jurisdiction to redetermine a deficiency in Federal income tax depends on the issuance of a valid notice of deficiency and a timely filed petition. See secs. 6211-6213; Rule 13(a), (c). Under section 6501(a), the IRS generally is required to assess the amount of tax imposed (or send a notice of deficiency) within three years after a Federal income tax return is filed, i.e., the three-year period of limitations.<sup>4</sup> The expiration of the three-year period of limitations is an affirmative defense, and the party raising it must specifically plead it and carry the burden of proving its applicability. Rules 39, 142(a). To establish this defense, taxpayers must make a prima facie case establishing the filing of their returns, the expiration of the statutory period of limitations, and receipt or mailing of the notice of deficiency after the running of the limitations period. Coleman v. Commissioner, 94 T.C. 82, 89 (1990); Robinson v. Commissioner, 57 T.C. 735, 737 (1972).

Petitioners suggest in their petition and specifically contend in their motion to dismiss (as well as in their reply to respondent's objection to their motion) that they filed their 2009 return in October 2010 and that thus the three-year period of limitations expired in October 2013, making the July 10, 2014, notice of deficiency untimely (and invalid).

Generally, a joint Federal income tax return by a husband and wife must be filed on or before the 15th day of April following the close of the calendar year. Sec. 6072(a). The IRS may grant an extension of time to file such a return, but the extension may not be longer than six months. Sec. 6081(a). A return generally is legally "filed" when "it is delivered to the proper official and by him received and filed." United States v. Lombardo, 241 U.S. 73, 76 (1916); see Gray v. Commissioner, 16 T.C. 262, 266 (1951). Section 7502, enacted in 1954, provides an exception to that general rule for a return placed in the mail on or before the date prescribed for filing (including extensions) in an envelope which is properly

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<sup>4</sup>Sec. 6501(e)(1)(A) extends the three-year period of limitations to six years "[i]f the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return", i.e., the six-year period of limitations. Respondent appears to only contend that the July 10, 2014, notice of deficiency was sent to petitioners prior to the expiration of the three-year period of limitations. In the light of our resolution of petitioners' motion, we see no need to address whether the six-year period of limitations is applicable.

addressed to the appropriate IRS office with prepaid postage and the return is delivered after the date it was due. Under section 7502(a)(1), the postmark date is considered the delivery, i.e., filing, date. See Hotel Equities Corp. v. Commissioner, 65 T.C. 528, 531 (1975); see also Sorrentino v. IRS, 383 F.3d 1187, 1193-1194 (10th Cir. 2004) (discussing evidence necessary to invoke section 7502). However, this exception does not apply to a delinquent return; a delinquent return is filed when it is received. The party seeking to establish that section 7502 applies bears the burden of producing evidence sufficient to establish that the document was mailed before the deadline (or the end of the filing period); self-serving testimony alone is insufficient to carry this burden. See Sylvan v. Commissioner, 65 T.C. 548, 553 (1975); Huff v. Commissioner, T.C. Memo. 2003-256, slip op. at 5-8; cf. Anderson v. Commissioner, 966 F.2d 487, 491 (9th Cir. 1992) (finding that section 7502 was not exclusive means of proving timely mailing and filing of tax return).

Petitioners have that burden and we find that they have not carried it. Even if we are to accept Mr. Peabody's and Mr. Lytle's statements in their declarations that petitioners' 2009 return was prepared and ready to be mailed on October 15, 2010, petitioners have not produced any evidence other than Mr. Peabody's own self-serving recollection that petitioners' 2009 return was actually mailed on that date.<sup>5</sup>

We also note that there are discrepancies between the allegations set forth in petitioners' petition and in their motion papers. The 2009 return attached to respondent's status report and his objection to petitioners' motion shows that petitioners apparently signed their 2009 return on October 13, 2010. This date, however, does not correspond with any of their alleged filing dates for their 2009 return. In their petition, they allege that their 2009 return was filed on October 10, 2010, while in their motion papers they assert that their 2009 return was reviewed

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<sup>5</sup>And we find Mr. Lytle's statement in his declaration that Mr. Peabody mailed the 2009 return to the IRS also self-serving (and thus lacking in credibility) because he has no personal knowledge when mailing actually occurred, whether it be on October 15, 2010, or even some time during 2010.

and filed on October 15, 2010, attaching a 2009 return that shows petitioners signed this return on that date.<sup>6</sup>

Respondent, on the other hand, has produced a certified Form 4340 showing that petitioners had until October 15, 2010, to file their 2009 return but that their 2009 return was not received and filed until October 31, 2011. The IRS uses a Form 4340 to provide a summary of a taxpayer's account for a given year; it "simply is a literal transcript, generated on a specific date, containing tax data from an IRS master file associated with a particular taxpayer." Morton v. Commissioner, T.C. Memo. 2016-227, at \*9 (citations omitted). Such tax data included in the form is "the record of assessments made against the taxpayer, the record of payments or credits applied to the taxpayer's account, the record of tax returns filed (if any), dates of notices and demands for payment, as well as dates of filing Notices of Federal Tax Lien." Rodgers v. United States, 1998 WL 782587, at 2 n.2 (D. Nev. Sept. 25, 1998). Forms 4340 are "highly probative, and are sufficient, in the absence of contrary evidence, to establish that the notices and assessments were properly made", i.e., that the IRS has complied with its statutory duties. United States v. Zolla, 724 F.2d 808, 810 (9th Cir. 1984); see also Roberts v. Commissioner, 329 F.3d 1224, 1228 (11th Cir. 2003); Hughes v. United States, 953 F.2d 531, 535 (9th Cir. 1992). Thus, the date shown on a Form 4340 of a taxpayer's return filing date is presumed correct.

Petitioners have not produced credible evidence to overcome the presumptive correctness as reflected on the Form 4340 for petitioners' 2009

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<sup>6</sup>Additionally, petitioners' statement that Mr. Peabody was advised he may have been the victim of identity theft (which, in turn, caused their returns for 2009, 2011, and 2012 to be rejected) does not bolster their position; to the contrary, it bolsters respondent's position since a rejected return is treated by the IRS as if it were never filed at all due to the fact that the IRS has determined that the submission is defective and unacceptable for whatever reason, see Beard v. Commissioner, 82 T.C. 766, 775-777 (1984), aff'd, 793 F.2d 139 (6th Cir. 1986), including that the return has already been filed (albeit fraudulently) by a individual who has stolen the identity of the taxpayer. If Mr. Peabody was indeed the victim of identity theft, the Court encourages respondent to reconsider whether the section 6651(a)(1) addition to tax should even be asserted against petitioners.

taxable year that petitioners' 2009 return was filed on October 31, 2011.<sup>7</sup> Accordingly, we find that petitioners filed their 2009 return on October 31, 2011, and, as a result, the July 10, 2014, notice of deficiency issued to them for 2009 was timely.

In the light of the foregoing and upon due consideration, it is hereby

ORDERED that petitioners' Motion to Dismiss for Lack of Jurisdiction, filed August 3, 2015, in Docket No. 17507-14, is denied. It is further

ORDERED that this Division of the Court no longer retains jurisdiction of Docket No. 17507-14 and Docket No. 3156-13, and the cases are restored to the Court's general docket and will be calendared for trial in due course.

**(Signed) Tamara W. Ashford  
Judge**

Dated: Washington, D.C.  
May 3, 2018

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<sup>7</sup>The Form 4340 also reflects that the IRS sent petitioners two delinquency notices--one dated July 25, 2011, and the other dated September 9, 2011--and that no other IRS correspondence was sent to petitioners. These two notices were sent before petitioners' 2009 examination by Mr. Marinoff commenced. A delinquency notice is sent by the IRS to a taxpayer to notify him that his return is overdue. See Dickow v. United States, 654 F.3d 144, 147 (1st Cir. 2011). Thus, it seems that the 2011 IRS letter that is referenced in the declaration of Mr. Peabody that is attached to petitioners' motion was one of the 2011 delinquency notices. Consequently, a fair inference can be made that petitioners knew they had failed to file their 2009 return, and that only after the delinquency notices were sent to and received by them (a fact they do not dispute in their filings) did they file their 2009 return.