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1545-2209

Sarah Hall Ingram,
Deputy Commissioner for Services and Enforcement.

Approved August 12, 2011.

Emily S. McMahon,
Acting Assistant Secretary of the Treasury (Tax Policy).

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Section 6651.—Failure to File Tax Return or To Pay Tax

Notice 2011-76 provides limited penalty relief to recipients who sold property in 2010 that they acquired from a decedent whose executor elected for the provisions of section 1022 of the Internal Revenue Code to apply to such property. See Notice 2011-76, page 479.

Section 6662.—Imposition of Accuracy-Related Penalty on Underpayments

Notice 2011-76 provides limited penalty relief to recipients who sold property in 2010 that they acquired from a decedent whose executor elected for the provisions of section 1022 of the Internal Revenue Code to apply to such property. See Notice 2011-76, page 479.

Section 7502.—Timely Mailing Treated as Timely Filing and Paying

26 CFR 301.7502-1: *Timely mailing of documents and payments treated as timely filing and paying.*

T.D. 9543

Timely Mailing Treated as Timely Filing

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains regulations amending a Treasury Regulation to provide guidance as to the only ways to establish *prima facie* evidence of delivery of documents that have a filing deadline prescribed by the internal revenue laws, absent direct proof of actual delivery. The regulations provide that the proper use of registered or certified mail, or a service of a private delivery service (PDS) designated under criteria established by the IRS, will constitute *prima facie* evidence of delivery. The regulations are necessary to provide greater certainty on this issue and to provide specific guidance. The regulations affect taxpayers who mail Federal tax documents to the Internal Revenue Service or the United States Tax Court.

DATES: Effective Date: These regulations are effective on August 23, 2011.

Applicability Date: These regulations apply to any payment or document mailed and delivered in accordance with the requirements of this section in an envelope bearing a postmark dated after September 21, 2004.

FOR FURTHER INFORMATION CONTACT: Steven Karon, (202) 622-4570 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545-1899. The collection of information in these final regulations is in §301.7502-1. This information is required in order for taxpayers to be able to establish the postmark date and *prima facie* evidence of delivery when using certified or registered mail.

An agency may not conduct or sponsor, and a person is not required to respond to, a

collection of information unless it displays a valid control number.

Books or records relating to a collection of information must be retained as long as their contents might become material in the administration of any internal revenue law. Generally, tax returns and return information are confidential, as required by 26 U.S.C. 6103.

Background

This document contains regulations amending 26 CFR part 301 under section 7502 of the Internal Revenue Code (Code). Section 7502(a) first appeared as part of the recodification of the Code in 1954. Section 7502(a) is commonly known as the timely mailing/timely filing rule. Section 301.7502-1 of the Procedure and Administration Regulations provides rules for taxpayers to follow to qualify for favorable treatment under section 7502. There is a conflict among the Federal circuit courts of appeal as to whether the provisions in section 7502 provide the exclusive means to establish *prima facie* evidence of delivery of a document to the IRS or the United States Tax Court. Specifically, courts have reached differing conclusions regarding whether a taxpayer may raise a presumption of delivery of Federal tax documents to the IRS and the United States Tax Court only in situations in which the taxpayer uses registered or certified mail.

A notice of proposed rulemaking (REG-138176-02, 2004-2 C.B. 710) was published in the **Federal Register** (69 FR 56377) on September 21, 2004. The proposed regulations clarified that, other than direct proof of actual delivery, the exclusive means to establish *prima facie* evidence of delivery of Federal tax documents to the IRS and the United States Tax Court is to prove the use of registered or certified mail. Under section 7502(f)(3), the IRS may extend to a service provided by a PDS a rule similar to the *prima facie* evidence of delivery rule applicable to certified and registered

mail. Prior to the publication of the notice of proposed rulemaking, the IRS had not received any comments or suggestions for extending this rule, even though the IRS and the Treasury Department previously requested comments in a prior notice of proposed rulemaking under section 7502. See **Federal Register**, 64 FR 2606 (January 15, 1999). Because the IRS was clarifying what documentation it will accept as proof of delivery, additional comments were sought on this issue. Accordingly, in the notice of proposed rulemaking, the IRS and the Treasury Department encouraged the public to make comments regarding whether the *prima facie* evidence of delivery rule should be extended to a service provided by a PDS.

Eighteen written comments were received in response to the notice of proposed rulemaking. Three commenters requested a public hearing. A notice of public hearing on proposed rulemaking was published in the **Federal Register** (69 FR 68282) on November 24, 2004. A public hearing was held on January 11, 2005. Three commenters appeared at the public hearing and commented on the notice of proposed rulemaking.

All comments were considered and are available for public inspection upon request. After consideration of the written comments and the comments provided at the public hearing, the proposed regulations under section 7502 are adopted as revised by this Treasury Decision. The public comments, public hearing, and the revisions are discussed in this preamble.

Summary of Comments and Explanation of Provisions

Four commenters expressed concern that the proposed regulations limited the proof to satisfy the timely mailing/timely filing rule of section 7502(a) rather than the *prima facie* evidence of delivery rule of section 7502(c). These final regulations do not limit the use of U.S. Mail, other delivery options offered by the United States Postal Service (USPS), or a PDS for purposes of satisfying the timely mailing/timely filing rule of section 7502(a). Instead, these final regulations clarify the *prima facie* evidence of delivery rule of section 7502(c).

Seven commenters suggested that the proposed regulations provide that evidence of proper use of a service offered by a PDS should establish *prima facie* evidence of delivery of Federal tax documents to the IRS and the United States Tax Court. Seven commenters observed that PDSs offered services similar to certified and registered mail, and that the services offered by the PDSs were as reliable as registered mail and certified mail. Two commenters noted that PDSs generally provide a greater level of detail with respect to tracking and delivery information than certified and registered mail for purposes of establishing proof of delivery. Three commenters expressed concern that it is inconsistent to permit individuals to rely upon PDSs to satisfy the timely mailing/timely filing rule of section 7502(a), but not for section 7502(c). One commentator observed that section 7502(f)(3) requires that the Treasury Secretary and the IRS consider PDS alternatives as substitutes for certified and registered mail.

After considering comments received on the proposed regulations, these final regulations provide that the Treasury Department and IRS will issue guidance that will establish the criteria to be used to designate PDSs for purposes of the *prima facie* evidence of delivery rule. Cf. Notice 2004-83, 2004-2 C.B. 1030 (listing PDSs that the Secretary has designated pursuant to section 7502(f)(2)) (see §601.601(d)(2)(ii)(b) of this chapter); Rev. Proc. 97-19, 1997-1 C.B. 644 (providing the criteria to determine whether a PDS qualifies as a designated private delivery service under section 7502(f) and the procedures under which a PDS can apply to become a designated PDS) (see §601.601(d)(2)(ii)(b) of this chapter). Thus, these final regulations provide that, other than direct proof of actual delivery, proof of proper use of registered or certified mail (registered or certified mail sender's receipt), and proof of proper use of a PDS duly designated under criteria established by the IRS, are the sole means to establish *prima facie* evidence of delivery of documents that have a filing deadline prescribed by the internal revenue laws.

The existing regulations under section 7502 are being reorganized. Section 301.7502-1(e) will still be entitled "Delivery," but will now focus on the requirement for actual delivery or the use of one

of the means discussed above to establish a presumption of delivery. Former paragraph (e)(2) and the example in paragraph (e)(3) are moved to paragraph (b)(2) to consolidate the discussion of the effect of section 7502 on certain claims for refund.

Seven commenters suggested that the proposed regulations should permit additional services offered by the USPS to establish *prima facie* evidence of delivery of Federal tax documents to the IRS and the United States Tax Court. Commenters recommended that the following USPS services should be permitted to establish *prima facie* evidence of delivery: Priority Mail, Certificate of Mailing, Express Mail Receipt, Delivery Confirmation Receipt, and Signature Confirmation.

Section 7502 does not authorize the Treasury Department or the IRS to adopt a rule that would permit USPS services in addition to certified and registered mail to establish *prima facie* evidence of delivery. Congress has been clear when it intended to change section 7502 to allow proof of delivery by other means. In 1958, Congress amended section 7502 to provide the IRS with the authority to treat certified mail the same as registered mail. See Technical Amendments Act of 1958, Public Law No. 85-866 (72 Stat. 1606 (1958)). Congress also amended section 7502 to authorize the IRS to publish rules providing the extent to which a PDS is the equivalent of certified mail. See Taxpayer Bill of Rights 2, Public Law No. 104-168 (110 Stat. 1452 (1996)); Internal Revenue Service Restructuring and Reform Act of 1998, Public Law No. 105-206 (112 Stat. 685 (1998)). Similar legislation would be necessary to authorize the IRS to treat additional USPS services as *prima facie* evidence of delivery.

Two commenters expressed concern that certified and registered mail services are expensive and inconvenient in comparison to first class mail. These commenters suggested that regular first class mail should suffice to establish *prima facie* evidence of delivery. As described above, the *prima facie* evidence of delivery rule provides an exception to the actual delivery rule. Absent actual delivery, however, first class mail without additional services provides nothing, such as certified or registered mail receipt, to establish proof of delivery. Moreover, without legislative action, the Treasury Department and the

IRS cannot adopt regulations extending the *prima facie* evidence of delivery rule to first class mail.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations.

It is hereby certified that the collection of information contained in this regulation will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required. Although the collection of information in this Treasury decision affects a substantial number of small entities, the economic impact on these small entities is not substantial. If a small entity uses registered or certified mail to file a document with the IRS, the additional burden (filling out the appropriate United States Postal Service forms) over and above using regular mail is not substantial. Furthermore, the extra cost to use registered or certified mail is not substantial as certified mail costs only \$2.80 and registered mail can be used for as little as \$10.60. Finally, the added burden of retaining the certified or registered mail sender's receipt will be minimal as the receipt can be associated with the small entity's copy of the document that it filed with the IRS.

Pursuant to section 7805(f) of the Code, the proposed rule that preceded this Treasury decision was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

Drafting Information

The principal author of these regulations is Steven L. Karon of the Office of the Associate Chief Counsel, Procedure and Administration.

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Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 is amended by removing the entry for §301.7502-1T to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 301.7502-1 is amended by:

1. Revising paragraphs (b)(2) and (e).
2. Adding paragraphs (c)(3) and (g)(4).

The additions and revisions read as follows:

§301.7502-1 Timely mailing of documents and payments treated as timely filing and paying.

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(b) * * *

(2) *Claims for refund*—(i) *In general.*

In the case of certain taxes, a return may constitute a claim for credit or refund. Section 7502 is applicable to the determination of whether a claim for credit or refund is timely filed for purposes of section 6511(a) if the conditions of section 7502 are met, irrespective of whether the claim is also a return. For rules regarding claims for refund on late filed tax returns, see paragraph (f) of this section. Section 7502 is also applicable when a claim for credit or refund is delivered after the last day of the period specified in section 6511(b)(2)(A) or in any other corresponding provision of law relating to the limit on the amount of credit or refund that is allowable.

(ii) *Example.* The rules of paragraph (b)(2)(i) of this section are illustrated by the following example:

Example. (A) Taxpayer A, an individual, mailed his 2004 Form 1040, "U.S. Individual Income Tax Return," on May 10, 2005, but no tax was paid at that time because the tax liability disclosed by the return had been completely satisfied by the income tax that had been withheld on A's wages. On April 15, 2008, A mails, in accordance with the requirements of this section, a Form 1040X, "Amended U.S. Individual Income Tax Return," claiming a refund of a portion of the tax that had been paid through withholding during 2004. The date of the postmark on the envelope containing the claim for refund is April 15, 2008. The claim is received by the IRS on April 18, 2008.

(B) Under section 6511(a), A's claim for refund is timely if filed within three years from May 10, 2005, the date on which A's 2004 return was filed. As a result of the limitations of section 6511(b)(2)(A), if A's claim is not filed within three years after April 15, 2005, the date on which A is deemed under section 6513 to have paid his 2004 tax, A is not entitled to any refund. Because A's claim for refund is postmarked and mailed in accordance with the requirements of this section and is delivered after the last day of the period specified in section 6511(b)(2)(A), section 7502 is applicable and the claim is deemed to have been filed on April 15, 2008.

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(c) * * *

(3) *Private delivery services.* Under section 7502(f)(1), a service of a private delivery service (PDS) may be treated as an equivalent to United States mail for purposes of the postmark rule if the Commissioner determines that the service satisfies the conditions of section 7502(f)(2). Thus, the Commissioner may, in guidance published in the Internal Revenue Bulletin (see §601.601(d)(2)(ii)(b) of this chapter), prescribe procedures and additional rules to designate a service of a PDS for purposes of the postmark rule of section 7502(a).

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(e) *Delivery*—(1) *General rule.* Except as provided in section 7502(f) and paragraphs (c)(3) and (d) of this section, section 7502 is not applicable unless the document or payment is delivered by U.S. mail to the agency, officer, or office with which the document is required to be filed or to which payment is required to be made.

(2) *Exceptions to actual delivery*—(i) *Registered and certified mail.* In the case of a document (but not a payment) sent by registered or certified mail, proof that the document was properly registered or that a postmarked certified mail sender's receipt was properly issued and that the envelope was properly addressed to the agency, officer, or office constitutes *prima facie* evidence that the document was delivered to the agency, officer, or office. Other than direct proof of actual delivery, proof of proper use of registered or certified mail, and proof of proper use of a duly designated PDS as provided for by paragraph (e)(2)(ii) of this section, are the exclusive means to establish *prima facie* evidence of delivery of a document to the agency, officer, or office with which the document is required to be filed. No other evidence of a postmark or of mailing will be *prima facie*

evidence of delivery or raise a presumption that the document was delivered.

(ii) *Equivalents of registered and certified mail.* Under section 7502(f)(3), the Secretary may extend the *prima facie* evidence of delivery rule of section 7502(c)(1)(A) to a service of a designated PDS, which is substantially equivalent to United States registered or certified mail. Thus, the Commissioner may, in guidance published in the Internal Revenue Bulletin (see §601.601(d)(2)(ii)(b) of this chapter), prescribe procedures and additional

rules to designate a service of a PDS for purposes of demonstrating *prima facie* evidence of delivery of a document pursuant to section 7502(c).

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(g) * * *

(4) *Registered or certified mail as the means to prove delivery of a document.* Section 301.7502-1(e)(2) will apply to all documents mailed after September 21, 2004.

Steven T. Miller,
*Deputy Commissioner for
Services and Enforcement.*

Approved August 10, 2011.

Emily S. McMahon,
*Acting Assistant Secretary
(Tax Policy).*

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