
Folks:

Take-Away: Communicating with the IRS is never fun. Relying on the mail to effect those communications comes with other risks, including the IRS's position that it never received the communication.

Background: A topic that seems to come up each year around tax-time is when an income tax return is timely filed. The Tax Code contains a couple of sections with regard to when, and how, a tax return is timely filed, and it provides something of 'safe harbor' presumptions to protect individuals when they file their returns with the U.S. Treasury. An individual must, however, follow those rules in order to rely upon the needed presumption.

IRC 7502: This Tax Code section was adopted with the express purpose to offer an individual a sense of assurance when he/she utilizes the U.S. Postal Service to file their tax return, or any other important tax document or communication with the IRS. IRC 7502 provides a specific method that enables an individual to ensure that his/her tax documents have been filed with Treasury within the designated time period. This general rule is found at IRC 7502(a)(1), which provides:

“(a)(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 be.”

Forms of *Delivery*: While the IRC 7502 deemed *delivery* rule provides a level of protection to an individual who decides to use the U.S. Postal Service first class mail, it also carries with it some limitations: (i) the rule applies only if the tax return is effectively *delivered* to the IRS; (ii) the individual must be able to substantiate that *delivery*, typically by having the IRS locate the filed return or document; and (iii) it necessitates a postmark that bears a date that is no later than the final deadline for filing the return or the required document.

Delivery Options: If the individual wants to have both documentation of the postmark date and the presumption of actual delivery to the U.S. Treasury, the statute provides a couple of *delivery* solutions. IRC 7502(c) outlines one option explicitly (registered mail- IRC 7502(c)(1)) while it also offers two other options which the IRS possesses the authority to implement through its Regulations (certified mail and/or electronic filing- IRC 7502(c)(2).) Extensive Regulations outline the specific requirements and procedures to follow to qualify for the protection associated with each of these alternative methods of *delivery* to the Treasury. The Tax Code even provides yet another option, along with implementing Regulations, that allows an individual to utilize an approved private delivery system.

How these *delivery and filing* rules work were the focus of a recent federal Court of Appeals decision. Anyone who has dealt with the IRS in recent years will not be surprised that the runaround that poor taxpayer had to deal with and the nightmare it became dealing with the IRS. [Reading this court decision is like reading an Edgar Allen Poe horror story.]

Pond v. United States, Fourth Circuit Court of Appeals, Docket No. 22-1537 (May 26, 2023)

Facts: The facts are highly unusual- more aptly a horror story in which no one wants to be caught. Apparently the IRS made an error which led to the taxpayer, Mr. Pond, to overpay the identified tax amount; the IRS had misinterpreted its own audit and reached the conclusion that Mr. Pond had underpaid his income taxes. Mr. Pond promptly paid the income taxes for two

years [2012 and 2013] plus interest. Later, Mr. Pond's CPA received the IRS's explanation of Mr. Pond's tax obligation and from that exchange of information the IRS accurately determined that the income taxes in question, already paid by Mr. Pond, were not actually owed by him.

Mr. Pond thus requested a refund on his 2012 and 2013 income taxes as well as the interest on the amount that he paid on his 2012 back tax payment. Mr. Pond claims he sent separate forms in a single envelop via first-class mail to an IRS center in New York in July 2017. About the same time, Mr. Pond sent a request for a refund of the interest that he paid, using a designated IRS form, to another IRS service center in Kentucky, which apparently then forward that request to yet another IRS service center in Massachusetts. (You can see where this is headed.) Mr. Pond ultimately received a refund of his 2012 taxes, and the interest he had paid on the 2012 income taxes, but no refund of his 2013 income tax payment. (If your head is spinning, this gets even worse!)

Mr. Pond finally heard back from the Massachusetts IRS service center about his interest and his 2013 tax-refund request. The IRS claims that it had not received his request, but it wanted a copy of his refund claim for the 2012 taxes to confirm that he was entitled to the interest refund. Mr. Pond responded that he had sent his original request for a tax refund to New York, but "*out of an abundance of caution*" he also forwarded a duplicate copy of his 2012 tax refund request to the Massachusetts IRS service center. Three weeks later the statutory period in which to claim Mr. Pond's tax refund expired.

Dispute: Let the games begin! After another few weeks, Mr. Pond was told by Massachusetts IRS service center that he would soon hear from the Kentucky IRS service center. Several months later, Mr. Pond still was awaiting contact from the IRS. Then, out of the blue, Mr. Pond received his 2012 tax refund. Later, after an extended period of silence from the IRS, Mr. Pond again reached out to the IRS inquiring as to the status of his tax refund claim for his 2013 income taxes. At that time the IRS was unable to locate his 2013 1040X return. After additional time with more IRS promises that Mr. Pond would soon be contacted by an IRS agent, no additional contact was initiated by the IRS. After many more months with no word from the IRS, Mr. Pond again reached out to

the New York IRS service center. He was then informed that his 2013 claim for a tax refund had been closed with no refund issued. Although the claim had been 'closed,' the New York IRS agent could not even find a copy of Mr. Pond's refund claim on the IRS's system. When he heard that explanation, Mr. Pond then faxed a third copy directly to that IRS agent. A few weeks after that Mr. Pond received in the mail a Notice of Denial that informed him that his 2013 income tax refund claim was denied because the statute of limitations had run- this denial letter listed the date the claim was received was July 17, 2017.

Up the 'Food Chain'- And Back : Mr. Pond then filed a formal protest of that denial with the New York IRS service center. He received no response. He then contacted the office and learned that his protest had not been processed. Mr. Pond then pursued his refund claim higher up the IRS 'food-chain,' filing a protest with the IRS's Office of Appeals. That Office returned his protest and told Mr. Pond that he did not have a case pending in the Office of Appeals, in effect sending him back to the New York IRS service center.

Lawsuit: Having had enough of the IRS's 'hide the ball,' Mr. Pond then filed a lawsuit in the U.S. District Court in which he sought a refund of the 2013 income taxes that he paid based on an erroneous IRS audit. The government filed a motion for dismissal in which it claimed that it was entitled to sovereign immunity because Mr. Pond's claim was not timely filed.

Technical Issue: Mr. Pond claimed that he should be able to use the common law 'mailbox rule' to establish his timely filing of his 2013 tax refund claim. The technical legal issue that the Court dealt with is the common law mailbox rule and the enactment of IRC 7502. Specifically, can a taxpayer invoke the preexisting *common-law* mailbox rule now that Congress adopted the *statutory mailbox* rule under IRC 7502? Does the Tax Code supplement the *common-law* mailbox rule, or does it supplant it altogether?

District Court: The District Court judge found that IRC 7502 supplanted the *common law* mailbox rule, concluding that Mr. Pond could not rely on the presumption of *delivery* under the *common law* mailbox rule. Instead, Mr. Pond should have followed the procedures that are outline in IRC 7502 to obtain the

presumption of *delivery* of his tax refund claim. This judge found:

“In short, Pond cannot resort to the common-law presumption of delivery. He must proceed under the statute. And 7502 makes clear when the presumption of delivery can apply to a taxpayer filing: certified and registered mailings. Because Pond did not send his 2013 refund claim by certified or registered mail, he does not satisfy the statute’s requirements. Thus, he is not entitled to a presumption of delivery.”

“When courts refer to the ‘mailbox rule’ they are often talking about one of two distinct-but related- presumptions. The narrower presumption is merely of timeliness, not delivery. In other words, if a filer can show that the document was actually delivered, but can’t pinpoint precisely when that happened, then this narrower version of the mailbox rule would allow a court to presume that ‘physical delivery occurred in the ordinary time after mailing.’ The mailbox rule is merely a method for determining the date of physical delivery under the physical delivery rule. It does not ignore the physical delivery requirement. The broader presumption is of physical delivery. Courts adopting this version of the mailbox rule say that ‘proof of proper mailing- including by testimonial or circumstantial evidence- gives rise to a rebuttable presumption that the document was physically delivered to the address in the time such a mailing would ordinarily take to arrive.”

Appeals Court: The appellate court reversed the District Court’s order of dismissal and remanded the case for further proceedings in the District Court. This panel determined that there is a possibility that Mr. Pond can demonstrate the actual physical delivery of his claim for refund to the IRS. But that is relevant only if Mr. Pond is unable to establish the actual timely physical delivery of his refund claim.

“Is Pond out of luck just because he cannot rely on a presumption of delivery? No. He can still proceed if he has plausibly alleged that his claim was physically delivered to the IRS. The District Court held that Pond ‘is unable to show’ physical delivery and that his allegations of physical

delivery are implausible. We disagree. Affording the complaint all reasonable inferences, Pond adequately alleged physical delivery. So his claim survives the government's motion to dismiss."

Conclusion: The lesson from the *Pond* decision is that Mr. Pond encountered this 'catch-22' challenge due to his failure to utilize provisions outlined in IRC 7502 to secure *prima facie* evidence of the timely filing his 2013 income tax refund claim. Mr. Pond could have mailed his 2013 claim by registered or certified mail and been protected by the statutory presumption. He chose not to do so, and as such, he must now show physical delivery in the trial court to continue in his quest to recover his 2013 income tax refund. This case neither provides a pretty picture of the IRS and the 'service' it provides to taxpayers, nor does it help Mr. Pond who relied on normal First Class U.S. Mail to deliver his refund claim. If there is any doubt or the filing deadline nears, always use registered or certified mail. As for the IRS and how it dealt with Mr. Pond, apparently the assertion that the IRS has been 'understaffed for years' is probably accurate.

If you would like to read additional missives, [click here](#).