No. 13-

In The
Supreme Court of the United States

ROBERT W. STOCKER II AND LAUREL A. STOCKER,

Petitioners,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a taxpayer may prove the timely filing of a tax refund claim through evidence other than an actual postmarked envelope or a registered or certified mail receipt, as the Third, Eighth, Ninth, and Tenth Circuits and the Tax Court have held, or whether the only evidence admissible to establish timely filing is the envelope or receipt itself, as the First, Second, and Sixth Circuits have held.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES:

STATUTES AND REGULATIONS:

RULES:

OTHER AUTHORITIES:

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Petitioners Robert W. Stocker II and Laurel A. Stocker respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-23a) is reported at 705 F.3d 225. The district court's opinion (App., *infra*, 24a-38a) is unreported, but is available at 2011 WL 2469899.

JURISDICTION

The court of appeals entered its judgment on January 17, 2013, App., *infra*, 1a, and denied Petitioners' request for panel rehearing and rehearing en banc on April, 24, 2013, *id*. at 39a. By letters dated July 12, 2013, and August 7, 2013, Justice Kagan extended the time for filing a petition for a writ of certiorari to and including August 29, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced at App., *infra*, 41a-47a.

STATEMENT OF THE CASE

A. Statutory Framework

Congress has vested the federal district courts with jurisdiction over "[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected *** under the internal-revenue laws." 28 U.S.C. § 1346(a)(1). Congress separately directed, however, that "[n]o suit *** shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected" unless and until "a claim for refund *** has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof." 26 U.S.C.

§ 7422(a). This Court has held that Section 7422(a)'s requirement of a timely filed administrative claim is jurisdictional. *Commissioner v. Lundy*, 516 U.S. 235, 240 (1996).

Section 7502 of Title 26 offers taxpayers a means, other than physical delivery to the IRS, by which they can affirmatively demonstrate the timely filing of their tax returns. That Section provides a statutory "mailbox rule" under which, if taxpayers send their returns via regular mail and they are delivered after the filing deadline has passed, the "date of the United States postmark" stamped on the envelope received by the IRS "shall be deemed to be the date of delivery." 26 U.S.C. § 7502(a)(1). In addition, if taxpayers send their returns by way of registered or certified mail, "the date of registration" or certification is "deemed the postmark date" for purposes of Section 7502(a)(1). *Id.* § 7502(c)(1); *see* 26 C.F.R. § 301.7502-1(c)(2) (extending protection of Section 7502(c)(1) to certified mail).

B. Factual Background and Procedural History

1. In March 2007, Petitioners learned that that they had overpaid their 2003 federal taxes in the amount of $64,058.00, and were entitled to a refund. App., *infra*, at 3a. At Petitioners' direction, their accountant prepared amended 2003 state and federal tax returns, which were to be filed contemporaneously with their 2006 state and federal tax returns by the statutory deadline of October 15, 2007, *see* 26 U.S.C. § 6511(a). App., *infra*, at 3a-4a.

On October 15th, Mr. Stocker obtained from his accountant and then mailed that same day postage-paid, return-receipt requested, certified-mail envelopes containing the amended 2003 federal and state tax returns, as well as ordinary postage-prepaid envelopes with the 2006 federal and state returns. App., *infra*, 4a. Each envelope was processed through an automated postage meter that marked it with a postage date of October 15, 2007. *See* Pet. C.A. Br. at 6 (6th Cir. Oct. 14, 2011) (No. 11-1890). Because his accountant's office had mistakenly retained the customer copies of the certified mail receipts, however, the post office did not provide Mr. Stocker with date-stamped receipts reflecting that he mailed the returns that day. App., *infra*, 4a.

Both Petitioners' amended 2003 and original 2006 state returns were acknowledged to have been timely received by the Michigan Department of Treasury based on the envelopes' postmark date, *see* M.C.L. § 211.44b ("[T]he date of a United States postal service postmark may be considered the date" on which tax payments are received.), and the IRS acknowledged timely receipt of Petitioners' simultaneously mailed 2006 federal tax return, App., *infra*, 5a.

The IRS claimed, however, that it did not receive Petitioners' amended 2003 federal return until October 25, 2007, and that the envelope in which it arrived bore a postmark date of October 19, 2007—four days after the statutory filing deadline. App., *infra*, at 5a. That asserted postmark date came from the statement of an IRS processing clerk, who was not able to verify that date because the IRS either

misplaced or destroyed the envelope in which the amended return arrived, *id.* at 5a & n.2, in violation of longstanding IRS policy, *see* Internal Revenue Manual § 3.10.72.6.2.2(2), *reproduced at* App., *infra*, 63a (Because "[t]he Postmark Date is used to determine timely mailing/timely filing[,] *** it is important that the [IRS] employee keep the envelope attached to a form or document when the postmark date is required."). The IRS also failed to date-stamp the certified mail return receipt accompanying the amended 2003 return, instead sending it back to Petitioners blank, *id.* at 5a, again in violation of IRS policy, *see id.* § 3.10.203.4.1.2(3) (2006), *reproduced at* App., *infra*, 61a (directing the "designated IRS mail clerk" to stamp certified mail acknowledgments with the month, day, and year they are received).

On that basis, the IRS disallowed Petitioners' refund claim as untimely. App., *infra*. 6a. Petitioners' accountant submitted a request for reconsideration that the IRS denied. *Id.*

2. In October 2009, Petitioners filed suit challenging the IRS's rejection of the amended 2003 return. App., *infra*, 6a. The IRS moved to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of jurisdiction. Petitioners countered with jurisdictional evidence of the timely filing, including (i) testimony from the accountant that the return and its mailing envelope had been prepared for filing on the deadline and retrieved by Mr. Stocker in time for them to be timely mailed; (ii) documentation that the accountant's automated postage meter had stamped the envelopes containing each of the returns with a postage date of October 15th; (iii) testimony from Mr.

Stocker that, after retrieving the returns from his accountant, he immediately proceeded to the post office and mailed them; (iv) testimony from Mr. Stocker that it was Petitioners' "recurring habit" to file their tax returns on October 15th; (v) a certified-mail customer receipt for the Michigan state returns along with evidence that state tax officials treated the counterpart state refund claim for 2003 as timely mailed under Michigan's Section 7502 equivalent, *see* M.C.L. § 211.44b; and (vi) documentation that the simultaneously mailed 2006 tax return bore the October 15th postmark date. App., *infra*, 25a; Pet. C.A. Br., *supra*, at 6. In addition, Petitioners requested a spoliation inference based on the IRS's unilateral control over and loss or destruction of the postmarked envelope, in violation of agency policy. App., *infra*, 19a. The IRS proffered its own extrinsic testimonial evidence by the clerk of an alleged later date-stamp on the return. *Id*. at 35a.

The district court granted the IRS's motion to dismiss. App., *infra*, 24a-38a. Even though the court was "sympathetic to [Petitioners'] case," and even though it concluded that "[i]t is the fault of the IRS that the postmarked envelope which contained Plaintiffs' amended return is not available," *id.* at 35a, the court stated that it was bound by circuit precedent that "evidence extrinsic to § 7502[(a)(1)'s postmark requirement] may not be offered as proof of a timely mailing in an effort to bypass the physical delivery rule," *id.* at 33a (citing *Miller v. United States*, 784 F.2d 728, 731 (6th Cir. 1986); *Surowka v. United States*, 909 F.2d 148, 149-150 (6th Cir. 1990)).

3. The Sixth Circuit affirmed. App., *infra*, 1a-23a. The court first held that the "exceptions embodied in" Section 7502 to the physical delivery rule "[a]re exclusive and complete," and thus that, in the absence of proof of physical delivery by the due date, only the production of a postmarked envelope or properly dated registered-mail receipt could establish the amended return's timeliness. App., *infra*, 11a-12a (quoting *Miller*, 784 F.2d at 731). Because, due to the IRS's loss or destruction of the envelope, Petitioners could not introduce their postmarked envelope and had not used registered mail, the court held that Section 7502 was not satisfied and Petitioners' claim was barred by the failure to prove timely physical delivery. App., *infra*, 15a-16a.

The court further held that Petitioners could not prove the existence of the postmark by any form of evidence beyond the envelope itself. App., *infra*, 17a-18a. In so holding, the Sixth Circuit acknowledged that "there is a circuit split on this issue, with other circuits having concluded that § 7502 does not altogether displace the common-law rules, such as the mailbox rule, that the courts have invoked to determine whether a tax return or other document has been timely filed with the IRS." *Id.* at 13a n.5 (citing *Philadelphia Marine Trade Ass'n—Int'l Longshoremen's Ass'n Pension Fund v. Commissioner*, 523 F.3d 140, 150 (3d Cir. 2008); *Anderson v. United States*, 966 F.2d 487, 491 (9th Cir. 1992)). The court further noted that prior Sixth Circuit panels had "express[ed] reservations" about the soundness of the court's interpretation of Section 7502. *See* App., *infra*, at 13a n.5 (citing *Carroll v. Commissioner*, 71 F.3d 1228, 1232 (6th Cir. 1995)). The court

nevertheless chose to adhere to its precedent and follow the rule "of other courts holding that the 'exceptions embodied in [Section 7502] [a]re exclusive and complete[.]'" *Id.* at 12a (quoting *Deutsch v. Commissioner*, 599 F.2d 44, 46 (2d Cir. 1979)).

4. Petitioners timely petitioned for panel rehearing and rehearing en banc, both of which were denied. App., *infra*, 39a.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit openly acknowledged that its decision took sides in a multi-faceted, multi-circuit conflict over the ability of taxpayers to prove the timely filing of a tax claim by means other than production of the original postmark affixed to the envelope in which it was mailed to the IRS, or a physical copy of a certified- or registered-mail receipt. That divide in the courts of appeals, moreover, concerns a frequently recurring question that affects countless taxpayers every year, as evidenced by the number of court decisions addressing the issue. The Sixth Circuit here joined the First and Second Circuits in holding that the two exceptions set forth in 26 U.S.C. § 7502 are "exclusive and complete," App., *infra*, 12a, so that Petitioners could not prove timely mailing in any way except through production of the actual postmarked envelope that the IRS destroyed or a return receipt. *See Deutsch v. Commissioner*, 599 F.2d 44 (2d Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980); *Maine Medical Center v. United States*, 675 F.3d 110, 116 (1st Cir. 2012).

Four courts of appeals and the Tax Court read Section 7502 the opposite way, holding that the statute does not denominate the only method by which a taxpayer may demonstrate timely filing through mailing. *See Philadelphia Marine*, 523 F.3d at 152-153; *Sorrentino v. IRS*, 383 F.3d 1187, 1193 (10th Cir. 2004) (Baldock, J.); *see id.* at 1196 (Hartz, J., concurring in the judgment) (explaining that two members of the panel believe that Section 7502 is not exclusive), *cert. denied*, 546 U.S. 812 (2005); *Lewis v. United States*, 144 F.3d 1220, 1223 (9th Cir. 1998); *Estate of Wood v. Commissioner*, 909 F.2d 1155, 1160-1161 (8th Cir. 1990); *Boone v. Commissioner*, 73 T.C.M. (CCH) 2132 (T.C. 1997).

That conflict in circuit law, moreover, is over the proper interpretation of a provision governing the timeliness of the 95 million paper tax returns filed each year, including 30 million individual returns like Petitioners'. The courts of appeals that have taken divergent positions on Section 7502 cover more than half of the total individual paper filers in more than half of the States. Furthermore, the question of whether Section 7502 expands or strictly limits how taxpayers can establish the timely filing of a claim is a commonly arising question of great importance to the uniform treatment of taxpayers. Maintaining such evenhandedness is essential to the credibility of the tax system. Given the state of the circuit conflict, compounded by the disparate outcomes in Tax Court cases, only this Court's review can harmonize the law.

I. THE COURTS OF APPEALS, AS WELL AS THE TAX COURT, ARE IN ACKNOWLEDGED AND IRRECONCILABLE CONFLICT OVER WHETHER THE METHODS OF PROOF IN SECTION 7502 ARE EXCLUSIVE AND COMPLETE.

Congress directed that the timely filing of a tax return or refund claim is determined either by the IRS's actual physical receipt or the taxpayers' timely mailing of the claim. 26 U.S.C. § 7502. However, the relevant statutory provisions displacing the prior, strict physical delivery rule have left open the questions of whether and in what way a taxpayer whose documents have been physically delivered to the IRS can prove that they were postmarked before the applicable deadline, and whether other methods of proving timely mailing known to the common law remain available to taxpayers.

A. Three Circuits Treat Section 7502 As Exclusive and Restrictive.

The Sixth Circuit in this case joined the First and Second Circuits in holding that Section 7502's two mentioned exceptions to the physical delivery rule are "exclusive and complete," App., *infra*, 12a, in that taxpayers can only prove timely mailing with either the original postmarked envelope (which is in the IRS's possession) or a certified or registered mail receipt in hand, *id.* at 15a-16a. Nothing else will suffice under that view. Even when, as here, the IRS has admitted losing or destroying that postmark in violation of its own internal guidelines, *id.* at 5a, "the

only exceptions to the physical delivery rule available to taxpayers are the two set out in section 7502," *id.* at 12a; *see* Internal Revenue Manual § 3.10.203.4.1.2 (2006), *reproduced at* App., *infra*, 63a (noting the "importan[ce]" of the IRS "employee keep[ing] the envelope attached to a form or document when the postmark date is required").

In so holding, the Sixth Circuit noted that members of the court had previously expressed "reservations" about that rigid interpretation of Section 7502, but that rehearing en banc had not been undertaken. App., *infra*, 13a n.5 (citing *Carroll*, 71 F.3d at 1232); *see Carroll*, 71 F.3d at 1232 (explaining that the court was previously "invited[] *** to reconsider" its interpretation of Section 7502 "in an en banc proceeding," but although a "number of judges voted in favor of rehearing *** the number was less than a majority").

The Sixth Circuit's cramped reading of Section 7502 mirrors the law of the Second Circuit. In *Deutsch v. Commissioner*, 599 F.2d 44 (1979), *cert. denied*, 444 U.S. 1015 (1980), that court held that the "exception[s] embodied in section 7502 *** demonstrate a penchant for an easily applied, objective standard," *id.* at 46. For that reason, even though the IRS indisputably had received the taxpayer's documents, the taxpayer was categorically unable to prove timely filing because "there [was] no postmark or registration receipt that indicate[d] timely mailing." *Id.*; *see also Washton v. United States*, 13 F.3d 49, 50 (2d Cir. 1993) (per curiam) (taxpayer could not prove timely filing through testimony of timely mailing).

In fact, under the Second and Sixth Circuits' view, Section 7502 is so restrictive that it fully supplants even those traditional evidentiary presumptions that preexisted Section 7502 itself, including the common-law "mailbox rule," which ordinarily provides that "proper and timely mailing of a document raises a rebuttable presumption that it is received by the addressee." *Anderson*, 966 F.2d at 491. *See Miller*, 784 F.2d at 730 (in light of Section 7502, taxpayer cannot "invoke the judicially-created presumption that material mailed is material received" or any other form of evidentiary proof); *Deutsch*, 599 F.2d at 46 (absolutely no other forms of proof permitted).

Last year, the First Circuit in *Maine Medical Center*, *supra*, noted the circuit conflict and chose to side with the Second and Sixth Circuits over the contrary approaches of other circuits. 675 F.3d at 116-118. The First Circuit accordingly held that the taxpayer could only prove timely filing with a postmarked envelope or mail receipt. *Id.* at 117-118. The court also held, like the Sixth Circuit here (App., *infra*, 18a) and the Second Circuit (*Washton*, 13 F.3d at 50; *see Deutsch*, 599 F.2d at 46), that a taxpayer could not prove, "via extrinsic evidence, that its refund claim had a timely postmark," 675 F.3d at 116. Only the actual postmarked envelope would suffice. *Id.*

Complicating the circuit conflict still further, the First Circuit ruled in the alternative that, "even if we were to accept that extrinsic evidence is a viable means of providing a postmark for purposes of § 7502," the plaintiff in that case could not satisfy the

requirements of the statute to the "level of extrinsic proof required" by the Eighth and Ninth Circuits. *Maine Medical*, 675 F.3d at 117. The First Circuit thus managed to both side with the Sixth Circuit on whether proof of a postmark or receipt is the "exclusive and complete" method of establishing timely mailing, and against the Sixth Circuit in its alternative holding addressing whether extrinsic evidence could ever establish the existence of the required postmark.[1]

B. The Third, Eighth, Ninth, and Tenth Circuits, As Well As The Tax Court, Permit Additional Forms Of Proof Of Timely Filing.

The Third, Eighth, Ninth, and Tenth Circuits, along with the Tax Court (when permitted by circuit precedent), have ruled the opposite. They have held that, while the postmark and receipt modes of proof identified in Section 7502 are sufficient as a matter of law to establish timely filing, they are neither necessary nor the exclusive means of providing such proof. Each of those courts thus has held that Section 7502 supplements but does not displace traditional evidentiary presumptions, such as the common-law "mailbox rule." *See Philadelphia*

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[1] In a related vein, the Fifth Circuit has declined to credit a taxpayer's circumstantial evidence of timely mailing under Section 7502. *See Drake v. Commissioner*, 554 F.2d 736, 738 (5th Cir. 1977). In that case, though, the taxpayer's evidence was introduced to contradict an extant but untimely postmark, not to establish the postmark date in the first instance. *See id*.

Marine, 523 F.3d at 141; *Anderson*, 966 F.2d at 487, 489; *Sorrentino*, 383 F.3d at 1196 (Hartz, J., concurring in the judgment); *Boparai v. Commissioner*, No. 12135-07S, 2009 WL 855903 (T.C. Mar. 31, 2009); *see also Estate of Wood*, 909 F.2d at 1160 (rejecting the government's argument that "Congress has completely displaced the common law presumption [of delivery] by the enactment of section 7502").

In addition, each of those courts has held that taxpayers seeking to prove timely filing can do so with circumstantial evidence, just as they had done before Section 7502's enactment. In a virtually indistinguishable case, the Ninth Circuit in *Lewis v. United States,* 144 F.3d 1220 (1998), rejected the narrow reading of Section 7502 endorsed by the Sixth Circuit and allowed the use of extrinsic evidence to establish a timely filing. The taxpayer, Lewis, mailed extension requests for his state and federal tax returns to the IRS and the State of California via regular mail on the filing deadline. As occurred with Petitioners, the state application was timely received, but the IRS claimed that the federal return was untimely. *Id.* at 1221. As in Petitioners' case, the true postmark date of the application could not be verified because the IRS lost or destroyed the envelope in which it arrived. *Id.* Lewis filed suit and attempted to prove timely filing by (i) his own testimony that he had mailed the application on the deadline, and (ii) the fact that the contemporaneously mailed state application had been timely received and processed. *Id.*

The Ninth Circuit's ruling is a diametric contradiction of the Sixth Circuit's decision here. The Ninth Circuit rejected the rule (employed by the First, Second and Sixth Circuits) that the postmark itself is the exclusive method of proof under Section 7502, holding instead that, "if a taxpayer furnishes credible evidence of the date her letter to the Service was postmarked, *that date is the date that controls*." *Lewis*, 144 F.3d at 1223 (citing *Anderson v. United States*, 966 F.2d 487 (9th Cir. 1992)) (emphasis added). "If it were otherwise," the court continued, "the postmark rule enacted by Congress would have effect, when the Service destroyed the envelope, only in the rare instance in which the postal clerk was perceived in the act of affixing the postmark." *Id.* The court then concluded that the taxpayer "'ha[d] produced sufficient evidence to convince a fact-finder that [the] return was timely filed.'" 144 F.3d at 1222 (citation omitted).

In so holding, the *Lewis* court reaffirmed an earlier Ninth Circuit case, *Anderson,* 966 F.2d at 490*,* that had openly acknowledged that the Sixth and Second "circuits [had] decided the matter differently," *id.* at 491. *Anderson* reasoned that, since the statutory text "of section 7502 [did] not set forth an exclusive limitation on admissible evidence to prove timely mailing," *id.* at 489, nothing in either "the language of the statute nor Ninth Circuit precedent bar[red] admission of extrinsic evidence to prove timely delivery" under Section 7502(a)(1). The court specifically declined to adopt its sister circuits' conclusions—which the IRS had re-urged on appeal—that Section 7502 displaced traditional forms of proof taxpayers had enjoyed prior to the statute's

enactment. *Id.* at 491. Even if Section 7502(c)'s provision for a certified mail receipt "is the only exception" permitted by Section 7502 to "proof of mailing by postmark," the court concluded, "it does not follow that the statutory mailbox rule announced in section 7502" itself "is the exclusive means of proving timely mailing and filing." *Id.* at 490.

The Eighth Circuit in *Estate of Wood v. Commissioner* likewise rejected the Second and Sixth Circuits' rulings that had "interpreted section 7502 as an exclusive provision," 909 F.2d at 1160. The Eighth Circuit ruled, instead, that where a taxpayer can establish the postmark date through sufficiently objective and conclusive evidence (even if circumstantial or extrinsic to the physical postmark itself), the "benefits of the postmark date should accrue to the [taxpayer]," because "Congress presumably intended that section 7502 would operate to alleviate hardship, for the benefit of the taxpayer." *Id.* at 1161 (testimony of postal worker who postmarked document was sufficient to establish postmark date). And because "Congress did not indicate in its legislative reports that section 7502 completely displaced the common law, or that a presumption of delivery could apply only given the circumstances of [Section 7502] subsection (c)," *id.* at 1160, the court "simply [could] not agree" with the Second and Sixth Circuits that, "by the enactment of section 7502, Congress intended to foreclose application of a presumption of delivery within section 7502(a)(1) in those cases in which the postmark requirements of the section can be conclusively established" by other means, *id.*

The law of the Third Circuit is the same, holding that Section 7502 is not "exclusive." In *Philadelphia Marine Trade Assoc.—Int'l Longshoremen's Ass'n Pension Fund*, 523 F.3d 140 (2008), the court of appeals rejected the IRS's argument that Section 7502 precluded a taxpayer from attempting to prove timely filing through any alternative method, *id.* at 149-150. The court found "no indication" that Congress, "by passing a law that was designed to *protect* taxpayers who meet § 7502's requirements, would (without so stating) simultaneously seek to *roll back the protections* for taxpayers that already exist at common law." *Id.* at 150 (emphasis in original). If anything, the court noted, the legislative history pointed in exactly the opposite direction. *Id.* at 150 n.8 (noting legislative history of Section 7502(e) stating that "'[t]he taxpayer, of course, could also establish the date of mailing by other competent evidence'" in addition to certified mail registration) (citing S. Rep. No. 9014, 90th Cong., 2d Sess. 20 (1968); H.R. Rep. No. 1104, 90th Cong., 2d Sess. 14 (1968)) (alteration in original). The Third Circuit reasoned that "Congress's intent[] *** was to supplement, not supplant, [the] means by which taxpayers can timely file documents with the IRS," and thus erected no barrier to a taxpayer's ability to prove timely filing by alternative means. *Philadelphia Marine*, 523 F.3d at 150; *see also id.* at 151-152 (specifically disagreeing with the Second and Sixth Circuits).

The Tenth Circuit joined suit in *Sorrentino v. IRS*, 383 F.3d 1187 (2004), *cert. denied,* 546 U.S. 812 (2005), ruling that Section 7502's "plain language" compelled it to reject the argument that "the

production of a registered, certified, or electronic mail receipt are the only means by which a taxpayer may establish timely delivery," *id.* at 1193 (Baldock, J.) Alternative methods of proof, the court explained, had been available to taxpayers before Section 7502 was enacted, and Congress had done nothing in Section 7502 to indicate that "a different result [was] desired as a matter of tax policy." *See id.* at 1194; *see also id.* at 1197-1199 (Seymour, J., dissenting from the judgment) (agreeing that Section 7502 does not prevent the introduction of extrinsic evidence of timely filing, and noting that the majority's "evidentiary hurdle to the factual presumption of the [statutory] mailbox rule runs counter to the rule's very purpose").

The Tenth Circuit subsequently confirmed its interpretation of Section 7502 in *Chandler v. Commissioner*, 327 F. App'x 763 (2009), in which it agreed with the parties that the taxpayer's appeal was timely under Section 7502(a), notwithstanding untimely delivery of the taxpayer's notice of appeal to the Tax Court and the absence of a postmark on the envelope in which it arrived, because the taxpayer "ha[d] produced affidavits attesting to his claim that he mailed his notice of appeal *** within" the required time period, *id.* at 764.[2]

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[2] Two other courts of appeals have expressly recognized the discord in circuit law, without yet taking sides. *See Spencer Med. Assocs. v. Commissioner*, 155 F.3d 268, 271-272 (4th Cir. 1998); *Davis v. United States*, No. 99-5073, 230 F.3d 1383 (Table), 2000 WL 194111, at *3 (Fed. Cir. Feb. 16, 2000).

Finally, the United States Tax Court has ruled that, "[n]otwithstanding section 7502, *** we, and certain other federal courts, have in particular circumstances allowed indirect evidence to prove that the form was mailed," *Brown v. Commissioner*, 74 T.C.M. (CCH) 1449 (T.C. 1997), *aff'd*, 181 F.3d 99 (6th Cir. 1999), including in particular when "a postmark date is *** destroyed," *Van Brunt v. Commissioner*, 100 T.C.M. (CCH) 322 (T.C. 2010). Indeed, a long line of Tax Court rulings has accepted extrinsic evidence of timely mailing, explaining that "section 7502(a)(1) requires only that the postmark be 'stamped on the cover in which [the document was] mailed,' and that the envelope be mailed within the statutory [time period]," but "[i]t does not require that the postmark survive a journey through the mail process." *Perry Segura & Assocs., Inc. v. Commissioner*, 34 T.C.M. (CCH) 406 (T.C. 1975).[3]

Painting in stark relief the problems caused by the circuit split, the Tax Court in *Brown* went on to explain that, notwithstanding its prior precedent, it was procedurally constrained in that particular case

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[3] *See, e.g., Boone v. Commissioner,* 73 T.C.M. (CCH) 2132 (T.C. 1997) ("[W]e have allowed indirect, credible evidence to prove the date of postmark."); *Maracle v. Commissioner*, 61 T.C.M. (CCH) 2083 (T.C. 1991) (where IRS did not "have the envelope in which the return was mailed, petitioners may offer direct proof of the postmark date"); *Mason v. Commissioner*, 68 T.C. 354, 355-356 (T.C. 1977) (permitting circumstantial evidence where postmark illegible); *Thompson v. Commissioner*, 66 T.C. 737, 741 (T.C. 1976) (allowing circumstantial evidence of timely mailing to prove timely delivery because "the presence of a postmark is not the sine qua non to invoking section 7502").

to categorically *foreclose* the taxpayer's evidence of timely mailing because "[t]he Court of Appeals for the Sixth Circuit, to which this case is appealable, has consistently rejected" the use of such evidence. 74 T.C.M. at 1449; *see Carroll,* 71 F.3d at 1233 (encountering the same problem).

That means that, because of the circuits' clashing Section 7502 interpretations, identically situated taxpayers presenting the identical facts to the same court—the Tax Court—receive entirely contradictory *legal* rulings based only on where they live or their Tax Court judge sits. *See id.* Such a result simply compounds the disparity in and geographic arbitrariness of timeliness determinations under the tax law, which only this Court's review can repair.

* * * * *

In sum, seven circuits and the Tax Court are in intractable conflict over the degree, if any, to which traditional methods of proving timely mailing exist under the Tax Code beyond a physical postmark or mail receipt itself. And that conflict is firmly entrenched, with the Sixth Circuit expressly and repeatedly reaffirming its prior interpretation and denying en banc review of the statutory text, notwithstanding some judges' expressed misgivings. The conflict, moreover, renders the law so variable that a single court, the Tax Court, must decide different taxpayers' cases differently based on where the taxpayers live or the court is sitting. The conflict therefore will only be exacerbated, not resolved, by future court decisions, which will simply pick sides in

this ongoing and fully developed dispute, rather than contribute further to the analytical framework for this Court's review.

Moreover, notwithstanding those divergent views, the one thing everyone agrees on is that Congress intended Section 7502 to have a single, uniform meaning. The current regime leaves taxpayers in certain parts of the Country subject to different rules than those in others and, in particular, consigns taxpayers in fully half of the States to having the timeliness of their returns decided under more traditional rules and procedures than taxpayers who file from States right next door. This Court's review is the only means of laying that conflict to rest, and restoring the fair, consistent, and even-handed application of federal tax law that Congress intended.[4]

II. THE QUESTION OF SECTION 7502'S PROPER INTERPRETATION IS RECURRING AND IMPORTANT.

This Court's prompt review is warranted because the correct interpretation of Section 7502's operation is a question of significant importance to federal tax law that arises with frequency.

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[4] *See also* IRS Mission Statement, *available at* http://www.irs.gov/uac/The-Agency,-its-Mission-and-Statutory-Authority (noting the IRS's responsibility to "enforce the law with integrity and fairness to all").

First, as attested by the litany of circuits on either side of the jurisprudential divide, as well as the number of times the dispute has been joined within those circuits, the issue is one that arises repeatedly. The end result of all those decisions is an entrenched and ever-expanding divide in circuit law that creates the exact crazy-quilt of divergent timing rules that Congress enacted Section 7502 to halt in the first place. *See Miller*, 784 F.2d at 730 ("Section 7502 was enacted *** to alleviate inequities arising from differences in mail delivery[.]").

Second, it is vital that the conflict in the law be resolved because it is outcome determinative. *Lewis* proves that, had Petitioners' case arisen in the Ninth Circuit, they would have been allowed to present evidence extrinsic to Section 7502's postmark-or-receipt reference to prove the timeliness of their amended 2003 return. *See* App., *infra*, 18a. Likewise, if Petitioners had lived in Minnesota or Pennsylvania instead of Michigan, extrinsic evidence of their timely filing would have been permitted.

But just because they live in Michigan, Petitioners (like other taxpayers filing within the First, Second, and Sixth Circuits) can find themselves out of luck if the IRS loses their postmarked envelope, even though their returns are likely to be mailed to the same IRS processing center

as taxpayers in adjoining circuits whose claims can go forward.[5]

Geographic happenstance is thus the only reason some taxpayers, like Lewis, obtained relief and others, like Petitioners, have not. *See Carroll,* 71 F.3d at 1233 ("If 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 *** [and] the Carrolls must pay an additional $22,479.25 in taxes."). Perpetuation of that geographic disparity is untenable.

Third, review is warranted because the Sixth Circuit's straitened view of Section 7502's operation is incorrect.

To begin with, the statutory text supports, rather than refutes, the continued use of extrinsic evidence and taxpayer-friendly evidentiary rules and presumptions. For example, Section 7502(a) is necessarily an alternative way to prove timely mail filing, considering that it addresses only the situation when a document is received bearing a valid

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[5] *See* U.S. Internal Revenue Service, Where to File Addresses for Taxpayers and Tax Professionals, http://www.irs.gov/uac/Where-To-File-Addresses-for-Tax-Professionals. For example, taxpayers in both Tennessee (6th Circuit) and neighboring Missouri (8th Circuit) mail their returns seeking refunds to the IRS center in Kansas City, Missouri.

postmark "*after* such period [when] *** such return *** is required to be filed." 26 U.S.C. § 7502(a)(1) (emphasis added); *see Philadelphia Marine*, 523 F.3d at 149 ("By its terms, § 7502(a) applies only to cases where the pertinent document was delivered to the Government after the filing deadline."). It thus addresses neither the ordinary timely delivery situation, nor the situation where a timely mailed postmark is missing or invalid. *Cf. Chandler*, 327 F. App'x at 764 (noting that the government had "concede[d] jurisdiction" in the situation where "no postmark was made on the envelope"). Certainly nothing in Section 7502's text affirmatively suggests that it was meant to displace other methods of proving timely filing through the mail. *See Philadelphia Marine*, 523 F.3d at 149 ("The text of the statute does not call for" displacement of alternative forms of proof; Section 7502 instead is "an extra taxpayer protection").

In addition, the statute provides, in the case of certified mail, that the postmark is merely "*prima facie* evidence of delivery[.]" 26 U.S.C. § 7502(c)(2) (emphasis added). The inclusion of the phrase "prima facie" is itself a strong indication that Congress envisioned that additional forms of proof could be employed, presumably because Congress also knew that direct evidence of delivery is necessarily outside the taxpayer's control. Even the IRS's own regulations explain that the proffering of prima facie evidence simply erects a "presumption" that a document was delivered. 26 C.F.R. § 301.7502-1(e)(2)(i). Indeed, in multiple circumstances, Treasury regulations *require* that taxpayers come forward with additional forms of

evidence, including proof of "timely mail[ing]." *See, e.g., id.* § 301.7502-1(c)(1)(iii) (explaining that, for illegible or late-received postmarks, "the person who is required to file the document or make the payment has the burden of proving the date that the postmark was made" or that the document "was timely mailed").

The legislative record points in the same direction, indicating that a taxpayer can "establish the date of mailing by other competent evidence" besides a postmark or certified mail receipt. S. Rep. No. 9014, 90th Cong., 2d Sess. 20 (1968); H.R. Rep. No. 1104, 90th Cong., 2d Sess. 14 (1968).

"[N]ormal rules of statutory construction" therefore compel the conclusion that taxpayers remain free to prove timely filing through circumstantial evidence or other means, just as they did before Section 7502's enactment. *See Midatlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 501 (1986) ("[I]f Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.").[6]

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[6] On August 23, 2011, the Treasury Department revised its regulations relating to Section 7502(c) to clarify that, "[o]ther than direct proof of actual delivery, proof of proper use of registered or certified mail[] *** are the exclusive means to establish prima facie evidence of *delivery*" to the IRS. 26 C.F.R. § 301.7502-1(e)(2) (2011) (emphasis added). That regulation says nothing about cases like Petitioners' whose return was indisputably *delivered* to the IRS, and the only question is the timeliness of the filing. *See* 76 Fed. Reg. 52,561, 52,561-52,562 (Aug. 23, 2011) (assuaging commenters' concerns "that the

Beyond that, the First, Second, and Sixth Circuits' grudging interpretation of Section 7502 wrongly transmogrifies what Congress intended to be a procedural option for determining the date of filing into a rigid remedial dividing line that commonly has, as in this case, jurisdictional consequences.

The "conventional rule" in civil litigation is that a plaintiff may prove his case by "'direct *or* circumstantial evidence.'" *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003) (emphasis added) (citation omitted); *see also United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983) (same). This is particularly true when, as here, original documents are lost or destroyed. *See* FED. R. EVID. 1004(a) (other evidence of content of writing admissible if "all the originals are lost or destroyed, and not by the proponent acting in bad faith"). Had Congress intended to modify that rule when a taxpayer seeks to establish the timely filing of a document sent to the IRS, it would have said so. *See Desert Palace, Inc.*, 539 U.S. at 100 (finding no "circumstance in which we have restricted a litigant to the presentation of direct evidence absent some affirmative direction in a statute"); *see also Sorrentino*, 383 F.3d at 1193 ("Congress is the final arbiter of tax policy ***. If Congress wish[ed] to

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proposed regulations limited the proof to satisfy the timely mailing/timely filing rule of section 7502(a)" by clarifying that "[t]hese final regulations do not limit the use of U.S. Mail [and] other delivery options *** for purposes of satisfying the *** []timely filing rule of section 7502(a)," but "[i]nstead *** clarify the prima facie evidence of delivery rule of section 7502(c)[]").

restrict the taxpayers' means of proving delivery of tax documents, Congress [could] easily amend § 7502 to establish 'an easily applied, objective standard.'") (citation omitted).

The court's reading of Section 7502 also runs headlong into well-settled canons of statutory interpretation. "[C]lear indication[s] of congressional intent" are required before courts will presume that Congress intended to displace the common law. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489 (2008); *see Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law *** are to be read with a presumption favoring the retention of long-established and familiar principles[.]").

Yet nothing in either the text or history of Section 7502 provides any indication that Congress intended for the automatic proof that Section 7502 ascribes to the postmark date and mail receipts to actually supplant all of the other longstanding methods of proving timely mailing or delivery. *See Philadelphia Marine*, 523 F.3d at 149-150 (finding no indication in text or legislative history to support Congress's intent to displace common-law methods of proof); *Estate of Wood*, 909 F.2d at 1160-1161 (same); *Anderson*, 966 F.2d at 491 (same); *Sorrentino*, 383 F.3d at 1193-1194 (Baldock, J.) (same) & *id.* at 1197 (Seymour, J.) (concurring) (same).

Finally, the Sixth Circuit's interpretation of Section 7502 fails to "construe[] [the statute] broadly to effectuate its purposes," and instead turns its remedial purpose on its head. *Jefferson County*

Pharm. Ass'n, Inc. v. Abbott Labs., 460 U.S. 150, 159 (1983).

Before 1954, documents mailed to the IRS were not considered filed until they had been physically delivered and received. App., *infra*, 9a. That "physical delivery" rule often led to harsh results, as it made no allowance for the happenstance of inefficient or negligent handling by either the postal service or the IRS, both of which are beyond the taxpayer's control. *See id.* at 29a. In an effort to ameliorate the rule's inequitable effects, courts frequently permitted taxpayers to prove timely filing through alternative means, including through circumstantial evidence, *see Crude Oil Corp. v. Commissioner*, 161 F.2d 809, 810 (10th Cir. 1947), and with the aid of various other taxpayer-friendly evidentiary presumptions like the common-law mailbox rule, *see Central Paper Co. v. Commissioner*, 199 F.2d 902, 904 (6th Cir. 1952); *Crude Oil Corp.*, 161 F.2d at 810-811.

In 1954, Congress enacted Section 7502 to supplement that existing framework. *See* Internal Revenue Code of 1954, ch. 736, § 7502, 68A Stat. 895 (codified as amended at 26 U.S.C. § 7502). That provision, part of a broader congressional effort to "remove inequities" and "end harassment of the taxpayer," *see* H.R. REP. No. 1337, 83d Cong., 2d Sess. 1 (1954); S. REP. No. 1622, 83d Cong., 2d Sess. 1 (1954), created another layer of protection for taxpayers against the physical delivery rule's unsparing operation by allowing timely mailing of a document with the postal service to be equivalent to physically filing with the IRS.

Against that backdrop, it makes no sense for this "remedial provision," *Miller*, 784 F.2d at 730, to substitute one burdensome and inequitable filing rule for another, especially when to do so would revive the problem of IRS control over the key proof of timeliness that Congress originally sought to counterbalance. *See Philadelphia Marine*, 523 F.3d at 150 ("Congress's intent[] *** was to supplement, not supplant, means by which taxpayers can timely file documents with the IRS."); *Estate of Wood*, 909 F.2d at 1161 ("Congress presumably intended that Section 7502 would operate to alleviate hardship, for the benefit of the taxpayer[.]"); *Anderson*, 966 F.2d at 490 ("Congress enacted section 7502 to mitigate the harshness of the old common law physical delivery rule[.]"); *see also* Kimberly C. Metzger, *Interpretation of the Section 7502 Timely-Mailing, Timely-Filing Requirements: Carroll v. Commissioner and the Liberal/Conservative Interpretation Dilemma*, 28 U. TOL. L. REV. 767, 796-803 (1997) (legislative history of Section 7502 supports taxpayer-favoring interpretation of postmark requirement). [7]

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[7] Although Congress did not extend Section 7502's protections to the filing of tax returns until 1966, *see* Pub. L. No. 89-713, § 5(a), 80 Stat. 1107, 1110 (Nov. 2, 1966), it delayed only because of the IRS's inexperience with the "timely-mailing-timely-filing" rule, which it feared might create "unforeseen problems" when applied to returns. *See* S. Rep. No. 1625, 89th Cong., 2d Sess. 9 (1966). By 1966 "[e]xperience with the [timely-mailing-timely-filing rule] since 1954 ha[d] allayed these fears, and in fact, the Service ha[d] in practice generally treated returns and payments which were mailed before the due date as being filed or paid on time" ever since Section 7502's enactment. *See id.*

Under the Sixth Circuit's decision, however, taxpayers today have *fewer*, rather than more, ways to establish that a return was timely mailed and delivered to the IRS than they did when the statute was enacted in 1954. And because the original postmark on a mailed return will necessarily be in the IRS's exclusive custody, the taxpayers' ability to invoke Section 7502 to rebut a timeliness challenge will often hinge on whether *the IRS* preserves the original postmark. Where, as here, the IRS failed to do so in violation of its own regulations, s*ee* Internal Revenue Manual § 3.10.72.6.2.2(2), *reproduced at* App, *infra*, at 63a, the Sixth Circuit's decision leaves taxpayers penalized rather than protected through no fault of their own. That is not how rules with jurisdictional implications are generally understood. *Cf. Gonzalez v. Thaler*, 132 S. Ct. 641, 650 (2012) (emphasizing "'unfai[r] prejudice'" that would result from imposing a jurisdictional consequence on a plaintiff meeting a requirement that he "has no control over" even when he has "done everything required of him by law") (citation omitted) (alteration in original).

At bottom, there is nothing "remedial" about a statute that imposes new and additional burdens of the same kind that the statute was intended to alleviate, let alone one that hinges jurisdiction over a claim for relief on a criterion over which the plaintiff has little control, and the defendant has broad control to defeat the suit against itself. Indeed, "it is difficult to imagine that Congress, by passing a law that was designed to *protect* taxpayers *** (without so stating) simultaneously [sought] to *roll back the protections* for taxpayers" that existed before Section

7502's enactment. *Philadelphia Marine*, 523 F.3d at 150.

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By reconfirming its atextual interpretation of Section 7502 as prohibiting a taxpayer from proving the timely filing of a tax return by any means other than the original postmark or certified mail receipt, the Sixth Circuit ignored not only the contrary intervening decisions of other circuits, but also the straightforward text of Section 7502, the remedial statutory purpose, and settled tenets of statutory construction. In so doing, the court entrenched a widespread circuit conflict that leaves taxpayers' claims at the mercy of state borders, rather than the uniform operation of federal law. Only this Court can harmonize the rulings, and this case presents a straightforward opportunity to do so.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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August 29, 2013

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT W. STOCKER, II and LAUREL A. STOCKER,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 11-1890

Appeal from the United States District Court for the Western District of Michigan at Grand Rapids.
No. 1:09-cv-955—Robert Holmes Bell, District Judge

Decided and Filed: January 17, 2013

Before: BATCHELDER, Chief Circuit Judge; COLE, Circuit Judge; ROSEN, Chief District Judge*

COUNSEL

ON BRIEF: James F. Mauro, Jeffrey V. Stuckey, Michael J. Pattwell DICKINSON WRIGHT PLLC, Lansing Michigan, for Appellants. Tamara W. Ashford, Richard Farber, Carol Barthel, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

OPINION

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* The Honorable Gerald E. Rosen, Chief United States District Judge for the Eastern District of Michigan, sitting by designation.

ROSEN, Chief District Judge.

I. INTRODUCTION

This case truly presents a "$64,000 Question"[1] — namely, what sort of proof the Plaintiff/Appellant taxpayers, Robert W. Stocker, II and Laurel A. Stocker (the Stockers), may introduce in order to demonstrate the timely filing of a tax return in which they sought a federal tax refund of just over $64,000. The Internal Revenue Service (IRS) denied this claim for a refund on the ground that the Stockers failed to file their amended 2003 federal tax return within the statutory three-year period for amending a return. The Stockers then brought this suit challenging the IRS's denial of their claim, but the district court dismissed the case for lack of subject matter jurisdiction, finding that the Stockers could not establish the jurisdictional prerequisite of a timely-filed tax return under any of the methods recognized in the Internal Revenue Code or this Circuit's precedents for determining the date of delivery of a federal tax return.

On appeal, the Stockers contend that the decisions relied upon by the district court are distinguishable, and that the pertinent tax code provisions and case law leave room for proof of timely mailing of a tax return through taxpayer testimony

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[1] For the benefit of our younger readers, "The $64,000 Question" was one of the earliest and most popular of the television game shows broadcast in the 1950s. It became embroiled in the game show scandals of the late 1950s, and was cancelled in 1958.

and circumstantial evidence. We conclude that the district court properly construed our precedents, and we therefore AFFIRM the dismissal of this action for lack of subject matter jurisdiction.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Stockers' Alleged Overpayment of Taxes

This suit arises from the claim of Plaintiffs/Appellants Robert W. Stocker, II and Laurel A. Stocker that they overpaid their federal taxes for the 2003 tax year. After securing two extensions, the Stockers filed their initial 2003 federal income tax return on October 15, 2004. A few years later, in March of 2007, the IRS settled an audit of Windward Communications II, a "flow-through entity" in which the Stockers had invested and lost money. In light of this development, the certified public accountant who prepared the Stockers' tax returns, Michael Flintoff, determined that the Stockers had overpaid their 2003 federal taxes in the amount of $64,058.00.

B. The Preparation and Mailing of the Stockers' Amended 2003 Return

To assist the Stockers in securing the refund he believed they were owed, Mr. Flintoff prepared an amended 2003 federal tax return for Mr. Stocker to mail. He also prepared an amended state return for the 2003 tax year, as well as the Stockers' 2006 federal and state tax returns. Each of these returns was due on October 15, 2007, with the Stockers having secured an extension of the due date for their 2006 returns, and with federal law dictating that any

claim for a refund of the Stockers' 2003 taxes had to be filed within three years of the October 15, 2004 filing of their initial 2003 return. *See* 26 U.S.C. § 6511(a).

On October 15, 2007, Mr. Flintoff's office manager, Karrin Fennell, prepared postage prepaid, certified mail, return receipt requested envelopes for the Stockers' amended 2003 federal and state tax returns, as well as ordinary postage prepaid envelopes for the Stockers' 2006 federal and state returns. Mr. Stocker drove to his tax preparer's office that afternoon to collect and sign the 2003 and 2006 returns, and was advised by both Mr. Flintoff and Ms. Fennell that all four returns were due and had to be mailed that same day. Ms. Fennell, however, mistakenly retained the customer copies of the certified mail receipts for the Stockers' 2003 amended returns, rather than giving these copies to Mr. Stocker so that he could present them at the post office as he mailed the returns.

Mr. Stocker testified that upon receiving the four tax returns and accompanying envelopes, he proceeded to the post office and timely mailed all four returns on the day he received them, October 15, 2007. By using certified mail for the 2003 amended returns, Mr. Stocker ordinarily would have been able to obtain date-stamped receipts from the post office reflecting that he mailed the returns that day. He explained, however, that he was unable to get any such date-stamped receipts, due to Ms. Fennell's failure to give him the customer copies of the certified mail receipts while he was at his tax preparer's office.

The record discloses that the Stockers' amended 2003 state tax return and 2006 state return were timely received by the Michigan Department of Treasury, and the Stockers received the refund sought in their amended 2003 state return. In addition, the IRS has acknowledged the timely receipt of the Stockers' 2006 federal tax return. As for the Stockers' amended 2003 federal tax return, however, the IRS claims that it did not receive this return until October 25, 2007, ten days after the date Mr. Stocker testified that he mailed the return. In addition, the agency's records reflect that the envelope containing the Stockers' amended 2003 federal return bore a postmark date of October 19, 2007.[2] The IRS concedes, however, that it did not retain the envelope in which the Stockers' amended 2003 return was sent. Moreover, although the Stockers requested a return receipt when they mailed their amended 2003 federal return, the portion of the return-receipt card that is to be completed by the recipient upon delivery was left blank when it was returned to the Stockers' tax preparer. (*See* Certified Mail Receipt, R.22–3, Page ID# 239.)

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[2] An IRS representative, Ericka Watford, testified that the postmark date and date of receipt as reflected in the agency's records are derived from dates that were stamped onto the face of the Stockers' amended 2003 return by a clerk who is responsible for opening and sorting returns. The amended return, for example, bears a stamp stating "ENVELOPE POST MARKED OCT 19 2007." (Form 1040X, Amended 2003 Federal Tax Return, R.26–4, Page ID# 291.)

C. The IRS's Rejection of the Stockers' Claim for a Refund

On November 27, 2007, the IRS sent the Stockers a notice disallowing the refund claimed in their amended 2003 federal tax return, citing the return's untimely postmark past the October 15, 2007 deadline. On June 23, 2008, Mr. Flintoff submitted a written request for the IRS to reconsider its rejection of the Stockers' claim for a refund, but the IRS denied this request on September 26, 2008.

D. Procedural History

The Stockers commenced this action on October 15, 2009, challenging the IRS's denial of their request for a refund of a portion of their 2003 federal tax payment. In their complaint, the Stockers alleged that their amended 2003 federal return was timely filed on October 15, 2007. The Government answered by denying that the Stockers' amended 2003 return was timely filed, and it asserted the three-year statute of limitations codified at 26 U.S.C. § 6511 as an affirmative defense.

The Stockers later moved for summary judgment, arguing that their amended 2003 federal tax return was properly mailed on October 15, 2007. In support of this contention, the Stockers pointed to evidence in the record reflecting the timely mailing of their amended 2003 return, including the testimony of Mr. Stocker and the evidence that the other three returns mailed contemporaneously with the amended 2003 federal return were deemed by the federal and state taxing authorities to be timely sent and received.

The Stockers also requested that the district court draw an adverse inference of timely filing against the Government as a spoliation sanction, in light of the IRS's failure to retain the postmarked envelope in which the Stockers had mailed their amended 2003 return.

The Government opposed the Stockers' motion, and also moved to dismiss the complaint under Fed.R.Civ.P. 12(b)(1) and (2), arguing that the district court lacked subject matter jurisdiction and that the Stockers' suit was barred by sovereign immunity due to the Stockers' failure to file their amended 2003 return within the three-year period for doing so. The district court agreed with the Government and held that it lacked jurisdiction over the case, and it therefore denied the Stockers' summary judgment motion as moot. This appeal followed.

III. ANALYSIS

A. The Standards Governing This Appeal

We review *de novo* the district court's dismissal of the Stockers' complaint for lack of subject matter jurisdiction. *See Wagenknecht v. United States,* 533 F.3d 412, 415 (6th Cir. 2008). In this case, the existence of subject matter jurisdiction turns upon whether the Stockers can show that they filed their amended 2003 federal tax return within three years of the October 15, 2004 filing date of their original 2003 return. *See* 26 U.S.C. § 6511(a); *see also Thomas v. United States,* 166 F.3d 825, 828–29 (6th Cir. 1999) (recognizing that the timely filing of an

administrative claim is a jurisdictional prerequisite to a suit for a refund); *Miller v. United States,* 784 F.2d 728, 729 (6th Cir. 1986) (holding that the taxpayer bears the burden of establishing this jurisdictional prerequisite). Thus, the federal courts may exercise subject matter jurisdiction over this suit only if the Stockers can establish, through some accepted means, that they filed their amended 2003 return within this three-year statutory period, or by October 15, 2007. Accordingly, we now turn to this question.

B. The District Court Properly Concluded That the Stockers Failed to Produce Cognizable Evidence of the Timely Filing of Their 2003 Amended Return

Under well-established and familiar principles of sovereign immunity, the United States may not be sued without its consent, and the terms of this consent define the jurisdiction of the courts to entertain a suit against the Government. *See United States v. Testan,* 424 U.S. 392, 399, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976). In this case, the pertinent expression of the Government's consent to be sued is found at 28 U.S.C. § 1346(a)(1), which vests jurisdiction in the federal district courts to hear suits "against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected." This waiver of sovereign immunity is limited, however, by an Internal Revenue Code provision mandating that no such suit may be brought "until a claim for refund or credit has been duly filed with the Secretary [of the Treasury], according to the provisions of law in

that regard." 26 U.S.C. § 7422(a).

Here, in determining whether the Stockers satisfied this jurisdictional requirement of a "duly filed" claim, the dispositive question is whether they timely filed their claim for a refund of a portion of their 2003 federal tax payment "within 3 years from the time [their original 2003] return was filed." 26 U.S.C. § 6511(a). As the Supreme Court has emphasized, "unless a claim for refund of a tax has been filed within the time limits imposed by § 6511(a), a suit for refund, regardless of whether the tax is alleged to have been 'erroneously,' 'illegally,' or 'wrongfully collected,' may not be maintained in any court." *United States v. Dalm,* 494 U.S. 596, 602, 110 S.Ct. 1361, 108 L.Ed.2d 548 (1990) (citing 28 U.S.C. § 1346(a)(1) and 26 U.S.C. § 7422(a)).

1. The Law Governing the Determination of the Filing of a Federal Tax Return

In order to decide whether the Stockers have established the jurisdictional prerequisite of a timely filed claim for a refund, we first must survey the law that determines the date upon which a federal tax return is deemed to be filed. As we explained in *Miller,* the courts initially determined the date of a tax filing by resort to the "physical delivery rule," under which filing was "not complete until the document [wa]s delivered and received." 784 F.2d at 730 (internal quotation marks, footnote, and citation omitted). Over time, however, some courts "carved out an exception" to the physical delivery rule, under which proof of "timely and accurate mailing raise[d] a rebuttable presumption that the mailed material was

received, and thereby filed." *Miller,* 784 F.2d at 730 (internal quotation marks and citation omitted).

Against this backdrop, Congress enacted an Internal Revenue Code provision that established two statutory exceptions to the common-law physical delivery rule. First, a return or other document that is "delivered by United States mail" to the IRS is deemed to have been delivered—and hence filed, under the physical delivery rule—on "the date of the United States postmark stamped on the cover" of this mailing. 26 U.S.C. § 7502(a)(1). Next, if a return or other document "is sent by United States registered mail," this registration "shall be prima facie evidence that the return ... or other document was delivered" to the IRS, and "the date of registration shall be deemed the postmark date." 26 U.S.C. § 7502(c)(1).[3]

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[3] Under § 7502(c)(2), the Secretary of the Treasury is "authorized to provide by regulations the extent to which" the provision governing registered mail also applies to certified mail. A regulation adopted pursuant to this authority provides that if a document "is sent by U.S. certified mail and the sender's receipt is postmarked by the postal employee to whom the document ... is presented, the date of the U.S. postmark on the receipt is treated as the postmark date of the document." 26 C.F.R. § 301.7502–1(c)(2). As explained in this regulation, "the risk that the document ... will not be postmarked on the day that it is deposited in the mail may be eliminated by the use of registered or certified mail." *Id.*

2. The Stockers Cannot Establish the Timely Filing of Their Amended 2003 Return Through the Means Set Forth in § 7502, Nor Through Any Other Method of Proof Recognized Under the Law of This Circuit.

Returning to the facts of the present case, it is immediately apparent that neither of the two above-cited statutory exceptions to the physical delivery rule can assist the Stockers in their effort to demonstrate the timely filing of their amended 2003 federal tax return. First, the Stockers cannot show that the envelope in which they mailed this amended return bore a postmark date of October 15, 2007 or earlier, as necessary to establish timely delivery under § 7502(a)(1). Instead, the IRS's records indicate that the envelope containing the Stockers' amended return was postmarked October 19, 2007, four days after the due date.[4] Next, while the Stockers state that they sent their amended return by certified mail, they failed to secure a date-stamped receipt that would corroborate their assertion that they timely delivered this return to the post office on October 15, 2007. Thus, they cannot avail themselves of § 7502(c)(2) and its corresponding administrative regulation, 26 C.F.R. § 301.7502–1(c)(2), under which a document sent by certified mail is deemed to be filed on the date stamped on the sender's receipt by the postal employee to whom the

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[4] As noted earlier, the IRS failed to retain the envelope in which the Stockers sent their return, so there is no way to confirm the statement in the agency's records that this envelope had an October 19, 2007 postmark. The possible significance of this lost envelope is addressed below.

document is presented.

Nonetheless, the Stockers insist that the two methods set forth in § 7502 for establishing timely filing are not the sole avenues of proof for overcoming the physical delivery rule, and that taxpayers remain free to prove timely filing through other means. This contention, however, runs directly counter to our decision in *Miller,* in which we expressly held that "the only exceptions to the physical delivery rule available to taxpayers are the two set out in section 7502." 784 F.2d at 731. In that case, the plaintiff sought to rely on an affidavit from his attorney stating that he had timely sent a claim for a refund by ordinary mail, but the IRS had no record of ever receiving this claim. Because the plaintiff could not produce a postmarked envelope that could confirm the timely filing of his claim, and because this claim had been sent by ordinary rather than registered or certified mail, we found that "the exceptions in section 7502 do not apply to the filing of [the plaintiff's] refund claim." *Id.* at 730. We then rejected the plaintiff's contention that the two exceptions set forth in § 7502 merely created "safe harbor[s]" to which a taxpayer could appeal "without question, while not barring him from relying on other exceptions created by the courts." *Id.* Instead, we elected to follow the decisions of other courts holding that the "exceptions embodied in [§ 7502] [a]re exclusive and complete." *Id.* at 731 (following *Deutsch v. Comm'r,* 599 F.2d 44, 46 (2d Cir. 1979),

and other cases cited therein).[5]

The Stockers seek to distinguish *Miller,* however, on the ground that the taxpayer's claim in that case was never received, whereas the postmarked envelope in which the Stockers sent their amended return *was* received by the IRS and then lost or destroyed. In support of this proposed distinction, the Stockers point to language in *Miller* which, in their view, operates to limit the ruling in that case to situations where the taxpayer's submission never reaches the IRS. In particular, the court in *Miller* construed the statutory "mailbox rule" set forth in § 7502(a)(1) as "appl[ying] only in cases where the document is actually received by the I.R.S. after the statutory period," and it reasoned that the taxpayer in that case could not satisfy this statutory provision because his "claim was never *received* by the I.R.S."

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[5] As noted by the Stockers, there is a circuit split on this issue, with other circuits having concluded that § 7502 does not altogether displace the common-law rules, such as the mailbox rule, that the courts have invoked to determine whether a tax return or other document has been timely filed with the IRS. *See, e.g., Philadelphia Marine Trade Ass'n—Int'l Longshoremen's Ass'n Pension Fund v. Comm'r,* 523 F.3d 140, 150 (3d Cir. 2008) (reasoning that Congress's intent in enacting § 7502 "was to supplement, not supplant, [the] means by which taxpayers can timely file documents with the IRS"); *Anderson v. United States,* 966 F.2d 487, 491 (9th Cir. 1992) ("[W]e decline to read section 7502 as carving out exclusive exceptions to the old common law physical delivery rule."). We, of course, are bound to adhere to this Circuit's resolution of this issue in the published *Miller* decision. *See Carroll v. Comm'r,* 71 F.3d 1228, 1232 (6th Cir. 1995) (expressing reservations about the ruling in *Miller* but confirming that it "remain[s] good law in the Sixth Circuit").

Miller, 784 F.2d at 730 (emphasis in original) (footnote omitted). Similarly, in a more recent decision that reaffirmed the ruling in *Miller,* we stated that § 7502(a)(1) "do[es] not apply to this case" because "[t]he IRS did not receive" the tax return at issue in that case. *Surowka v. United States,* 909 F.2d 148, 150–51 (6th Cir. 1990). It follows, according to the Stockers, that *Miller* and its progeny do not preclude a taxpayer from satisfying § 7502(a)(1) (or perhaps some related common-law rule) through extrinsic evidence in cases where the IRS ***did*** receive the tax return or claim at issue, and where the only question is whether this document was timely filed.

We see no principled basis for distinguishing *Miller* on this ground. In both *Miller* and this case, the plaintiff taxpayers were met with the objection that they could not bring suit for a refund because they had failed to timely file a claim with the IRS. In both cases, this purported absence of a timely filing—whether owing to late delivery to the IRS or to the IRS's failure to receive the claim at all—could only be rebutted through extrinsic evidence indicating that the taxpayer presented the claim to the post office for mailing on or before the pertinent deadline. If we did not allow this extrinsic evidence to rebut the IRS's claim of lack of receipt in *Miller,* we fail to see how we could consider such evidence here, based solely on the IRS's acknowledgment that it received the Stockers' amended return ten days late (and with a postmark four days after the filing deadline), rather

than not at all.[6]

Indeed, it seems to us that this factual distinction from *Miller* cuts against the taxpayers here. As we explained in *Miller,* § 7502 is intended, at least primarily, to address cases in which a document reaches the IRS after a filing deadline. 784 F.2d at 730 & n. 3; *see also Philadelphia Marine Trade Ass'n,* 523 F.3d at 149 (reasoning that "[b]y its terms, § 7502(a) applies only to cases where the pertinent document was delivered to the Government after the filing deadline"). Since this is precisely the situation presented here, there is all the more reason for us to hold the Stockers to the terms of this statute and to insist that they meet the conditions imposed by Congress for excusing late delivery, rather than looking to judge-made rules that are intended to address different situations. *Compare, e.g., id.* at 149–152 (finding that the common-law mailbox rule should remain available where the "taxpayer does not need the protection of § 7502," but instead seeks to invoke a presumption of timely delivery of a claim mailed well in advance of a deadline). Because § 7502 addresses the very dilemma confronted by the Stockers here—namely, the need for an exception to the physical delivery rule that would overcome the admitted arrival of a document after a filing deadline—we conclude, in accordance with *Miller,* that the Stockers' failure to produce evidence that

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[6] There is, of course, the separate question whether the Government might be subject to an adverse inference of a timely postmark, as a sanction for the IRS's failure to preserve the envelope in which the Stockers sent their amended return. Again, we consider this matter below.

would satisfy either of this statute's two specified exceptions is fatal to their suit for a refund.[7]

Moreover, the Stockers' proposed basis for

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[7] We pause to observe, as an aside, that there is nothing inherently more suspicious or less plausible about the IRS's claim in this case of a postmark after the filing deadline, as compared to the agency's claim in *Miller* that a document was never received. In either case, the claim cannot be verified. Indeed, this potential predicament is explicitly acknowledged in the regulatory counterpart to § 7502, which advises that "the risk that [a] document ... will not be postmarked on the day that it is deposited in the mail may be eliminated by the use of registered or certified mail." 26 C.F.R. § 301.7502–1(c)(2). Accordingly, just as it is a recognized risk that mail might get lost in transport or that an IRS employee might inadvertently misplace a document upon its delivery to the agency, it is likewise a recognized risk that a postal employee might not postmark a document on the same day the taxpayer brings it to the post office. Section 7502(c) grants immunity from all of these risks through the use of registered or certified mail, but a taxpayer who uses ordinary mail and hopes to rely on § 7502(a)(1) is equally vulnerable to each of these risks. *See Carroll,* 71 F.3d at 1229 ("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.").

In this case, then, it is possible to credit the Stockers' extrinsic evidence that they delivered their amended 2003 tax return to the post office on October 15, 2007, while also crediting the statement in the IRS's records that the envelope in which the Stockers' return arrived at the agency bore a postmark date of October 19, 2007. Thus, while we find that *Miller* precludes us from considering the Stockers' extrinsic evidence that they brought their return to the post office on October 15, 2007, nothing in this mailing effort necessarily ensured that their return would bear an October 15, 2007 postmark, such that they could successfully invoke § 7502(a)(1) as establishing the timely filing of their return.

distinguishing *Miller* runs afoul of a prior (albeit unpublished) decision in which we applied *Miller* to a case involving late delivery of tax returns. In *Schentur v. United States,* No. 92–3605, 1993 WL 330640, at *1–2 (6th Cir. Aug. 30, 1993), the plaintiff taxpayers filed claims for refunds that were received by the IRS a year or more past the pertinent deadlines, and the IRS did not save the envelopes in which the plaintiffs submitted these claims. Although the plaintiffs offered affidavits from themselves, their secretary, and their accountant attesting that their tax returns were timely filed, we cited *Miller* as holding that § 7502 defines the "only exceptions" to the physical delivery rule, and we declined to consider the plaintiffs' affidavits in ruling as a matter of law that the plaintiffs had failed to satisfy either of the statutory exceptions to the physical delivery rule. *Schentur,* 1993 WL 330640, at *3–4. While *Schentur* is not binding here, we concur in the panel's determination in that case that *Miller* applies equally to late-delivered and never-delivered claims.

Finally, taking a somewhat different tack, the Stockers suggest that their proffer of extrinsic evidence is not necessarily inconsistent with *Miller*'s holding that § 7502 states the only two exceptions to the physical delivery rule. In particular, the Stockers maintain that nothing in *Miller* prevents them from satisfying the "postmark" requirement of § 7502(a)(1) circumstantially through evidence of timely mailing, in lieu of direct evidence of the postmark date stamped on the envelope in which they mailed their amended 2003 return. In effect, the Stockers invite us to substitute the evidence of the October 15, 2007

mailing of their return for the statutory recognition of a postmark date as an acceptable proxy for the date of delivery.

We once again conclude that *Miller* forecloses this proposed method of proof. In that case, as here, the plaintiff taxpayer was unable to produce the evidence called for under the statutory "postmark" exception—namely, proof of "the date of the United States postmark stamped on the cover" of the envelope or package in which the plaintiff taxpayer mailed his refund claim. 26 U.S.C. § 7502(a)(1). To be sure, the ***reasons*** for this absence of proof differ in the two cases—the mailing in *Miller* was never received, while the envelope containing the Stockers' return was lost or destroyed. Yet, as explained earlier, we see no principled basis for concluding that § 7502(a)(1) confers upon taxpayers whose claims are delivered late additional avenues of proof that, under *Miller,* are unavailable to those whose claims are never received. Indeed, we declined to allow such an avenue of proof in *Schentur*—a case where, as here, the IRS failed to preserve the envelopes in which the plaintiffs mailed their tax returns—and instead found that the timeliness of the plaintiffs' tax filings should be determined "without looking to the affidavits" in which the plaintiffs sought to establish the date of mailing. 1993 WL 330640, at *4 (footnote omitted).

In any event, it bears emphasis that the extrinsic evidence put forward by the Stockers does not purport to establish the fact of significance under § 7502(a)(1)—namely, the "date of the United States postmark" on their amended 2003 return—but

instead is directed at the separate factual question of when they presented this return to the post office for mailing. As the Eighth Circuit has observed, "in section 7502 Congress dealt with issues of proof, and determined that a postmark is evidence verifiable beyond any self-serving testimony of a taxpayer who claims that a document was timely mailed." *Estate of Wood v. Comm'r,* 909 F.2d 1155, 1161 (8th Cir. 1990). Thus, "[t]he act of mailing is not significant for purposes of the statute but placement of a postmark is." *Id.* Consequently, we affirm the district court's finding that the Stockers' extrinsic evidence had no role to play in determining whether they could satisfy either of § 7502's two exclusive exceptions to the physical delivery rule, and we further affirm the lower court's ruling that neither of these exceptions is available here to establish the timely filing of the Stockers' amended 2003 federal tax return.

C. The District Court Did Not Abuse Its Discretion in Declining to Draw an Adverse Inference of Timely Filing as a Spoliation Sanction for the Government's Failure to Preserve the Envelope in Which the Stockers Mailed Their Amended Return.

Apart from challenging the district court's refusal to consider the extrinsic evidence that they mailed their amended 2003 federal tax return at the October 15, 2007 deadline, the Stockers also take issue with the district court's failure to impose spoliation sanctions against the Government arising from the IRS's failure to retain the envelope in which they sent this return. More specifically, the Stockers

sought an inference that this lost or destroyed envelope bore a postmark date of October 15, 2007, but the district court declined without comment to draw such an adverse inference against the Government, or to otherwise impose any sort of spoliation sanctions based on the IRS's loss or destruction of this envelope. We review the district court's failure to impose the requested spoliation sanctions for an abuse of discretion, *see Beaven v. U.S. Dep't of Justice,* 622 F.3d 540, 553 (6th Cir. 2010), and we conclude that the court acted within its discretion when it declined to impose such sanctions here.

As we recently explained, a "party seeking an adverse inference instruction based on the destruction of evidence must establish (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to [a] party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." *Id.* (internal quotation marks and citations omitted). The requisite "culpable state of mind" may be established through a "showing that the evidence was destroyed knowingly, even if without intent to breach a duty to preserve it," but even negligent conduct may suffice to warrant spoliation sanctions under the appropriate circumstances. *Id.* at 554 (internal quotation marks, alteration, and citations omitted).

Turning to the first of these factors, the Stockers point to a provision in an IRS internal policy manual

that seemingly requires the agency to retain the envelopes in which amended returns are received. In their view, this internal policy gave rise to an obligation to preserve the postmarked envelope in which they sent their amended 2003 return, and the Government does not contend otherwise. Thus, we agree that the first factor cited in *Beaven* has been established here.

We conclude, however, that the Stockers have not demonstrated that the IRS acted with a sufficiently culpable state of mind to warrant an adverse inference of a timely postmark date. We explained in *Beaven* that "an adverse inference for evidence spoliation is appropriate" if the party with control over the evidence "knew the evidence was relevant to some issue at trial" or to "future litigation," but nonetheless engaged in culpable conduct that "resulted in its loss or destruction." *Id.* at 553 (internal quotation marks and citations omitted). The Stockers contend that the IRS knew or should have known that the evidence at issue here could prove relevant to future litigation, given (i) the legal significance that § 7502(a)(1) confers upon postmarks stamped on envelopes, and (ii) the recognition in the IRS's internal policy manual that envelopes containing amended returns should be retained and that postmark dates are used to determine timely filing. The Government, on the other hand, argues that the IRS reasonably could have failed to perceive the relevance of the envelope to future litigation, where (i) according to the agency's records, the postmark date on the envelope was October 19, 2007, four days after the applicable deadline, and (ii) the Stockers' use of certified mail to send their return

gave rise to the reasonable assumption that they had obtained a date-stamped receipt at the post office that could establish timely filing under § 7502(c).

On balance, we find that these considerations would warrant the adverse inference sought by the Stockers only if there were evidence that the IRS acted with a degree of culpability beyond mere negligence. To be sure, we have recognized that spoliation sanctions may properly be imposed even for lesser degrees of fault such as negligence. *See Beaven,* 622 F.3d at 554. Yet, the choice of an appropriate sanction should be linked to the degree of culpability, with more severe sanctions reserved for the knowing or intentional destruction of material evidence. *Id.* at 553–54. Here, the record discloses no culpable conduct beyond the negligent failure to preserve an envelope in accordance with internal agency regulations. Moreover, as we noted earlier, the extrinsic evidence produced by the Stockers, even if fully credited, does not definitively establish that the IRS employee who received and opened the Stockers' amended 2003 return incorrectly recorded the postmark date on the envelope as October 19, 2007. To the contrary, it is possible that this notation in the IRS record was accurate, and that the fault for the late postmark date lies with a postal worker. If so, the lost or destroyed envelope would not have aided the Stockers' cause in this litigation.

As we have observed, under the present state of the law 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." *Carroll,* 71 F.3d at 1229. The Stockers recognized as

much when they sent their amended 2003 federal return by certified mail, but they failed to take the necessary steps to ensure that they obtained the date-stamped receipt of certified mailing that would establish timely filing under § 7502(c). It is unfortunate, to be sure, that the IRS did not retain the envelope that possibly could have enabled the Stockers to establish timely filing through the alternative route made available in § 7502(a)(1). Yet, as the Government points out, a review of the case law reveals no decisions in which the IRS's failure to preserve a postmarked envelope resulted in an adverse evidentiary inference of timely mailing. Indeed, our unpublished decision in *Schentur* featured a similar failure by the IRS to retain the postmarked envelopes in which the plaintiff taxpayers mailed their returns, but we nonetheless held that the plaintiffs' suit for a refund was time-barred. 1993 WL 330640, at *1–2, *4. Against this backdrop, we conclude that the district court did not abuse its discretion in declining to grant an adverse inference of timely filing as a spoliation sanction for the IRS's loss or destruction of the envelope in which the Stockers mailed their amended 2003 federal tax return.

IV. CONCLUSION

For the reasons set forth above, we AFFIRM in all respects the district court's June 20, 2011 opinion granting the Government's motion to dismiss this suit for lack of subject matter jurisdiction.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT W. STOCKER II, et al.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

_____/

File No. 1:09-cv-955

HON. ROBERT HOLMES BELL

OPINION

This matter is before the Court on Plaintiffs' motion for summary judgment, (Dkt. No. 19), and on Defendant's cross motion to dismiss for lack of jurisdiction (Dkt. No. 29). For the reasons stated below, Defendant's motion to dismiss will be granted, and Plaintiffs' motion for summary judgment will be denied as moot.

I.

Plaintiffs Robert W. Stocker II and Laurel A. Stocker brought this action to recover an alleged overpayment of Internal Revenue taxes. Plaintiffs maintain that they are entitled to a refund or credit in the amount of $64,058 based on a net-loss-carryback deduction arising out of a March, 2007, settlement between the government and Windward Communications II, an entity in which the Plaintiffs

had invested and lost money. (Dkt. No. 19 at 3.)

Whether or not Plaintiffs did, in fact, overpay $64,058 in taxes has not been the issue of contention between the parties.[1] The dispute focuses instead on whether Plaintiffs timely filed their amended 2003 return as required by law. Michael Flintoff (CPA) and Karrin Fennell testified at deposition that they timely prepared and provided Mr. Stocker with Plaintiffs' 2006 state and federal tax returns, as well as their amended 2003 state and federal returns (claiming entitlement to refunds of $7,768 and $64,058, respectively) on October 15, 2007, along with written and verbal reminders that the returns were all presently due. (Dkt. No. 19 at 4–5, 17–18.) Mr. Stocker testifies that, after receiving the returns, he immediately proceeded to a post office and mailed all four claims with full knowledge that the then present day of October 15, 2007, was the deadline for filing the claims. (Dkt. No. 19 at 4 .) In addition to this testimony, Plaintiffs note their recurring habit of filing tax returns on October 15, and point out that the three returns prepared by Mr. Flintoff which are not the subject of this suit were all received by the appropriate agencies and accepted as timely postmarked on October 15, 2007. (Dkt. No. 19 at 17–18.) Plaintiffs argue that, taken together, this evidence establishes that Plaintiffs' amended 2003

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[1] Although Defendant does not concede that Plaintiffs overpaid taxes in 2003, Defendant has declined to investigate the matter in light of its position that Plaintiffs are time barred from seeking a refund.

federal return was also mailed on October 15, 2007.[2]

Defendant contends that the Internal Revenue Service ("IRS") did not receive Plaintiff's 2003 amended return until October 25, 2007, and that the postmark date on the envelope containing Plaintiffs' amended 2003 return was October 19, 2007. (Dkt. No. 28 at 3–4.) However, Defendant admits that the IRS did not retain the actual envelope that contained Plaintiffs' amended return. (*Id.* at 4.) As the envelope bearing an official postmark has been lost or destroyed, Defendants rely instead on the date stamp marked on the amended return itself. The stamp reads "ENVELOPED POST MARKED OCT. 19 2007." (*Id.*)

On November 27, 2007, the IRS disallowed Plaintiffs' refund claim on the basis that it was not postmarked on or before the October 15, 2007, deadline. (Dkt. No. 19 at 8.) On June 23, 2008, Michael Flintoff requested in writing that the IRS reconsider its rejection of the Plaintiffs' refund claim. (*Id.* at 9.) The IRS rejected the request on September 26, 2008. Plaintiffs commenced this action seeking judgment in the amount of their alleged overpayment

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[2] Additionally, Mr. Stocker maintains that he sent the amended returns by certified mail, but that the postal representative was unable to date stamp a certified-mail receipt because Flintoff & Klein, Plaintiff's tax preparers, had placed the returns in postage-prepaid envelopes and retained the customer receipts. (Dkt. No. 19 at 5.) At any rate, the incomplete certified mail receipt attached to Plaintiffs' motion for summary judgment (Dkt. No. 22, Ex. Q) bears no postmark.

on October 15, 2009. Plaintiffs now move for summary judgment on the grounds that the evidence presented unequivocally establishes that Plaintiffs timely filed their amended 2003 return on October 15, 2007, and that Defendant has not contested the merits of their claimed overpayment in the amount of $64,058. Defendant moves for dismissal under Federal Rule of Civil Procedure 12(b)(1) and (2) on grounds that Plaintiffs' amended return was not timely filed, consequently depriving this Court of jurisdiction to hear Plaintiffs' case.

II.

As Defendant's cross motion to dismiss under Rule 12(b)(1) and (2) raises the question of this Court's jurisdiction, the Defendant's motion must take precedence in the Court's analysis. The preliminary and, in this case, dispositive question before the Court is whether Plaintiffs can establish that they timely mailed their amended 2003 return on or before October 15, 2007.

A plaintiff may bring suit against the United States to recover any "tax alleged to have been erroneously or illegally assessed or collected...." 28 U.S.C. § 1346(a)(1). However, a plaintiff must also satisfy the claim for refund requirements of 26 U.S.C. § 7422 and the timeliness requirements of 26 U.S.C. § 6511. *See United States v. Dalm,* 494 U.S. 596, 601–2, 110 S.Ct. 1361, 108 L.Ed.2d 548 (1990).

Section 7422(a) states that "no suit shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously

or illegally assessed or collected ... until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard." To be "duly filed," a claim for refund must be timely under § 6511, which requires taxpayers to file a claim for refund within three years from the date that they filed their return. 26 U.S.C. § 6511; *Comissioner v. Lundy,* 516 U.S. 235, 239, 116 S.Ct. 647, 133 L.Ed.2d 611 (1996). The government is free to place these statutory restrictions as it is well settled that the United States of America, as sovereign, may not be sued without its consent, and that the terms of its consent define the Court's jurisdiction. *United States v. Testan,* 424 U.S. 392, 399, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976); *United States v. Sherwood,* 312 U.S. 584, 586, 61 S.Ct. 767, 85 L.Ed. 1058 (1941); *United States v. Shaw,* 309 U.S. 495, 500–01, 60 S.Ct. 659, 84 L.Ed. 888 (1940).

For Plaintiffs, who filed their 2003 return on October 15, 2004, the three-year cutoff date for filing an amended return was October 15, 2007. Plaintiffs do not dispute that they have the burden of establishing jurisdiction, and that in order to meet that burden, they must demonstrate that they duly filed their amended 2003 return on or before October 15, 2007. (Dkt. No. 30 at 7.) To this end, Plaintiffs offer affidavits and circumstantial evidence supporting their emphatic contention that Plaintiff Robert Stocker II did in fact mail the amended 2003 return on October 15, 2007. (Dkt. No. 19 at 2–6, 17–19.)

Defendant argues that the evidence offered by Plaintiffs is belied by the date stamp marked on the

return after receipt of the return by the Internal Revenue Service on Oct. 25. More importantly, Defendant argues that all of the evidence presented by Plaintiffs to establish a timely Oct. 15, 2007, postmark date is inadmissible under binding Sixth Circuit precedent, rendering Plaintiffs unable to meet their burden in establishing jurisdiction.

III.

In general, a federal tax return is deemed filed on the date that it is actually received by the IRS. *Miller v. United States,* 784 F.2d 728, 730 (6th Cir. 1986). This is known as the "physical delivery rule." *Id.* (citing *Phinney v. Bank of the Sw. Nat'l Ass'n, Houston,* 335 F.2d 266, 268 (5th Cir. 1964)). In 1954, Congress added § 7502 to the Internal Revenue Code (Title 26) to remedy inequities resulting from delay in mail deliveries in various parts of the country. *Id.* That section created two exceptions to the physical delivery rule. 26 U.S.C. § 7502;[3] *Surowka v. United*

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[3] 26 U.S.C. § 7502 provides, in relevant part:

(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 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.

States, 909 F.2d 148, 150 (6th Cir. 1990); *Miller,* 784 F.2d at 731. "First, if any return is required to be filed by a certain date, and is received after that date, the date of the United States postmark shall be deemed the date of delivery. Second, if a document is sent by registered or certified mail, such registration or certification shall be *prima facie* evidence that the document was delivered on the date of the postmark." *Schentur v. United States,* 4 F.3d 994, 1993 WL 330640, at *4 (6th Cir. 1993) (Table opinion).

Mailing requirements.—This subsection shall apply only if—(A) the postmark date falls within the prescribed period or on or before the prescribed date—(i) for the filing (including any extension granted for such filing) of the return, 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.

(c) Registered and certified mailing; electronic filing.—

(1) Registered mail.—For purposes of this section, if any 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; electronic filing.—The Secretary is authorized to provide by regulations the extent to which the provisions of paragraph (1) with respect to prima facie evidence of delivery and the postmark date shall apply to certified mail and electronic filing.

The § 7502 exceptions are not available to Plainitiffs. The first exception is of no help, as the envelope bearing the relevant postmark was lost or destroyed by the IRS. Nor does the second exception apply, as Plaintiffs did not send their return by registered mail or obtain a postmark on a certified mail receipt. Nevertheless, Plaintiffs argue that the affidavits and circumstantial evidence which they present establish that their amended 2003 return was mailed on October 15, 2007, and that this is sufficient to satisfy the filing requirements of 26 U.S.C. §§ 7422 and 6511.

Relying on the Sixth Circuit's decision in *Miller v. United States,* 784 F.2d 728, 730 (6th Cir. 1986), Defendant argues that Plaintiffs are prohibited from relying on evidence extrinsic to § 7502 to establish that their amended return was timely filed. Defendant maintains that, in this circuit, the specific exceptions to the physical delivery rule laid out in § 7502 are the *only* acceptable alternatives for establishing a timely filing, and that the evidence presented by Plaintiffs is therefore immaterial. In *Miller,* the plaintiff-taxpayer sought a $53,663 refund. 784 F.2d at 729. The taxpayer alleged that he timely mailed his claim for a refund, but the IRS had no record that the claim was received. *Id.* Despite the fact that the taxpayer offered proof extrinsic to § 7502 that he timely mailed his return, the District Court dismissed the case on jurisdictional grounds. The Sixth Circuit affirmed. "Because the Court concludes that the only exceptions to the physical delivery rule available to taxpayers are the two set out in section 7502, we hold that the District Court was correct in granting

defendant's motion to dismiss for lack of subject matter jurisdiction." *Id.* at 731.

Plaintiffs try to distinguish *Miller* on grounds that, unlike here, the IRS never received Miller's amended tax return. The *Miller* Court reasoned that the plaintiff failed to satisfy the first exception created by § 7502 because the IRS did not actually receive the amended return, as 7502(a)(1) requires. *Id.* at 730. Because the IRS never received the return, and the taxpayer did not use registered or certified mail, the § 7502 sections did not apply. The same scenario and reasoning were repeated in *Surowka v. United States,* 909 F.2d 148 (6th Cir. 1990), where once again a taxpayer claimed that he timely filed his tax return by regular mail, but the IRS had no record of receiving the return. Plaintiffs believe that the IRS's receipt of Plaintiffs' return in this case is a highly significant distinction, and that *Miller* and *Surowka* should not be applied to the present case. For support, Plaintiffs refer to a bankruptcy court decision in the Eastern District of Tennessee, which stated that "[t]he Sixth Circuit has only refused to allow a taxpayer to present extrinsic evidence other than a registered or certified mail receipt when the IRS has sufficiently proven that the documents in question were not received." *In re Conner,* 187 B.R. 217, 219–20 (Bankr.E.D.Tenn.1995); *But see Schentur v. United States,* No. 92–3605, 1992 WL 95798 (6th Cir. Aug. 30, 1993).

Plaintiffs' reading of *Miller* is selective. *Miller* and *Surowka* did indeed hold that the first exception to the physical delivery rule created by § 7502 can

only be satisfied when the document in question is actually delivered. That particular holding has no relevance here. However, the broader holding of the two cases is that the two § 7502 exceptions are the *sole* exceptions to the physical delivery rule, and that evidence extrinsic to § 7502 may not be offered as proof of a timely mailing in an effort to bypass the physical delivery rule. *Miller,* 784 F.2d at 731 ("[T]he only exceptions to the physical delivery rule available to taxpayers are the two set out in section 7502); *Surowka,* 909 F.2d at 149–50 ("The exception embodied in section 7502 and the cases construing it demonstrate a penchant for an easily applied, objective standard. Where, as here, the exception of section 7502 is *not literally applicable,* courts have consistently rejected testimony or other evidence as proof of the actual date of mailing.") (citations omitted) (emphasis added). The fact that Plaintiffs in this case fail the first § 7502 exception for a different reason than the plaintiffs in *Miller* or *Surowka* does not provide a basis for ignoring the broader holding of those cases.

This Court's reading of *Miller* is directly supported by the Sixth Circuit's decision in *Schentur.* Although the Sixth Circuit's opinion in *Schentur* is unpublished and therefore not binding upon this Court, it confirms this Court's determination that *Miller* and *Surowka* require the exclusion of evidence extrinsic to § 7502 for purposes of evading the physical delivery rule. In *Schentur,* as here, the IRS did receive plaintiff-taxpayers' amended returns but did not retain the postmarked mailing envelopes. 1992 WL 95798 at *1. The *Schentur* plaintiffs submitted affidavits as evidence that they timely

filed their returns. The Sixth Circuit ignored the plaintiffs' extrinsic evidence, holding, "[P]laintiffs do not meet either [§ 7502] exception. The postmarks from the returns were destroyed and are not available as evidence. Moreover, plaintiffs did not use registered or certified mail to file their returns. Thus, without looking to the affidavits, the returns were filed as a matter of law when they were actually received by the IRS...."[4]

The plaintiffs in *Miller* and *Surowka* failed under the first § 7502 exception because their tax returns were never received by the IRS. The plaintiffs in *Schentur* and the Stockers fail under the first exception because the envelopes containing their tax returns were lost or destroyed, and therefore no postmark is available as proof. All of these plaintiffs fail under the second § 7502 exception because they did not utilize registered or certified mail. And none of these plaintiffs are permitted to rely on evidence

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[4] Plaintiffs argue that *Schentur* may not necessarily stand for the exclusion of extrinsic evidence, as it appears the District Court weighed the evidence provided by the plaintiffs in that case. However, regardless of whether the District Court in Schentur considered extrinsic evidence, it is clear that the Sixth Circuit panel did not. At oral argument before the panel, the government argued "that the affidavits produced by plaintiffs were insufficient to establish their claim because the only ways to establish delivery to the IRS are a postmark or a certified or registered mail receipt." *Shentur,* 1993 WL 330640 at *3. The Sixth Circuit agreed, and held as a matter of law that the physical delivery rule governed the case "without looking to the affidavits." *Id.* at *4. The fact that the Stockers' extrinsic evidence, if admissible, would likely be more convincing than that of the Schenturs is also immaterial.

extrinsic to § 7502 for the purpose of evading the physical delivery rule.

The Court is sympathetic to Plaintiffs' case. It is the fault of the IRS that the postmarked envelope which contained Plaintiffs' amended return is not available. Defendant argues that the IRS was under no obligation to preserve the envelope[5] and that the date stamp of Oct. 19 is an acceptable substitution for the lost postmark. The Court disagrees. In the Court's view, the date stamp touted by Defendants is just as extrinsic to § 7502 as the evidence presented by Plaintiffs. Unfortunately for Plaintiffs, it is they who carry the burden of proving the timely delivery of their return.

Miller and the parallel Second Circuit decision in *Deutsch v. Comm'r of Internal Revenue,* 599 F.2d 44 (2nd Cir. 1979), *cert. denied,* 444 U.S. 1015, 100 S.Ct. 665, 62 L.Ed.2d 644 (1979) have been criticized for

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[5] In contradiction to Defendant's claim, Plaintiffs point to the IRS's manual, which requires that employees "[a]lways attach envelopes and stamp receive date on ... [a]ll returns specifically sorted as 'Amended' ... returns." Reliance on a date stamp without an original postmark is less than desirable, as courts have noted that the IRS is not immune to human error. *Gless v. United States ex rel. IRS (In re Gless),* 179 B.R. 646, 653 (Bankr.D.Neb.1995) (refusing to assume that an IRS computer printout was accurate where the IRS failed to preserve the actual documents as required by the Internal Revenue Manual); *Harzvi v. United States,* 73–2 U.S. Tax Cas. (CCH) P9712, 1973 U.S. Dist. LEXIS 12117, at *5,1973 WL 629 (E.D.N.Y. Aug. 29, 1973) ("The IRS employees' faith in the perfection of their system is commendable, but the court is not persuaded that IRS index records are the only man-made records that are free from error.").

allowing sloppiness on the part of the government, and several courts have taken a more permissive view of § 7502. *See, e.g., Phila. Marine Trade Ass'n–Int'l Longshoremen's Ass'n Pension Fund v. Comm'r,* 523 F.3d 140, 151 (3d Cir. 2008) ("The Second and Sixth Circuit Courts, contrary to what we decide today, have seemingly concluded that § 7502 preempts the common-law mailbox rule even where the taxpayer does not need § 7502's protection."); *Anderson v. United States,* 966 F.2d 487, 491 (9th Cir. 1992) ("Neither the language of the statute nor Ninth Circuit precedent bars admission of extrinsic evidence to prove timely delivery."); *Estate of Wood v. Comm'r,* 909 F.2d 1155, 1159 (8th Cir. 1990) ("To the extent that the Sixth and Second Circuits in *Miller* and *Deutsch* hold that a presumption of delivery can never be used to satisfy the requirement of delivery in section 7502(a)(1), we disagree."); *Lee Brick & Tile Co., Inc. v. United States,* 132 F.R.D. 414, 419 (M.D.N.C. 1990) ("Importantly for this case, in the Fourth Circuit, the court specifically held that enactment of Section 7502 did not eliminate the prior judicially created common law presumption of delivery by proof of mailing."); *Sorrentino v. IRS,* 383 F.3d 1187, 1193 (10th Cir. 2004) ("I am not prepared, based upon § 7502's plain language, to hold a taxpayer may never prove delivery to the IRS of the "undelivered return" in the absence of a registered, certified, or electronic mail receipt.").

However, the fact remains that *Miller* and its progeny are binding upon this Court. *Carroll v. Comm'r,* 71 F.3d 1228, 1232 (6th Cir. 1995) ("A number of judges voted in favor of rehearing [of *Miller* and *Surowka*] (it may come as no surprise to

the attentive reader that the author of the present opinion was among them), but the number was less than a majority."); *Schentur,* 1992 WL 95798 at *6 (Nelson, J., concurring) ("If I were free to do so, I would follow Anderson and Wood. Under § 10.2 of the Court Policies of this circuit, however, the Surowka and Miller decisions, both of which have been published in the Federal Reporter, are binding on this panel."); *In re Crump,* 282 B.R. 859, 863 (Bankr. N.D. Ohio 2002) ("This rule, although it has been criticized on the grounds that it allows sloppiness by the IRS, has on several occasions been reiterated by the Sixth Circuit Court of Appeals.").

IV.

Under binding Sixth Circuit precedent, the statutory exceptions created by 26 U.S.C. § 7502 are the only alternatives to the physical delivery rule for establishing delivery of a federal tax return. Plaintiffs cannot avail themselves of the § 7502 exceptions. Therefore, Plaintiffs amended 2003 return is deemed delivered on October 25, 2007, the day it was actually received by the IRS. Because Plaintiffs have failed to show that they timely filed their amended 2003 return pursuant to 26 U.S.C. §§ 7422 and 6511, this Court lacks jurisdiction to hear this case, and Defendant's cross motion to dismiss pursuant to Rule 12(b)(1) and (2) will be granted. Plaintiffs' motion for summary judgment will be denied as moot. An order corresponding with this opinion will be entered.

Dated: June 20, 2011

/s/ Robert Holmes Bell

ROBERT HOLMES BELL
UNITED STATES
DISTRICT JUDGE

No. 11-1890

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT W. STOCKER, II; LAUREL A. STOCKER, Plaintiffs-Appellants,	)	
v.	)	ORDER
UNITED STATES OF AMERICA Defendant-Appellee.	)	

BEFORE BATCHELDER, Chief Judge; COLE, Circuit Judge; and ROSEN, * District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

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* Hon. Gerald E. Rosen, Chief United States District Judge for the Eastern District of Michigan, sitting by designation.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

FILED
Apr 24, 2013
DEBORAH S. HUNT, Clerk

United States Code

Title 26. Internal Revenue Code

Subtitle F. Procedure and Administration

Chapter 76. Judicial Proceedings

Subchapter B. Proceedings by Taxpayers and Third Parties

§ 7422. Civil actions for refund

(a) No suit prior to filing claim for refund.— No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

* * * *

United States Code

Title 26. Internal Revenue Code

Subtitle F. Procedure and Administration

Chapter 77. Miscellaneous Provisions

§ 7502. Timely mailing treated as timely filing and paying

(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 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.

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

(A) the postmark date falls within the prescribed period or on or before the prescribed date—

(i) for the filing (including any extension granted

for such filing) of the return, 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 not 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; electronic filing.

(1) Registered mail.—For purposes of this section, if any 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; electronic filing.—The Secretary is authorized to provide by regulations the extent to

which the provisions of paragraph (1) with respect to prima facie evidence of delivery and the postmark date shall apply to certified mail and electronic filing.

(d) Exceptions.—This section shall not apply with respect to—

(1) the filing of a document in, or the making of a payment to, any court other than the Tax Court,

(2) currency or other medium of payment unless actually received and accounted for, or

(3) returns, claims, statements, or other documents, or payments, which are required under any provision of the internal revenue laws or the regulations thereunder to be delivered by any method other than by mailing.

(e) Mailing of deposits.—

(1) Date of deposit.—If any deposit required to be made (pursuant to regulations prescribed by the Secretary under section 6302(c)) on or before a prescribed date is, after such date, delivered by the United States mail to the bank, trust company, domestic building and loan association, or credit union authorized to receive such deposit, such deposit shall be deemed received by such bank, trust company, domestic building and loan association, or credit union on the date the deposit was mailed.

(2) Mailing requirements.—Paragraph (1) shall apply only if the person required to make the deposit establishes that—

(A) the date of mailing falls on or before the second day before the prescribed date for making the deposit (including any extension of time granted for making such deposit), and

(B) the deposit was, on or before such second day, mailed in the United States in an envelope or other appropriate wrapper, postage prepaid, properly addressed to the bank, trust company, domestic building and loan association, or credit union authorized to receive such deposit.

In applying subsection (c) for purposes of this subsection, the term "payment" includes "deposit", and the reference to the postmark date refers to the date of mailing.

(3) No application to certain deposits.—Paragraph (1) shall not apply with respect to any deposit of $20,000 or more by any person who is required to deposit any tax more than once a month.

(f) Treatment of private delivery services.—

(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 similar to the rule of paragraph (1) with respect to any service provided by a designated delivery service which is substantially equivalent to United States registered or certified mail.

United States Code

Title 28. Judiciary and Judicial Procedure

Part IV. Jurisdiction and Venue

Chapter 85. District Courts; Jurisdiction

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

> **(1)** Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

* * * *

2011 Code of Federal Regulations

Title 26. Internal Revenue

Chapter I. Internal Revenue Service, Department of the Treasury

Subchapter F. Procedure and Administration

Part 301. Procedure and Administration

Judicial Proceedings

Miscellaneous Provisions

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

(a) General rule. Section 7502 provides that, if the requirements of that section are met, a document or payment is deemed to be filed or paid on the date of the postmark stamped on the envelope or other appropriate wrapper (envelope) in which the document or payment was mailed. Thus, if the envelope that contains the document or payment has a timely postmark, the document or payment is considered timely filed or paid even if it is received after the last date, or the last day of the period, prescribed for filing the document or making the payment. Section 7502 does not apply in determining whether a failure to file a return or pay a tax has continued for an additional month or fraction thereof for purposes of computing the penalties and additions to tax imposed by section 6651. Except as provided in section 7502(e) and § 301.7502–2, relating to the timely mailing of deposits, and paragraph (d) of this

section, relating to electronically filed documents, section 7502 is applicable only to those documents or payments as defined in paragraph (b) of this section and only if the document or payment is mailed in accordance with paragraph (c) of this section and is delivered in accordance with paragraph (e) of this section.

(b) Definitions--(1) Document defined. (i) The term document, as used in this section, means any return, claim, statement, or other document required to be filed within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue laws, except as provided in paragraph (b)(1)(ii), (iii), or (iv) of this section.

(ii) The term does not include returns, claims, statements, or other documents that are required under any provision of the internal revenue laws or the regulations thereunder to be delivered by any method other than mailing.

(iii) The term does not include any document filed in any court other than the Tax Court, but the term does include any document filed with the Tax Court, including a petition and a notice of appeal of a decision of the Tax Court.

(iv) The term does not include any document that is mailed to an authorized financial institution under section 6302. However, see § 301.7502–2 for special rules relating to the timeliness of deposits and documents required to be filed with deposits.

(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.

* * *

(3) Payment defined. (i) The term payment, as used in this section, means any payment required to be made within a prescribed period or on or before a prescribed date under the authority of any provision of the internal revenue laws, except as provided in paragraph (b)(3)(ii), (iii), (iv), or (v) of this section.

(ii) The term does not include any payment that is required under any provision of the internal revenue laws or the regulations thereunder to be delivered by any method other than mailing. See, for example, section 6302(h) and the regulations thereunder regarding electronic funds transfer.

(iii) The term does not include any payment, whether it is made in the form of currency or other medium of payment, unless it is actually received and accounted for. For example, if a check is used as the form of payment, this section does not apply unless the check is honored upon

presentation.

(iv) The term does not include any payment to any court other than the Tax Court.

(v) The term does not include any deposit that is required to be made with an authorized financial institution under section 6302. However, see § 301.7502–2 for rules relating to the timeliness of deposits.

(4) Last date or last day prescribed. As used in this section, the term the last date, or the last day of the period, prescribed for filing the document or making the payment includes any extension of time granted for that action. When the last date, or the last day of the period, prescribed for filing the document or making the payment falls on a Saturday, Sunday or legal holiday, section 7503 applies. Therefore, in applying the rules of this paragraph (b)(4), the next succeeding day that is not a Saturday, Sunday, or legal holiday is treated as the last date, or the last day of the period, prescribed for filing the document or making the payment. Also, when the last date, or the last day of the period, prescribed for filing the document or making the payment falls within a period disregarded under section 7508 or section 7508A, the next succeeding day after the expiration of the section 7508 period or section 7508A period that is not a Saturday, Sunday, or legal holiday is treated as the last date, or the last day of the period, prescribed for filing the document or making the payment.

(c) Mailing requirements--(1) In general. Section 7502 does not apply unless the document or payment is

mailed in accordance with the following requirements:

(i) Envelope and address. The document or payment must be contained in an envelope, properly addressed to the agency, officer, or office with which the document is required to be filed or to which the payment is required to be made.

(ii) Timely deposited in U.S. mail. The document or payment must be deposited within the prescribed time in the mail in the United States with sufficient postage prepaid. For this purpose, a document or payment is deposited in the mail in the United States when it is deposited with the domestic mail service of the U.S. Postal Service. The domestic mail service of the U.S. Postal Service, as defined by the Domestic Mail Manual as incorporated by reference in the postal regulations, includes mail transmitted within, among, and between the United States of America, its territories and possessions, and Army post offices (APO), fleet post offices (FPO), and the United Nations, NY. (See Domestic Mail Manual, section G011.2.1, as incorporated by reference in 39 CFR 111.1.) Section 7502 does not apply to any document or payment that is deposited with the mail service of any other country.

(iii) Postmark--(A) U.S. Postal Service postmark. If the postmark on the envelope is made by the U.S. Postal Service, the postmark must bear a date on or before the last date, or the last day of the period, prescribed for filing the document or making the payment. If the postmark does not bear a date on or before the last date, or the last

day of the period, prescribed for filing the document or making the payment, the document or payment is considered not to be timely filed or paid, regardless of when the document or payment is deposited in the mail. Accordingly, the sender who relies upon the applicability of section 7502 assumes the risk that the postmark will bear a date on or before the last date, or the last day of the period, prescribed for filing the document or making the payment. See, however, paragraph (c)(2) of this section with respect to the use of registered mail or certified mail to avoid this risk. If the postmark on the envelope is made by the U.S. Postal Service but is not legible, the person who is required to file the document or make the payment has the burden of proving the date that the postmark was made. Furthermore, if the envelope that contains a document or payment has a timely postmark made by the U.S. Postal Service, but it is received after the time when a document or payment postmarked and mailed at that time would ordinarily be received, the sender may be required to prove that it was timely mailed.

(B) Postmark made by other than U.S. Postal Service--(1) In general. If the postmark on the envelope is made other than by the U.S. Postal Service--

(i) The postmark so made must bear a legible date on or before the last date, or the last day of the period, prescribed for filing the document or making the payment; and

(ii) The document or payment must be

received by the agency, officer, or office with which it is required to be filed not later than the time when a document or payment contained in an envelope that is properly addressed, mailed, and sent by the same class of mail would ordinarily be received if it were postmarked at the same point of origin by the U.S. Postal Service on the last date, or the last day of the period, prescribed for filing the document or making the payment.

(2) Document or payment received late. If a document or payment described in paragraph (c)(1)(iii)(B)(1) is received after the time when a document or payment so mailed and so postmarked by the U.S. Postal Service would ordinarily be received, the document or payment is treated as having been received at the time when a document or payment so mailed and so postmarked would ordinarily be received if the person who is required to file the document or make the payment establishes--

(i) That it was actually deposited in the U.S. mail before the last collection of mail from the place of deposit that was postmarked (except for the metered mail) by the U.S. Postal Service on or before the last date, or the last day of the period, prescribed for filing the document or making the payment;

(ii) That the delay in receiving the document or payment was due to a delay in the transmission of the U.S. mail; and

(iii) The cause of the delay.

(3) U.S. and non-U.S. postmarks. If the envelope has a postmark made by the U.S. Postal Service in addition to a postmark not so made, the postmark that was not made by the U.S. Postal Service is disregarded, and whether the envelope was mailed in accordance with this paragraph (c)(1)(iii)(B) will be determined solely by applying the rule of paragraph (c)(1)(iii)(A) of this section.

(2) Registered or certified mail. If the document or payment is sent by U.S. registered mail, the date of registration of the document or payment is treated as the postmark date. If the document or payment is sent by U.S. certified mail and the sender's receipt is postmarked by the postal employee to whom the document or payment is presented, the date of the U.S. postmark on the receipt is treated as the postmark date of the document or payment. Accordingly, the risk that the document or payment will not be postmarked on the day that it is deposited in the mail may be eliminated by the use of registered or certified mail.

(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).

(d) Electronically filed documents--(1) In general. A document filed electronically with an electronic return transmitter (as defined in paragraph (d)(3)(i) of this section and authorized pursuant to paragraph (d)(2) of this section) in the manner and time prescribed by the Commissioner is deemed to be filed on the date of the electronic postmark (as defined in paragraph (d)(3)(ii) of this section) given by the authorized electronic return transmitter. Thus, if the electronic postmark is timely, the document is considered filed timely although it is received by the agency, officer, or office after the last date, or the last day of the period, prescribed for filing such document.

(2) Authorized electronic return transmitters. The Commissioner may enter into an agreement with an electronic return transmitter or prescribe in forms, instructions, or other appropriate guidance the procedures under which the electronic return transmitter is authorized to provide taxpayers with an electronic postmark to acknowledge the date and time that the electronic return transmitter received the electronically filed document.

(3) Definitions--(i) Electronic return transmitter. For purposes of this paragraph (d), the term electronic return transmitter has the same meaning as contained in section 3.01(4) of Rev. Proc. 2000–31 (2000–31 I.R.B. 146 (July 31, 2000)) (see § 601.601(d)(2) of this chapter) or in procedures prescribed by the Commissioner.

(ii) Electronic postmark. For purposes of this paragraph (d), the term electronic postmark means a record of the date and time (in a particular time zone) that an authorized electronic

return transmitter receives the transmission of a taxpayer's electronically filed document on its host system. However, if the taxpayer and the electronic return transmitter are located in different time zones, it is the taxpayer's time zone that controls the timeliness of the electronically filed document.

(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).

(f) Claim for credit or refund on late filed tax return--
(1) In general. Generally, an original income tax return may constitute a claim for credit or refund of income tax. See § 301.6402–3(a)(5). Other original tax returns can also be considered claims for credit or refund if the liability disclosed on the return is less than the amount of tax that has been paid. If section 7502 would not apply to a return (but for the operation of paragraph (f)(2) of this section) that is also considered a claim for credit or refund because the envelope that contains the return does not have a postmark dated on or before the due date of the return, section 7502 will apply separately to the claim for credit or refund if--

(i) The date of the postmark on the envelope is within the period that is three years (plus the period of any extension of time to file) from the day the tax is paid or considered paid (see section 6513), and the claim for credit or refund is delivered after this three-year period; and

(ii) The conditions of section 7502 are otherwise met.

(2) Filing date of late filed return. If the conditions of paragraph (f)(1) of this section are met, the late filed return will be deemed filed on the postmark date.

* * *

(g) Effective date--(1) In general. Except as provided in paragraphs (g)(2) and (3) of this section, the rules of this section 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 January 11, 2001.

(2) Claim for credit or refund on late filed tax return. Paragraph (f) of this section applies to any claim for credit or refund on a late filed tax return described in paragraph (f)(1) of this section except for those claims for credit or refund which (without regard to paragraph (f) of this section) were barred by the operation of section 6532(a) or any other law or rule of law (including res judicata) as of January 11, 2001.

(3) Electronically filed documents. This section applies to any electronically filed return, claim, statement, or other document transmitted to an electronic return transmitter that is authorized to provide an electronic postmark pursuant to paragraph (d)(2) of this section after January 11, 2001.

(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.

2006 Internal Revenue Manual

Part 3. Submission and Processing

Chapter 10. Campus Mail and Work Control

Section 203. Mail Receiving and Sorting Operations

§ 3.10.203.4.1.2 Registered and Certified Mail

1. Process Registered and Certified Mail by agreement with the local Post Office, or by following the procedures below if a postal employee is located on site:

    1. Identify certified and registered mail by red or green stickers affixed to or part of each envelope prior to the sorting operation.

    2. Separate all certified and registered mail and forward it to the Detached Mail Unit (DMU) employee for control.

    3. Have the designated IRS mail clerk stamp Certified Mail and Registered Mail, and sign the Registered Mail acknowledgement. Stamp the acknowledgments in the following manner: **Internal Revenue Service Received** (Month, day, year) (Center name)(City, State).

    4. Direct certified mail queries to the Detached Mail Unit (DMU) employee. The

DMU employee has the responsibility of researching computerized certified mail records maintained by the USPS.

5. Return certified and registered mail processed mail by the DMU employee, to sorting personnel for processing.

2009 Internal Revenue Manual

Part 3. Submission and Processing

Chapter 10. Campus Mail and Work Control

Section 72. Receiving, Extracting, and Sorting

§ 3.10.72.6.2.2 (01-01-2010)

"Postmark Date" and "Received Date"

1. This section contains procedures for determining the Postmark Date on mail received from a designated Private Delivery Service (PDS) or the United States Postal Service (USPS), including Private Metered mail delivered by the USPS.
2. The Postmark Date is used to determine timely mailing/timely filing. It is important that the extractor keep the envelope attached to a form or document when the postmark date is required.
3. IRC 7502 provides what is commonly called the "timely mailing-timely filing" rule. For example, an individual income tax return would be considered timely filed even if received after the April 15th due date as long as the return was delivered to the United States Postal Service or a designated Private Delivery Service (PDS) in an envelope with the correct postage and properly addressed envelope before the April 15th due date.
4. Use the following rules to determine the Postmark Date for mail delivered by the

United States Postal Service (USPS), Private Metered (USPS), and designated Private Delivery Service (PDS).

A. If a container/envelope has both a USPS postmark and a private metered postmark, always use the USPS postmark.

B. If a container/envelope has only a **private metered** postmark, use it as the Postmark Date.

5. If the container/envelope is from a designated **Private Delivery Services (PDSs)** outlined in IRM 3.10.72.2.4.3, use the date on the "drop-off" date shown on the label (if provided) as the Postmark, or use the rules for type of delivery service shown in IRM 3.10.72.6.2.4 (e.g. Next Day, Overnight, etc.)

6. If there are multiple documents, Receipt & Control must stamp the Postmark Date and Received Date on the first document and attach the envelope, then stamp both the Postmark Date and Received Date on all subsequent documents contained in the envelope (or use a Dual Date). If using single stamps, stamp the Postmark Date in the left margin and Received Date on the face (page one) of the document in an area that does not cover taxpayer information.

- If the **postmark is illegible**, leave the Postmark Date portion blank, or "blank it out."
- If the **postmark is missing**, edit

"Missing" in place of the date portion of Postmark.

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