



Current Federal Tax Developments

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Section: Enforcement

Court Grants Some of IRS's Request to Obtain Customer Information from Bitcoin Exchange

Citation: *United States v. Coinbase Inc.* USDC ND California, Case No. 3:17-cv-0143, 11/29/17

The IRS was granted the right to receive some, but not all, of the information it wished to see related to customers of a bitcoin exchange (*United States v. Coinbase Inc.* USDC ND California, Case No. 3:17-cv-01431), though not on all customers of the exchange.

The IRS had been originally seeking information on all U.S. customers of the exchange, but the agency had already revised their request to exclude any account with less than \$20,000 in one transaction type (buy, sell or receive) during any one year between 2013-2015 and also excluding any customer that had only purchased bitcoin or customers for which Coinbase had issued a Form 1099K. The IRS also had requested detailed information on each customer, including know your customer due diligence, agreements granting a third party access to the account and correspondence between Coinbase and any party relating to a specific account.

The Court found that the IRS did not have a right to those three specific items, but otherwise found that the IRS's subpoena otherwise would be enforced. Thus the court ordered Coinbase to produce the following for the IRS:

Coinbase is ORDERED to produce the following documents for accounts with at least the equivalent of \$20,000 in any one transaction type (buy, sell, send, or receive) in any one year during the 2013 to 2015 period:

- (1) the taxpayer ID number,*
- (2) name,*
- (3) birth date,*
- (3) address,*
- (4) records of account activity including transaction logs or other records identifying the date, amount, and type of transaction (purchase/sale/exchange), the post transaction balance, and the names of counterparties to the transaction, and*
- (5) all periodic statements of account or invoices (or the equivalent).*

The opinion notes the reasons the IRS is interested in this data:

The IRS believes that virtual currency gains are underreported. In particular, approximately 83 to 84 percent of taxpayers file returns electronically which are maintained in various databases including the Modernized Tax Return Data Base ("MTRDB"). (Id. ¶¶ 11-12.) Capital gain or loss for property transactions, including those from virtual currency, is reported on IRS Form 8949, which is attached to Schedule D of a Form 1040. (Id. ¶ 11.) Form 8949 includes a space where the taxpayer is asked to report the type of property sold. (Id.) Based upon an IRS search, only 800 to 900 persons electronically filed a Form 8949 that included a property description that is "likely related to bitcoin" in each of the years 2013 through 2015. (Id. ¶ 13.)

The IRS had previously outlined its position for reporting gains/losses in bitcoin in Notice 2014-21.

Generally, the ruling provides that Bitcoin and similar virtual currencies are property and not currency for federal tax purposes. This has the practical result, given the varying value on a daily basis of Bitcoin, that a user will compute a gain or loss when exchanging Bitcoin for a product, service or traditional currency. How that gain or loss is taxed is determined by the same rules that affect dispositions of property generally—which means determining if the Bitcoin property is investment property, inventory, personal property, etc.

Some of the key rulings in the Notice include:

- A person who receives Bitcoin (or any other virtual currency—we'll use Bitcoin here for simplicity) for goods or services must include the value of the Bitcoin in the computation of gross income. The value would be the value of the Bitcoin in U.S. currency at the time it is received (with the practical valuation problem noted above). The IRS does provide, at Q&A5 of the FAQ, that if a currency is listed on an exchange that is established by market supply and demand, that exchange value would be used to determine the fair value in U.S. currency.
- Q&A 6 specifically holds that the holder of Bitcoin who then uses that to acquire a product or service will have a gain or loss on the conversion, again measured by the fair value at the time the Bitcoins are used to acquire the good or service. The gain or loss is measured by comparing that value to the taxpayer's basis in the Bitcoins surrendered, which would generally be what the taxpayer had paid for the Bitcoin or the value recognized when the Bitcoins were received by the taxpayer in an initial exchange or at the time of mining.
- The gain or loss recognized is determined by the nature of the Bitcoin property in the hands of the taxpayer prior to the exchange.
 - If the Bitcoin is investment property (the taxpayer was speculating in Bitcoin, for instance), then there would be a capital gain or loss
 - If the Bitcoin is inventory to the taxpayer (as it would be for a Bitcoin exchange), then the gain or loss would be ordinary
 - If the Bitcoin is personal property, any gain would be capital in nature (and taxable) but losses would not be deductible. Interestingly enough, the IRS does not mention this type of property in the FAQ
- The taxation of "miners" is outlined in Q&As 8 and 9. A miner recognizes income equal to the fair value of the Bitcoin at the time it is mined and such income would, at least in the view of the IRS, be self-employment income if earned by an individual.
- Employees and independent contractors paid in Bitcoin have income at the time of receipt of the Bitcoin equal to the fair value of the Bitcoin at the time of receipt. The payments are subject to all of the withholding and reporting rules that generally apply to any such payments. Thus, a business paying its employees in Bitcoin would issue W-2s to those employees. Similarly, a business paying more than \$600 for services to an unincorporated independent contractor during the year would issue a Form 1099-MISC to that contractor. As well, the business would need to obtain a Form W-9 from the contractor and a contractor that refused to provide the required information would be subject to backup withholding.
- The IRS also ruled that entities that contract as an intermediary to settle payments between merchants and their customers in virtual currency would be considered a third party settlement organization and required to issue Forms 1099-K if the requirements are met, in the same way as is done for credit cards and organizations like Paypal.

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The IRS also provided that there will not be a blanket waiver of penalties for not having treated a transaction under these rules prior to March 25, 2014 (when the ruling was issued). However the IRS does indicate that the general reasonable cause relief may apply.

Most likely those who reasonably and innocently run afoul of these provisions will be granted relief. But an individual who was using Bitcoin transactions to “stay off the radar” and escape notice will not likely find any relief will be given if their transgressions come to light.

As a practical matter, this ruling is going to make things a bit more difficult for businesses that accept Bitcoins in payment since a gain or loss has to be computed each time the virtual currency is converted to cash or used for paying expenses. And it’s important to note that the ruling provides no “safe harbor” time period where a vendor would be allowed to use the redemption price as the value of the Bitcoin. So prudence suggests that a vendor would probably want to have the Bitcoin converted to cash immediately upon receipt.

Section: 71

English Law Used to Determine if Payments Would Cease on Death of Payee

Citation: *Wolens v. Commissioner*, TC Memo 2017-236, 11/27/17

The basic question the Court had to decide in the case of [Wolens v. Commissioner](#), TC Memo 2017-236 seemed to be one often encountered in alimony court cases. Did the payment stream in question stop upon the death of the recipient spouse? Answering that question in the affirmative would satisfy one of four initial requirements for a payment stream to be treated as alimony for tax purposes.

As has often been true in previous cases, the divorce document did not specifically address whether these payments would continue after the death of the recipient. And, as happens in those cases, the Court next looks to the relevant governing law (referred to in the cases as “state” law) to determine if the underlying law would cause the payment stream to stop.

But in this case, while the marriage took place in the state of New York, the divorce was granted in England. The taxpayer argued that because it was a New York marriage and he and his ex-wife remained domiciled in New York, that New York law should govern interpreting the agreement. And, as well, the prior court cases referred to “state law” so that would mean England, not being a state of the United States, would be ignored as a potential source of governing law.

However, the Tax Court did not see things that way.

The Court first determined that New York law was not relevant in this case. As the opinion notes:

*Although the parties dispute domicile, neither party is challenging the validity of the divorce. We, therefore, conclude that the law of the marital [*7] domicile is not the law that we must interpret. Section 71 requires us to interpret the divorce order. See Rood v. Commissioner, slip op. at 9-10. The divorce order was issued under English law, as petitioner acknowledged. We, therefore, will apply English law to determine the rights and obligations created by the English court's order. Kean v. Commissioner, 407 F.3d 186, 191 (3d Cir. 2005) (applying New Jersey law to conclude that “[a] support order issued pendente lite in a New Jersey divorce proceeding does not survive the death of the*

*payee”), aff’g T.C. Memo. 2003-163; see also Lovejoy v. Commissioner, 293 F.3d 1208, 1210 (10th Cir. 2002) (applying Colorado law to payments made pursuant to a divorce made under Colorado law), aff’g Miller v. Commissioner, T.C. Memo. 1999-273; Hoover v. Commissioner, 102 F.3d at 847 (applying Ohio law to payments made pursuant to a divorce made under Ohio law); Muniz v. Commissioner, T.C. Memo. 2015-125 (applying Florida law to payments made pursuant to a divorce under Florida law), aff’d, 661 F. App’x 1027 (11th Cir. [*8] 2016); Hampers v. Commissioner, T.C. Memo. 2015-27 (applying New Hampshire law to payments made pursuant to a divorce under New Hampshire law); Leventhal v. Commissioner, T.C. Memo. 2000-92 (applying New York law to a separation agreement made pursuant to a divorce under New York law); Human v. Commissioner, T.C. Memo. 1998-106 (applying Georgia law to payments made pursuant to a divorce under Georgia law).*

But what about the “state law” question—England is not a state of the United States, so doesn’t that remove English law as a possible source to resolve this matter? The Tax Court pointed out this question has been answered before—and not in the way the taxpayer wishes.

We also reject petitioner’s contention that the “State law” referred to in our analysis of section 71(b)(1)(D) means the law of one of the fifty States. We previously applied the law of a foreign country in determining the taxability of rights created by a divorce decree granted under the laws of that country. In Parsons v. Commissioner, 44 B.T.A. 1142, 1146, 1151 (1941), we applied Latvian law in determining whether trust income paid to the taxpayer’s ex-wife discharged a legal obligation for the taxpayer to provide support for his ex-wife under a Latvian divorce decree. In Reighley v. Commissioner, 17 T.C. 344, 352-353 (1951), we applied German law in determining whether payments made pursuant to a German annulment were alimony. Because the divorce order was issued under English law, we must determine whether petitioner’s obligation to make the 2009 payment would have terminated upon the death of petitioner’s ex-wife under English law.

The Tax Court, looking at the agreement in question, found that English courts had ruled that the type of payment agreed to by the parties would not terminate upon the death of the recipient spouse. Since that is one of the four initial requirements for a payment stream to be treated as tax alimony, the deduction claimed for alimony was disallowed.

Section: 165

IRS Provides Safe Harbor for Claiming Casualty Loss Arising from Deterioration of Residence Foundation Due to Pyrrhotite

Citation: Revenue Procedure 2017-60, 11/24/17

In [Revenue Procedure 2017-60](#) the IRS has provided a safe harbor for use by individuals who have suffered damage to their personal residences due to deteriorating concrete foundations caused by the presence of pyrrhotite. Under the safe harbor, amounts paid to repair such damage will count as a casualty loss in the year of payment.

The issue affects residents of the Northeastern United States due to the presence of pyrrhotite in the concrete mixture used to pour the affected foundations. The IRS notes that this is a mineral that naturally occurs in stone aggregate which is used to produce concrete. The mineral oxidizes in the presence of water and oxygen, leading to the formation of expansive mineral products and causing the concrete to deteriorate prematurely.

Taxpayer who pay for repairs for such a “deteriorating concrete foundation” may elect to use the safe harbor and treat the amount of the payment as a casualty loss in the year paid.

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The Revenue Procedure provides the following details on what must be true for a taxpayer to qualify to use this procedure.

A taxpayer who pays to repair damage to that taxpayer's personal residence caused by a deteriorating concrete foundation may treat the amount paid as a casualty loss in the year of payment. For purposes of this revenue procedure, the term "deteriorating concrete foundation" means a concrete foundation that is damaged as a result of the presence of the mineral pyrrhotite in the concrete mixture used to pour the foundation. The safe harbor under this revenue procedure is available to a taxpayer who has obtained a written evaluation from a licensed engineer indicating that the foundation was made with defective concrete, and has requested and received a reassessment report that shows the reduced reassessed value of the residential property based on the written evaluation from the engineer and an inspection pursuant to Connecticut Public Act No. 16-45 (Act). The safe harbor also is available to a taxpayer whose personal residence is either in Connecticut or outside of Connecticut, provided the taxpayer has obtained a written evaluation from a licensed engineer indicating that the foundation was made with defective concrete containing the mineral pyrrhotite.

Note that it is key that the taxpayer obtain the written evaluation from a licensed engineer to take advantage of this safe harbor.

The procedure goes on to describe the following limitations on the loss claimed:

The amount of a taxpayer's loss resulting from the deteriorating concrete foundation is limited to the taxpayer's adjusted basis in the property. In addition, the amount of the loss may be limited depending on whether the taxpayer has a pending claim for reimbursement (or intends to pursue reimbursement) of the loss through property insurance, litigation, or otherwise. A taxpayer who does not have a pending claim for reimbursement, and who does not intend to pursue reimbursement, may claim as a loss all unreimbursed amounts (subject to the adjusted basis limitation) paid during the taxable year to repair damage to the taxpayer's personal residence caused by the deteriorating concrete foundation. A taxpayer who has a pending claim for reimbursement, or who intends to pursue reimbursement, may claim a loss for 75 percent of the unreimbursed amounts paid during the taxable year to repair damage to the taxpayer's personal residence caused by the deteriorating concrete foundation. A taxpayer who has been fully reimbursed before filing a return for the year the loss was sustained may not claim a loss. A taxpayer who has a pending claim for reimbursement, or who intends to pursue reimbursement, may have income or an additional deduction in subsequent taxable years depending on the actual amount of reimbursement received. See § 1.165-1(d).

A taxpayer electing to use the safe harbor must indicate the election on his/her tax return, as detailed below:

A taxpayer claiming a casualty loss under this revenue procedure must report the amount of the loss on Form 4684 ("Casualties and Thefts") and must mark "Revenue Procedure 2017-60" at the top of that form. Taxpayers are subject to the \$100 limitation imposed by § 165(h)(1) and the 10-percent-of-AGI limitation imposed by § 165(h)(2).

Taxpayers do not have to use the safe harbor method—but the Revenue Procedure reminds taxpayers who may believe they want to go another route of the general rules that they would have to demonstrate compliance with:

Taxpayers who choose not to apply the safe harbor treatment provided by this revenue procedure are subject to all of the generally applicable provisions governing the deductibility of losses under § 165. Accordingly, these taxpayers must establish that the damage, destruction, or loss of property resulted

from an identifiable event that is sudden, unexpected, and unusual, and was not the result of progressive deterioration through a steadily operating cause. See Rev. Rul. 72-592, 1972-2 C.B. 101; Matheson v. Commissioner, 54 F.2d 537 (2d Cir. 1931). These taxpayers also must prove that the loss is properly deductible in the taxable year claimed by the taxpayer and not in another year. Further, these taxpayers must prove the amount of the claimed loss and must prove that no claim for reimbursement of any portion of the loss exists for which there is a reasonable prospect of recovery.

The procedure is effective for tax returns (including amended returns) filed after November 21, 2017.

Section: 262

No Deduction for Legal Fees Paid in Attempt to Recover Overpaid Alimony

Citation: Barry v. Commissioner, TC Memo 2017-23, 11/28/17

Taxpayers often come to advisers seeking a way to claim a deduction for legal fees. As we are aware, the IRC doesn't provide a provision that broadly allows a deduction for legal fees. Rather, taxpayers must find a provision in the IRC that allows a deduction for expenses of a type in which the current legal fees can be categorized.

The search for a provision under which to claim a deduction for legal fees was undertaken recently by the taxpayer in the case of [Barry v. Commissioner](#), TC Memo 2017-237. In this case the taxpayer had incurred over \$25,000 of legal fees in an unsuccessful attempt to recover what he claimed was alimony which he had paid to his wife in excess of what was allowed under their agreement.

Mr. Barry's attempt to obtain the overpaid alimony from his ex-spouse eventually failed when the court in which he had filed suit dismissed the case due to it being filed after the statute of limitations for such a claim had expired.

The general rule for determining whether legal fees are deductible by a taxpayer is referred to as the "origin of the claim" test. Under this test, established in the U.S. Supreme Court case of *United States v. Gilmore*, 372 U.S. 39 (1963) the taxpayer attempting to claim a deduction for legal fees must show that origin of the claim in question arose from a profit making, rather than personal, activity even if the result of the legal case might have various consequences on the financial condition of the taxpayer.

If the origin of the claim is a personal issue, then the deduction is barred under IRC §262(a). However, if the claim originates in, say, the production or collection of income or the management conservation or maintenance of property held for the production of income, then the expenses would be deductible under IRC §212. Specifically, in a divorce related case, the origin of the claim would generally be regarded as personal (and therefore the expenses nondeductible) if the claim would not have arisen but for the marriage.

That would appear to create a major barrier for the taxpayer in this case, but the taxpayer argued that his case was different from the situation in *Gilmore*. As the Court explained the taxpayer's rationale:

They contend, however, that Gilmore and Patrick are distinguishable as involving taxpayers whose claimed deductions were based on specific language of the Code, now found in section 212(2), allowing a

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*deduction for expenses paid or incurred “for the * * * conservation * * * of property held for the production of income”. By contrast, petitioners rely upon section 212(1), which allows a deduction for expenses paid or incurred “for the production * * * of income”. Because Mr. Barry’s lawsuit was for the purpose of recovering allegedly overpaid alimony, which petitioners equate with “the production * * * of income”, they say the deduction of the associated legal expenses is not barred by the origin-of-the-claim test.*

However, the Court found that this distinction did not make a difference, and that the general origin of the claim test would still apply to an attempt to recoup overpaid alimony deducted in a prior year.

The Court pointed to a prior District Court case that specifically disallowed a deduction for legal expenses related to overpaid alimony, noting:

And in a case presenting the very question presented to us today--the deductibility under section 212(1) of legal expenses incurred in an attempt to recoup allegedly wrongfully paid alimony--a District Court disallowed the claimed deduction, relying upon Sunderland and its application of the Gilmore origin-of-the-claim test. Favrot v. United States, 550 F. Supp. 809 (E.D. La. 1982).

But the taxpayer protested that legal fees paid by a potential recipient of alimony to attempt to obtain or increase such payment has been held to be deductible, so he should get the same treatment since, had he been successful, the repayment of the alimony would have includable in gross income under the tax benefit rule.

While agreeing any recovery would have been taxable, the Court found that the cases dealing with deducting legal fees to obtain alimony did not base their rulings on the question of whether the payment in question would have been includable in the taxpayer’s income had he/she been successful.

Contrary to the teaching of Gilmore, petitioners’ argument focuses improperly on the potential consequences of Mr. Barry’s lawsuit--the putative inclusion of the recovered proceeds in petitioners’ gross income under the tax benefit rule--rather than upon the origin and character of his claim. Moreover, the holding in Wild does not turn, as petitioners seem to suggest, simply on the question of whether the amounts sought to be recovered in the legal proceedings would have been includible in gross or taxable income. Rather, Wild relied on regulations which contain an exception to the general rule that was applied in Gilmore and Patrick. Sec. 1.262-1(b)(7), Income Tax Regs. That regulatory exception “relates solely to expenses incurred by the wife for the production or collection of amounts ‘includible in gross income under section 71,’ which deals with the taxability of alimony and similar amounts received by a wife as separate maintenance or support in connection with the marital relationship.” Wolfson v. Commissioner, 47 T.C. 290, 294 (1966).⁶ Petitioners do not contend that this regulatory exception applies to Mr. Barry’s claimed legal expenses, and the record does not support any such contention.

The Court expanded on why this regulation would not help Mr. Barry in a footnote to the above analysis, pointing out:

Although the amount Mr. Barry sought to recover from Ms. Barry was attributable to allegedly overpaid alimony, any amount he recovered as a result of his legal action would not have been includable in income as alimony under sec. 71. In order to qualify as alimony, a cash payment must satisfy four requirements, including that “such payment is received by (or on behalf of) a spouse under a divorce or separation instrument”. Sec. 71(b)(1)(A). Because Mr. Barry’s claim against Ms. Barry was for breach of contract and sought to recover alimony allegedly overpaid, any amount recovered would not be

“under a divorce or separation instrument.” Therefore, any recovery on that cause of action would not be alimony under sec. 71, and the associated legal fees would not come within the ambit of the second sentence of sec. 1.262-1(b)(7), Income Tax Regs.

Section: 6081

IRS Grants Additional Relief for Partnerships Affected by Change in Due Date

Citation: Notice 2017-71, 11/30/17

In [Notice 2017-71](#) the IRS has granted additional relief to taxpayers impacted by the change in the due date for partnership and related returns changed by the Surface Transportation and Veterans Health Care Act. Calendar year partnership returns for 2016 were due on March 15, 2017, while in prior years that return would have been due by April 15.

In Notice 2017-47 the IRS granted relief from late filing penalties for partnerships that filed their return or extension by the original due date. This notice extends that relief to other items, except interest on tax due, affected by the change in the due date made by Congress. That would include, for instance, the funding of a contribution to an employee benefit plan by the due date of the return for which a deduction is claimed on the prior year return.

The IRS outlines the relief as follows:

The IRS will treat acts of any (a) partnership, (b) REMIC, or (c) entity that may properly file a Form 1065—such as a bank (with respect to the return of a common trust fund), or a religious or apostolic association or corporation—and in fact filed a Form 1065, as timely for the first taxable year that began after December 31, 2015, and ended before January 1, 2017, if the entity took the act by the date that would have been timely under section 6072 before amendment by the Surface Transportation Act (April 18, 2017, for calendar-year taxpayers, because April 15 was a Saturday and April 17 was a legal holiday in the District of Columbia). However, the entity will be liable for any interest due under section 6601 from the date prescribed for payment until the date the payment was actually made.

The notice also provides the following relief for taxpayers that have already suffered negative consequences from the late filing:

An entity that has already been assessed a penalty for failure to timely file a return that is deemed timely filed under this notice can expect to receive a letter within the next several months notifying it that the penalty has been abated. For other acts deemed timely under this notice, such as elections, an entity should file its returns consistent with the treatment of the acts as being performed timely as provided by this notice, and need not take further action to obtain relief unless contacted by the IRS. For reconsideration of a penalty covered by this notice that has not been abated by February 28, 2018, contact the number listed in the letter that notified you of the penalty or call (800) 829-0115 and state that you are entitled to relief under Notice 2017-71. Taxpayers who qualify for relief under this notice will not be treated as having received a first-time abatement under the IRS's administrative penalty waiver program.

Section: 7501**Stamps.com Date Printed Used as a Postmark Applied by Other than the USPS for Timely Filing Rule**

Citation: *Pearson v. Commissioner*, 149 TC No. 20, 11/29/17

The Tax Court, having been reversed on appeal by the Seventh Circuit Court of Appeals in a case with virtually identical facts, officially changed its position on how to determine if a document mailed with a Stamps.com mailing label meets the timely filing rules of IRC §7502. In *Pearson v. Commissioner*, 149 TC No. 20, the Court rejected its prior position that entries in the U.S. Postal Service database amounted to the equivalent of U.S. Postal Service applied postmark which took precedence over the Stamps.com mailing date. Instead, a document mailed with a Stamps.com label (or any other sort of postage meter equivalent label) is tested under the regulations for a document with a postmark applied by other than the U.S. Postal Service.

While, as noted, this position had been adopted on appeal, reversing the prior Tax Court decision, the reversal only would have had effect for taxpayers in the Seventh Circuit had the Tax Court not reversed its prior position.

IRC §7502(a)(1) provides the general timely mailing is timely filing rule most practitioners are aware of. If a document is postmarked by the United States Postal Service prior to final date for the action in question (in this case, filing of a Tax Court petition), it is deemed delivered on the date it is mailed. If the document with “postmarks not made by the United States Postal Service” the presumption only applies “if and to the extent provided by regulations prescribed by the Secretary.”¹

The IRS has provided such regulations at Reg. §301.7502-1(c)(1)(iii)(B). The general rule for such documents provides:

(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.

If the document is not received by the time it would ordinarily have arrived at its destination, the regulation goes on to open a second possible way to show timely filing with a postmark not applied by the USPS:

(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

¹ IRC §7502(b)

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.

As the opinion notes, the facts of this case are virtually identical to those in the original Seventh Circuit case (*Tilden v. Commissioner*, 846 F.3d 882 (7th Cir. 2017), *rev'g and remanding* T.C. Memo. 2015-188), with the law firm and the administrative assistant being the same in both cases. However, the new case would be appealable to the Eight Circuit rather than the Seventh.

The facts are described as follows:

The Court received the petition on Wednesday, April 29, 2015, and filed it that same day. The petition was sent to the Court via certified mail delivery provided by the U.S. Postal Service (USPS). The envelope in which the petition was mailed bore a 20-digit USPS certified mail tracking number. The envelope did not have a USPS postmark, but it did have a "postmark" from Stamps.com, an online postage services provider. Stamps.com enables ordinary consumers to "enjoy the convenience of a traditional postage meter." Tilden v. Commissioner, 846 F.3d at 885.

Petitioners have supplied a declaration under penalty of perjury from Katelynn Marshall, an administrative assistant at the law firm representing them. She avers that on April 21, 2015, she created through Stamps.com a postage label with official U.S. postage of \$7.82 (the cost of ordinary postage plus the supplement for certified delivery). That label shows the Court's correct address, the certified mail tracking number referenced above, and the date "04/21/2015," reflecting the date on which the label was created.

Ms. Marshall further avers that she affixed this label to an envelope containing the petition and sealed that envelope. According to her declaration, she personally carried the sealed envelope later that day to the U.S. Post Office at 2350 Arbor Lane, Salt Lake City, Utah 84117, and deposited it in the U.S. mail.

Ms. Marshall attached to her declaration a USPS "certified mail receipt" bearing the tracking number referenced above. Written by hand on that receipt are petitioners' names, the words "United States Tax Court" (in the block captioned "Send To"), and the date "4/21/15" (in the block captioned "Postmark Here"). Ms. Marshall avers that she made these notations when she mailed the envelope.

The USPS maintains an online tracking system that enables customers to track the progress of certified mail. The earliest entry in that system for the item bearing the certified mail number referenced above shows its arrival at a Salt Lake City USPS facility, with ZIP Code 84199, at 5:39 p.m. on April 23, 2015. (That is a different USPS facility from the one at which Ms. Marshall mailed the petition; the latter has ZIP Code 84117.) Subsequent entries in the USPS tracking system show that the item left the USPS facility with ZIP Code 84199 at 6:57 p.m. on April 23, 2015, and was delivered to this Court at 11:02 a.m. on April 29, 2015. As noted previously, the Court filed the petition an hour later that day.

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The last date for filing the petition was April 22, 2015. In the *Tilden* case the Tax Court noted the USPS tracking system showed the document at a Postal Service facility on April 23. In a prior case (*Boulbee v. Commissioner*, TC Memo 2011-11) the Tax Court had found that such a tracking date was the functional equivalent of a USPS Postmark, using that as evidence the document in question had been timely filed.

But in this case (and in *Tilden*) the first date in the USPS tracking system was the date after the final date for filing. If that entry was the equivalent of a USPS applied postmark under the regulations it would take precedence over any postmark applied by a party other than the United States Postal Service.² In *Tilden* the Court, finding that was a USPS applied postmark based on the *Boulbee* rationale, determined the Court lacked jurisdiction since the date was after the last date for filing the petition.

The Seventh Circuit, reviewing the above rationale in the *Tilden* case, decided that the Tax Court had erred in treating that first entry in the USPS system as a postmark and giving it precedence over the Stamps.com date. Rather, the rules for a postmark applied by a party other than USPS should apply and, based on the facts in the *Tilden* case, the petition was timely filed.

The majority of the Court in *Pearson* decided to adopt the Seventh Circuit's analysis, and thus held that since the facts were the same as *Tilden*, the Court had jurisdiction to hear this case. Judge Buch in a concurring opinion that ten other Tax Court judges agreed with expanded on the Tax Court's holding, noting that there are many methods for applying a postmark beyond the methods available when this provision was added to the law and that all those methods (beyond the postmark applied by the USPS itself) should be granted the same treatment as postage meters and Stamps.com labels.

One concern that arises from this holding is whether the Court would still hold the same as it did before if a case arose where there was no postmark on the envelope, but the USPS tracking systems showed the document in their systems before the filing date. *Boulbee* had found that was a USPS postmark, but this case would seem to contradict that view.

² Reg. §301.7502-1(c)(1)(iii)(B)(3)