Nos. 17-55115 & 17-55354

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOWARD L. BALDWIN; KAREN BALDWIN,

Plaintiffs-Appellees

v.

UNITED STATES OF AMERICA,

Defendant-Appellant

ON APPEAL FROM THE JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE APPELLANT

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GLOSSARY

Abbreviation	Definition
Br.	Taxpayers' Answering Brief
ER	Excerpts of Record
I.R.C.	Internal Revenue Code
IRS	Internal Revenue Service
Op. Br.	United States' Opening Brief

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ARGUMENT

I

The district court lacked jurisdiction over this refund suit because taxpayers failed to file a timely claim for refund

A. Introduction

As explained in our opening brief (pp. 22-23), I.R.C. § 7502 was enacted in 1954 to establish a uniform rule that would alleviate the harshness of the rule that, to satisfy filing requirements, tax documents

not only had to be actually received by the IRS, but also had to be timely received. I.R.C. § 7502 contains two exceptions to the requirement of physical delivery of the document by its due date. First § 7502(a)(1) treats timely mailing as timely filing; the date of the United States postmark is deemed to be the date of delivery. Second, I.R.C. § 7502(c)(1)(A) provides that if a tax document is sent by U.S. registered mail, such registration shall be prima facie evidence that the document was actually delivered.

Because the courts of appeals split on the questions whether the exceptions to physical delivery contained in § 7502 are the exclusive exceptions to the physical-delivery rule and whether the common-law mailbox rule still applies, Treas. Reg. § 301.7502-1(e) was amended to clarify that I.R.C. § 7502 provides the exclusive means to prove that a document was delivered. *See* T.D. 9543, 2011-2 C.B. 470. Treasury Regulation § 301.7502-1(e)(2)(i) provides:

> 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 [private delivery service] . . . , 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. [Emphasis added.]

It is undisputed that if Treas. Reg. § 301.7502-1(e)(2)(i) is valid and applicable, taxpayers' claim for refund is untimely, and the district court lacked jurisdiction over this case.

Taxpayers make two arguments in response. First, they argue (Br. 13) that I.R.C. § 7502 and the interpretive regulation only apply when a tax document is sent before, but arrives after, its due date and do not apply when, as here, the document is alleged to have been mailed several months before its due date and thus should have arrived on time. In the alternative, they argue that the Treasury regulation is not entitled to *Chevron* deference because, in *Anderson v. United States,* 966 F.2d 487 (9th Cir. 1992), which pre-dated the adoption of the regulation, this Court "specifically concluded that Congress intended to keep the common-law mailbox rule in place under § 7502. . . ." (Br. 22.) According to taxpayers, under *stare decisis*, "the common-law mailbox rule applied in *Anderson* remains the law in the Ninth Circuit. . . ." (Br. 17.)

As we explain below, both arguments are meritless. I.R.C. § 7502 plainly addresses not only late-delivered tax documents, but also the IRS's non-receipt of a tax document; under I.R.C. § 7502(c)(1)(A),

evidence that a tax document was sent by registered mail is treated as "prima facie evidence that the return, claim, statement, or other document was delivered to the agency." And *Anderson* presents no impediment to *Chevron* deference because *Anderson* expressly recognized that the statute does not clearly address the common-law mailbox rule's applicability.

B. I.R.C. § 7502 contains rules for determining whether a tax document will be treated as filed when the IRS never receives the document

By its plain terms, Section 7502 sets out rules for when a tax document will be considered as filed in two situations: (1) when the document is received after its due date, and (2) when the document is not received at all. Section 7502(a)(1) addresses the first situation, in which a tax document (or payment) is received late, and provides that, in such a case, the document (or payment) will be considered timely if it was postmarked by the due date.

Section 7502(c)(1)(A) addresses the second situation, in which a tax document is not received. It explains that when a tax document is sent by registered mail "such registration shall be prima facie evidence that the return, claim, statement, or other document was delivered to

the agency." I.R.C. § 7502(c)(1)(A). Evidence that a tax document was delivered is only necessary if the IRS does not have the document and claims not to have received it. Thus, in establishing a rule that registration counts as prima facie evidence that a document *was delivered* to the IRS, I.R.C. § 7502(c)(1)(A) can only be understood to address situations such as the one in this case, where a tax document was not received at all.

A comparison of the differential statutory treatment of tax documents *vis-a-vis* tax payments provides additional support for the applicability of Section 7502 to cases like this one, where a tax document was not received. Under Section 7502(a)(1), a payment, like a tax document, is timely so long as it is postmarked by the due date. Likewise, under Section 7502(c)(1)(B), the registration date can be used in place of a postmark for a payment sent by registered mail, which allows a taxpayer to guard against the risk that a payment will not be postmarked on the day it is placed in the mail (*see* Op. Br. 32-33 (citing Treas. Reg. 301.7502-1(c)(1)(iii)).

Section 7502(c)(1)(A)'s evidence of delivery rule, however, applies only to a "return, claim, statement, or other document." It does not

apply to payments. So registration is not prima facie evidence that a payment was delivered; it is only evidence of a payment's timeliness. Section 7502(d)(2) confirms this different treatment of payments by explaining that "[t]his section shall not apply with respect to currency or other medium of payment unless actually received and accounted for."

Legislative history provides additional confirmation of Section 7502's applicability to situations in which a tax document was not received by the IRS. In 1954, when Section 7502 was first enacted, it applied to certain tax documents, but not to tax returns or payments of tax. Internal Revenue Code of 1954, Pub. L. No. 83-591, ch. 736, 68A Stat. 895-96 (1954). Subsequently, Congress amended the law to make all the protections of Section 7502 applicable to tax returns, but made only the timeliness protection applicable to payments of tax.[1] The House Report explained that "Paragraph (1) of section 7502(c), as amended . . ., extends to both returns and payments the rule that the registration date is the postmark date, but it extends only to returns,

[1] *See* Technical Amendments Act of 1958, Pub. L. No. 85-866, § 89, 72 Stat. 1606, 1665 (1958); Pub. L. No. 89-713 § 5, 80 Stat. 1107, 1110-11 (1966).

and not to payments, the rule that registration is prima facie evidence of delivery." H.R. Rep. No. 89-1915, at 15 (1966); *see also id.* at 8; S. Rep. No. 89-1625, at 8, 16 (1966), *reprinted in* 1966-2 C.B. 803, 809, 814 (same). Thus, as the statute itself makes plain, Congress intended Section 7502 to create two rules, one for tax documents and payment received late and another for tax documents not received at all.

Although there is one case that appears to support, in *dicta*, taxpayers' misinterpretation of the statute, that case is neither precedential nor persuasive. In *Philadelphia Marine Trade Association-International Longshoremen's Association Pension Fund v. Commissioner*, 523 F.3d 140, 146 (3d Cir. 2008), which taxpayer discusses (Br. 18-20), the court held that the district court's grant of summary judgment on the issue of timely filing of a tax return was improper because there was sufficient direct evidence that the IRS had received the return to create a triable issue. *Id.* at 146-47. The court then went on to state, in *dicta*, that "[e]ven if [it] had concluded that the Fund's direct evidence of receipt is insufficient to preclude summary judgment," it would still rule in the Fund's favor because I.R.C. § 7502 does not preempt the mailbox rule.

In *Philadelphia Marine*, the Third Circuit concluded that Section 7502, including Section 7502(c)(1)(A), is inapplicable where a taxpayer claims to have mailed a tax document long enough in advance of the deadline so that it should have been timely received if it was received at all. 523 F.3d at 149-50. The court reasoned that (1) Section 7502(a) applies only "where the pertinent document was delivered to the Government after the filing deadline," and (2) Section 7502(c) "limits its application to cases in which § 7502 generally applies." *Id.* Therefore, according to the court, Section 7502(c) cannot apply where the IRS claims not to have received a document at all. *Id.* In support of this reasoning, the court pointed out that Section 7502(c) begins with the words "*[f]or purposes of this section*," a phrase the court interpreted to mean that the coverage of subsection (c) cannot go beyond or be different from the coverage of subsection (a). *Id.* at 150 (emphasis in original).

The *Philadelphia Marine* dicta misconstrues Section 7502. The fundamental problem with the Third Circuit's analysis is that it fails to provide any plausible interpretation of Section 7502(c)(1)(A). As explained above, Section 7502(c)(1)(A) supplies a rule of evidence of

delivery of a tax document to the IRS and thus is applicable only where the IRS claims not to have received the document. Otherwise there would be no need for evidence of delivery. In essence, the Third Circuit interpreted the phrase "for purposes of this section" to nullify the substance of the provision that follows. The court did not explain why "for purposes of this section" at the beginning of subsection (c) must necessarily be read to mean that subsection (c) will not address any circumstances not already addressed in subsection (a), particularly where such a limiting construction conflicts with the only plausible meaning of subsection (c)(1)(A).

The Third Circuit also failed to account for the clear confirmation in Section 7502(d)(2) that Section 7502 deals with both the late receipt and non-receipt situations. And it likewise failed to address the legislative history discussed above, which confirms Congress's intent to address both situations. For all these reasons the *Philadelphia Marine* dicta is not persuasive, and this Court should not follow it.

C. This Court's prior construction of I.R.C. § 7502 in *Anderson* presents no impediment to deference under *Chevron* to Treas. Reg. § 301.7502-1(e)(2)(i)

As explained in our opening brief (p.43), the Supreme Court has held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

As also explained in our opening brief (pp. 44-46), this Court, in holding in *Anderson* that the common law mailbox rule still applied after the enactment of I.R.C. § 7502, did not conclude "that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* On the contrary, in explaining why it declined to hold that § 7502 "displac[ed] the common law presumption of delivery," the court merely stated that "[t]he statute itself does not reflect a clear intent by Congress to displace the common law mailbox rule." *Anderson*, 966 F.2d at 491.

Taxpayers fail to point to any language in the *Anderson* opinion that supports their contention that, in *Anderson*, this Court "specifically concluded that Congress intended to keep the common-law mailbox rule in place under § 7502" and that this Court found "no statutory ambiguity." (Br. 22) In fact, taxpayers appear essentially to agree with the United States' characterization of *Anderson* as an opinion in which, in the face of the statute's silence on the status of the common-law mailbox rule, this Court relied on a general canon of statutory construction. (Br. 16, 21.) As discussed in our opening brief, this Court has explained that it uses canons of statutory construction not when a statute unambiguously answers the question at hand, but rather to decide between plausible interpretations of a statute. (*See* Op. Br. 45-46 n.5 (citing *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005), and *United States v. Gallegos*, 613 F.3d 1211 (9th Cir. 2010).)

Moreover, that the *Anderson* court found it necessary to resort to the common law to determine whether and when certain tax documents were filed makes the gap in the statute's coverage apparent. Long before *Brand X*, courts of appeals recognized that agencies could enact regulations that supersede the gap-filling presumptions supplied by

common law. (*See* Op. Br. 31-32 (citing *United States v. Chestman*, 947 F.2d 551 (2d Cir. 1991), and *Prussner v. United States*, 896 F.2d 218 (7th Cir. 1990).)

Relying on *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478 (2012), taxpayers argue (Br. 15-17) that, because this Court interpreted Section 7502 as not repealing the common-law mailbox rule, *stare decisis* bars the conflicting regulatory interpretation set out in Treas. Reg. § 301.7502-1(e)(2)(i). But *Home Concrete* does not support the claim that a court's prior statutory construction forecloses any conflicting regulatory interpretation of the statute.

To the contrary, the majority opinion in *Home Concrete* quoted the central holding of *Brand X* that "a 'court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the *unambiguous* terms of the statute.' "[2] 566

[2] Justice Breyer's opinion in *Home Concrete* is the opinion of the Court except as to Part IV-C, which is the portion of the opinion that applies the *Brand X* standard. Justice Scalia joined Justice Breyer's opinion except as to Part IV-C and wrote a concurring opinion in which he criticized Part IV-C's application of the *Brand X* standard. Thus Part IV-C of Justice Breyer's opinion is a plurality opinion, while the remainder of that opinion is a majority opinion.

U.S. at 486 (emphasis in original). To read *Home Concrete* to mean that once a court interprets statutory language, an agency may not interpret that language differently would be to interpret *Home Concrete* as overruling *Brand X*, something it clearly did not do. Indeed, Justice Scalia, concurring in part, observed that the *Home Concrete* plurality had decided to "stand by *Brand X*." *Id.* at 494.

To be sure, it is reasonable to detect some dissonance between the plurality portion of the *Home Concrete* opinion and *Brand X*. As taxpayers point out (Br. 23), *Home Concrete* involved the validity of a regulation that conflicted with the Supreme Court's prior interpretation, in *Colony, Inc. v. Commissioner*, 357 U.S. 28 (1958), of a statute that the Court had, in *Colony*, described as being "not 'unambiguous.' " *See Home Concrete*, 566 U.S. at 482. On its face, it would seem that *Colony*'s concession that the statute was not unambiguous means that, under the logic of *Brand X*, an agency is free to issue a regulation interpreting the statute differently.

But the *Home Concrete* plurality distinguished the facts of that case from the typical *Brand X* situation. The plurality relied, for instance, on the fact that *Colony* was decided long before *Chevron* and

concluded that therefore "[t]here is no reason to believe that the linguistic ambiguity noted by *Colony* reflects a post-*Chevron* conclusion that Congress had delegated gap-filling power to the agency." 566 U.S. at 488-89. This Court's decision in *Anderson*, by contrast, was issued eight years after *Chevron*.

The *Home Concrete* plurality also concluded that the Court's examination in *Colony* "of legislative history led it to believe that Congress had decided the question definitively, leaving no room for the agency to reach a contrary result." *Id.* at 489. In other words, "Congress had 'directly spoken to the question at hand.' " *Id.* (quoting *Chevron*, 467 U.S. at 842-43).

This Court's opinion in *Anderson*, unlike the Supreme Court's prior opinion in *Colony*, did not determine that the statute addressed the precise issue at hand. Rather, as explained above and in our opening brief (pp. 44-46), *Anderson* concluded that the statute was silent on the issue at hand and then looked outside the statute's text, to a general canon of construction— that a new statute is presumed to be harmonious with existing law and its judicial construction—to decide that issue. Thus, the unique set of circumstances that led the *Home*

Concrete plurality to apply *Brand X* in an unusual manner simply are not present here.

Since the Supreme Court's decision in *Home Concrete*, this Court, in more than 50 cases, has continued to apply *Brand X*, and has not interpreted *Home Concrete* as constraining or altering the *Brand X* standard. *See, e.g., Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1246 (9th Cir. 2013) (explaining that, under *Brand X*, a court's prior interpretation of a statute does not trump a subsequent conflicting regulation unless the prior opinion held that its construction "represented the *only* reasonable interpretation of that statute") (emphasis in original); *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1079 (9th Cir. 2016) (explaining that, if the statute does not unambiguously speak to the issue at hand, courts "must 'accept the agency's construction of the statute' so long as that reading is reasonable, 'even if the agency's reading differs from what the court believes is the best statutory interpretation' ") (quoting *Brand X*, 545 U.S. at 980); *Moscoso-Castellanos v. Lynch*, 803 F.3d 1079, 1082 (9th Cir. 2015) ("We are bound to defer to an agency's reasonable interpretation of an ambiguous statute even if that interpretation conflicts with our earlier

interpretation of the same provision."). Indeed, this Court has cited the Supreme Court's opinion in *Home Concrete* in only one published opinion, and the citation was to Justice Scalia's concurring opinion. *See United States v. Garcia-Santana*, 774 F.3d 528, 542 (9th Cir. 2014). In short, this Court's faithful application of *Brand X* after *Home Concrete* makes plain that, contrary to taxpayers' argument, the *Brand X* standard is unaltered.

D. Treas. Reg. § 301.7502-1(e)(2)(i) applies to the mailing of the amended tax return at issue in this case

Taxpayers assert (Br. 23-26) that Treas. Reg. § 301.7502-1(e)(2)(i) cannot be applied to them because it was promulgated on August 23, 2011, two months after June 21, 2011, the date their assistant allegedly mailed their amended tax return. Their argument is meritless.

As we pointed out in our opening brief (p. 7), and as taxpayers concede (Br. 12), the applicable treasury regulation expressly provides that "Section 301.7502–1(e)(2) will apply to all documents mailed after September 21, 2004." Treas. Reg. § 301.7502-1(g)(4). Taxpayers do not argue that this express designation of Treas. Reg. § 301.7502-1(e)(2)'s applicability is invalid. Instead, taxpayers jump into a discussion (Br. 23-26) of the factors set out in *Montgomery Ward & Co. v. F.T.C.*, 691

F.2d 1322 (9th Cir. 1982), for determining whether an adjudicatory administrative decision applies retroactively. They cite *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 519-23 (9th Cir. 2012) (en banc), in which this Court applied the *Montgomery Ward* factors in order to determine whether a Board of Immigration Appeals decision that conflicted with a prior decision of this Court, but to which this Court deferred under *Brand X*, could be applied retroactively.

But the *Montgomery Ward* factors, which apply to administrative adjudications, are not relevant to the retroactivity of a Treasury Regulation. The retroactive application of Treasury Regulations is governed by I.R.C. § 7805(b). In general, regulations "relating to the internal revenue laws" may not apply "to any taxable period ending before the earliest" of three dates: (A) the date the regulation is "filed with the Federal Register"; (B) "[i]n the case of any final regulation, the date on which any proposed or temporary regulation to which such final regulation relates was filed with the Federal Register"; or (C) "[t]he date on which any notice substantially describing the expected contents of

any temporary, proposed, or final regulation is issued to the public."[3] I.R.C. § 7805(b)(1).

The retroactivity of Treas. Reg. § 301.7502-1(e)(2) complies with the requirements of I.R.C. § 7805(b). The language of Treas. Reg. § 301.7502-1(e)(2) was proposed in a notice of proposed rulemaking issued on September 21, 2004. 69 Fed. Reg. 56,377. The proposal stated expressly that "the final regulations, to which these proposed regulations relate, will be effective for all documents mailed after the publication date of these proposed regulations." *Id.* at 56,378. And, as explained above, the final regulations also make this clear. *See* Treas. Reg. § 301.7502-1(g)(4). Section 7805(b)(1)(B) expressly authorizes the Secretary of the Treasury to make a regulation applicable from the date is was proposed. Not surprisingly, the First Circuit has determined that Treas. Reg. § 301.7502-1(e)(2) applied to a refund claim that "was allegedly mailed on April 15, 2005, almost seven months after the

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[3] Prior to 1996, when the current language of I.R.C. § 7805(b) was enacted, *see* Taxpayer Bill of Rights 2, Pub. L. No. 104–168, § 1101(b), 110 Stat. 1452, 1469 (1996), the IRS's authority to make regulations retroactive was even less constrained: "The Secretary may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect." I.R.C. § 7805(b) (26 U.S.C., 1994 ed.).

regulations were proposed in the Federal Register." *Maine Med. Ctr. v. United States*, 675 F.3d 110, 118 n.14 (1st Cir. 2012). The regulation likewise plainly applies here, where the amended tax return was mailed more than six years after the regulation was proposed.

The Supreme Court has made clear that a regulation may be applied retroactively where, as here, the power to promulgate retroactive regulations "is conveyed by Congress in express terms." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). And courts, including this one, have had no difficulty concluding that I.R.C. § 7805(b) authorizes retroactive regulations relating to internal revenue laws. *See, e.g., Maine Med. Ctr.*, 675 F.3d at 118 n.14 (citing *Bowen* and determining that retroactive application of Treas. Reg. § 301.7502-1(e)(2), pursuant to Treas. Reg. § 301.7502-1(g)(4), is authorized under I.R.C. § 7805(b)); *Cemco Inv'rs, LLC v. United States*, 515 F.3d 749, 752 (7th Cir. 2008) (ruling that, under I.R.C. § 7805(b), Treas. Reg. § 1.752-6's express retroactive application was valid); *Meserve Drilling Partners v. Commissioner*, 152 F.3d 1181, 1183-84 (9th Cir. 1998) (determining that, under the prior version of I.R.C. § 7805(b), retroactive application of regulations defining partnership items was

valid). Thus, Treas. Reg. 301.7502-1(e)(2)'s compliance with I.R.C. § 7805(b) makes it validly retroactive.

For all of these reasons, and for the reasons detailed in our opening brief, the district court lacked jurisdiction over this case.

II

Even assuming that this Court had jurisdiction to consider the issue, taxpayers have not demonstrated entitlement to the net operating loss deduction upon which their refund claim was based

As explained in our opening brief (pp. 47-59), taxpayers claim entitlement to a net operating loss for the 2007 tax year. Taxpayers sought to establish this loss by marshaling evidence to support two factual claims: (1) that legal rights to certain movie projects, for which they had made capitalized expenditures, expired in 2007; and (2) that, although their legal rights to other movie projects had expired prior to 2007, they were still making efforts to renew and continue those movie rights into 2007 but finally ceased these efforts during 2007. But the evidence taxpayers proffered in support of factual claim (1) is inadmissible, and the evidence taxpayers proffered in support of factual claim (2) is legally insufficient.

A. Taxpayers' evidence that certain movie rights expired in 2007 is inadmissible because it violated the best evidence rule

Taxpayers did not produce the contracts containing the expiration dates of the movie rights alleged to have expired in 2007. Instead, they offered only their own self-serving testimony. This violates the best evidence rule, which requires "[a]n original writing . . . in order to prove its content unless these rules or a federal statute provides otherwise." Fed. R. Evid. 1002. As explained in our opening brief (pp. 52-53), this rule clearly applies to contracts.

Taxpayers nevertheless argue (Br. 35) that the best evidence rule is inapplicable because they were seeking "to demonstrate a company policy," rather than prove the contents of a writing. This argument makes no sense. Taxpayers do not deny that written contracts contain the expiration dates of the movie rights they had obtained. (*See* Br. 31 ("The property rights to the underlying stories owned by BEG had expired *by their terms* in 2005, 2006 and 2007.") (emphasis added).) Nor do they deny that the expiration of numerous movie rights in 2007 formed the basis for most of the net operating losses they claimed. Thus, taxpayers' entitlement to a net operating loss depends upon the

expiration dates of the movie rights, not the existence of an unspecified company policy. And the expiration dates of the movie rights are contained in the written contracts. Under the best evidence rule, taxpayers' self-serving representations about the movie rights' expiration dates, *i.e.*, about the contents of the written contracts, were inadmissible.

Taxpayers also contend (Br. 36) that the inadmissibility of evidence under the best evidence is immaterial because "only $660,653.00 of the total loss of $4,177,255.81 of § 165(a) losses were attributable to the lapse of the option rights." This statement is, at the very least, misleading. The primary evidence taxpayers relied on the substantiate their net operating loss is a two-page summary in their financial records that lists the movie projects that allegedly expired in 2005, 2006, or 2007, and that were written off as of December 31, 2007, as well as amounts of the capitalized costs that were written off on a project-by-project basis. (ER 236-37.) Under the "account" column, some expired movie project expenditures are listed as "capitalized film

expenses," others as "film projects," and still others as "options."[4] (*Id.*) This document also lists the "date expired" for the movie project on which each expenditure was made. (*Id.*) And the tally of all expenditures on projects alleged to have expired in 2007 is $2,631,280.65. (*Id.*) The best evidence of the expiration of these projects is the contracts that contain the expiration dates of the rights for these film projects.

Finally, taxpayers' argue (Br. 33-34, 36-37) that, although the United States raised the best-evidence-rule objection before trial, it is waived because the United States failed to reassert it during the trial. This argument is meritless. As taxpayers concede (Br. 33-34), the Government raised a best-evidence-rule objection to taxpayers' pretrial testimony about the expiration dates of the movie projects. (ER 78, 87-91.) At the bench trial, before the parties called witnesses, taxpayers' counsel asked the court for a ruling on the Government's evidentiary objections to portions of the declarations (which included the best-

[4] Although the record does not make the precise meanings of these designations clear, what is clear is that, whatever account category they are placed in, the listed expenses are alleged to be separate expenses related to the expired movie projects.

evidence-rule objection). (ER 105-109.) The trial judge was surprised because the objections had not been presented as a motion *in limine*, and he had clearly anticipated dealing with any evidentiary objections during the trial. (*Id.*) But the judge said that he could deal with the evidentiary objections before the trial as "kind of a belated motion in limine," and asked if Government counsel would agree to that. (ER 108.) Government counsel suggested that it might be best to proceed normally, but did not object to a pre-trial ruling on the evidentiary objections after taxpayers' counsel continued to insist. (ER 108-09.) After a recess for the judge to review the objections, the court overruled most of the Government's evidentiary objections, including the best-evidence-rule objection. (ER 110-12.)

The sole authority taxpayers cite (Br. 37) in support of their waiver argument is *City of Phoenix v. Com/Sys., Inc.*, 706 F.2d 1033, 1038 (9th Cir. 1983), where this Court concluded that an evidentiary objection "never argued in the district court" was waived. This opinion in no way supports the notion that the Government was obligated to renew its best-evidence-rule objection during the testimony of Howard Baldwin, after that objection had just been overruled. To the contrary,

this Court "reject[s] an invariable requirement that an objection that is the subject of an unsuccessful motion *in limine* be renewed at trial." *Palmerin v. City of Riverside*, 794 F.2d 1409, 1413 (9th Cir. 1986); *see also* Fed. R. Evid. 103(b) ("Once the court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal."); *City of Pomona v. SQM N. Am. Corp.*, 866 F.3d 1060, 1070 (9th Cir. 2017) ("When a district court makes a pretrial ruling on a motion *in limine* that is subject to limitations regarding how the evidence actually comes in, and if the testimony 'stay[s] within [those] parameters,' then 'no additional objection [is] necessary.' ") (citation omitted) (alterations in original). The United States' best-evidence-rule argument was not waived.

B. Evidence of taxpayers' alleged cessation of efforts to renew the movie rights during 2007 is legally insufficient to establish eligibility for an I.R.C. § 165(a) loss deduction

As explained in our opening brief (pp. 48-51, 54-57), an I.R.C. § 165(a) loss deduction is allowed only for the taxable year in which the loss is sustained, and the loss must be established by an identifiable event that is observable to outsiders and irrevocably cuts ties to the asset. *See Washington Mut., Inc. v. United States*, 856 F.3d 711, 727

(9th Cir. 2017) ("A deduction is proper if there is '(1) an intention on the part of the owner to abandon the asset, and (2) an affirmative act of abandonment.'"). Taxpayers sought to establish a loss based on their cessation in 2007 of efforts to renew movie rights that had expired before 2007. But an internal decision to stop pursuing renewal of the expired movie rights is not an identifiable event, observable to outsiders, that irrevocably cuts ties to an asset. *See Corra Res., Ltd. v. Commissioner*, 945 F.2d 224, 227 (7th Cir. 1991).

Taxpayers concede (Br. 29-30) that some observable overt act is required to establish abandonment and argue that the cessation of their "attempts to renew" the movie rights was such an act. But they offer no convincing support for that proposition. Unlike taxpayer's failure to pay rent in *Gulf Oil Corp. v. Commissioner*, 914 F.2d 396, 402 (3d Cir. 1990), the decision to end already dwindling attempts to renew movie rights is not an observable overt act.[5] Taxpayers were "not helpless. [They] could have sent letters to [the parties from whom they purchased

[5] Indeed, as explained in our opening brief (p. 55 n.6), Howard Baldwin's testimony indicated that taxpayers had actually given up on at least some of the expired movie rights before 2007. (ER 152.)

the movie rights] giving up the ghost." *Corra Res.*, 945 F.2d at 227. Significantly, they failed to do so.

Finally, taxpayers posit, as a separate theory, "obsolescence of nondepreciable property," citing Treas. Reg. § 1.165-2(a). They contend that, under the regulation, discontinuance of their movie development business in 2007 allowed them to take a loss under I.R.C. § 165(a) for that year. This theory fails under *Washington Mutual.* In *Washington Mutual*, the taxpayer, a savings and loan association, sought to establish obsolescence under Treas. Reg. § 1.165-2(a) based on the closing of its Missouri branch offices. 856 F.3d at 720. But this Court concluded that the district court correctly rejected the obsolescence theory because the taxpayer had preserved the right to reenter the market in the future. *Id.* at 728.

Here, the record does not support the claim that taxpayers discontinued their movie development business. Instead, taxpayer Howard Baldwin, when asked if he left the movie business in 2007, responded that "[a] good way to put it is, we – we took a sabbatical from it." (ER 142.) He added that "[t]hanks to [defendant-taxpayer] Karen, we kept some of [the movie projects] alive to the best of our ability, but

we took a good break from it." (ER 142.) Taxpayers' "break" from the movie business was avowedly temporary and thus did not constitute a discontinuance of the movie business that would support the conclusion that the nondepreciable assets of the business were permanently discarded for purposes of Treas. Reg. § 1.165-2(a).

CONCLUSION

This Court should reverse the judgment of the district court and its award of litigation costs.[6]

Respectfully submitted,

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[6] Taxpayers do not dispute (Br. 37) the fact that, if this Court were to reverse the judgment of the district court on either procedural or substantive grounds, it should also reverse the district court's award of attorney's fees.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for the United States respectfully inform the Court that the following pending case is related to the instant appeal: *Steven Waltner, et al. v. Commissioner*, No. 16-72754. This case raises the same issue (the validity of Treas. Reg. § 301.7502-1(e)(2)) as the instant appeal.

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-55115 & 17-5

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Signature of Attorney or Unrepresented Litigant: s/ Nathaniel S. Pollock

Date: 02/26/2018

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 26, 2018. I certify that participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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