No. 16-72754

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVEN T. WALTNER; SARAH V. WALTNER,

Petitioners-Appellants

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

ON APPEAL FROM THE DECISION OF
THE UNITED STATES TAX COURT

BRIEF FOR THE APPELLEE

DAVID A. HUBBERT
Deputy Assistant Attorney General

JOAN I. OPPENHEIMER **(202) 514-2954**
NATHANIEL S. POLLOCK **(202) 514-8139**
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

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GLOSSARY

Abbreviation	Definition
Br.	Appellants' opening brief
CDP	collection due process
DOJ	Department of Justice
ER	Appellants' Excepts of Record
I.R.C.	Internal Revenue Code
IRS	Internal Revenue Service
SER	Supplemental Excerpts of Record

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STATEMENT OF JURISDICTION

Between December 2009 and May 2010, Steven T. and Sarah V. Waltner received from the IRS five letters informing them of tax lien filings and of the IRS's intent to levy collect outstanding tax liabilities. (ER 17.) Taxpayers requested collection-due-process hearings to challenge the collection actions discussed in the letters, and those hearings were conducted on January 24, 2011. (ER 17.) After conducting the collection-due-process hearings, the IRS issued notices of

determination sustaining all the liens and levies described in the letters. (ER 18.)

Taxpayers then filed a timely petition for review in the Tax Court. (ER 18); *see* I.R.C. § 6330(d)(1).[1] The Tax Court had jurisdiction to review the collection-due-process determination under section 6330(d) of the Internal Revenue Code of 1986 (26 U.S.C.) (the Code or I.R.C.). The Tax Court entered a decision in this case on January 21, 2016, which disposed of all claims of all parties. (ER 2-3.) The Tax Court never received the notice of appeal that taxpayers claim to have mailed on April 15, 2016. (ER 1432.) Taxpayers filed an untimely notice of appeal in the Tax Court on August 15, 2016. (ER 1, 1432.)

As discussed below, the timely filing of a notice of appeal is jurisdictional, and this Court lacks jurisdiction over this appeal due to the untimely notice.

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[1] The Tax Court opinion states that the petition was filed on April 12, 2011, which is more than 30 days after March 9, 2011, when the notices of determination were issued. (ER 18, 170; *see also* Br. 9.) Neither the appellants' excerpts of record, nor the Tax Court record appears to include a copy of the envelope in which the petition was mailed. But the IRS file does include a copy of the envelope, and the envelope is postmarked April 8, 2011, exactly 30 days after the notices of determination was issued. Thus, under I.R.C. § 7502(a), the petition was timely filed.

STATEMENT OF THE ISSUES

1. Whether this Court lacks jurisdiction over this appeal when the Tax Court did not receive any notice of appeal from taxpayers within the required 90 days following its final decision in this case.

2. Whether the Tax Court correctly granted the Commissioner's motion for summary judgment sustaining the proposed collection actions.

APPLICABLE STATUTES AND REGULATIONS

The statutes and regulations relevant to the disposition of this appeal are included as an addendum to this brief. *See* Fed. R. App. P. 28(f); 9th Cir. R. 28-2.7.

STATEMENT OF THE CASE

A. Overview of the case and proceedings below

In this appeal, taxpayers challenge IRS liens and levies to collect I.R.C. § 6702 frivolous return penalties based on tax returns for 2003, 2004, 2005, 2006, and 2007. (ER 16-17) Taxpayers' returns for those years asserted that taxpayers owe $0 in federal income taxes. (ER 16) The IRS assessed penalties based on those returns. (*Id.*)

After taxpayers failed to pay the penalties, the IRS notified them of proposed liens and levies. (ER 16-17.) Taxpayers then requested

collection-due-process (CDP) hearings, which the IRS held. (ER 17.) After the hearings, the IRS issued notices of determination sustaining all of the liens and levies at issue. (ER 18.) Taxpayers petitioned under I.R.C. § 6330(d) for review of those notices of determination in Tax Court. (ER 18.)

The Tax Court sustained the IRS's determinations as to four of the five notices at issue, and it ruled that the IRS's collection actions described in those notices may proceed. (ER 2-3.) Pursuant to an agreement between the parties, the IRS's other determination, with respect to the notice to Steven Waltner of intent to levy to collect penalties related to his 2003, 2005, 2006, and 2007 tax returns, was not sustained. (ER 3, 1432). Taxpayers now seek to appeal to this Court.

B. Facts: taxpayers' "zero return" filings

This case is one of five cases[2] that taxpayers have initiated based on the same set of facts, which is as follows.

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[2] The other cases are: (1) *Waltner v. United States*, 98 Fed. Cl. 737, 755-65 (2011) (dismissing taxpayers' refund suit for tax years 2003-2008 for lack of jurisdiction), *aff'd.*, 679 F.3d 1329 (Fed. Cir.), *cert. denied*, 133 S. Ct. 319, *reh'g denied*, 133 S. Ct. 688 (2012); (2) *Waltner v. Commissioner*, 107 T.C.M. (CCH) 1189 (2014), *aff'd*, No. 14-71531, 2016 WL 5800492 (9th Cir. Oct. 5, 2016); (3) *Waltner v. Commissioner*, 108

Starting in early 2008, taxpayers began acting on their belief that they owed $0 in income tax, a belief they apparently arrived at with the help of a well-known tax-defier manual authored by a man convicted of tax-related crimes.[3] Taxpayers began "correcting" tax documents they had filed in previous years by filing numerous Forms 1040X that purported to adjust the amount they owed from the amount reported on their original tax return down to $0. (ER 16.) Taxpayers also filed numerous tax forms that purported to correct Forms W-2 and 1099 that were submitted to the IRS by Mr. Waltner's employer and by the Waltners' financial institutions. (*Id.*) Not surprisingly, the "correction" taxpayers made to those forms was to change the wages and other income from the amounts reported by third parties to $0.[4] (*Id.*)

T.C.M. (CCH) 6 (2014), *appeal pending*, No. 16-71797 (9th Cir.); (4) *Waltner v. Commissioner*, 110 T.C.M. (CCH) 133 (2015), *appeal pending*, No. 17-72261 (9th Cir.).

[3] *See Waltner v. Commissioner*, 107 T.C.M. (CCH) 1189, 2014 WL 775179, at *12-14, 22 (2014) (discussing in detail the book *Cracking the Code: The Fascinating Truth About Taxation in America*, by Peter Hendrickson, and also Mr. Hendrickson's criminal convictions), *aff'd,* No. 14-71531, 2016 WL 5800492 (9th Cir. Oct. 5, 2016).

[4] In the Court of Federal Claims case adjudicating taxpayers' refund claims based on these tax years, the court chronicled in great detail the amounts shown on taxpayers' original returns and taxpayers'

Instead of processing those forms, the IRS informed taxpayers by letter that there was no legal basis for the positions taken on those forms. (ER 1256-77.) The letters warned that, if taxpayers did not file corrected returns within 30 days, the IRS would assess a $5,000 penalty for "each purported return [the Waltners] filed for which [they] did not file a corrected return." (*See, e.g.*, ER 1259, 1261.)

Taxpayers did not file corrected returns. The IRS accordingly assessed frivolous return penalties under I.R.C. § 6702 for each Form 1040 or Form 1040X that reported taxpayers' tax liability as $0. (ER16.) Thus, the IRS assessed $5,000 against each taxpayer (Steven and Sarah) for the 2003, 2004, and 2005 tax years. The IRS assessed two $5,000 penalties against each taxpayer for 2006. (*Id.*) And, prior to the collection-due-process proceedings that gave rise to this case, it assessed five $5,000 penalties against each taxpayer for 2007.[5] (*Id.*)

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subsequent filings, in which they sought to zero out their tax liability. *See Waltner v. United States*, 98 Fed. Cl. 737, 740-47 (2011), *aff'd.*, 679 F.3d 1329 (Fed. Cir.), *cert. denied*, 133 S. Ct. 319, *reh'g denied*, 133 S. Ct. 688 (2012).

[5] As explained below, pp. 63-64, *infra*, the second penalty assessed against each taxpayer for the 2006 tax year and the fourth and fifth penalties assessed against each taxpayer for the 2007 tax year were erroneously assessed based on duplicate documents submitted by

Because taxpayers did not pay these penalties, the IRS sent letters to each taxpayer (Steven and Sarah) to inform them that the IRS had filed a notice of tax lien based on the unpaid penalties and explaining that they could request a hearing to challenge this action. (ER17.) The IRS also sent several letters that advised taxpayers that the IRS intended to levy to collect I.R.C. § 6702 penalties assessed against them and that they could request a hearing to challenge that action. (ER17.) In addition, the IRS sent to both taxpayers a letter notifying them of a lien based on an unpaid tax liability for 2006, and it sent Sarah a letter notifying her that it intended to levy to collect that unpaid 2006 tax liability. (ER 17, 265, 637-38.) These letters also informed taxpayers that they could request a hearing. (ER 17, 265, 637-38.)

Taxpayers requested hearings. (ER 17.) On January 24, 2011, the IRS Office of Appeals conducted five consecutive telephonic CDP hearings, which covered the lien notices sent to both taxpayers and also

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the taxpayers. The Department of Justice is currently working with the IRS to abate these penalties.

the levy notices for all years except 2004.[6] (*Id.*) At the hearings, taxpayers argued that they were not liable for the Section 6702 penalties for each of the years at issue. (*Id.*) They maintained that the IRS had failed to demonstrate that the forms they filed asserting zero tax liability were frivolous and that the IRS had failed to verify that a manager had approved the IRS's assessment of all of the Section 6702 penalties. (ER 18.)

In March 2011, the IRS sent taxpayers notices of determination sustaining all of the liens and levies at issue during the January 24, 2011 hearing. (ER 18.) In the notices, the IRS explained that all legal and administrative requirements for the proposed collections actions had been satisfied and that the proposed collections actions were appropriate and balanced the need for efficient tax collection with the taxpayers' concerns that any collection action be no more intrusive than necessary. (ER 20-21, 176-77, 273-75, 436-38, 562-64.) The Office of

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[6] The January 24, 2011 CDP hearing covered all liens for the frivolous return penalties for 2003-2007 and all proposed levies for those penalties except the levies for the 2004 penalties. Taxpayers contested the notices of intent to levy to collect the 2004 penalties in a separate CDP hearing and later challenged that notice in a separate Tax Court proceeding, which is now on appeal before this Court. *See Waltner, et al. v. Commissioner*, No. 16-71797.

Appeals added that the "corrected" Forms 1099 and other forms, and arguments included on those forms, were frivolous and that, although taxpayers disputed their underlying liability for the penalties, they had failed to substantiate that claim. (ER 173, 176-77, 270, 273-75, 436-38, 562-64.) Thus, the IRS determined that taxpayers' assertions were frivolous. (ER 18.) Taxpayers then filed a petition in the Tax Court challenging those determinations. (*Id.*)

C. Tax Court proceedings

1. Motions

Both parties filed motions for summary judgment. (ER 84-86, 645-52, 1048-1102). During the pendency of the cross-motions for summary judgment, taxpayers filed numerous additional motions. Among these were motions to strike declarations, or portions of declarations, and to exclude evidence and exhibits that the Commissioner submitted in support of his motion for summary judgment. (*See* ER 5-14.) Taxpayers claimed, for example, that the submitted copy of the Court of Federal Claims decision in their refund suit was inadmissible under the Tax Court Rules. (SER 8-14.) Taxpayers also moved to strike a declaration of the IRS trial attorney

that merely asserted that a submitted joint appendix from taxpayers' then-pending appeal in the Federal Circuit was "a true and correct copy" and to exclude the joint appendix itself. (SER 20-34; ER 874.)

In addition, taxpayers moved to strike the declaration of IRS employee Shauna Heinline about the IRS's assessments of the frivolous return penalties and the documents that reflect those assessments and to exclude all the exhibits the declaration discusses. (SER 37-49.) Taxpayers' objection was based principally on an allegation that Ms. Heinline lacked personal knowledge, even though the declaration revealed that Ms. Heinline did claim personal knowledge. (*See* SER 43-44; ER 88.) And taxpayers moved to strike the declarations of two other IRS employees, and the accompanying exhibits, for much the same reason. (SER 55-56 & SER 68-69.)

Taxpayers also sought to reopen discovery. (SER 87-89.) They claimed that the IRS Forms 8278, Abatement and Assessment of Miscellaneous Civil Penalties, that were submitted along with IRS employee Jill Decaria's declaration, which reflected assessment and managerial approval of the I.R.C. § 7502 penalties, "appear to be fabricated or altered." (SER 84.) Taxpayers sought the Tax Court's

permission to "hire an expert Questioned Documents Examiner" to examine the documents and give evidence about their authenticity. (*Id.*)

The Commissioner opposed these evidentiary motions. (ER 1428.) In objecting to taxpayers' motion to compel discovery, the Commissioner asserted, *inter alia*, that taxpayers' "abusive and oppressive discovery" practices included "skewing discovery to promote their frivolous positions that zero returns are not frivolous and their zero return for 2006 establishes their 2006 income tax liability at zero" and that taxpayers "intentionally filed as an attachment to their Motion for Summary Judgment an adulteration of respondent's response to admissions." (SER 3-4.) The Tax Court denied taxpayers' evidentiary motions. (ER 6-12.)

Despite the court's denial of taxpayers' motions to reopen discovery and for leave to hire an expert document examiner and submit an untimely expert witness report, taxpayers submitted a "laboratory report" that purported to provide the results of a forensic examination of certain IRS exhibits. (ER 46-49.) The Tax Court did not rule on or address this evidence. (ER 1431-32.)

2. Summary judgment

The Tax Court granted the Commissioner's motion for summary judgment with respect to four of the five CDP hearings. (ER 22.) It granted summary judgment with respect to the IRS's notice of determination regarding the liens against both Steven and Sarah for 2003-2007 frivolous return penalties. (ER 17-22.) It determined that taxpayers' 2007 Form 1040 and 2003-2007 Forms 1040X were frivolous under I.R.C. § 6702(a) because (1) they were filed to obtain refunds and thus purported to be tax returns, (2) the forms contained substantially incorrect information, and (3) the Commissioner had identified "zero returns" as frivolous before these forms were filed. (ER 19-20.)

The Tax Court also granted summary judgment with respect to the lien against both Steven and Sarah for 2006 income tax and the levy against Sarah for 2006 income tax because taxpayers had not properly raised any challenge to their 2006 tax liability during their CDP hearings. (ER 20.) The court explained that, though taxpayers contended that their 2006 tax liability is zero, "they did not furnish the Appeals officer with any evidence supporting their contention or explaining the discrepancy between the position they adopted on the

2006 Form 1040 and the position they subsequently adopted on their 2006 Forms 1040X." (*Id.*)

The Tax Court also rejected taxpayers' argument that the IRS had failed to ensure compliance with applicable laws and administrative procedures by failing to demonstrate managerial approval of the frivolous return penalties. (ER 20-21.) The court found, contrary to taxpayers' contentions, that, at the CDP hearing "the Appeals officer reviewed Forms 4340 [i.e. the record of assessment] relating to each relevant tax year and verified that all applicable laws and administrative procedures were met." (ER 20.) The court also concluded that taxpayers had "failed to demonstrate any irregularity in the assessment procedure that would raise a question about the validity of the assessments or the information contained in the Forms 4340." (ER 20-21.)

The Tax Court held that the IRS Appeals officer's determination that taxpayers were ineligible for a collection alternative was a valid exercise of discretion since taxpayers had failed to submit the requested information, but instead "submitted self-prepared financial documents that were not credible." (ER 21.) The Tax Court rejected taxpayers'

statute of limitations argument. (*Id.*) Finally, the court ruled that additional frivolous arguments that taxpayers attempted to raise during the CDP hearings were properly rejected. (ER 21-22.)

The Tax Court, however, denied summary judgment with respect to the IRS's notice of determination regarding the IRS's levy against Steven Waltner to collect the 2006 income tax and frivolous return penalties for 2003, 2005, 2006, and 2007, because the IRS was unable to locate the administrative file for the CDP hearing that dealt with this levy and had submitted a "reconstructed administrative file" for that hearing. (ER 17-18.) Taxpayers and the IRS subsequently reached a settlement as to this notice of determination. The parties agreed that that notice of determination would not be sustained. (ER 1432.)

Because that settlement disposed of the only claim that was not decided on summary judgment, the Tax Court then issued a final decision authorizing the IRS to proceed with the collection actions described in four of the notices of determination and stating that, pursuant to the settlement agreement, the IRS's fifth notice of determination was not sustained. (ER 2-3.)

3. Untimely notice of appeal

The Tax Court entered a decision in this case on January 21, 2016. (ER 3.) The time for filing a notice of appeal from that decision expired 90 days later on April 20, 2016 (I.R.C. § 7483), and when taxpayers did not file a notice of appeal by that date, the decision became final (I.R.C. § 7481(a)(1)).

On August 4, 2016, more than three months after the Tax Court's decision became final, taxpayers electronically submitted a Statement Letter to the Tax Court in which they claimed that they mailed a notice of appeal to the Tax Court by regular mail on Friday April 15, 2016, and that the notice of appeal may have been lost by the U.S. Postal Service or the Tax Court. (ER 28-41.) On August 9, 2016, the Tax Court entered an order striking the Statement Letter because it was submitted after the court's decision had become final. (ER 1.) As allowed by the striking order, taxpayers, on August 15, 2016, filed a notice of appeal in the Tax Court, which they dated April 15, 2016. (ER 24-27.)

SUMMARY OF ARGUMENT

This appeal should be dismissed for lack of jurisdiction. In the alternative, the Tax Court's decision on the merits was correct and should be affirmed.

1. The timely filing of a notice of appeal is jurisdictional. Taxpayers did not file a notice of appeal within the 90-day period required by federal statute. Their contention to the contrary depends wholly on their invocation of the common-law mailbox rule, under which courts may consider circumstantial evidence of timely mailing to establish timely filing. But Treas. Reg. § 301.7502-1(e)(2)(i), which applies to notices of appeal filed in Tax Court, expressly forecloses use of the common-law mailbox rule. That regulation 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 . . . ."

Treasury Regulation § 301.7502-1 is entitled to *Chevron* deference. It was promulgated pursuant to I.R.C. § 7502, which provides that, for tax documents, the postmark date is considered the delivery date, and

thus, the filing date. The statute also provides that, for documents sent by registered mail, a registration receipt may serve as evidence of both the fact and date of filing, and the statute allows Treasury to adopt regulations authorizing similar exceptions for certified mail and other forms of delivery. The statute contains a gap that the Treasury Department was entitled to fill with a reasonable regulation: the statute is silent on whether the common-law mailbox rule is foreclosed.

The regulation reasonably interprets the statute as supplanting the common-law mailbox rule. If the common-law mailbox rule continued to apply, it would run counter to the system I.R.C. § 7502 establishes, which uses objective indicia to determine the fact and date of delivery of tax documents. It would also violate the *expressio unis est exclusion alterius* canon of statutory construction, under which the provision of express exceptions to a general rule counsels against further implied exceptions.

Taxpayers argue that this Court has jurisdiction to consider allegations of fraud on the court even in the absence of a timely notice of appeal. But none of the authorities they cite establishes such a proposition. To the contrary, in holding that the Tax Court could

properly consider a motion to vacate, for lack of jurisdiction, a decision that had become final, this Court relied, in part, on the unavailability of appellate review in the absence of a timely notice of appeal. *Billingsley v. Commissioner*, 868 F.2d 1081, 1085 (9th Cir. 1989).

2. If this Court reaches the merits of this appeal, it should affirm the Tax Court's decision granting of the Commissioner's motion for summary judgment and sustaining the proposed collection actions. The Tax Court correctly determined that the positions taken on taxpayers' 2003 through 2007 returns—that taxpayers had $0 in income and thus owed $0 tax—were frivolous and thus that the I.R.C. § 6702 penalties were appropriate. And the Tax Court correctly decided that the IRS had complied with the collection-due-process requirements and did not abuse its discretion by declining to consider collection alternatives.

STANDARD OF REVIEW

This Court determines its "own jurisdiction *de novo*." *Pena v. Lynch*, 815 F.3d 452, 455 (9th Cir. 2016) (citations omitted). Determinations of the IRS Office of Appeals regarding the propriety of administrative collection action are reviewed for abuse of discretion. *Keller v. Commissioner*, 568 F.3d 710, 716 (9th Cir. 2009). This Court

reviews the Tax Court's grant of summary judgment *de novo*. *Dial v. Commissioner*, 968 F.2d 898, 900 (9th Cir. 1992). The taxpayers' challenges to the Tax Court's evidentiary rulings "are reviewed for abuse of discretion." *Hongsermeier v. Commissioner*, 621 F.3d 890, 899 (9th Cir. 2010).

ARGUMENT

I.

This Court lacks jurisdiction over this untimely appeal

A. Introduction

Timely filing of a notice of appeal is "mandatory and jurisdictional." *Bowles v. Russell*, 551 U.S. 205, 209 (2007) (citation omitted); *Melendres v. Maricopa Cty.*, 815 F.3d 645, 649 (9th Cir. 2016) (same). As a result, "the courts of appeals routinely and uniformly dismiss untimely appeals for lack of jurisdiction." *Bowles*, 551 U.S. at 210.

To be timely, a notice of appeal from a Tax Court decision must be filed "within 90 days after the decision of the Tax Court is entered." I.R.C. § 7483. Since this time limit was set by Congress, it is jurisdictional, rather than a claims processing rule. *See Hamer v.*

Neighborhood Hous. Servs of Chicago, 138 S. Ct. 13, 17 (2017). Because the Tax Court did not receive a notice of appeal for this case within the 90-day time limit, this appeal is untimely and must be dismissed.

Taxpayers, however, contend that they mailed their notice of appeal to the Tax Court on April 15, 2016, five days before the expiration of the 90-day time limit for filing a notice of appeal. (Br. 18.) Taxpayers argue (Br. 20-22) that their notice of appeal was timely, and thus that this Court has jurisdiction over this appeal, under the common-law mailbox rule, a rule that permits litigants to proffer testimonial and circumstantial evidence of timely mailing to establish presumptively both the timing and fact of delivery. *See Anderson v. United States,* 966 F.2d 487, 491-92 (9th Cir. 1992). Taxpayers proffered as evidence of timely mailing a declaration of taxpayer Sarah Waltner and an affidavit of the owner of "Mail Enhancement," the private mail services center at which Sarah Waltner allegedly tendered the notice of appeal for mailing. (ER 30-34, 40-41.)

Such evidence, however, is expressly foreclosed by the relevant regulation, Treas. Reg. § 301.7502-1(e)(2)(i), which provides:

> Other than direct proof of actual delivery, proof of proper use of registered or certified mail, and proof of proper use

> of a designated [private delivery service] 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.

Treas. Reg. § 301.7502-1 construes I.R.C. § 7502(a)(2), which treats timely mailing as timely filing if the "document required to be filed . . . within a prescribed period . . . under authority of any provision of any provision of the internal revenue laws is, after such period . . . delivered by United States mail. . . ." A notice of appeal filed in Tax Court is such a document; the timeliness of its filing is governed by I.R.C. § 7483, which is a "provision of the internal revenue laws," I.R.C. § 7502(a)(1). Thus, the I.R.C. § 7502 rules for determining whether and when a tax document is filed plainly apply to notices of appeal filed in the Tax Court. Indeed, recognizing I.R.C. § 7502's applicability to notices of appeal filed in Tax Court, the Federal Rules of Appellate Procedure provide that "[i]f sent by mail" a notice of appeal filed in Tax Court "is considered filed on the postmark date, *subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations*." Fed. R. App. P. 13(a)(1)(2) (emphasis added).

In their brief, taxpayers have failed to address Treas. Reg. § 301.7502-1(e)(2)(i), which is dispositive of this case. As discussed below, that regulation is entitled to deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and precludes reliance on the common-law mailbox rule to establish timeliness.[7]

B. Treas. Reg. § 301.7502-1(e) warrants *Chevron* deference

Before the enactment of I.R.C. § 7502 in 1954, it was well established that, to satisfy filing requirements, tax documents not only had to be actually received by the IRS, but also had to be timely received. *See United States v. Lombardo*, 241 U.S. 73, 76 (1916). Under the physical-delivery rule, a document that was timely mailed but not timely received was not treated as having been timely filed. *Phinney v. Bank of SW. Nat'l Assn., Houston*, 335 F.2d 266, 268 (5th Cir. 1964). *Accord Anderson*, 966 F.2d at 490 ("[The] physical delivery rule . . . required that tax documents must be physically received by the IRS on time to be timely filed" and "left taxpayers vulnerable to postal service

[7] A district court in this circuit has recently invalidated this regulation, and the Government has appealed. *Baldwin et al. v. United States*, No. 2:15-cv-06004-RGK-ARG (N.D. Cal. July 27, 2016) (attached).

malfunctioning."). Nevertheless, some courts departed from this physical-delivery rule and applied the common-law mailbox rule. *See, e.g., Detroit Auto. Prods. Corp. v. Commissioner*, 203 F.2d 785 (6th Cir. 1953); *Arkansas Motor Coaches, Ltd. v. Commissioner*, 198 F.2d 189 (8th Cir. 1952).

Against this background, in 1954 Congress enacted Section 7502 to establish a uniform rule that would alleviate the harshness of the physical-delivery requirement. *See* H.R. Rep. No. 83-1337, at A434-35 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4017, 4583; S. Rep. No. 83-1622, at 615 (1954), *reprinted in* 1984 U.S.C.C.A.N. 4621, 5266; *Anderson*, 966 F.2d at 490. Section 7502(a)(1) treats timely mailing as timely filing. That is, if a document required to be filed (or payment required to be made) is received after, but postmarked before, a date prescribed under the internal revenue laws, the postmarked date shall be deemed to be the date of delivery (or date of payment). In order for Section 7502(a)(1) to apply, however, the document or payment must have been actually delivered by the United States Postal Service to the agency, officer, or office with which the document (or payment) was required to be filed.

Section 7502(c)(1) contains the second exception to the physical-delivery rule. It provides that if a document or payment is sent by U.S. registered mail, such registration shall be prima facie evidence that the document was actually delivered, and the date of registration shall be deemed the postmark date. Section 7502(c)(2) authorizes the Secretary of Treasury "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." Section 7502(f)(3) authorizes the Secretary to "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."[8]

After the adoption of I.R.C. § 7502, the courts of appeals split on the question 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. The Second and Sixth Circuit held that I.R.C. § 7502 preempts the common law mailbox

[8] Section 7502(f) was added to the Code in 1996 by the Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452, § 1210.

rule. *See Deutsch v. Commissioner*, 599 F.2d 44 (2d Cir. 1979); *Miller v. United States*, 784 F.2d 728 (6th Cir. 1986). The Eighth Circuit and this Court, on the other hand, held that § 7502 does not displace the common law mailbox rule. *See Estate of Wood v. Commissioner*, 909 F.2d 1155 (8th Cir. 1990); *Anderson*, 966 F.2d at 491. Subsequently, in *Sorrentino v. Internal Revenue Service*, 383 F.3d 1187 (10th Cir. 2004), a Tenth Circuit panel issued three different opinions on the question whether § 7502 supplanted the common-law mailbox rule—one for, one against, and one carving out a middle position.

Faced with these disparate holdings, Treas. Reg. § 301.7502-1(e) was amended in 2011 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 then emphasizes this point by stating that "[n]o other evidence of a postmark or of mailing will be prima facie evidence of delivery or raise a presumption that the document was delivered."

Id. The regulation thus bars consideration of the declaration of taxpayer Sarah Waltner and the affidavit of the owner of the private mail services center to which she allegedly tendered the notice of appeal for mailing, which documents claim the notice of appeal was mailed before its due date.

Chevron established a two-step procedure for determining the validity of an agency's statutory construction:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-43 (footnotes omitted). *See also Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1246 (9th Cir. 2013). In other words, "[i]t is for agencies, not courts, to fill statutory gaps." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

As discussed below, Treas. Reg. § 301.7502-1(e)(2)(i) is valid under *Chevron*.

1. I.R.C. § 7502 contains a gap that the Treasury Department was entitled to fill with a reasonable regulation

Section 7502 establishes rules that allow tax documents to be considered timely filed, under certain conditions, even though they are received late or not at all. Section 7502(a)(1) provides that when tax documents are received after they are due, the postmark date will be treated as the date of delivery, *i.e.*, as the filing date:

> 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 . . . 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 . . . shall be deemed to be the date of delivery or the date of payment, as the case may be.

I.R.C. § 7502(a)(1).

Section 7502(c)(1) establishes that, for tax documents sent by registered mail, the registration is evidence of delivery and that the registration date is treated as the postmark date, and thus the filing date:

> [I]f 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.

The statute authorizes similar presumption-of-delivery rules to be established by regulation for certified mail, for electronic filing, and for private delivery services. I.R.C. §§ 7502(c)(2) & (f)(3). And the Treasury Department has enacted such rules. *See* Treas. Reg. § 301.7502-1(e)(2).

Section 7502 is silent on the question presented here, namely: if a tax document is not actually received by the office where it is required to be filed, can a taxpayer who chose to send that document by regular mail establish a prima facie case that it was delivered? In other words, I.R.C. § 7502 contains a gap on the question of the common-law mailbox rule's applicability; the statute neither explicitly displaces the common-law mailbox rule, nor adopts it as an alternative method of proving delivery. And because the statute does not directly address the

common-law mailbox rule's viability, step one of the *Chevron* test is met.

2. The regulation is a permissible construction of I.R.C. § 7502

When the common law fills a gap in a statutory scheme, the agency that administers the statute may supersede the gap-filling presumption the common law supplies. *See United States v. Chestman*, 947 F.2d 551, 558 (2d Cir. 1991) (rejecting the notion that the common-law definition of "fraud" cabined the SEC's authority to define that term via regulation); *Prussner v. United States*, 896 F.2d 218, 225 (7th Cir. 1990) (determining that while "common law supplementation of the tax code and regulations" can sometimes be appropriate, "a power of judicial supplementation should not be used to nullify valid regulations").

Here, the regulation also satisfies *Chevron*'s second step in a more direct way because the statute itself can reasonably be read as supplanting the common-law mailbox rule. The statute sets out a system of objective rules under which the questions whether and when a document is filed are determined by designated objective indicia. Regarding the date of delivery, the postmark is the primary objective

indicia, but other indicia, such as the date of registration for a document sent by registered mail, or the date of certification for a document sent by certified mail, may act as substitutes. *See* I.R.C. §§ 7502(a)(1), (c) & (f).

In general, a postmark made by the United States Postal Service will bear the date an item was deposited in the mail. But there is a risk that an envelope containing a tax document may not be postmarked on the day it was deposited in the mail. *See* Treas. Reg. 301.7502-1(c)(1)(iii) (contemplating this possibility). Taxpayers can guard against this risk by using a substitute indicia of timely mailing, *e.g.*, registered or certified mail. *See* I.R.C. § 7502(c)(1)(B); Treas. Reg. § 301.7502-1(c)(2) ("[T]he 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."). In other words, a tax document that is due on April 15 but postmarked April 16 is late *unless* the taxpayer produces a receipt for registered or certified mailing that shows that the document was deposited in the mail on April 15.

The system works in much the same way when it comes to establishing the fact of delivery. When a document is not received, the

postmark is obviously unavailable. Thus, the authorized substitute objective indicia supply both evidence of the fact of delivery and of its timing. *See* I.R.C. § 7502(c)(1); Treas. Reg. § 301.7502-1(e)(2).

The common-law mailbox rule is directly at odds with I.R.C. § 7502's system of designated objective indicia for determining the fact and date of delivery of tax documents. *See Deutsch*, 599 F.2d at 46 (observing that I.R.C. § 7502 "demonstrate[s] a penchant for an easily applied, objective standard"). The common-law mailbox rule generally depends on testimonial and circumstantial evidence that something was placed in the mail to establish presumptively both the fact and timing of delivery. *See Anderson*, 966 F.2d at 491-92. Thus, because the common-law mailbox rule is not in harmony with I.R.C. § 7502, the Treasury Department reasonably concluded that, absent "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 . . . ." Treas. Reg. § 301.7502-1(e)(2)(i) (emphasis supplied).

The statutory canon of construction *expressio unius est exclusio alterius* provides additional support for this conclusion. As described

above, I.R.C. § 7502 expressly creates a limited statutory mailbox rule by providing that particular objective indicia, such as a registered mail receipt, can supply evidence of the fact and date of delivery. *Anderson*, 966 F.2d at 490. That Congress expressly created a statutory exception to the physical-delivery rule strongly indicates that it did not intend there to be a further exception to that rule.

This Court has explained that when a statute creates an express exception to a general rule, "the familiar judicial maxim *expressio unius est exclusio alterius* counsels against finding additional, implied, exceptions." *Syed v. M-I, LLC*, 853 F.3d 492, 501 (9th Cir. 2017); *see also Hillman v. Maretta*, 133 S. Ct. 1943, 1953 (2013) ("We have explained that [w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.") (internal quotation marks omitted; alteration in original). The correct inference in such a situation "is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United States v. Johnson*, 529 U.S. 53, 58 (2000). This is particularly true concerning I.R.C. § 7502, since the very purpose of the statute was

to create a set of exceptions to the requirement of actual delivery in circumstances where a tax document or payment is delivered late or not at all.

Moreover, courts should be especially reluctant to create an implied exception that would swallow up the express exception. In *TRW Inc. v. Andrews*, 534 U.S. 19 (2001), the Supreme Court considered whether the general discovery rule—that a federal statute of limitations will not begin to run until an injury is discovered—applied in the face of statutory language that expressly set out, as an exception to the normal 2-year statute of limitations, a discovery rule applicable only in particular circumstances. 534 U.S. at 26-28. The Court determined that the *expressio unis* canon counseled against application of the general rule in the face of a more specific one. *Id.* at 28-29. It reasoned that "incorporating a general discovery rule into [the Fair Credit Reporting Act] would not merely supplement the explicit exception contrary to Congress' apparent intent; it would in practical effect render that exception entirely superfluous in all but the most unusual circumstances." *Id.* at 29.

So, too, here. If it remained applicable, the common-law mailbox rule would, as a practical matter, render the specific exceptions to physical delivery contained in I.R.C. § 7502 superfluous. For instance, under the common law mailbox rule, testimony that a tax document was mailed on a particular date could create a presumption that it was delivered. Thus, if the common-law mailbox rule applied, the objective indicia required by I.R.C. § 7502, *e.g.*, registered mailing or certified mailing, would be redundant because they would merely give taxpayers protection that they already had under the common law.

3. The judicial construction of I.R.C. § 7502 provides additional support for the conclusion that Treas. Reg. § 301.7502-1(e)(2)(i) is entitled to *Chevron* deference

As discussed below, before the adoption of the regulation, there was a circuit split on the question whether I.R.C. § 7502 supplanted the common-law mailbox rule. This split of authority also supports *Chevron* deference. It is highly unlikely that numerous federal judges would reach conflicting interpretations of an issue if there were a statute that addressed the matter and regarding which there was only one permissible construction. *See Chevron*, 467 U.S. at 842-43. In other words, where, as here, the federal courts of appeals have split on a

question of statutory construction, that state of affairs is itself strong evidence that there is more than one reasonable interpretation of the statute.

The Second and Sixth Circuits construed I.R.C. § 7502 as supplanting the common-law mailbox rule. In *Deutsch*, the Second Circuit rejected taxpayer's attempt to resort to the mailbox rule to prove delivery and timeliness of his Tax Court petition, explaining that the statute "demonstrate[s] a penchant for an easily applied, objective standard." 599 F.2d at 46. In *Miller*, the Sixth Circuit likewise concluded that the exceptions to the physical delivery rule set out in I.R.C. § 7502 are exclusive and thus preclude reliance on the common-law mailbox rule. 784 F.2d at 731. *See also, e.g.*, *Martinez v. United States*, 101 Fed. Cl. 688, 692 (2012) ("[T]he Court of Federal Claims has consistently ruled that § 7502 provides the only exceptions [to the physical delivery rule].") (citing cases).

On the other side of the circuit split, a divided panel in the Eighth Circuit held that I.R.C. § 7502 does not supplant the common-law mailbox rule. In *Estate of Wood*, the Eighth Circuit concluded that, because I.R.C. § 7502 does not affirmatively indicate that it displaces

the mailbox rule, the presumption should be that it does not. 909 F.2d at 1160. The court concluded that I.R.C. § 7502(c)'s express exception to the physical-delivery rule for certified and registered mail "is better read as a safe harbor" that does not exclude application of the common-law mailbox rule. *Id.* at 1161. This Court in *Anderson* (discussed below) reached the same conclusion for similar reasons.

Finally, the Tenth Circuit in *Sorrentino*, issued three different opinions on the question whether § 7502 supplanted the common-law mailbox rule.[9] If *Sorrentino* makes anything clear, it is that, before the regulation was issued, the question of the mailbox rule's viability was a close one. Indeed, Judge Baldock, delivering the judgment of the Court and an opinion, said "[a]s the case law illustrates, the question of what, if anything, remains of the common law mailbox rule after § 7502 is not easily answered." 383 F.3d at 1193 (footnote omitted).

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[9] Two years after *Sorrentino*, the Tenth Circuit, in an unpublished decision, stated that "[w]e have not yet decided whether § 7502 provides the exclusive method by which timely mailing can be proven," and described *Sorrentino* as "equivocal at best." *Crook v. Commissioner*, 173 F. App'x 653, 657 (10th Cir. 2006).

In sum, two circuit courts of appeals—the Second and the Sixth—and two judges in other circuits—Judge Hartz concurring in *Sorrentino* and Chief Judge Lay dissenting in *Estate of Wood*—interpreted Section 7502 in the same way the Treasury Department interpreted it in Treas. Reg. § 301.7502-1(e). That fact decisively supports the regulation's reasonableness.

4. The inconsistent treatment of taxpayers that would result if the common-law mailbox rule were applicable further supports the conclusion that Treas. Reg. § 301.7502-1(e)(2)(i) is entitled to *Chevron* deference

The approach reflected in the Treasury regulations should produce much greater uniformity of treatment among similarly situated taxpayers than is the case under the common-law mailbox rule. Under the common-law mailbox rule, the presumption of delivery of a document placed in the mail is rebuttable. A court faced with a document allegedly mailed but not received could conclude that, because the IRS's records are generally accurate and complete, its attestation that it has no record of receiving a particular document is sufficient to rebut the presumption of delivery that the evidence of mailing created. A different court might credit testimony presented by

taxpayers of timely mailing. Still another court might discredit the very same testimony.

So if the question before a lower court is whether, in light of all the facts and circumstances, it is more likely than not that a particular item was delivered to the IRS, the court could resolve the issue either way and be affirmed on appeal under the clearly erroneous standard of review. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.") Thus, under the common-law mailbox rule, similarly situated taxpayers will be treated differently because the same evidence of timely mailing will be accepted by some courts but rejected by others.

This is an unsatisfactory state of affairs in a legal regime where hundreds of millions of documents are mailed to the IRS each year, and the determination of whether the documents were actually delivered may have very significant practical consequences. The approach reflected in the Treasury regulations, in addition to preventing taxpayer abuse, will produce greater uniformity of treatment among similarly situated taxpayers.

5. Two district courts have ruled that Treas. Reg. § 301.7502-1(e)(2)(i) is entitled to *Chevron* deference

In light of the overwhelming evidence of the reasonableness of the regulation, it is not surprising that two recently decided district court cases have upheld its validity under *Chevron*. *See McBrady v. United States*, 167 F. Supp. 3d 1012, 1017 (D. Minn. 2016) ("perceiv[ing] no reason why it should not defer, under *Chevron* . . . to these regulations as reasonable interpretations of § 7502".); *Jacob v. United States*, No. 15-10895, 2016 WL 6441280, at *2 (E.D. Mich. Nov. 1, 2016) ("Given that Congress had expressly delegated to the Secretary of the Treasury the authority to regulate in this area, 26 U.S.C. § 7502(b), the court deems it appropriate to defer under *Chevron* . . . to the agency's reasonable interpretations of §7502.").

Indeed, the *McBrady* court upheld the regulation even though the Eighth Circuit, to which its decision was appealable, had, like this Court in *Anderson*, previously held that I.R.C. § 7502 does not supplant the common law mailbox rule. 167 F. Supp. 3d at 1017. The *McBrady* court correctly concluded that "in light of the regulations," the Eighth Circuit's decision in *Estate of Wood* was no longer "viable." *Id.*

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

As noted above, this Court in *Anderson* embraced one of two competing interpretations of Section 7502, and that interpretation differs from the one subsequently adopted in Treas. Reg. § 301.7502-1(e)(2). But that fact does not affect the validity of the regulation.

Under *Brand X*, "[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." 545 U.S. at 982. The Supreme Court explained that "allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute . . . would allow a court's interpretation to override an agency's" and that "*Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps." *Id.* at 982.

This Court has applied *Brand X* in several cases to uphold an agency interpretation of a statute even though that interpretation conflicted with one of this Court's prior decisions. *See, e.g., Managed Pharmacy Care*, 716 F.3d at 1246; *Garfias-Rodriquez v. Holder*,

702 F.3d 504, 512 (9th Cir. 2012) (en banc); *Gonzales v. Department of Homeland Sec.*, 508 F.3d 1227, 1242 (9th Cir. 2007). In each case, this Court determined that its interpretation of the statute was not the only reasonable interpretation. *See, e.g., Managed Pharmacy Care*, 716 F.3d at 1246 (observing that "[a]lthough *Orthopaedic Hospital* [this Court's prior decision] was grounded in the language of the statute—as are all of our statutory interpretation cases—we did not hold that our view of [a particular statutory provision] represented the *only* reasonable interpretation of that statute"); *Gonzales*, 508 F.3d at 1237 (noting that "despite some language to the contrary, *Perez-Gonzalez* [this Court's prior decision] was based on a finding of statutory ambiguity that left room for agency discretion").

This Court should reach the same conclusion here. In *Anderson*, this Court did not indicate that it was interpreting unambiguous, gap-less statutory language. Quite the contrary, in explaining why it declined to hold that § 7502 "displac[ed] the common law presumption of delivery," the court merely stated that "the statute itself does not reflect a clear intent by Congress to displace the common law mailbox rule." 966 F.2d at 491. Of course, *Anderson* "was grounded in the

language of the statute—as are all of [this Court's] statutory interpretation cases." *See Managed Pharmacy Care*, 716 F.3d at 1246. But *Anderson* nowhere suggests that the plain language of Section 7502 addresses the delivery-presumption question in a way that would foreclose either of the two competing interpretations. Nor did it identify anything in the statute that would prevent the Treasury Department from interpreting Section 7502 to supplant the common-law mailbox rule.

Instead, *Anderson*'s statutory analysis reflected an awareness that this Court was acting to fill a gap in the statute. *See, e.g.,* 966 F.2d at 490 ("[T]he language of section 7502 itself does not indicate that [§ 7502(c)] is the only exception to the statutory mailbox rule.").[10] This

[10] *Anderson* also invoked the statutory canon of construction that a new statute is presumed to be harmonious with existing law and its judicial construction. *See* 966 F.2d at 491. But invocation of that canon does not indicate that the court believed the statute lacks any gap that the Treasury Department can properly fill. To the contrary, it is when a statute is ambiguous, not when its meaning is plain, that canons of statutory construction are useful. *See, e.g., Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 140 (2005) (explaining that application of a particular canon of statutory construction "simply informed the choice among plausible readings of [the statute's] text"); *United States v. Gallegos*, 613 F.3d 1211, 1214 (9th Cir. 2010) (similar). *See also Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) ("canons . . .

is not surprising; in *Anderson*, this Court recognized that it was deciding a difficult statutory construction issue and that "other circuits ha[d] decided the matter differently." *Id.* at 491. This was hardly a situation in which this Court held (or even suggested) that its "view of [I.R.C. § 7502] represented the *only* reasonable interpretation of that statute." *Managed Pharmacy Care*, 716 F.3d at 1246. Thus, under *Brand X*, *Anderson* presents no impediment to applying *Chevron* deference to Treas. Reg. 301.7502-1(e)(2).

C. Taxpayers' allegations of fraud on the Tax Court do not provide an independent basis for this Court's jurisdiction where the notice of appeal is untimely

Taxpayers assert that the IRS committed fraud on the Tax Court, and they argue that this alleged fraud means that this Court can exercise jurisdiction over this appeal even when the notice of appeal is untimely. (Br. 22-24.) That argument is baseless.

Taxpayers cite a number of cases that deal with allegations of fraud on the court. But none of those cases stands for the proposition that a court of appeals may review allegations of fraud on the lower

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are guides that need not be conclusive.") (citation and internal quotation marks omitted).

court absent a timely notice of appeal. Indeed, none of the cases taxpayers cite even involve any dispute about the timeliness of a notice of appeal.

Taxpayers cite *Hongsermeier*, 621 F.3d at 900, for the proposition that "this Court 'may vacate the Tax Court judgment upon a finding of fraud on the court.'" (Br. 22.) But that statement plainly does not mean that this Court will reach and address an argument that there was a fraud on the lower court even though the appeal is untimely. Indeed, in *Hongsermeier*, the timeliness of the appeal was not in dispute. 621 F.3d at 898 ("Taxpayers filed this timely appeal."). Similarly, in *Dixon v. Commissioner*, 316 F.3d 1041, 1046 (9th Cir. 2003), *as amended* (Mar. 18, 2003), another case taxpayers cite, this Court noted that taxpayers had filed a "timely appeal" from the Tax Court's denial of a motion to vacate a decision because of fraud on the court.

The other cases taxpayers cite (Br. 23) likewise do not hold or suggest that an allegation of fraud on the lower court provides this Court with jurisdiction over an untimely appeal. They involve the question whether *the Tax Court* has jurisdiction to vacate a decision

that has become final. *See Kenner v. Commissioner*, 387 F.2d 689 (7th Cir. 1968); *Toscano v. Commissioner*, 441 F.2d 930 (9th Cir. 1971); *Billingsley v. Commissioner*, 868 F.2d 1081 (9th Cir. 1989). This Court has ruled that, although the Tax Court generally cannot entertain a motion to reopen once a decision is final under I.R.C. § 7481, the Tax Court has jurisdiction to vacate a final decision for fraud on the court. *See, e.g., Toscano*, 441 F.2d at 933. But that ruling in no way suggests that, in cases involving allegations of fraud on the Tax Court, this Court will exercise jurisdiction over appeals that are untimely under I.R.C. § 7483.

Indeed, in *Billingsley*, in holding that the Tax Court could properly consider a motion to vacate an earlier decision for lack of jurisdiction when that earlier decision had already become final under I.R.C. § 7481, this Court relied, in part, on the unavailability of appellate review without a timely notice of appeal:

> Were we to affirm the Tax Court's denial of Billingsley's motion, no forum would be available to provide direct review of the Tax Court's original exercise of jurisdiction over Billingsley. Fed. R. App. P. 13(a) limits this court's jurisdiction to appeals filed within 90 days after the decision of the Tax Court is entered; this filing period is tolled only by "a *timely* motion to vacate or revise a decision . . . ."

868 F.2d at 1085.

In short, there is simply no support for the notion that taxpayers' allegations of fraud on the court allow taxpayers to circumvent the jurisdictional bar created by their failure to file a timely notice of appeal. Therefore, we decline to address taxpayers' allegations of fraud on the court.

II.

In the alternative, the Tax Court correctly granted the Commissioner's motion for summary judgment sustaining the proposed collections actions

A. Introduction and statutory background

To provide certain procedural safeguards for taxpayers in connection with tax collection activity by means of liens and levies, Congress enacted I.R.C. §§ 6320 and 6330 as part of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3401, 112 Stat. 685, 746. *See generally Living Care Alternatives of Utica, Inc. v. United States*, 411 F.3d 621, 624-25 (6th Cir. 2005). Under §§ 6320 and 6330, the Commissioner must notify a taxpayer of his right to request a CDP hearing before the IRS Office of Appeals upon the filing of a notice of lien or before a levy is made.

I.R.C. §§ 6320(a)(3)(B), (b), 6330(a). If a timely request is made, the taxpayer is entitled to a CDP hearing before the IRS Office of Appeals, and the IRS's proposed collection action is suspended until the CDP proceeding is concluded. I.R.C. §§ 6320(b)(1),(2), (c), 6330(b)(1),(2), 6330(e); Treas. Reg. §§ 301.6320-1(b),(d), 301.6330-1(b),(d).

As part of the hearing, the Appeals officer is required to "obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met." I.R.C. § 6330(c)(1). The taxpayer also may raise "any relevant issue," including "(i) appropriate spousal defenses; (ii) challenges to the appropriateness of collection actions; and (iii) offers of collection alternatives, which may include the posting of a bond, the substitution of other assets, an installment agreement, or an offer-in-compromise." I.R.C. § 6330(c)(2)(A); *see* Treas. Reg. § 301.6320-1(e). Finally, the taxpayer "may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability." I.R.C. § 6330(c)(2)(B).

Following the hearing, the IRS Office of Appeals sends the taxpayers a "notice of determination" that takes into account the "verification" of compliance with applicable law and procedure, the issues raised by the taxpayers, and "whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary." I.R.C. § 6330(c)(3)(C); *see* Treas. Reg. § 301.6330-1(e)(3) (Q&A E8). Within 30 days after the date of the notice, the taxpayer may seek Tax Court review. I.R.C. § 6330(d)(1).

In a Tax Court challenge to a notice of determination issued after a CDP proceeding, the taxpayer bears the burden of establishing that the IRS Office of Appeals failed to comply with I.R.C. § 6330 and abused its discretion in sustaining the collection action. Tax Ct. R. 142(a)(1); *see also Keller*, 568 F.3d at 716.[11] However, where, as here, taxpayers properly challenge their liability (*see* I.R.C. § 6330(c)(2)(B)), the Tax

[11] Taxpayers in their brief erroneously claim that the Commissioner bore the burden of proof and production regarding liability for penalties and appropriateness of collection. (Br. 16, 32-33.)

Court reviews such challenges *de novo*. *See, e.g., Callahan v. Commissioner*, 130 T.C. 44, 50 (2008).

In this case, as to the I.R.C. § 6702 penalties that remain at issue in this appeal,[12] the Tax Court correctly concluded that taxpayers are liable. (ER 19-20.) As the Tax Court explained, and as discussed below, taxpayers' 2003 through 2007 returns were frivolous for purposes of I.R.C. § 6702, and thus subject to the penalty, because: (1) they purported to be tax returns; (2) they lack "the information necessary to gauge the substantial correctness of the self-assessment or lack[ ] information indicating the self-assessment is substantially correct"; and, (3) they advance a position "the Commissioner has identified as frivolous." (ER 19.); *see also* I.R.C. § 6702(a). The Tax Court likewise correctly determined that the IRS complied with I.R.C. § 6330 and that the IRS Office of Appeals did not abuse its discretion by declining to consider collection alternatives. (ER 20-21.)

[12] As explained, pp. 63-64, *infra*, the Government concedes that three of the penalties assessed against each taxpayer were not appropriate and is working to abate them.

B. The frivolous argument identified as the basis for the I.R.C. § 6702 penalties is identified on the IRS's official list of frivolous arguments

Under I.R.C. § 6702(a)(2), a person who files a return, or purported return, that is, on its face, either substantially incorrect or incomplete is subject to a frivolous return penalty if the inaccuracy or incompleteness: "(A) is based on a position which the Secretary has identified as frivolous under subsection (c), or (B) reflects a desire to delay or impede the administration of Federal tax laws." Subsection (c), in turn, requires Secretary of Internal Revenue to "prescribe (and periodically revise) a list of positions which the Secretary has identified as being frivolous." I.R.C. 6702(c).

The position reflected on taxpayers' purported amended tax returns for 2003-2006 and on their tax return and amended tax returns for 2007 was that, despite the numerous third party reports on Forms W-2, Forms 1099, etc., indicating that they had received taxable income, they, in fact, had zero income and owed zero taxes. That position had been identified as frivolous before taxpayers filed their purported returns. *See Frivolous Positions*, 2007-1 C.B. 883 (2007) (identifying as a frivolous position the notion that "[a] taxpayer has an

option under the law to . . . elect to file a tax return reporting zero taxable income and zero tax liability even if the taxpayer received taxable income during the taxable period for which the return is filed, or similar arguments described as frivolous in Rev. Rul. 2004-34, 2004-1 C.B. 619."); *see also Frivolous Positions*, 2010-17 I.R.B. 609 (2010) (same). Moreover, this Court has held that the filing of a zero return constitutes a frivolous position for purposes of I.R.C. § 6702. *See Olson v. United States*, 760 F.2d 1003, 1005 (9th Cir. 1985) (ruling that a taxpayer who filed a Form 1040 that "listed his wages, salaries, and tips as zero" despite the existence of a W-2 form that "indicated that he had received in excess of $50,000 in wages" had taken a frivolous position for purposes of I.R.C. § 6702).

The Tax Court and other courts of appeals have reached the same conclusion. *See, e.g., Whitaker v. Commissioner*, T.C.M. (RIA) 2017-192 (T.C. 2017) ("The Secretary long ago identified as frivolous the position that a taxpayer can elect to file a tax return reporting zero taxable income and zero tax liability even if . . . [he] received taxable income.") (internal quotation marks and citation omitted); *Grunsted v. Commissioner*, 136 T.C. 455, 460 (2011) ("This Court and others have

repeatedly characterized returns reflecting zero income and zero tax as frivolous."); *Sullivan v. United States*, 788 F.2d 813, 815 (1st Cir. 1986) (holding that a taxpayer who reported no income from wages when Forms W-2 showed he "received wages totaling $32,502.32" in the relevant tax year had taken a frivolous position for purposes of I.R.C. § 6702).

Taxpayers argue repeatedly that the I.R.C. § 6702 penalties are improper because the frivolous position the IRS identified as the basis for the penalties was "Argument 44," and there is no Argument 44 on the IRS's official list of frivolous positions. (*See* Br. 28-29, 48-49.) That is immaterial. The statute does not require that the IRS notify taxpayers which of the frivolous arguments on the official list their purported return contains. It merely requires that the position taken on the purported return to be one of the positions the Secretary has identified as frivolous "or reflects a desire to delay or impede the administration of Federal tax laws." I.R.C. § 6702(a)(2). Taxpayers' position that they have zero income and owe zero taxes,

notwithstanding third party reporting documents that show otherwise, satisfies the statutory requirement.[13]

C. Taxpayers' other arguments are meritless

1. The Tax Court applied the correct standards of review

Contrary to taxpayers' contention (Br. 34-37), the Tax Court applied the correct standard of review. The Tax Court correctly applied the *de novo* standard of review (ER 19) to taxpayers' challenge to the imposition of I.R.C. § 6702 penalties as taxpayers did not receive notices of deficiency related to the penalties or otherwise have an opportunity to dispute them. *See, e.g., Callahan v. Commissioner*, 130 T.C. 44, 50

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[13] The "ARG44" notation contained in certain IRS documents was apparently a reference to the list of frivolous positions contained in the Internal Revenue Manual. The Manual lists separately several different permutations of the "Zero Return" position, including:

> Zero Wages on a Substitute Form: Taxpayer generally attaches either a substitute Form W-2, Form 1099, or Form 4852 that shows "$0" wages or no wage information. A statement may be included indicating the taxpayer is rebutting information submitted to the IRS by the payer. Entries are usually for Federal Income Tax Withheld, Social Security Tax Withheld, and/or Medicare Tax Withheld.

IRM Exhibit 25.25.10-1(ar) available at https://www.irs.gov/irm/part25/irm_25-025-010r#idm140409231681104.

(2008). The court correctly reviewed the Commissioner's administrative determination of the CDP hearings for abuse of discretion. *See Keller*, 568 F.3d at 716.

2. The Tax Court's decision had no impact on the I.R.C. § 6702 penalty related to the Sarah V. Waltner Trust

Taxpayers next argue (Br. 38-39) that the Tax Court erroneously determined that they were liable for a frivolous return penalty based on a tax return they submitted for the 2006 tax year for the Sarah V. Waltner Trust. In actuality, although the Tax Court's summary judgment opinion mentions the 2006 trust return, the Tax Court's final decision specifically states that the IRS may proceed with the collection actions outlined in four specific letters, which notified taxpayers of the liens and levies at issue here. (ER 2-3.) Because a lien and/or levy to collect the Section 6702(a) penalty based on the Trust's 2006 tax return was not among the collection actions described in those letters (ER 170-77, 265-75, 277-78, 432-38, 546-47, 558-64, 637-39), the Tax Court's decision in this case (ER 2-3) has no impact on that penalty.

3. Taxpayers' assessment period argument is meritless

Taxpayers also contend (Br. 53-54) that the IRS's assessment of frivolous return penalties for 2003 and 2004 was barred by I.R.C. § 6501(a)'s three-year assessment period.[14] However, I.R.C. § 6501(a)'s limitations period does not apply to the assessment of I.R.C. § 6702 frivolous return penalties based on zero returns. *Hill v. Commissioner*, 108 T.C.M. (CCH) 12, 2014 WL 3056137, at *5 (2014) (explaining that a zero return does not trigger I.R.C. § 6501(a)'s limitations period because such a return fails "to provide sufficient data to calculate tax liability or to reasonably attempt to satisfy the requirements of the tax law") (citation omitted).

Moreover, if any assessment period applied to the assessment of frivolous return penalties, it would run from the filing of taxpayers' amended tax returns, which assert zero tax liability for those years, and not from the filing of taxpayers' original 2003 and 2004 tax returns, as taxpayers suggest. *See O'Brien v. Commissioner*, 104 T.C.M. (CCH)

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[14] Section 6501(a) provides that in general "the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed . . . ."

620, 2012 WL 5935675, at *8 (2012) ("Any period of limitations that arguably applies for the assessment of the section 6702(a) penalty cannot possibly begin to run until the frivolous return document is submitted to and received by the IRS."). Because taxpayers filed their Forms 1040X for 2003 and 2004 in February 2008 (ER 21) and the assessments were made in September 2008 and April 2009 (ER 276, 547), they were timely, as the Tax Court correctly held (ER 21).

4. Taxpayers did not raise genuine issues of material fact that precluded summary judgment

Taxpayers attempt to argue (Br. 41-42) that they created a genuine issue of fact as to whether the IRS followed the law when it assessed the I.R.C. § 6702 penalties. But taxpayers do not actually posit any disputed issues of material fact. Instead they rehash some of the arguments discussed herein—for example, that the Tax Court should have considered their alleged expert evidence that IRS documents were forged and that, in assessing the penalties, the IRS committed error by identifying their argument as "Argument 44," an argument they claim was not on the official list. These arguments raise legal issues that the Tax Court properly decided on summary judgment, or evidentiary issues over which the Tax Court had discretion and

which it properly determined in advance of its summary judgment decision.

5. To the extent that the Tax Court's decision addresses tax liabilities for 2003, 2004 and 2006 that have already been collected, it is moot

Taxpayers also argue that the Tax Court erred in determining that the IRS could proceed with collection activities related to their 2006 tax liability. (Br. 44-45.) Taxpayers assert that the IRS applied overpayment credits in 2008 and 2009 to their 2006 tax liability and that, as of April 2010, their balance owing for 2006 was $0. (Br. 44-45, 55-56.)

This appears to be correct. (ER 217-221.) While taxpayers state that the Tax Court "should have seen" this, they do not say that they pointed it out. In any event, if the IRS has already collected all of the 2006 tax liability that is due (as apparently it has), it will not have any reason to take the collection activities described in the April 12, 2010 and May 6, 2010 letters. (ER 2-3.) Thus, to the extent that the Tax Court's decision authorizes liens and levies to collect a 2006 tax liability that has already been collected, it is moot. *See Greene-Thapedi v. Commissioner*, 126 T.C. 1, 5-7 (2006) (dismissing as moot a taxpayer's

challenge to a levy when the tax liability had already been collected via an application of an overpayment for a subsequent tax year).

Other aspects of this case have also been rendered moot by the IRS's application of taxpayers' subsequent overpayments to satisfy their tax liabilities. As taxpayers concede (Br. 37 n.8), the IRS applied their 2009 overpayment to satisfy Steven Waltner's liability for his 2003 penalty. (*see also* ER 85 n.1.) Review of taxpayers' current IRS account information reveals that the IRS has also applied overpayments to satisfy Steven Waltner's liability for the I.R.C. § 6702 penalty for the amended 2004 return. Thus, the I.R.C. § 6702 penalties assessed against Steven Waltner for the 2003 and 2004 Forms 1040X have already been paid and accordingly will not be collected via the liens and levies at issue in this appeal. Thus, taxpayers' challenges to the liens and levies for the collection of the I.R.C. § 6702 penalties assessed against Steven Waltner for the 2003 and 2004 Forms 1040X penalties are also moot.[15]

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[15] To the extent that taxpayers' brief can be interpreted as challenging the IRS's ability to use overpayments it receives to set off unpaid tax liabilities at issue in collections due process litigation, that argument fails for two reasons. First, applicable regulations make

D. The Tax Court acted well within its discretion in declining to reopen discovery in order to consider supposed expert testimony regarding the validity of IRS documents

As explained, pp. 10-11, *supra*, taxpayers sought the Tax Court's permission to reopen discovery so that they could hire an expert to examine certain signatures that they believed were forged. Taxpayers contended that certain signatures were forged on some of the Forms 8278, *i.e.*, the forms used to document managerial approval of an assessment of an I.R.C. § 6702 penalty. *See* pp. 10-11, *supra*. The Tax Court declined to reopen discovery, but taxpayers nonetheless hired an expert to examine the documents and then submitted the report prepared by this alleged expert. (ER 6, 46-49.)

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plain that non-levy offset collections may take place during the period described in I.R.C. § 6330(e)(1) when levies are prohibited. *See* Treas. Reg. § 301.6330-1(g)(A-G3) (explaining that the IRS "*may take* other non-levy collection actions such as initiating judicial proceedings to collect the tax shown on the CDP Notice or *offsetting overpayments from other periods, or of other taxes,* against the tax shown on the CDP Notice") (emphasis added). Second, the IRS's decision to offset tax liability using subsequent overpayments as allowed under I.R.C. § 6402(a) is not subject to I.R.C. § 6330's hearing and appeals procedures, and thus is not reviewable by the Tax Court. *See Boyd v. Commissioner*, 451 F.3d 8, 9-13 (1st Cir. 2006).

"The Tax Court's evidentiary rulings are reviewed for abuse of discretion and will not be reversed absent a showing of prejudice." *Sparkman v. Commissioner*, 509 F.3d 1149, 1156 (9th Cir. 2007). *Accord Sacks v. Commissioner*, 82 F.3d 918, 921 (9th Cir. 1996). The laboratory report from Affiliated Forensic Laboratory is inconclusive at best. (ER 46.) The report appears to conclude tentatively that signatures on several of the Forms 8278 were copied from another document or other documents. (ER 47-48.) Even if that were true, it would not establish that a supervisor failed to issue written approvals for the penalties. *See, e.g.*, *Deyo v. United States*, 296 F. App'x 157, 159 (2d Cir. 2008) (holding that, "[s]ection 6751 requires only personal approval in writing, not any particular form of signature or even any signature at all."). Thus, taxpayers have failed to show that the Tax Court abused its discretion in declining to reopen discovery in order to consider alleged evidence of forged signatures on Forms 8278.

E. The IRS is currently correcting errors concerning taxpayers' I.R.C. § 6702 penalties

1. The erroneous abatement of taxpayers' unpaid I.R.C. § 6702 penalties

In April and May of 2017, while this appeal was pending, taxpayers applied to the IRS for an I.R.C. § 6702(d) reduction of the frivolous return penalties at issue in this case. Under I.R.C. § 6702(d), the Secretary of Internal Revenue may reduce the amount of any frivolous return penalty "if the Secretary determines that such reduction would promote compliance with and administration of the Federal tax laws."

In order to implement this provision, the IRS has instituted a procedure through which taxpayers, by filing Form 14402, can seek reduction of all unpaid I.R.C. § 6702 penalties to $500. *See* Rev. Proc. 2012-43, 2012-49 I.R.B. 643 (2012).[16] The IRS document that instituted this procedure made clear that the procedure "does not apply to persons who seek to challenge the merits of a section 6702 penalty assessment," which, of course, is what taxpayers are doing in this litigation. *Id.* The

[16] *See also* Form 14402, *available at* https://www.irs.gov/pub/irs-pdf/f14402.pdf.

instructions for Form 14402 likewise state that the form should not be used "if you want to challenge the merits of a section 6702 penalty assessment." Form 14402 at 3.[17]

In April 2017, while this appeal was pending, both taxpayers submitted Forms 14402, thereby seeking a reduction of all of their unpaid I.R.C. § 6702 penalties to $500. And taxpayers each submitted a check for $500 along with this form. Taxpayers did not inform the undersigned counsel or this Court of the filing of their requests for the I.R.C. § 6702(d) reductions of the penalties at issue in this litigation. There was a litigation hold in place, which should have alerted all IRS personnel that the Waltners' I.R.C. § 6702 penalties were the subject of ongoing litigation, and thus that reduction of these penalties under I.R.C. § 6702(d) was impermissible. Unfortunately that hold was not heeded, and the IRS employees who processed taxpayers' Forms 14402 erroneously approved the reductions taxpayers requested. That error is now being corrected.[18]

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[17] Available at https://www.irs.gov/pub/irs-pdf/f14402.pdf.

[18] The IRS has no authority to compromise a case after it has been referred to the Department of Justice for prosecution or defense. I.R.C. § 7122(a); *see also United States v. Jackson*, 511 F. App'x 200, 203

2. The erroneous assessment of three I.R.C. § 6702 penalties

Along with their numerous meritless arguments, taxpayers have argued (Br. 24-25, 42) that it was inappropriate for the IRS to issue I.R.C. § 6702 penalties based on copies of previously filed tax forms included as part taxpayers' correspondence with the IRS and based on communications between taxpayers and Taxpayer Advocate Services. Review of the record reveals that three of the penalties at issue in this case were assessed based on submissions that did not constitute the filing of a tax return or purported tax return. We concede that it was error for the IRS to issue penalties based on the submissions provided to the Tax Court as Exhibits 10-R (ER 733-44), 15-R (ER 778-827), and 16-R (ER 828-38). Exhibit 10-R is a facsimile taxpayers sent to the Taxpayer Advocate Service. Exhibits 15-R and 16-R are

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(3d Cir. 2013) (concluding that, because the IRS "lost its authority to compromise" the taxpayers' liabilities when it transferred his case to the Department of Justice, its subsequent abatement of that liability, without authorization from the Department, was void); *see also* IRS CCN CC-2011-020, 2011 WL 4402105 (Sept. 15, 2011) ("Following the referral of a case, Justice has the exclusive authority to make and approve adjustments to the referred tax liabilities. Any abatement made by the Service in order to adjust a referred tax liability must be authorized by Justice or it will be void.").

correspondence, or partial correspondence, from taxpayers to the IRS that included a copy (or copies) of previously filed 2007 tax forms.

The IRS is in the process of abating these penalties, *i.e.*, the second 2006 penalties assessed against each taxpayer and the fourth and fifth 2007 penalties assessed against each taxpayer. Thus, irrespective of whether this Court exercises jurisdiction over this appeal, these penalties will not be collected.[19]

[19] If this Court reaches the merits of this appeal, it can properly affirm the Tax Court's decision despite the IRS's error in assessing these particular penalties. The Tax Court's decision authorizes the IRS to take the collection actions described in particular notices sent to taxpayers. Just as affirmance of the Tax Court's decision would not authorize the IRS to collect tax liabilities that have already been collected via an application of overpayments from later tax-years, *see* pp. 58-59, *supra*, so, too, affirmance of the decision would not authorize collection of tax liabilities that have been abated.

CONCLUSION

This appeal should be dismissed for lack of jurisdiction. In the alternative, the decision of the Tax Court should be affirmed.

Respectfully submitted,

DAVID A. HUBBERT
Deputy Assistant Attorney General

/s/ Nathaniel S. Pollock

JOAN I. OPPENHEIMER (202) 514-2954
NATHANIEL S. POLLOCK (202) 514-8139
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

DECEMBER 2017

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for the Appellee respectfully inform the Court that the following cases related to the instant appeal that are pending in this Court: *Steven Waltner, et al. v. Commissioner*, No. 17-72261, which is a case involving the same parties as the instant appeal and may raise the same or closely related issues; *Steven Waltner, et al. v. Commissioner*, No. 16-71797, which is also a case involving the same parties as the instant appeal and may raise the same or closely related issues; and *Baldwin, et al. v. United States*, Nos. 17-55115 & 17-55354, which raises the same issue regarding the validity of Treas. Reg. § 301.7502-1(e) that is raised in this appeal.

ADDENDUM

I.R.C. § 6501. Limitations on assessment and collection

(a) General rule.--Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period. For purposes of this chapter, the term "return" means the return required to be filed by the taxpayer (and does not include a return of any person from whom the taxpayer has received an item of income, gain, loss, deduction, or credit).

. . . .

I.R.C. § 6702. Frivolous tax submissions (excerpts)

(a) Civil penalty for frivolous tax returns.--A person shall pay a penalty of $5,000 if--

(1) such person files what purports to be a return of a tax imposed by this title but which--

(A) does not contain information on which the substantial correctness of the self-assessment may be judged, or

(B) contains information that on its face indicates that the self-assessment is substantially incorrect, and

(2) the conduct referred to in paragraph (1)--

(A) is based on a position which the Secretary has identified as frivolous under subsection (c), or

(B) reflects a desire to delay or impede the administration of Federal tax laws.

. . . .

(3) Opportunity to withdraw submission.--If the Secretary provides a person with notice that a submission is a specified frivolous submission and such person withdraws such submission within 30 days after such notice, the penalty imposed under paragraph (1) shall not apply with respect to such submission.

(c) Listing of frivolous positions.--The Secretary shall prescribe (and periodically revise) a list of positions which the Secretary has identified as being frivolous for purposes of this subsection. The Secretary shall not include in such list any position that the Secretary determines meets the requirement of section 6662(d)(2)(B)(ii)(II).

(d) Reduction of penalty.--The Secretary may reduce the amount of any penalty imposed under this section if the Secretary determines that such reduction would promote compliance with and administration of the Federal tax laws.

(e) Penalties in addition to other penalties.--The penalties imposed by this section shall be in addition to any other penalty provided by law.

I.R.C. § 7483. Notice of appeal

Review of a decision of the Tax Court shall be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after the decision of the Tax Court is entered. If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after the decision of the Tax Court is entered.

I.R.C. § 7502 – Timely mailing treated as timely filing and paying (excerpts)

(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.

. . . .

(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.

. . . .

(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.

Treas. Reg. § 301.7502–1 Timely mailing of documents and payments treated as timely filing and paying. (excerpts)

(c) Mailing requirements—(1) In general. Section 7502 does not apply unless the document or payment is mailed in accordance with the following requirements:

. . . .

(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.

. . . .

(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.

. . . .

(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.

. . . .

(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.

. . . .

(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.

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 16-72754

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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The brief is [12,887] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated [ ]
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

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

Date: Dec 14, 2017

("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 December 14, 2017. I certify that participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Nathaniel S. Pollock
NATHANIEL S. POLLOCK
Attorney

Attachment

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	**15-CV-06004 RGK (AGR)**	Date	July 27, 2016
Title	***Howard L. Baldwin, et al., v. United States of America***		

Present: The Honorable	R. GARY KLAUSNER, U.S. DISTRICT JUDGE

Sharon L. Williams (Not Present)	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) Order re: Defendant's Motion for Summary Judgment**

I. INTRODUCTION

On August 7, 2015, Howard and Karen Baldwin ("Plaintiffs") filed an action against the United States of America ("Defendant"). The Complaint seeks the refund of income taxes wrongfully denied to Plaintiffs by the Internal Revenue Service ("IRS").

On June 16, 2016, Defendant filed this Motion for Summary Judgment arguing that because Plaintiffs cannot meet their burden to show a waiver of sovereign immunity, the Court must dismiss the case for lack of personal jurisdiction.

For the following reasons the Court **DENIES** Defendant's Motion for Summary Judgment.

II. STATEMENT OF FACTS

The following facts are undisputed:

On October 24, 2006, the IRS received Plaintiffs' individual income tax return form and payment of the full $170,951 in liability for the tax year 2005 ("2005 Return"). (Greene Decl. Exs. D and F, ECF No. 27-3.) For tax year 2007, Plaintiffs requested and were granted an extension of time to file their return until October 15, 2008. *Id*. On November 1, 2010, the IRS received Plaintiffs' individual income tax return form for tax year 2007 ("2007 Return"), indicating a net operating loss for that year. *Id*. Plaintiffs then prepared an amended individual income tax return ("Amended Return"), claiming the 2007 net operating loss ("NOL") as a carry back deduction for the tax year 2005 and a refund in the amount of $170,951. *Id*. On June 21, 2011, Plaintiffs' assistant sent the Amended Return to the IRS via

regular mail. *Id*. The IRS records do not reflect that the Amended Return was ever received, nor that any return claiming a refund for tax year 2005 was postmarked, delivered, or filed by October 15, 2011. *Id*. The IRS denied Plaintiffs' refund claim on August 12, 2013, and Plaintiffs brought this suit against the IRS on August 7, 2015. *Id*.

III. JUDICIAL STANDARD

Pursuant to Federal Rule of Civil Procedure 56(a), a court may grant summary judgment only where "there is no genuine issue as to any material fact and … the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Upon such a showing, the court may grant summary judgment on all or part of the claim. *Id*.

To prevail on a summary judgment motion, the moving party must show that there are no triable issues of material fact as to matters upon which it has the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). On issues where the moving party does not have the burden of proof at trial, the moving party need only show that there is an absence of evidence to support the non-moving party's case. *See id*.

To defeat a summary judgment motion, the non-moving party may not merely rely on its pleadings or on conclusory statements. *Id*. at 324. Nor may the non-moving party merely attack or discredit the moving party's evidence. *See Nat'l Union Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983). The non-moving party must affirmatively present specific admissible evidence sufficient to create a genuine issue of material fact for trial. *Celotex* 477 U.S. at 324.

VI. DISCUSSION

At the nexus of Defendant's motion is the contention that because Plaintiffs failed to prove a waiver of sovereign immunity, the Court lacks personal jurisdiction.

As a sovereign, the United States may not be sued without its consent, and that consent defines the court's jurisdiction. *United States v. Dalm*, 494 U.S. 596, 608 (1990). A waiver of sovereign immunity must be "unequivocally expressed" through a Congressional statute, *United States v. Testan*, 424 U.S. 392, 399 (1976), and that statute must be strictly construed against the surrender of sovereign immunity. *Safeway Portland Emp. Federal Credit Union v. Federal Deposit Ins. Corp.*, 506 F.2d 1213, 1216 (9th Cir. 1974).

Congress has granted this Court jurisdiction over claims against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected. 28 U.S.C. § 1346(a)(1). "Despite its spacious terms, § 1436(a)(1) must be read in conformity with other statutory provisions which qualify a taxpayer's right to bring a refund suit upon compliance with certain conditions." *Dalm*, 494 U.S. at 601. The Internal Revenue Code ("IRC") lays out three requirements, all of which must be met, for a proper waiver of sovereign immunity with regard to suits for the recovery of refunds. First, the IRC bars a suit for the recovery of a refund until the taxpayer has fully paid his tax for the year in question. *Flora v. United States*, 362 U.S. 145, 176 (1960). Second, no suit for recovery of a refund may be initiated unless a claim for a refund was timely filed. 26 U.S.C. § 7422(a). Third, a suit proceeding under § 7422 may not be filed within 6 months from the date of filing the refund claim, or more than two years from the date the IRS denied the claim. 26 U.S.C. § 6532(a)(1).

Here, Plaintiffs fully paid the tax liability of $170,951 for tax year 2005. (Greene Decl. Exs. D and F, ECF 27-3.) Furthermore, the IRS denied Plaintiffs' refund claim on August 12, 2013, and Plaintiffs filed their refund suit less than two years later, on August 7, 2015. (*Id*.) In light of these facts,

the Court finds that Plaintiffs have fulfilled the first and third requirements for a waiver of sovereign immunity.

With respect to the second requirement, however, Defendant contends that Plaintiffs did not timely file their claim for a refund and thus failed to prove a waiver of sovereign immunity. The Court disagrees and finds that Plaintiffs provide sufficient evidence to show a triable issue of material fact with respect to the timely filing of their refund claim.

Timely Filing of Refund Claims

To claim a refund arising from an overpayment attributable to a net operating loss ("NOL"), a taxpayer must file a claim for a refund within "3 years after the time prescribed by law for the filing of the return (including extensions thereof) for the taxable year of the NOL." 26 U.S.C. § 6511(d)(2)(A).

Here, Plaintiffs contend they mailed the Amended Return on June 21, 2011, thereby timely filing their claim for the 2007 NOL as a carryback deduction and a refund in the amount of $170,951. (Greene Decl. Exs. D and F, ECF No. 27-3.) In support, Plaintiffs testify that they mailed the Amended Return on June 21, 2011, and provide a declaration from a former assistant who claims to have applied the appropriate postage and deposited the Amended Return at the post office on the date in question. (Lynch Decl. Ex. B, ECF No. 30.) Defendant responds that Plaintiffs' evidence is inadmissible. Defendant argues therefore, that because the IRS never received the Amended Return, Plaintiffs cannot raise a triable issue as to its filing.

Accordingly, the Court addresses the admissibility of Plaintiffs' evidence, and the sufficiency of that evidence.

1. *Admissibility of Extrinsic Evidence*

In the event the IRS does not receive a return, the common law provides that proof of timely mailing of the return raises a rebuttable presumption that it was timely received. *Anderson v. United States*, 966 F.2d 487, 491 (9th Cir. 1992) (citing *Rosenthal v. Walker*, 111 U.S. 185, 193-94 (1884)); *Schikore v. BankAmerica Supplemental Ret. Plan*, 269 F.3d 956, 961 (9th Cir. 2001). Like any rebuttable presumption, it is chiefly a "tool for determining, in the face of inconclusive evidence, whether or not receipt has actually been accomplished." *Id*. Under IRC § 7502, however, a taxpayer may *conclusively* establish receipt of a return by presenting proof of registered or certified mail as evidence. 26 U.S.C. § 7502(c). In the Ninth Circuit, when no such evidence exists, a taxpayer may introduce extrinsic and circumstantial evidence of mailing for the purposes of establishing a presumption of receipt. *Anderson*, 966 F.2d at 491.

In 2011, the Treasury Department amended its regulations related to § 7502(c), making registered or certified mail receipts the *only* evidence that can conclusively *or* presumptively establish receipt of a return not actually received. 26 CFR 301.7502-1(e). This regulation is in direct conflict with Ninth Circuit precedent, which allows credible extrinsic evidence of mailing to create a presumption of receipt under § 7502(c). Defendant contends that under the *Chevron* deference test, the Court must defer to the agency's regulation.

In *Chevron, U.S.A., Inc., v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984), the Supreme Court laid out a two-step analysis to determine whether a court should defer to an agency's statutory interpretation. First, the court must determine if Congress has clearly and unambiguously expressed its intent through the statute. *Id*. If the statute is unambiguous, the court need not give any deference to the agency regulation. *Id*. If the statute is ambiguous, however, the court must defer to all reasonable agency interpretations of that statute. *Id*. at 843. Furthermore, any prior judicial constructions of that statute are

superseded by reasonable agency interpretations of ambiguous statutes. *Nat'l Cable & Telecomm. Ass'n. v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

A statute is ambiguous if Congress either explicitly or implicitly left room for agency interpretation. *Chevron* 467 U.S. at 843-44. An example of an explicit authorization is found in § 7502 itself. The statute explicitly authorizes the Treasury Secretary to create regulations to determine whether postmarks made by delivery services other than the United States Postal Service qualify as postmarks for the purposes of the statute. 26 U.S.C. § 7502(b). Implicit authorization is present where Congress remains silent as to the definition of a statutory term. *Chevron* 467 U.S. at 844. For example, in *Chevron*, the EPA interpreted the definition of the statutory term "stationary source," 467 U.S. at 839; and, in *Brand X*, the Federal Communications Commission interpreted the statutory term "telecommunications service." 545 U.S. at 974. In both instances, however, the statutory terms were considered ambiguous, thus leaving room for varying interpretations of their meaning or application.

Here, the Court finds no statutory ambiguity. Congress did not explicitly authorize the Treasury to interpret what constitutes evidence. As evidenced by other sections of the statute, it is clear that Congress knows how to explicitly authorize agency interpretations when it intends to do so. *See generally* 26 U.S.C. § 7502(b) (statute explicitly authorizes the Treasury Secretary to create regulations to determine whether postmarks made by delivery services other than the United States Postal Service qualify as postmarks for the purpose of § 7502). Accordingly, the Court finds its silence instructive. Nor has Congress implicitly left room for agency interpretation, as there is no ambiguous statutory term that has been left undefined.

Based on the foregoing, the Court finds that the Treasury Department's 2011 amendment materially alters an otherwise clear statute. When Congress enacted § 7502(c), it intended to alleviate the hardship of postal service malfunctions by giving taxpayers a means to *conclusively* establish the IRS' receipt of a return with proof of certified or registered mail. While the statute made the proof of certified or registered mail sufficient evidence to *conclusively* establish a receipt of the return, there is no indication that it intended to foreclose other evidentiary means that might assist in establishing a presumption of delivery.

The Court finds that § 7502 is not ambiguous, and therefore the Court need not proceed to the second step of the *Chevron* analysis. Accordingly, no deference shall be granted to the Treasury Department's interpretation of the statute. The Court next considers Plaintiffs' testimony and the declaration of their former assistant in determining the sufficiency of Plaintiffs' evidence.

2. *The Sufficiency of Plaintiffs' Evidence*

If a taxpayer furnishes credible evidence of the date on which her return was postmarked and mailed to the IRS, that date controls. *Lewis v. United States*, 144 F.3d 1220, 1223 (9th Cir. 1998). In the Ninth Circuit's seminal case on the admissibility of extrinsic evidence for purposes of § 7502, a taxpayer's testimony, in addition to a corroborating affidavit, was sufficient to prove that a tax return was postmarked and mailed on the alleged date. *Anderson* 966 F.2d at 491.[1] Furthermore, in *Lewis*, a taxpayer provided credible evidence that the return was mailed on the date alleged when he produced not only its own sworn testimony, but also three signed and dated checks received by the IRS and bearing the postmark date. 144 F.3d at 1223.

[1] The affidavit declared that she went to the post office with the taxpayer and waited for her in the car. *Id*. at 489. The taxpayer returned to the car without the envelope containing the tax return. *Id*.

Here, Plaintiffs provide not only their own sworn testimony that the Amended Return was mailed on June 21, 2011, but also a sworn affidavit from their former assistant. This affidavit details how the assistant placed the Amended Return in an envelope addressed to the IRS, placed the appropriate postage on the envelope, and deposited it in the mail. (Lynch Decl. Ex. B, ECF No. 30.) To rebut this presumption, the government offers IRS records that reflect that the Amended Return was never received. (Greene Decl. Exs. D and F, ECF No. 27-3.) The credibility of each party's evidence is for a jury to weigh, and is not a determination made at summary judgment. The Court does find, however, that Plaintiffs have shown a triable issue of material fact as to the timely mailing of the Amended Return.

V. CONCLUSION

Plaintiffs have provided sufficient evidence to show a triable issue of material fact with respect to the timely filing of their refund claim. Therefore, a triable issue exists as to Defendant's waiver of sovereign immunity in this case.

For these reasons, the Court **DENIES** Defendant's Motion for Summary Judgment.

IT IS SO ORDERED.

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Initials of Preparer _____