

Department
of the
Treasury

Internal
Revenue
Service

Office of
Chief Counsel

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Subject: Procedures to be Followed in Light of Upon Incorporation
Mail Delivery Issues with the Tax Court Cancellation Date: into CCDM

Purpose

To establish procedures to be followed with respect to mail lost or delayed in transmission to the Tax Court due to the recent anthrax problem.

Background

Mail delivery to the Tax Court has been and continues to be disrupted by the recent anthrax problem. As a result of this problem, mail addressed to the Tax Court was diverted for special handling and treatment before being delivered to the court, which has resulted in significant delays in the delivery of mail as well as discoloration and other adverse physical effects on the mail. We understand that the treatment being applied to mailing envelopes may affect the legibility of postmarks and the contents of mail, or cause the destruction of individual pieces of mail. Regular mail service to the Tax Court was interrupted in mid-October 2001 and was only resumed during the last week of November. The volume of mail delivered to the Tax Court continues to increase, but much of the interrupted mail still remains to be delivered. New mailings to the Tax Court continue to be diverted for special treatment and delays in mail deliveries to the Tax Court are expected to continue for the indefinite future.

These delays have created a number of problems in case processing and have generated questions from our field offices on how to deal with these issues. For example, petitions mailed to the Tax Court during the period of mail disruption will be delivered well beyond the ordinary mailing time between the originating city and Washington, D.C. Almost all of these petitions were timely mailed and should bear timely U.S. postmarks or postmeter marks. The lengthy delay in delivery of a petition, often well after the 90-day deadline, has caused a number of our field offices to question the correctness of the postmark information supplied by the Tax Court. The Tax Court's jurisdiction has also been questioned in some cases, particularly in postmeter cases where timely delivery of the petition is required by regulation. In addition, many new petitions mailed to the court during this period remain to be delivered, causing the Service to make default assessments of the deficiencies. This development was the subject of a press release by the Service on December 20, 2001, Release No. IR-2001-120, providing the public

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with a toll-free telephone number to contact the Service if assessment and collection activity is taking place with respect to a case where a timely petition was filed.

Other documents, other than petitions, have also been affected by these delays. For example, our offices have been served with pleadings, motions, and requests for admissions by the opposing parties to which responses are required pursuant to the Tax Court's Rules; yet, the pleading or other paper has not yet been received and filed with the court. Or, we have sought to amend a pleading or take some other action, such as filing a T.C. Rule 37(c) motion seeking deemed admissions, with respect to a pleading that still has not been received by the Tax Court.

Counsel offices should take the following approaches when confronted with issues resulting from delays in mail deliveries to the Tax Court:

Jurisdictional Issues

The Tax Court, in a November 6, 2001, press release, announced that, in response to the mail disruption, “[f]or documents subject to a filing deadline . . . a legible [U.S. Postal Service] postmark, bearing a date within the applicable time period, will be considered timely even though it is actually received after the due date.” Accordingly, if you are served with a Tax Court petition bearing a notation from the court reflecting a timely U.S. postmark, the court's jurisdiction over the petition should not be questioned on the basis of timeliness, despite any inordinate delay in the delivery of the petition to the court during this time period. Similarly, if the court reports a timely private postmeter date, you should consider the petition to have been timely filed notwithstanding the delay in delivery. Pursuant to the regulations under section 7502, you may consider the requirement that the delay in delivery was due to a delay in the transmission of the mail to have been satisfied. See Treas. Reg. § 301.7502-1(c)(1)(iii)(B). Accordingly, the postmark date information provided by the court should be accepted at face value. We will not undertake to routinely verify this information by examining the court's file, absent unusual circumstances that are unrelated to the delay in delivery of the petition.

If the court reports that the postmark is illegible or missing, you should communicate with the petitioner or the petitioner's representative in order to verify that the petition was mailed in a timely manner. Assuming such verification is provided, the timeliness of the petition should not be questioned. While it is preferable to obtain such verification in writing for placement in the legal file, you may also accept an oral representation which should be memorialized in a memorandum to the file.

In contrast, if you are served with a petition bearing an untimely postmark or postmeter date, a motion to dismiss for lack of jurisdiction should be filed in the usual manner. Likewise, if a petition carrying an illegible or missing postmark contains some objective indication that it was not timely mailed, such as an untimely signature date, or if the petitioner fails to confirm the timely mailing of the petition after being contacted, a motion to dismiss may be filed.

Pleadings Issues

A significant problem in case processing has been caused by the delay in the delivery of answers to the Tax Court. Until an answer is received and filed by the court, a regular Tax Court case will not be considered "at issue" under T.C. Rule 38 and, accordingly, available for calendaring by the court for trial. The delay in receipt of an answer also complicates the processing of T.C. Rule 37(c) motions seeking deemed admissions for undenied allegations appearing in answers. In order to facilitate a resolution of these problems, we have agreed to supply copies of previously mailed but undelivered answers to the Tax Court.

Procedure & Administration has reviewed the Tax Court's docket information against our internal databases and determined that there are approximately 140 answers that were mailed but, as of the date of this notice, have not been received by the Tax Court. Lists of these yet to be filed answers have been provided to the Area Counsel for distribution to the respective Associate Area Counsel groups. In conjunction with the receipt of these lists, Counsel attorneys should check the Tax Court's web site to determine whether the listed answers have been received and filed with the court. For each answer that has not been received, a photocopy of the previously mailed answer should be sent to the court with a brief cover letter stating that the enclosed copy of the answer was mailed to the court on the relevant date, and that, as of the date of the letter to the court and after consultation with the Tax Court's web site, the answer has not been filed. The copy of the answer should not be re-signed, re-dated, re-served, or altered in any way. If the only available copy is an "initialed" copy in the legal file, a photocopy of that document should be sent. Petitioner or petitioner's representative should be copied with the letter to the court. Upon receipt of the photocopy and the cover letter, the court will take appropriate action, which may include holding the copy pending the receipt of the original, or filing the copy as the answer in the case. Because more of the mail backlog is being delivered to the Tax Court daily, the court's web site should be checked immediately prior to mailing a copy of the answer to the court to make sure that supplying a photocopy of the answer is still necessary.

Because the timely submission of answers to the Tax Court is also critical to the Tax Court's calendaring process, copies of the answers previously sent to the court should be sent overnight to the court through the use of private delivery services. Subsequent papers, such as amendments to pleadings and motions, as well as new answers, should be sent in accordance with the discussion of mailing best practices set forth below.

The Filing of Pleadings, Motions, and Other Documents Whose Due Dates are Dependent Upon the Date of Service of an Earlier Document

Chief Counsel attorneys should follow the provisions of the Tax Court's Rules in the usual manner with respect to the filing of pleadings, motions, and other documents whose due dates are dependent upon the date of service of an earlier document, notwithstanding mail delivery delays. For example, if you seek to amend an answer without leave of the court within 30 days of service of the answer pursuant to T.C. Rule 41(a), the amendment should be sent to the court before the end of the 30-day period, even though your original answer has not yet been received

by and filed with the court. Similarly, a T.C. Rule 37(c) motion should be sent to the court within the time period described in the rule, even though the answer to which the motion relates has not yet been received by the court. If you are served with a request for admissions pursuant to T.C. Rule 90, you should serve a response (and send the original to the court) within 30 days of service of the admissions, even though the request for admissions has not yet been received by the court. Likewise, a response to a motion for litigation costs should be sent to the court within 60 days after service of the motion pursuant to T.C. Rule 232(b), even though the motion has not yet been filed with the court. Any other response or submission to the court dependent on a date of service should be treated in a similar manner.

To assist the court in handling papers in the situations described above, the Tax Court's web site should be checked to determine whether the pleading, motion, or other document to which you are responding has been filed with the court. If it has not, you should reference the document to which you are responding in the body of the response and, if possible, attach a copy as an exhibit, and state that you have consulted the docket information on the web site and determined that the document had not been filed as of the date of your responsive filing. This information will assist the court in determining what action to take with respect to a response to a missing document. Checking the Tax Court's web site is a recommended best practice that should be routinely followed in almost all cases before submitting documents to the court, even if the recent disruptions in mail delivery to the court had not occurred.

Stipulations, Joint Motions, Decision Documents, and Other Jointly Signed Papers

As a preventive measure, all documents, such as stipulations, joint motions, and decision documents, that are to be executed by both parties and filed with the court, should be secured in the form of duplicate originals. See, e.g., CCDM 35.10.9.2:(2). In the event that such documents that are mailed to the court are delayed, lost, or destroyed, the duplicate original will be available for transmission to the court by private delivery service or submission at a trial calendar.

Defaulted Deficiency Notices

Taxpayers who complain that assessment and collection action is taking place despite the fact that they have timely mailed a petition to the Tax Court should be asked to call the Service's toll-free number at 1-800-829-1040 and referred to the Service's December 20, 2001, press release (Release No. IR-2001-120).

Mailing Best Practices

Guidance was previously provided in an e-mail message on November 6, 2001, concerning best practices to follow if you are relying on the timely mailing as timely filing rule in sending documents to the Tax Court. As stated therein, one best practice to follow, if we are relying on the postmark date appearing on an envelope as proof of timely mailing, would be to send that document separately under its own transmittal in its own envelope. This procedure may be followed when it is reasonably anticipated that the timeliness of a particularly critical document may be seriously questioned by the opposing party or the court.

Mailing documents individually, however, is not the only method by which the timely mailing of Tax Court documents can be established. For example, offices may continue their routine practice of sending multiple documents to the court in a single envelope, listing each such document on a single transmittal memorandum (e.g., Form M-8692 or its equivalent). When the Tax Court receives such a package, the court's docket personnel check off each document received against those listed and a copy of the transmittal is returned to our office to verify delivery.

It is critically important that each document being sent under a transmittal memorandum be separately listed and accurately described on the transmittal form, and that the use of collective indicators, such as "et al.," be avoided. When the mailing date of any listed document is critical, offices should utilize certified mail or a designated private delivery service, and enter the certified mail number or private delivery service tracking number in the appropriate location on the transmittal form. The postmarked certified mailing receipt or private delivery service receipt whose number corresponds to the number listed on the transmittal form should be securely attached to the retained copy of the transmittal memorandum. These retained transmittals must be carefully filed in chronological order in a central location in each Counsel office for easy retrieval, should the need for proof of mailing arise.

For documents where certificates of service are required and used, the Tax Court's practice is, in almost all cases, to rely on the date shown on the certificate of service attached to each document as the date of mailing of the document. If that date is timely, the document will almost always be received and filed as timely and the court will rarely require additional documentation to establish the mailing date. If an occasional document's timeliness should be questioned, the retained transmittal memorandum and mailing receipt should be sufficient to prove the mailing date.

Consideration should be given to the use of private delivery services for transmission of documents to the court in cases appearing on trial calendars, such as trial memoranda, motions for continuance, or decision documents, in order to ensure timely delivery prior to the scheduled session. Likewise, private delivery services should be utilized for documents ordered or required to be received by the court by a date certain. It is our understanding that private services, such as UPS and FedEx, are delivering packages routinely without delay.

Finally, if you receive a communication from the court requesting that a particular document be sent by fax or other means, you should honor such requests without hesitation. This includes providing a copy of the opposing party's document to the court as a courtesy upon request.

