

NOT FOR PUBLICATION WITHOUT APPROVAL OF  
THE TAX COURT COMMITTEE ON OPINIONS

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SCOTTY PINE, INC.	:	TAX COURT OF NEW JERSEY
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Plaintiff,	:	DOCKET NO: 009486-2015
vs.	:	
	:	
DIRECTOR, DIVISION OF	:	
TAXATION,	:	
	:	
Defendant.	:	

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Decided: March 30, 2017

Richard M. Conley, Esquire for plaintiff.

Ramanjit K. Chawla, Esquire for defendant  
(Christopher S. Porrino, Attorney General of New  
Jersey, attorney).

CIMINO, J.T.C.

The Director, Division of Taxation conducted an audit of the taxpayer for the period covering April 1, 2008 through March 31, 2012. As a result of said audit, the Director issued a Notice of Assessment related to Final Audit Determination to the taxpayer indicating that the taxpayer was liable for \$317,058.88 in unpaid sales and use tax, litter control fee, penalties and interest. The Director sent correspondence dated June 18, 2014 advising the taxpayer of the assessment. The notice of assessment was sent by certified mail and was received by the taxpayer on June 23, 2014.

During the course of the audit, the taxpayer was represented by Howard Lieb, Esquire. Unfortunately, Mr. Lieb passed away in November of 2013. At the time the notice of assessment was issued, it was brought to the attention of Walter Wilson, Esquire who represented the taxpayer with regard to land use matters. Mr. Wilson alleges that he started preparing a protest requesting a conference before leaving for vacation in July of 2014. While on vacation on July 23, 2014, Mr. Wilson alleges that he completed the protest on his laptop computer, went to the Lavallette Library to print the protest, placed it in a hand-addressed envelope addressed to the Chief of Conference of Appeals of the Division of Taxation, and deposited same at the Normandy Beach branch of the United States Post Office on July 23, 2014. Mr. Wilson alleges that the letter was only sent via regular mail and that he had purchased one first class stamp and two 21 cent stamps to place upon the envelope. He did not make a copy of the signed protest, but merely saved the word processing file of the document on his computer laptop.

Mr. Wilson does not recall any follow-up with the Division as to the status of the protest prior to the September 21, 2014 filing deadline which was 90 days from the June 23, 2017 date of receipt of the final audit determination. By February 5, 2015, the taxpayer sought different counsel by the name of James M. Turtletaub, Esquire. On March 5, 2015, Mr. Turtletaub sent via

Federal Express another copy of the protest allegedly mailed by Mr. Wilson on July 23, 2014.

On March 19, 2015, the Director responded to the taxpayer indicating that since a valid protest was not filed within ninety days of receipt of the June 18, 2014 notice, the request for a conference could not be granted. Thereafter, the taxpayer's current and fourth counsel, Richard M. Conley, Esquire filed a complaint with the Tax Court on June 17, 2015.

The Director filed for summary judgment on the basis that the complaint was not filed timely. After hearing the arguments of counsel, the Court denied the application since there appeared to be disputed issues of material fact as to the issue of mailing of the protest by Mr. Wilson which would require the Court to make a credibility assessment. The Court set the matter down for an evidentiary hearing.

At the hearing, the taxpayer produced Mr. Wilson who essentially testified in accordance with the recitation set forth above. After a brief recess to consider the issues, the Court decided the matter pursuant to the postmark rule statute, N.J.S.A. 54:49-3.1, and the implementing regulations adopted by the Director found at N.J.A.C. 18:2-4.1 to 4.13. Both the statute and the regulations provide that the postmark is deemed to be the date of filing for most documents sent to the Director. Moreover, proof of a certified mailing is deemed to be prima facie evidence of

such mailing. At that juncture, the court determined that the postmark rule statute appeared to supplant the common law mailbox rule that provides that if a document is properly mailed, the Court will presume the United States Postal Service delivered the document to the addressee. See SSI Medical Services v. State of New Jersey 146 N.J. 614, 621 (1996). Since the taxpayer was unable to produce any evidence of delivery per the postmark rule, the court did not need to determine Mr. Wilson's veracity and dismissed the complaint.

Given that the postmark rule was not raised by either party, and neither party had the opportunity to address whether it supplanted the common law mailbox rule, the court advised the parties that it would entertain a motion for reconsideration if authority was discovered indicating that the postmark rule is not the exclusive means of establishing delivery of a document to the Director.

Subsequently, the taxpayer did file for reconsideration urging the court to reconsider its position. "Reconsideration is a matter within the sound discretion of the court to be exercised in the interest of justice". Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). Reconsideration is particularly useful when an opinion or award deals with unlitigated or unargued matters. Calcaterra v. Calcaterra, 206 N.J. Super 398, 403-04

(App. Div. 1986) (cited by Pressler & Verniero, Current N.J. Court Rules, Comment 2 on R. 4:49-2 (2017)).

After reviewing the submissions of the parties and a further review of the law in this matter, the Court has determined that reconsideration is appropriate. Moreover, in light of the Court's reconsideration of the issue as set forth below, there is now the necessity for this Court to make credibility findings in order to fully address the issue.

The postmark rule as enacted by the Legislature provides:

Except as another payment method may be specified by law, a tax return, report, notice, petition, protest, claim or other document to be filed or remittance containing payment of tax, required to be filed within a prescribed period, or on or before a prescribed date, under the provisions of any State tax that, after the period or the date, is delivered by United States mail to the director, bureau, office, officer or person with which or with whom the document is required to be filed shall be deemed to be delivered on the date of the United States postmark stamped on the envelope. This shall apply only if the postmark date falls within the prescribed period or on or before the prescribed date for the filing of the document, determined with regard to any extension granted for filing, and the document was deposited in the mail, postage prepaid, properly addressed to the director, bureau, office, officer or person with which or with whom the document is required to be filed. If any document is sent by United States registered or certified mail, such registration or certification shall be prima facie evidence that the document was delivered to the director, bureau, office, officer or

person to which or to whom addressed. . .  
[N.J.S.A. 54:49-3.1(a)]

The statutory enactment was part of the "Taxpayers' Bill of Rights" adopted by the Legislature in 1992. L. 1992, c. 175. The purpose of the bill is to assure all taxpayers are accorded basic rights of fair and equitable treatment. Assembly Appropriations Committee, Statement to A., Nos. 384 and 1474, at 1 (June 8, 1992). Senate Budget and Appropriations Committee, Statement to A., Nos. 384 and 1474, at 1 (October 1, 1992).

The text of the postmark rule significantly follows the federal version of the postmark rule found at Section 7502 of the Internal Revenue Code. 26 U.S.C. § 7502. Generally speaking, federal concepts of taxation are not incorporated into New Jersey's tax laws. See Centex Homes of New Jersey, Inc. v. Director, Div. of Taxation, 10 N.J. Tax 473, 492 (Tax 1989). The key point is that "concepts" of federal taxation are not automatically incorporated into state law unless the Legislature so provides. Smith v. Director, Division of Taxation, 108 N.J. 19, 33 (1987). For example, the Legislature intended to and did reject the federal income tax model in favor of a gross income tax act in order to avoid tax loopholes available under the federal tax laws. Id. at 30-31.

The postmark rule is not a "concept" in taxation, but rather an administrative rule for dealing with the filing of documents.

While this court is not bound to follow the interpretations of Section 7502 in interpreting New Jersey's postmark rule, interpretations of Section 7502 by the federal courts provide insight into how to deal with the New Jersey version of the rule. In any event, amongst the United States Circuit Courts of Appeal there is a split of authority as to whether the postmark rule supplants the common law mailbox rule.

The Second and Sixth Circuits have upheld that the common law mailbox rule has been supplanted by Section 7502. In Miller v. United States, 784 F.2d 728, 729 (6<sup>th</sup> Cir. 1986), the taxpayer alleged that he timely mailed his claim for a refund, but the IRS had no record that the claim was received. Despite the fact that the taxpayer offered extrinsic proof that he timely filed his return, the 6<sup>th</sup> Circuit concluded that the only exception to proof of actual physical delivery is the postmark rule. Proof of mere deposit in the mail was not enough. Id. at 730. The Second Circuit took a similar view in Deutsch v. Comm'r of Internal Revenue, 599 F.2d 44, 46 (2<sup>nd</sup> Cir. 1979), cert. denied, 444 U.S. 1015, 100 S. Ct. 665, 662 L. Ed. 2d, 644 (1979).

On the other hand, the Third, Eighth, Ninth and Tenth Circuits have held that Section 7502 does not preempt the common mailbox law rule. Philadelphia Marine Trade Ass'n v. Comm'r, 523 F.3d 140 (3<sup>rd</sup> Cir. 2008), Estate of Wood vs. Comm'r, 909 F.2d 1155, 1159 (8<sup>th</sup> Cir. 1990). Anderson v. United States, 966 F.2d 487, 491 (9<sup>th</sup>

Cir. 1992). Sorentino v. I.R.S., 383 F.3d 1187, 1193 (10<sup>th</sup> Cir. 2004).

As explained by the Third Circuit, a statutory filing requirement generally can only be satisfied by actual physical delivery to the government. Philadelphia Marine, supra, 523 F.3d at 147, citing United States v. Lombardo, 241 U.S. 73, 76 (1916), Heard v. Comm'r, 269 F.2d 911, 913 (3<sup>rd</sup> Cir. 1959). To determine when a document was physically delivered, courts developed the common law mailbox rule. Id. Section 7502 relieves the taxpayer from the timely physical delivery requirement, the postmark date effectively becomes the delivery date. Id. at 148.

In Philadelphia Marine, the dispute was whether Section 7502 had completely supplanted the common law mailbox rule where the taxpayer does not even rely upon the postmark rule. Id. at 150. The Court noted that "as a matter of logic, it is difficult to imagine that Congress, by passing a law that was designed to protect taxpayers who meet § 7502's requirements, would (without so stating) simultaneously seek to roll back the protections for taxpayers that already exist at common law. Congress's intent, we believe, was to supplement, not supplant, means by which taxpayers can timely file documents with the IRS." Id. at 150, citing Estate of Wood, supra, 909 F.2d at 1161. As a result, the court in Philadelphia Marine held that "at least where a taxpayer does not rely on § 7502's protection and produces circumstantial evidence

beyond its own testimony that it mailed the tax document early enough to allow timely physical delivery, it may avail itself of the common-law mailbox rule". Id. at 152; See also Id. at 147.1 As set forth in greater detail below, this court is persuaded that the position adopted by the majority of the Circuits applying the Federal Rule is the sounder approach in implementing New Jersey's version of the postmark rule.

We now turn to New Jersey's postmark rule. The postmark rule, N.J.S.A. 54:49-3.1, was enacted as part of the Taxpayers' Bill of Rights. The purpose of the Taxpayers' Bill of Rights is to assure that all taxpayers would be accorded basic rights of fair and equitable treatment including reasonable deadlines. Assembly Appropriations Committee, Statement to A., Nos. 384 and 1474, at 1 (June 8, 1992). Senate Budget and Appropriations Committee, Statement to A., Nos. 384 and 1474, at 1 (October 1, 1992). The postmark rule helps taxpayers in meeting deadlines by establishing the postmark date, if timely, as the filing date.

"It is fundamental that a statute may take away a common law right; however there is a presumption that the Legislature had no

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<sup>1</sup> The Court did caution however, that it was not deciding whether a plaintiff's own testimony was enough because it was not presented with that set of facts. Id. at 147, n.6. However, the Tenth Circuit has indicated that the taxpayer's own testimony was insufficient to raise the presumption that the IRS received the document prior to the deadline. Sorentino, supra, 383 F.3d at 1195.

such intention and if a change in the common law is to be effectuated, the legislative intent to do so must be clearly and plainly expressed." Lisi v. Purnell, 201 N.J. Super. 321, 327 (App. Div. 1985). See also Warnig v. Atlantic County Special Services, 363 N.J. Super 563, 571 (App. Div. 2003). Boileau v. De Cecco 125 N.J. Super. 263, 268 (App. Div. 1973), aff'd o.b., 65 N.J. 234 (1974).

The statute or the enactment on its face reveals no intent that the common law rules regarding delivery are supplanted. The plain statutory language indicates that the purpose of the statute is to supplement, not supplant, any common law rule. Any argument that could be made that the statute somehow supplants the common law rule is offset by the rule of statutory construction that the interpretation the court should generally adopt is one that has a lesser impact on the common law right to seek redress through the courts.

Here, the taxpayer is seeking the redress of the audit findings of the Director. Even if the language could be construed to preclude the use of the common law mailbox rule, that interpretation is disfavored because its impact would be to limit taxpayer's avenue to seek redress. The postmark rule was adopted as part of a comprehensive bill to give greater rights to taxpayers, not to take those rights away. It would simply not make sense to construe this expansive provision which generally

makes it easier for a taxpayer to file as an effort by the Legislature to tighten or eliminate the common law mailbox rule. Additionally, the regulation adopted by the Director merely interprets the postmark rule and does not in any way hint that the Director intended that the statutory enactment is intended to supplant the common law rule.

To argue that the postmark rule eviscerates any alternate method of establishing a timely filing is simply counter to the plain language of the statute as well as the context of the legislative purpose of adopting the Taxpayers' Bill of Rights. Thus, this court determines that satisfaction of the postmark rule is not the only way in which a taxpayer can establish delivery of a document to be filed. The common law mailbox rule also remains as a viable method of establishing delivery.

The issue now turns to what are the contours of the common law rule regarding the filing of documents. "New Jersey cases have recognized the presumption that mail properly addressed, stamped and posted was received by the party to whom it was addressed." SSI Medical Services, supra, 146 N.J. at 621. The elements to satisfy the presumption are:

1. the mailing was properly addressed;
  2. the proper postage was affixed;
  3. the return address was correct; and
  4. the mailing was deposited in the proper mail receptacle or at the post office.
- [Id., citing Lamantia v. Township of Howell, 12 N.J. Tax 347, 352 (Tax 1992).]

In the absence of any administrative rule or regulations to the contrary, the traditional preponderance of evidence standard applies to administrative agency matters which would include filings with the Director. See Id. at 622. The decision in SSI Medical Services involved mass mailings in which there were certain office procedures for mailing of the documents in question. The issue was whether the customary mailing practice was adequately followed so as to create a presumption of mailing and receipt. Id. at 623-624. The Court noted that in the case of large document mailings, other corroborating proof creating a reasonable inference that the custom was followed on a given occasion may suffice to establish proof of mailing. Id. at 624.

In a footnote, the Supreme Court was careful to note that “[i]n all cases, courts should evaluate the nature and worth of the corroborative evidence offered to determine whether it meets the preponderance of the evidence standard and raises the presumption of mailing and receipt.” Id. at 624, n.1. The Court seems to be referring to corroborative proof beyond the mere testimony of the witnesses. For example, the court indicated in the same footnote that “[i]n order to establish proof that electronic messages have been sent, courts may look, for example, to proof of electronic mail return-receipt or to confirmation of downloading or printing.” Id.

In a more traditional setting, the Appellate Division has looked at a number of factors concerning corroborative proof. For example, the court looked at: (1) whether certified mail or return receipts were utilized; (2) whether a cover letter accompanies the legal document; (3) the use of a return address on the mailing envelope; and (4) the conscientious effort to ensure delivery or to take any action within the remaining time to ensure delivery. Szczesny v. Szczesny, 71 N.J. Super. 347, 355-56 (App. Div. 1962).

In the case at hand, Mr. Wilson was licensed as an attorney in New Jersey for a number of years. There is simply no explanation as to why he did not send the document by certified mail. He allegedly took the item to the post office where presumably certified cards and return receipts would be available. Pursuant to the mailbox rule, having a receipt from the Post Office demonstrating that he sent the document by certified mail would have plainly been prima facie evidence that the document was delivered. Moreover, there was not any testimony indicating that Mr. Wilson used anything but a plain white envelope. What was especially disconcerting to the court is the fact that Mr. Wilson testified he was only on vacation for a week in late July and that the protest was not due until the end of September. It simply does not make sense as to why Mr. Wilson would have been working during his vacation when he had some eight weeks remaining to get the protest to the Director. Obviously, if the notice had been

mailed from his office, there would have been not only his testimony, but the testimony of his staff establishing the standard mailing procedures for his office. Rather, he allegedly engaged in this aberrant preparation and mailing procedure in which he was printing law office documents at public libraries and then going to post office and buying stamps. Overall, the court has had the opportunity to review Mr. Wilson's testimony in this case as well as his demeanor and such and finds that his testimony is simply not credible.

However, even if the court did find him credible, the action must still be dismissed. The Appellate Division has clearly ruled that "even according plaintiff the presumption of delivery, the attorney could not continue to rely upon it for more than the time period between the date the complaint was mailed and the date the statute of limitations expired. When three or four weeks had elapsed and plaintiff's attorney still had not received confirmation from the Clerk's Office that the complaint had been filed, it was incumbent upon him to ascertain if the mailing had reached its destination." Luiz v. Sanjurjo, 335 N.J. Super. 279, 281 (App. Div. 2000). Here, there was some eight weeks to go and there is simply not any evidence that Mr. Wilson took steps to remediate the failure of the protest to reach its destination regardless of the reason or fault. On cross-examination, Mr. Wilson conceded he did not contact the Division to ascertain

delivery or filing status. "[A]n attorney owes a duty to monitor whether a mailed document has actually been mailed and filed. That is an easy task, particularly in the age of computers." Id. at 282.<sup>2</sup>

Likewise, the Appellate Division previously ruled some years earlier in Cwiklinski v. Burton, 217 N.J. Super. 506 (App. Div. 1987), that "even if plaintiffs were accorded the benefit of the presumption of delivery, plaintiffs could not continue to rely upon it for more than five weeks between the time the complaint was allegedly mailed and the running of the statute of limitations." Id. at 511. "When three or four weeks had elapsed and the plaintiffs' attorney still had not received confirmation from the Clerk's Office that the complaint had been filed and he

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<sup>2</sup> The Appellate Division has noted that there may be extenuating circumstances that preclude an attorney from effectively monitoring whether a mailed document is filed such as a holiday or a clerk's improper refusal to file a document. Id. at 282. For example, a certified mailing on December 20 from a post office along with a stamped receipt was deemed sufficient to establish delivery to the Clerk's Office when the deadline was fifteen days later. Waite v. Doe, 204 N.J. Super. 632, 633, 637 (App. Div. 1985). It was undisputed that during non-holiday periods, the Clerk's Office took seven to ten days to acknowledge filing. Id. at 637. The Appellate Division determined that it would be reasonable during the holiday period for the acknowledgement to take longer. Id. Thus, the failure of the attorney to have received the filed copy by January 4 (when the statute of limitations ran) would not have necessarily alerted him of a problem. Id. On the other hand, mailing a complaint three days before the statute of limitation runs would not be reasonable. Leake v. Bullock, 104 N.J. Super. 309, 311, 313 (App. Div. 1969) In such a circumstance, due diligence requires personal delivery to the clerk. Id. at 313.

had not received the cancelled check for the filing fees, it was incumbent upon him to ascertain if the complaint had reached its destination. He failed to do that here." Id. at 511-12. The Appellate Division has more than once made it clear that the common law mailbox rule will not protect an attorney filer who fails to follow-up on the status of delivery and filing when there are many weeks between the date of mailing and the running of a statute. This court is constrained to follow the express rulings of the Appellate Division set forth above in detail.

While the result may seem, as described by the Appellate Division, "harsh," the court "would be myopic were [it] to see only the case before [it]". Id. at 282. However, this court, like the Appellate Division, is concerned that "departure from the rule adopted . . . could easily lead to fraud and chicanery." Id. While the dismissal of plaintiff's complaint here is unfortunate, the overarching interests of justice mandate the result.

An Order will follow.