



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

CC:TL-R-806-97
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Attachment 1

ACTION ON DECISION

SUBJECT: Weisbart v. United States Department of Treasury and Internal Revenue Service, 222 F. 3d 93 (2d Cir. 2000), rev'g 99-1 USTC (CCH) ¶ 50,549 (E.D.N.Y. 1999).

Issue: Whether the "timely mailing/timely filing" rule of I.R.C. § 7502 applies to a claim for refund included on a tax return mailed after the due date of the return.

Discussion: The taxpayer received an extension of time from April 15, 1992, to August 17, 1992, to file his 1991 income tax return. He mailed the return on August 17, 1995, exactly three years after the extended due date. The Internal Revenue Service received the return (bearing an August 17, 1995, United States Postal Service postmark) on August 21, 1995. The return claimed a refund of income taxes withheld from wages. Section 6513(b)(1) treated the withheld income taxes as deemed paid on April 15, 1992. The Service denied the claim for refund because the deemed payment date of the withheld taxes (April 15, 1992) preceded the date the Service received the claim (August 21, 1995) by more than the 3 years plus the extension period provided for claiming a refund of the withheld amounts. See section 6511(b)(2)(A).

The taxpayer filed suit for refund in the United States District Court for the Eastern District of New York. The taxpayer, citing section 7502(a), argued that the Service should treat the date he mailed the claim (August 17, 1995), rather than the date the Service received the claim (August 21, 1995), as the date of filing. His claim would then be within the 3 years plus extension of the deemed payment date of the withheld taxes. Section 7502(a) treats a claim mailed by United States mail on or before the due date as filed on the date of the postmark, even though received by the Service after that date. The government argued that section 7502(a) did not apply because the taxpayer made his claim on his original tax return which he mailed long after the return due date. Accordingly, section 7502(a), by its own terms, did not apply. See, for example, King v. United States, 495 F. Supp. 344 (D. Neb. 1980). The District Court agreed with the government and dismissed the suit.

The taxpayer appealed to the United States Court of Appeals for the Second Circuit which reversed on this issue. The Second Circuit held that section 7502 treats the claim as filed on the date of mailing (August 17, 1995) because the taxpayer mailed the

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claim on the last day of the period prescribed for filing the claim with respect to the withheld taxes. Pointing to Treas. Reg. §§ 301.6402-3(a)(5) and 301.7502-1, the Second Circuit reasoned that the Service should determine the timeliness of the claim and the timeliness of the return on which the taxpayer made the claim independently. When determined independently, the delinquency of the return would not preclude the application of the timely mailing/timely filing rule of section 7502(a) to the claim for refund.

The Second Circuit also rejected the government's alternative argument. Section 6511(a) provides that a taxpayer must file a claim for refund within two years of the time the tax was paid if no return was filed. The government argued that, if section 7502(a) applied to the claim, but not the return, since the taxpayer had not filed a return on August 17, 1995, when he filed the claim, the refund claim was required to be filed within 2 years from the time the tax was paid. The appellate court disagreed, citing Rev. Rul. 76-511, 1976-2 C.B. 428. Rev. Rul. 76-511 holds that a refund claim made on a delinquent return filed within 3 years of the due date of the return is timely for purposes of section 6511(a). In the appellate court's view, because the Service simultaneously received the return and the claim on the same document, the Service had the necessary information to process both. The appellate court, however, overlooked the fact that the facts in the revenue ruling did not implicate the application of section 7502 in any respect.

The opinion in Weisbart conflicts with the opinions of other courts on this issue. See for example, Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000); Christie v. United States, No. 91-2375MN (8th Cir., March 20, 1992) (per curiam) (unpublished); Branstrom v. United States, 44 Fed. Cl. 1 (1999); Becker v. Dept. of Treasury, 823 F. Supp. 231 (S.D.N.Y. 1994); King v. United States, *supra*. After careful consideration of the relevant opinions and the interests of sound tax administration, the Service has decided that it will no longer argue that section 7502(a) does not apply under facts such

as those in Weisbart. Accordingly, the Service will apply the timely mailing/ timely filing rule of section 7502(a) in such cases and treat claims for refund included on delinquent original returns as filed on the date of mailing for purposes of section 6511(b)(2)(A).

Recommendation: Acquiescence

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