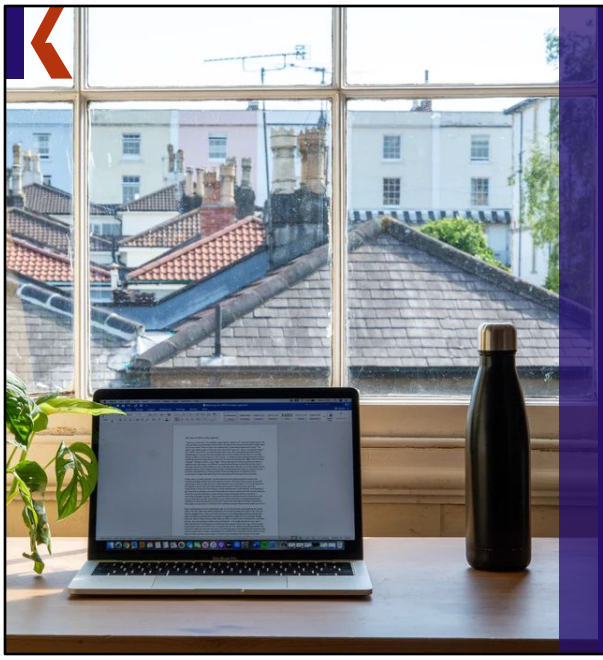

Current Federal Tax Developments

May 30, 2023

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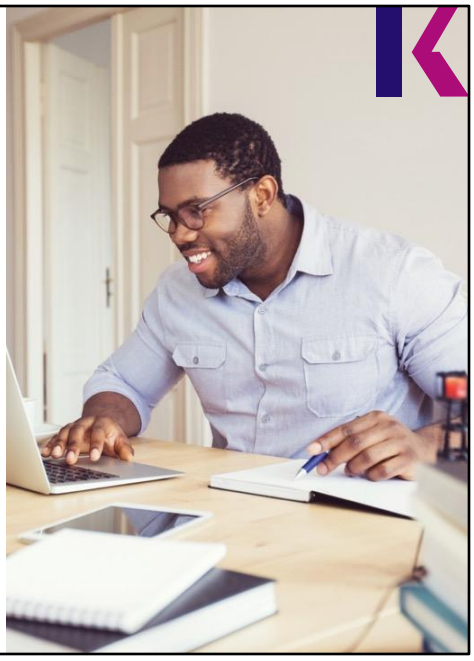
This Week We Look At:

Tax Court finds they have no authority to review the IRS notice for certification of seriously delinquent tax debt to State Department

IRS publishes warning signs for employers to use to identify ERC scams

Fourth Circuit finds that Section 7502 fully supplants common law mailbox rule for filing documents



https://www.currentfederaltaxdevelopments.com

Tax Court Finds It Has No Jurisdiction to Review IRS Notice to Taxpayer on Seriously Delinquent Tax Debt

Photo by Levi Ventura on Unsplash

- *Meduty v. Commissioner,* 160 TC No. 13, 5/23/23
  - IRC §7345 provides for IRS notice to the State Department for a "seriously delinquent tax debt"
  - The idea is to restrict the taxpayer's use of their passport until issue is resolved
  - The IRS must provide contemporaneous notice to the taxpayer of the referral
  - IRC §7345(e) provides for judicial review of certain items in this area

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/tax-court-upholds-irs-certification-in-passport-case/7grpm

Tax Court Finds It Has No Jurisdiction to Review IRS Notice to Taxpayer on Seriously Delinquent Tax Debt

(a) **In general.** If the Secretary receives certification by the Commissioner of Internal Revenue that an individual has a seriously delinquent tax debt, the Secretary shall transmit such certification to the Secretary of State for action with respect to denial, revocation, or limitation of a passport pursuant to section 32101 of the FAST Act.

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Tax Court Finds It Has No Jurisdiction to Review IRS Notice to Taxpayer on Seriously Delinquent Tax Debt

(b) **Seriously delinquent tax debt**.

(1) **In general**. For purposes of this section, the term "seriously delinquent tax debt" means an unpaid, legally enforceable Federal tax liability of an individual—

(A) which has been assessed,

(B) which is greater than $50,000, and

(C) with respect to which—

(i) a notice of lien has been filed pursuant to section 6323 and the administrative rights under section 6320 with respect to such filing have been exhausted or have lapsed, or

(ii) a levy is made pursuant to section 6331.

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Tax Court Finds It Has No Jurisdiction to Review IRS Notice to Taxpayer on Seriously Delinquent Tax Debt

(2) **Exceptions**. Such term shall not include --

(A) a debt that is being paid in a timely manner pursuant to an agreement to which the individual is party under section 6159 or 7122, and

(B) a debt with respect to which collection is suspended with respect to the individual --

(i) because a due process hearing under section 6330 is requested or pending, or

(ii) because an election under subsection (b) or (c) of section 6015 is made or relief under subsection (f) of such section is requested.

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Tax Court Finds It Has No Jurisdiction to Review IRS Notice to Taxpayer on Seriously Delinquent Tax Debt

(d) **Contemporaneous notice to individual**. The Commissioner shall contemporaneously notify an individual of any certification under subsection (a), or any reversal of certification under subsection (c), with respect to such individual. Such notice shall include a description in simple and nontechnical terms of the right to bring a civil action under subsection (e).

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Tax Court Finds It Has No Jurisdiction to Review IRS Notice to Taxpayer on Seriously Delinquent Tax Debt

(e) **Judicial review of certification**.

(1) **In general**. After the Commissioner notifies an individual under subsection (d), the taxpayer may bring a civil action against the United States in a district court of the United States, or against the Commissioner in the Tax Court, to determine whether the certification was erroneous or whether the Commissioner has failed to reverse the certification. For purposes of the preceding sentence, the court first acquiring jurisdiction over such an action shall have sole jurisdiction.

(2) **Determination**. If the court determines that such certification was erroneous, then the court may order the Secretary to notify the Secretary of State that such certification was erroneous.

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Tax Court Finds It Has No Jurisdiction to Review IRS Notice to Taxpayer on Seriously Delinquent Tax Debt

Photo by Levi Ventura on Unsplash

- *Meduty v. Commissioner,* 160 TC No. 13, 5/23/23
  - Taxpayer failed to file a number of years returns
  - Assessed liabilities against the taxpayer and taxpayer did not request a CDP hearing

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/tax-court-upholds-irs-certification-in-passport-case/7grpm

Tax Court Finds It Has No Jurisdiction to Review IRS Notice to Taxpayer on Seriously Delinquent Tax Debt

On October 1, 2018, the IRS certified Mr. Meduty as an individual owing a seriously delinquent tax debt arising from tax years 2003, 2004, 2005, 2006, 2007, 2008, 2009, and 2012. The IRS concurrently sent Mr. Meduty, at his last known address, a Notice CP508C, Notice of Certification of Your Seriously Delinquent Federal Tax Debt to the State Department. At that point, Mr. Meduty's assessed liabilities totaled $106,346.

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Tax Court Finds It Has No Jurisdiction to Review IRS Notice to Taxpayer on Seriously Delinquent Tax Debt

Photo by Levi Ventura on Unsplash

- *Meduty v. Commissioner,* 160 TC No. 13, 5/23/23
  - Taxpayer filed with the Tax Court regarding this certification of a seriously delinquent tax debt
  - Tax Court not terribly impressed with claim that there was no seriously delinquent tax debt
  - But did find one question the Court hadn't addressed before - can it consider issues related to §7345(d) notice issue?

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Tax Court Finds It Has No Jurisdiction to Review IRS Notice to Taxpayer on Seriously Delinquent Tax Debt

The jurisdiction Congress conferred in section 7345(e) does not extend to the review of the IRS's compliance with section 7345(d). Section 7345(e)(1) provides that after certification, "the taxpayer may bring a civil action . . . against the Commissioner in the Tax Court, to determine whether the certification was erroneous or whether the Commissioner has failed to reverse the certification." "The text of section 7345(e) focuses exclusively on the Commissioner's actions certifying seriously delinquent tax debts and authorizes our Court (and the district courts) to determine whether those actions are erroneous." *Adams*, 160 T.C., slip op. at 16.

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Tax Court Finds It Has No Jurisdiction to Review IRS Notice to Taxpayer on Seriously Delinquent Tax Debt

As the U.S. District Court for the District of Columbia recently noted, "§7345 does not say that a flawed or failed notice renders a certification erroneous." *McNeil v. United States*, No. CV 20-329 (JDB), 2021 WL 1061221, at *5 (D.D.C. Mar. 18, 2021), *aff'd per curiam sub nom. McNeil v. U.S. Dep't of State*, No. 21-5161, 2022 WL 4349598 (D.C. Cir. Sept. 20, 2022). And the structure of section 7345 belies such a conclusion. Subsections (a) and (b) describe when the Secretary of the Treasury must transmit certification to the Secretary of State and identify which debts qualify as "seriously delinquent tax debt." Neither suggests that notice is a prerequisite to a proper certification by the IRS of a "seriously delinquent tax debt." See *McNeil*, 2021 WL 1061221, at *5. To the contrary, "subsection (d) says that notice to the taxpayer should be 'contemporaneous[ ]' with certification to State, so it logically cannot be a prerequisite to that certification." Id.

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Tax Court Finds It Has No Jurisdiction to Review IRS Notice to Taxpayer on Seriously Delinquent Tax Debt

Like the District Court for the District of Columbia, we struggle to see any prejudice adhering to a taxpayer who does not receive proper notice of the certification contemplated in subsection (d). Subsection (e) supplies no period of limitations, and a taxpayer such as Mr. Meduty who does not receive proper notice (accepting his factual allegations in their most favorable light) is nonetheless able to challenge a certification. See I.R.C. §7345(e); see also *McNeil*, 2021 WL 1061221, at *5.

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Tax Court Finds It Has No Jurisdiction to Review IRS Notice to Taxpayer on Seriously Delinquent Tax Debt

In short, we do not believe that our jurisdiction to determine whether a certification is erroneous encompasses patrolling compliance with the requirement to provide notice to a taxpayer "in simple and nontechnical terms of the right to bring a civil action under subsection (e)." See I.R.C. §7345(d).

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IRS Points Out Warning Signs for Misleading ERC Scams

Photo by Muhammad Daudy on Unsplash

- *"IRS alerts businesses, tax-exempt groups of warning signs for misleading Employee Retention scams; simple steps can avoid improperly filing claims,"* IRS News Release IR-2023-105, 5/25/23
  - Yet another IRS release warning employers about overly aggressive ERC marketing
  - Promoters continue to heavily market contingent fee arrangements to file ERC claims

https://www.irs.gov/newsroom/irs-alerts-businesses-tax-exempt-groups-of-warning-signs-for-misleading-employee-retention-scams-simple-steps-can-avoid-improperly-filing-claims

IRS Points Out Warning Signs for Misleading ERC Scams

"The aggressive marketing of the Employee Retention Credit continues preying on innocent businesses and others," said IRS Commissioner Danny Werfel. "Aggressive promoters present wildly misleading claims about this credit. They can pocket handsome fees while leaving those claiming the credit at risk of having the claims denied or facing scenarios where they need to repay the credit."

https://www.irs.gov/newsroom/irs-alerts-businesses-tax-exempt-groups-of-warning-signs-for-misleading-employee-retention-scams-simple-steps-can-avoid-improperly-filing-claims

IRS Points Out Warning Signs for Misleading ERC Scams

The IRS has stepped up audit and criminal investigation work involving these claims. Businesses, tax-exempt organizations and others considering applying for this credit need to carefully review the official requirements for this limited program before applying. Those who improperly claim the credit face follow-up action from the IRS.

https://www.irs.gov/newsroom/irs-alerts-businesses-tax-exempt-groups-of-warning-signs-for-misleading-employee-retention-scams-simple-steps-can-avoid-improperly-filing-claims

IRS Points Out Warning Signs for Misleading ERC Scams

The IRS reminds anyone who improperly claims the ERC that they must pay it back, possibly with penalties and interest. A business or tax-exempt group could find itself in a much worse cash position if it has to pay back the credit than if the credit was never claimed in the first place. So, it's important to avoid getting scammed.

https://www.irs.gov/newsroom/irs-alerts-businesses-tax-exempt-groups-of-warning-signs-for-misleading-employee-retention-scams-simple-steps-can-avoid-improperly-filing-claims

IRS Points Out Warning Signs for Misleading ERC Scams

IRS Warning Signs

- Unsolicited calls or advertisements mentioning an "easy application process."
- Statements that the promoter or company can determine ERC eligibility within minutes.
- Large upfront fees to claim the credit.
- Fees based on a percentage of the refund amount of Employee Retention Credit claimed. This is a similar warning sign for average taxpayers, who should always avoid a tax preparer basing their fee on the size of the refund.
- Aggressive claims from the promoter that the business receiving the solicitation qualifies before any discussion of the group's tax situation. In reality, the Employee Retention Credit is a complex credit that requires careful review before applying.

https://www.irs.gov/newsroom/irs-alerts-businesses-tax-exempt-groups-of-warning-signs-for-misleading-employee-retention-scams-simple-steps-can-avoid-improperly-filing-claims

IRS Points Out Warning Signs for Misleading ERC Scams

IRS Warning Signs

- The IRS also sees wildly aggressive suggestions from marketers urging businesses to submit the claim because there is nothing to lose. In reality, those improperly receiving the credit could have to repay the credit – along with substantial interest and penalties.

https://www.irs.gov/newsroom/irs-alerts-businesses-tax-exempt-groups-of-warning-signs-for-misleading-employee-retention-scams-simple-steps-can-avoid-improperly-filing-claims

IRS Points Out Warning Signs for Misleading ERC Scams

These promoters may lie about eligibility requirements. In addition, those using these companies could be at risk of someone using the credit as a ploy to steal the taxpayer's identity or take a cut of the taxpayer's improperly claimed credit

https://www.irs.gov/newsroom/irs-alerts-businesses-tax-exempt-groups-of-warning-signs-for-misleading-employee-retention-scams-simple-steps-can-avoid-improperly-filing-claims

IRS Points Out Warning Signs for Misleading ERC Scams

IRS List of Ways Unscrupulous Promoters Lure Their Victims

- **Aggressive marketing.** This can be seen in countless places, including radio, television and online as well as phone calls and text messages.
- **Direct mailing.** Some ERC mills are sending out fake letters to taxpayers from the non-existent groups like the "Department of Employee Retention Credit." These letters can be made to look like official IRS correspondence or an official government mailing with language urging immediate action.

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IRS Points Out Warning Signs for Misleading ERC Scams

IRS List of Ways Unscrupulous Promoters Lure Their Victims

- **Leaving out key details.** Third-party promoters of the ERC often don't accurately explain eligibility requirements or how the credit is computed. They may make broad arguments suggesting that all employers are eligible without evaluating an employer's individual circumstances.
  - For example, only recovery startup businesses are eligible for the ERC in the fourth quarter of 2021, but promoters fail to explain this limit.
  - Again, the promoters may not inform taxpayers that they need to reduce wage deductions claimed on their business' federal income tax return by the amount of the Employee Retention Credit. This causes a domino effect of tax problems for the business.

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IRS Points Out Warning Signs for Misleading ERC Scams

IRS List of Ways Unscrupulous Promoters Lure Their Victims

- **Payroll Protection Program participation**. In addition, many of these promoters don't tell employers that they can't claim the ERC on wages that were reported as payroll costs if they obtained Paycheck Protection Program loan forgiveness.

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IRS Points Out Warning Signs for Misleading ERC Scams

IRS Recommendations to Businesses to Avoid Being a Victim

- **Work with a trusted tax professional**. Eligible employers who need help claiming the credit should work with a trusted tax professional; the IRS urges people not to rely on the advice of those soliciting these credits. Promoters who are marketing this ultimately have a vested interest in making money; in many cases they are not looking out for the best interests of those applying.
- **Don't apply unless you believe you are legitimately qualified for this credit**. Details about the credit are available on IRS.gov, and again a trusted tax professional – not someone promoting the credit – can provide critical professional advice on the ERC.

https://www.irs.gov/newsroom/irs-alerts-businesses-tax-exempt-groups-of-warning-signs-for-misleading-employee-retention-scams-simple-steps-can-avoid-improperly-filing-claims

IRS Points Out Warning Signs for Misleading ERC Scams

IRS Recommendations to Businesses to Avoid Being a Victim

- **To report ERC abuse, submit Form 14242, Report Suspected Abusive Tax Promotions or Preparers**. People should mail or fax a completed Form 14242, Report Suspected Abusive Tax Promotions or Preparers, and any supporting materials to the IRS Lead Development Center in the Office of Promoter Investigations.

https://www.irs.gov/newsroom/irs-alerts-businesses-tax-exempt-groups-of-warning-signs-for-misleading-employee-retention-scams-simple-steps-can-avoid-improperly-filing-claims

Fourth Circuit Holds That IRC §7502 Totally Supplants Common Law Mailbox Rule

Photo by Alex Perz on Unsplash

- *Pond v. United States,* Docket No. 22-1537, CA4, 5/26/23
  - IRS fouled up at conclusion of audit, treated overpayment uncovered as an underpayment
  - Compounding the problem, the taxpayer went ahead and paid the amount shown
  - After the fact, gives information to CPA who pointed out the error
  - Taxpayer files a claim for refund but did not use certified or registered mail

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/fourth-circuit-finds-tax-refund-suit-was-improperly-dismissed/7gs17

Fourth Circuit Holds That IRC §7502 Totally Supplants Common Law Mailbox Rule

IRC Section 7502

(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.

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Fourth Circuit Holds That IRC §7502 Totally Supplants Common Law Mailbox Rule

IRC Section 7502

(c) **Registered and certain 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.

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Pond thus requested a refund (1) on his 2012 taxes, (2) on his 2013 taxes, and (3) of the interest he had paid on the 2012 back payments. To request the refund on the taxes for both years, Pond says that he sent separate forms in a single envelope via first-class mail to an IRS center in Holtsville, New York in July 2017. Around the same time, to request the refund of the interest, Pond sent a form to an IRS center in Covington, Kentucky, which forwarded the request to an IRS center in Andover, Massachusetts.

What followed was a series of communications with the IRS that resulted in Pond getting a refund on his 2012 taxes and of the interest he paid, but not on his 2013 taxes.

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Fourth Circuit Holds That IRC §7502 Totally Supplants Common Law Mailbox Rule

Pond first heard back from IRS Andover in September about his interest-refund request: They had received his request but wanted a copy of his refund claim for the 2012 taxes to confirm that he was entitled to the interest refund. Pond responded on October 3 that he had sent his original request for a tax refund to IRS Holtsville. But to be helpful — and "out of an abundance of caution" — he forwarded a duplicate copy of his 2012 tax-refund request to IRS Andover. J.A. 9. Three weeks later, on October 26, 2017, the statutory period to claim a refund ended.

After another few weeks, Pond heard from IRS Andover again. They claimed to have shared Pond's 2012 tax-refund claim with IRS Holtsville and that someone from Holtsville would contact Pond about his claim. Several months passed and Pond heard nothing. Then, in March 2018 — without further contact from IRS Holtsville — Pond received a refund for the 2012 tax year, including interest

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Fourth Circuit Holds That IRC §7502 Totally Supplants Common Law Mailbox Rule

Sometime later, having heard nothing about his 2013 claim, he again contacted the IRS about it. At that time, agents at the IRS "attempting to locate the 2013 Form 1040X were unable to find it anywhere on the IRS's system." J.A. 10. So Pond sent a duplicate copy of his 2013 claim to IRS Holtsville. Time passed. Again, Pond heard nothing. So Pond contacted IRS Holtsville and learned that his claim had been "processed . . . and assigned to an agent." J.A. 10. They "promised" Pond would hear something from the agent. J.A. 10.

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Fourth Circuit Holds That IRC §7502 Totally Supplants Common Law Mailbox Rule

More months went by, and Pond still heard nothing. When he once again contacted IRS Holtsville, Pond learned that his 2013 claim had been closed with no refund issued. Although the claim had been closed, the agent at IRS Holtsville could not locate a copy of the claim on the IRS's system, so Pond faxed a third copy directly to the agent.

A couple of weeks later, Pond received a Notice of Denial informing him that his 2013 refund claim was denied because the statute of limitations had run. The denial letter listed the "[d]ate of claims received" as July 17, 2017. J.A. 84.

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Fourth Circuit Holds That IRC §7502 Totally Supplants Common Law Mailbox Rule

Pond filed a formal protest of the denial with IRS Holtsville. He got no response, so he contacted the office and learned that his protest had not been processed. So he tried to go to the higher-ups. He filed a protest with the IRS's Office of Appeals. But the Office of Appeals returned his protest and told Pond that he did not "have a case pending in the Office of Appeals," effectively sending him back to IRS Holtsville. J.A. 12.

Having had enough, Pond filed an action in federal court for a tax refund. The government moved to dismiss under Rule 12(b)(1), arguing they were entitled to sovereign immunity because the refund claim was not timely filed.

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Fourth Circuit Holds That IRC §7502 Totally Supplants Common Law Mailbox Rule

Photo by Alex Perz on Unsplash

- *Pond v. United States,* Docket No. 22-1537, CA4, 5/26/23
  - US District Court dismissed his claim as untimely
    - §7502 supplants the common law mailbox rule
    - Taxpayer is not able to prove physical delivery - his positions aren't plausible
  - Taxpayer appealed dismissal to Fourth Circuit

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Fourth Circuit Holds That IRC §7502 Totally Supplants Common Law Mailbox Rule

During the relevant period, a refund claim was timely if filed "within 6 months after the day on which the Secretary mails the notice of computational adjustment to the partner." See 26 U.S.C. §6230(c)(2)(A) (2016). The IRS sent Pond a Notice of Computation Adjustment on April 26, 2017. He was therefore required to file his claim by October 26, 2017, to benefit from the sovereign-immunity waiver. Pond says that he complied with this requirement, and that he sent his refund claim via first-class mail postmarked July 18, 2017. But the IRS says that they have no record of that claim. So Pond must — at this stage — either show that he (1) can rely on a presumption of delivery or (2) plausibly alleged physical delivery.

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Fourth Circuit Holds That IRC §7502 Totally Supplants Common Law Mailbox Rule

…[W]hen courts refer to the "mailbox rule," they are often talking about one of two distinct — but related — presumptions. The narrower presumption is merely of timeliness, not delivery. In other words, if a filer can show that the document was actually delivered, but can't pinpoint precisely when that happened, then this narrower version of the mailbox rule would allow a court to presume that "physical delivery occurred in the ordinary time after mailing." *Philadelphia Marine Trade Ass'n-Int'l Longshoremen's Ass'n Pension Fund v. Comm'r,* 523 F.3d 140, 147 (3d Cir. 2008); see also id. ("[T]he mailbox rule is merely a method for determining the date of physical delivery under the 'physical delivery' rule. It does not ignore the physical delivery requirement."); *Me. Med. Center v. United States*, 675 F.3d 110, 114 (1st Cir. 2012).

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Fourth Circuit Holds That IRC §7502 Totally Supplants Common Law Mailbox Rule

The broader presumption is of physical delivery. Courts adopting this version of the mailbox rule say that "proof of proper mailing — including by testimonial or circumstantial evidence — gives rise to a rebuttable presumption that the document was physically delivered to the addressee in the time such a mailing would ordinarily take to arrive." *Baldwin*, 921 F.3d at 840; see also *Detroit Auto. Prod. Corp. v. Comm'r*, 203 F.2d 785, 785 (6th Cir. 1953) ("[W]hen mail matter is properly addressed and deposited in the United States mails, with postage thereon duly prepared, there is a rebuttable presumption of fact that it was received by the addressee in the ordinary course of mail.")

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Fourth Circuit Holds That IRC §7502 Totally Supplants Common Law Mailbox Rule

May a taxpayer invoke the preexisting common-law mailbox rule now that Congress enacted the new statutory mailbox rule in §7502? The answer depends on whether the statute merely supplements the common-law mailbox rule or else supplants it altogether. And the courts of appeals have split on the question. The Second and Sixth Circuits both say that the statute supplanted the common-law rule. See *Miller v. United States*, 784 F.2d 728, 731 (6th Cir. 1986); *Deutsch v. Comm'r*, 599 F.2d 44, 46 (2d Cir. 1979). The Eighth and Tenth Circuits, however, both say the statute merely supplemented the common-law rule. See *Sorrentino v. IRS*, 383 F.3d 1187, 1193–94 (10th Cir. 2004); *Est. of Wood v. Comm'r*, 909 F.2d 1155, 1160–61 (8th Cir. 1990).

We agree with the Second and Sixth Circuits that the statute has supplanted the common-law rule.

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Fourth Circuit Holds That IRC §7502 Totally Supplants Common Law Mailbox Rule

When a federal statute invades an area occupied by federal common law, we generally presume the statute does not change the established common law. *United States v. Texas*, 507 U.S. 529, 534 (1993). This presumption favors "the retention of long-established and familiar principles." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). But the presumption in favor of background principles may be overcome — and the common law supplanted — when "the language of a statute be clear and explicit for this purpose." *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623 (1812); see also *Texas*, 507 U.S. at 534; *Isbrandtsen*, 343 U.S. at 783.11

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Does this amount to a clear statement rule? No, Congress need not attach an express disclaimer to a statute that "this statute hereby abrogates the common law." See *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("This interpretative presumption is not one that entails a requirement of clear statement, to the effect that Congress must state precisely any intention to overcome the presumption's application to a given statutory scheme."); see also Antonin Scalia & Bryan A. Garner, R*eading Law: The Interpretation of Legal Texts* §52 (2012) (a change in common law "need not be express"). Instead, evidence that the statute supplants the common law can be implied when the statute "'speaks directly' to the question addressed by the common law." *Texas*, 507 U.S. at 534 (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/fourth-circuit-finds-tax-refund-suit-was-improperly-dismissed/7gs17

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…§7502 abrogates the common-law mailbox rule because the Act "speaks directly" to the same question as the common-law rule. *Texas*, 507 U.S. at 534. Section 7502 mirrors the two presumptions that the common-law rule afforded: the presumption of timeliness and the presumption of delivery. See §7502(a), (c). In doing so it directly addresses the common-law rule's question. For taxpayers, §7502 provides a complete, if slightly narrower, set of mailbox presumptions. And that supplants the common law without the need for an express statement or unavoidable conflict. See *Milwaukee*, 451 U.S. at 319–20 (noting that when a statute thoroughly addresses an issue, "there is no basis for a federal court to impose more stringent limitations . . . by reference to federal common law"); *Gardner v. Collins*, 27 U.S. 58, 93 (1829) (explaining that a court cannot "resort to the common law" when the statute does not contain "a causus omissus; but a complete scheme").

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/fourth-circuit-finds-tax-refund-suit-was-improperly-dismissed/7gs17

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In short, Pond cannot resort to the common-law presumption of delivery. He must proceed under the statute. And §7502 makes clear when the presumption of delivery can apply to a taxpayer filing: certified and registered mailings. See §7502(c). Because Pond did not send his 2013 refund claim by certified or registered mail, he does not satisfy the statute's requirements. Thus, he is not entitled to a presumption of delivery.

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/fourth-circuit-finds-tax-refund-suit-was-improperly-dismissed/7gs17

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Photo by Alex Perz on Unsplash

- *Pond v. United States,* Docket No. 22-1537, CA4, 5/26/23
  - But the panel did not agree with the US District Court finding the taxpayer could not prove physical delivery
  - §7502 would not address timely physical delivery, so if timely physical delivery is proven then the failure to use certified or registered mail won't be a problem

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Fourth Circuit Holds That IRC §7502 Totally Supplants Common Law Mailbox Rule

Is Pond out of luck just because he cannot rely on a presumption of delivery? No. He can still proceed if he has plausibly alleged that his claim was physically delivered to the IRS. The district court held that Pond "is unable to show" physical delivery and that his allegations of physical delivery are "implausible." *Pond v. United States*, No. 1:21CV83, 2022 WL 1105031, at *6–7 (M.D.N.C. Apr. 13, 2022). We disagree. Affording the complaint all reasonable inferences, Pond adequately alleged physical delivery. So his claim survives the government's motion to dismiss.

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/fourth-circuit-finds-tax-refund-suit-was-improperly-dismissed/7gs17

Fourth Circuit Holds That IRC §7502 Totally Supplants Common Law Mailbox Rule

The complaint directly alleges the 2013 claim was "physically delivered to the IRS service center in Holtsville, New York, in accordance with standard postal delivery practices and in accordance with IRS guidelines." J.A. 7. The government argues that this is a "mere conclusory and speculative allegation." Government Br. at 20–21 (citing *Painter's Mill Grille, LLC v. Brown*, 716 F.3d 342, 350 (4th Cir. 2013)). Perhaps, but Pond elsewhere supported this conclusion with three factual allegations. These well-pled factual allegations — and their resulting inferences — make physical delivery plausible.

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/fourth-circuit-finds-tax-refund-suit-was-improperly-dismissed/7gs17

Fourth Circuit Holds That IRC §7502 Totally Supplants Common Law Mailbox Rule

First, Pond alleged that the envelope containing the 2013 claim "was postmarked with a date of July 18, 2017[.]" J.A. 7. The fact that the document was postmarked for delivery — which we accept as true — suggests that the document made it to its destination. This is the very idea underlying the presumptions of delivery: we can expect the U.S. Postal Service to do its job with some reliability. *But if we allowed an allegation of a postmark alone to suffice for showing physical delivery, then that would effectively afford a "backdoor" presumption of delivery. So Pond must show more.*

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/fourth-circuit-finds-tax-refund-suit-was-improperly-dismissed/7gs17

Fourth Circuit Holds That IRC §7502 Totally Supplants Common Law Mailbox Rule

Second, Pond alleged that his 2012 and 2013 claims were sent in a single envelope. The 2012 claim was paid. A reasonable inference from the fact that the IRS paid Pond's 2012 claim is that they timely received it at IRS Holtsville. If both the 2012 claim and the 2013 claim were in the same envelope, then another reasonable inference is that IRS Holtsville received Pond's 2013 claim at the same time.

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/fourth-circuit-finds-tax-refund-suit-was-improperly-dismissed/7gs17

Fourth Circuit Holds That IRC §7502 Totally Supplants Common Law Mailbox Rule

True, there are other possibilities. The IRS might have refunded Pond his 2012 overpayment without a filed claim. See §6230(d)(5). Or the IRS may have paid Pond's 2012 claim based on a duplicate copy of the claim that he sent to IRS Andover in connection with his requested interest refund. These other possible scenarios show that Pond's preferred inference — that IRS Holtsville received the envelope with Pond's 2012 and 2013 claims — is far from certain. *But the plausibility standard is not a "probability requirement." Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). We are required to draw all factual inferences in Pond's favor, so long as they are "reasonable." See *Nemet Chevrolet*, 591 F.3d at 253. Notwithstanding other possibilities, one reasonable inference is that IRS Holtsville received Pond's envelope. *And that inference would support a plausible claim.*

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Fourth Circuit Holds That IRC §7502 Totally Supplants Common Law Mailbox Rule

Third, Pond alleged that the letter he received from the IRS denying his 2013 claim listed the "date of claims received" as July 17, 2017. J.A. 11. We cannot ignore — in deciding whether Pond plausibly alleged timely filing — that the IRS itself prepared a document listing a timely date as the "[d]ate of claims received." J.A. 84.

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/fourth-circuit-finds-tax-refund-suit-was-improperly-dismissed/7gs17

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The government responds to this last point with a great deal of hand-waving. It says that, under Pond's own narrative, the claims could not have been delivered by July 17, 2017. *After all, Pond alleged that, while he signed the refund claims on July 17, 2017, he did not place them in the mail until a day later, July 18, 2017.* A letter cannot arrive a day before it was sent. But cf. Stephen W. Hawking, *A Briefer History of Time* (2008) (explaining when it might be possible to arrive at your destination before departing). So, the government claims, *the IRS obviously put the wrong date on the letter*. It was a simple mistake. The government even offers an explanation: The agent who authored the denial letter was surely referencing a later copy of the 2013 claim that Pond faxed over, well after the deadline.

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/fourth-circuit-finds-tax-refund-suit-was-improperly-dismissed/7gs17

Fourth Circuit Holds That IRC §7502 Totally Supplants Common Law Mailbox Rule

But just because the IRS used the wrong date does not mean that they never received a timely copy of Pond's 2013 claim. Perhaps the denial letter's author got the date from a subsequent fax. But it is also plausible that the letter's author got the date from the original — and timely — copy of the 2013 claim. And if that is the case, then the claim may well have been received before the deadline. As Pond notes, "given the comedy of errors by the Holtsville service center, using the date Pond signed his 2013 Amended Return as the date his claim was received would be the least egregious error committed by the IRS in this refund saga." Appellant's Br. at 18. In any event, at this stage we need not conduct a searching inquiry into why the IRS listed a timely "date of claims received." It just matters that they did so. Again, the plausibility standard is not a "probability requirement." *Iqbal*, 556 U.S. at 678.

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/fourth-circuit-finds-tax-refund-suit-was-improperly-dismissed/7gs17

Fourth Circuit Holds That IRC §7502 Totally Supplants Common Law Mailbox Rule

This shows the error in dismissing his complaint at this stage. The district court reasoned that Pond "cannot show actual physical delivery or receipt by the IRS, since, according to the Complaint, the IRS has no record of receiving the return." Pond, 2022 WL 1105031, at *7. But this misreads Pond's complaint. It alleges that: "After inquiring again through counsel about the status of the 2013 refund, *Plaintiff learned that the agents attempting to locate the 2013 Form 1040X were unable to find it anywhere in the system."* J.A. 10 (emphasis added). That some IRS agents could not locate Pond's claim on the system does not mean the IRS never received it, nor does it mean that the IRS actually has no records of its delivery. A more exhaustive effort during discovery could reveal something that the initial search missed. So this allegation is compatible with the IRS having record of timely filing. A denial letter listing a timely "date of claims received," is itself some evidence that his claim was timely filed. On remand, the government may produce evidence supporting their argument that the date they listed as "date of claims received" must have been a mistake. Or, to the contrary, discovery might unearth additional evidence that the 2013 claim was timely filed.

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/fourth-circuit-finds-tax-refund-suit-was-improperly-dismissed/7gs17

Fourth Circuit Holds That IRC §7502 Totally Supplants Common Law Mailbox Rule

Pond plausibly alleges that his claim for a refund on his 2013 taxes was physically delivered to the IRS before the statutory deadline. If true, then Pond's suit falls within the United States's sovereign-immunity waiver, and the district court has jurisdiction. The district court's order holding otherwise is thus vacated.

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But The Whole Matter Could Have Been Made Moot by the Taxpayer

But Pond cannot rely on a presumption of delivery. Section 7502 is clear: only registered and certified mail are presumed delivered. And because the statute "speaks directly" to that presumption, it displaces the common-law presumption that might otherwise help Pond. Pond could have mailed his 2013 claim by registered or certified mail and been protected by the statutory presumption. He chose not to, so he must show physical delivery on remand.

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