No. 04-1396

In the Supreme Court of the United States

ROLLY J. SORRENTINO AND JOANN M. SORRENTINO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
EILEEN J. O'CONNOR
Assistant Attorney General
KENNETH L. GREENE
ROBERT W. METZLER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether taxpayers who claim that they mailed a required tax document by ordinary mail are entitled to a presumption that the document was delivered to the Internal Revenue Service in a timely manner even though the records of the Service reflect that the document was not, in fact, timely received.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 383 F.3d 1187. The opinion of the district court (Pet. App. 28-35, 36-57) is reported at 199 F. Supp. 2d 1068.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 2004 (Pet. App. 26-27). A petition for rehearing was denied on January 14, 2005. Pet. App. 60-61. The petition for a writ of certiorari was filed on April 14, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under 26 U.S.C. 6511(a), a taxpayer must file a claim for a tax refund within three years of the time that his return is filed. Section 6511(b)(2)(A) of the Internal Revenue Code limits the amount that a taxpayer can recover on a refund claim to taxes paid within the preceding three-year period, plus any extension of time for filing the tax return for the relevant year. 26 U.S.C. 6511(b)(2)(A).

b. Section 7502 of the Internal Revenue Code provides two rules for the timely filing of required tax documents:

(i) Section 7502(a) provides that if a document is "delivered by United States mail" to the Internal Revenue Service (IRS) after the due date, the document shall be deemed to have been filed on "the date of the United States postmark stamped on the cover" of the mailing envelope. 26 U.S.C. 7502(a)(1).

(ii) Section 7502(c)(1) provides that, if a tax document is "sent by United States registered mail," the document shall be deemed to have been filed on the date of registration. 26 U.S.C. 7502(c)(1)(B). Section 7502(c)(1) further provides that the receipt for registration is "prima facie evidence" that the document was delivered to the IRS. 26 U.S.C. 7502(c)(1)(A). Pursuant to Section 7502(c)(2), the IRS has promulgated similar rules for documents sent by certified mail. See 26 C.F.R. 301.7502-1(c)(2).

2. Petitioners paid their 1994 income tax through income tax withholding (Pet. App. 69); accordingly, those payments were deemed to have been made on April 15, 1995. See 26 U.S.C. 6513(b)(1). Petitioners thereafter obtained a four-month extension of time until August 15,

1995, to file their 1994 income tax return. Pet. App. 3. Therefore, under 26 U.S.C. 6511(b)(2)(A), petitioners were required to file a claim on or before August 15, 1998, to obtain a refund of their 1994 taxes. Pet. 3-4; Pet. App. 3 n.2.

In September 1998, petitioners, who had not received a refund for their 1994 taxes, inquired about the status of their alleged refund claim for 1994. The IRS advised them that it did not have a record of receiving a tax return from petitioners for 1994. Pet. App. 29, 38. Petitioners subsequently sent the IRS a photocopy of a 1994 federal income tax return, dated March 1, 1998, and signed by petitioners; the return included a claim for a refund of $8551. *Id.* at 28-30. The IRS received the copy on October 2, 1998. *Id.* at 30. The IRS treated that document as petitioners' original return for 1994. Because the refund claim was received after August 15, 1998, the IRS denied the refund claim as untimely. *Id.* at 3.

3. Petitioners filed a complaint in the United States District Court for the District of Colorado, challenging the IRS's denial of their claim. After the IRS's motion for summary judgment was denied (Pet. App. 30-35), petitioners moved for summary judgment. Pet. App. 4. In support of their motion, petitioners provided a deposition by petitioner Rolly Sorrentino, in which he stated that in March 1998 he had placed their 1994 income tax return with adequate postage in a mail drop. *Id.* at 63-64. Relying on the common-law mailbox rule, which establishes a rebuttable presumption that a properly mailed document is delivered in due course, see *Hagner* v. *United States*, 285 U.S. 427, 430 (1932), petitioners argued that they were entitled to a presumption that their refund claim had been received by the IRS, and

that their claim thus should be deemed filed in March 1998, well before the August 15, 1998, deadline.

The district court granted petitioners' motion for summary judgment. Pet. App. 36-57. The court rejected the government's argument that Section 7502 displaces the common-law mailbox rule and, therefore, that a taxpayer cannot rely on a presumption of delivery unless, as specified in Section 7502(c), he used registered or certified mail. The court also rejected the government's argument that Rolly Sorrentino's deposition was insufficient as a matter of law to establish that the refund claim was timely because that deposition testimony was uncorroborated and self-serving. *Id.* at 45-46. Because the government did not offer any evidence disputing Sorrentino's testimony that he mailed the refund claim in March 1998, and because the government did not contest the merits of petitioners' refund claim, the court concluded that petitioners were entitled to the refund. *Id.* at 48-51.

4. A divided panel of the court of appeals reversed and remanded to the district court with instructions to dismiss the case. Pet. App. 1-25.

a. Judge Baldock delivered the judgment of the court. Agreeing with the position adopted by the Eighth and Ninth Circuits, he concluded that Section 7502 does not completely supplant the common law mailbox rule. Pet. App. 15-16 (citing *Anderson* v. *United States*, 966 F.2d 487 (9th Cir. 1992); *Estate of Wood* v. *Commissioner*, 909 F.2d 1155 (8th Cir. 1990)). But, also like the Eighth and Ninth Circuits, he further concluded that, when a document is placed in ordinary mail, the mailbox rule may be invoked only if the taxpayer provides "evidence of an actual postmark," not merely evidence of mailing. Pet. App. 15. Determining that petitioners had

not presented adequate evidence of the date of postmark, Judge Baldock concluded that petitioners were not entitled to rely on the mailbox rule.

b. Judge Hartz concurred in the judgment. Pet. App. 19-22. In his view, Section 7502 completely supplants the common law mailbox rule. Pet. App. 22. Thus, he explained, "[b]ecause [petitioners'] proof [did] not meet the statutory requirements [of Section 7502], their refund claim [was] untimely." Pet. App. 22.

c. Judge Seymour dissented. Pet. App. 22-25. She agreed with Judge Baldock that Section 7502 does not displace the common law mailbox rule. *Ibid*. Unlike Judge Baldock, however, she would have held that petitioner's deposition was sufficient to raise the presumption that the IRS timely received petitioners' 1994 tax return. *Id*. at 24.

ARGUMENT

Petitioners contend that this Court should grant certiorari because the court of appeals' conclusion that the mailbox rule does not apply in this case conflicts with decisions of this Court and of other courts of appeals. The decision below does not present such a conflict, however, and further review is not warranted.[1]

1. a. Contrary to petitioners' claim, the court of appeals' refusal to apply the mailbox rule in this case does not conflict with other courts of appeals' decisions. The Second and Sixth Circuits have concluded that Section 7502 provides the only exceptions to the general rule that tax documents must actually be received by the IRS on or before the filing deadline. See, *e.g.*, *Thomas* v.

[1] This Court denied review of this issue in *Carroll* v. *Commissioner*, 518 U.S. 1017 (1996).

United States, 166 F.3d 825, 829-830 (6th Cir. 1999); *Deutsch* v. *Commissioner*, 599 F.2d 44, 46 (2d Cir. 1979), cert. denied, 444 U.S. 1015 (1980).[2] Under the holdings of those courts, a taxpayer cannot invoke the mailbox rule to establish that the IRS received a mailed document, unless, as specified in Section 7502(c), registered or certified mail was used. See *Thomas*, 166 F.3d at 829; *Deutsch*, 599 F.2d at 46.[3] The Eighth and Ninth Circuits

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[2] See also *Boccuto* v. *Commissioner*, 277 F.2d 549, 553 (3d Cir. 1960) (stating in dicta that "Congress has explicitly set forth the allowable exceptions to the rule of actual receipt" and that "[u]nless a taxpayer can fit himself within one of the statutory exceptions, he is bound by this rule").

[3] The holdings of those courts are correct. Before the enactment of Section 7502 in 1954, it was well established that a statutory filing requirement for a document could be satisfied only if the document was both actually and timely received by the "particular officer" specified in the statute. *United States* v. *Lombardo*, 241 U.S. 73, 78 (1916). Some courts, however, departed from that "physical delivery rule" by holding that proof of mailing is prima facie evidence of receipt that could be rebutted by evidence of non-receipt. See *Detroit Auto. Prods. Corp.* v. *Commissioner*, 203 F.2d 785, 785-786 (6th Cir. 1953) (per curiam); *Arkansas Motor Coaches, Ltd.* v. *Commissioner*, 198 F.2d 189 (8th Cir. 1952); *Crude Oil Corp. of Am.* v. *Commissioner*, 161 F.2d 809, 810 (10th Cir. 1947).

Section 7502 was enacted against that backdrop to address concerns about the effect of irregularities in postal delivery on the filing of tax documents. H.R. Rep. No. 1337, 83d Cong., 2d Sess. A434-A435 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 615 (1954); *Drake* v. *Commissioner*, 554 F.2d 736, 738-739 (5th Cir. 1977); *Sylvan* v. *Commissioner*, 65 T.C. 548, 551 (1975). As has frequently been observed, the provision reflects "a penchant for an easily applied, objective standard." *E.g.*, *Miller* v. *United States*, 784 F.2d 728, 731 (6th Cir. 1986); *Deutsch*, 599 F.2d at 46. It provides two exceptions to the physical delivery rule. The first, Section 7502(a), specifies that a tax document delivered by mail after its due date shall be deemed to have been delivered on "the date of the United States postmark stamped on the cover." 26 U.S.C.

have taken a different position. They have concluded that Section 7502 does not displace the common-law mailbox rule completely. Instead, those courts hold that the mailbox rule's presumption applies to documents subject to Section 7502, but only if the taxpayer provides "proof of postmark," and not "mere evidence of mailing." *Estate of Wood* v. *Commissioner*, 909 F.2d 1155, 1161 (8th Cir. 1990); see *Anderson* v. *United States*, 966 F.2d 487, 491 (9th Cir. 1992) (expressly following *Estate of Wood*); see also *Lewis* v. *United States*, 144 F.3d 1220, 1223 (9th Cir. 1998) (requiring "credible evidence of the date [the] letter * * * was postmarked").[4]

In this case, petitioners assert that they mailed their tax claim in March of 1998. Petitioners acknowledge that they did not use certified or registered mail. Pet. 8. Therefore, as Judge Hartz concluded (Pet. App. 22), petitioners could not rely on the mailbox rule under the Second and Sixth Circuits' rule. Nor, as Judge Baldock concluded, were petitioners entitled to a presumption of delivery under the Eighth and Ninth Circuits' view. As Judge Baldock explained, petitioners did not present any credible evidence regarding the date on which the documents were postmarked. Pet. App. 18. Accordingly, petitioners would not be entitled to a presumption of deliv-

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7502(a)(1). The second exception, Section 7502(c), provides a method to guard against the risk of non-delivery. It states that a receipt for a document sent by registered (or, under 26 C.F.R. 301.7502-1(c)(2), certified) mail is to be treated as "prima facie evidence" of delivery and that the date of registration (or certification) shall be treated as the date of delivery. 26 U.S.C. 7502(c)(1) and (2). No such presumption of delivery attaches, however, when a document is sent by regular mail.

[4] No court of appeals has adopted the theory in Judge Seymour's dissent (Pet. App. 22-24) that, after the enactment of Section 7502, the taxpayer's self-serving assertion of the timely mailing of tax documents alone is sufficient to raise the presumption of timely delivery.

ery under either the Second and Sixth Circuits' view or the Eighth and Ninth Circuits' view. To be sure, petitioners dispute Judge Baldock's conclusion, arguing that they did produce adequate credible evidence of the date of postmark, but that fact-bound contention does not warrant this Court's attention.

b. There is no merit to petitioners' contention (Pet. 11-12) that the court of appeals' decision conflicts with this Court's decisions in *Rosenthal* v. *Walker*, 111 U.S. 185 (1884), and *Hagner* v. *United States*, 285 U.S. 427 (1932), the Ninth Circuit's decision in *Schikore* v. *BankAmerica Supp. Ret. Plan*, 269 F.3d 956 (2001), or the Seventh Circuit's decision *Godfrey* v. *United States*, 997 F.2d 335 (1993). None of those cases involved Section 7502, much less its effect on the mailbox rule. Accordingly, the court of appeals' conclusion that the mailbox rule does not apply in this case does not warrant further review.

2. Review is also inappropriate because of ongoing administrative efforts to bring further clarity to this area of the law. The IRS has recently issued proposed regulations to provide "specific guidance" regarding the proof needed to establish that a tax document was delivered. See *Timely Mailing Treated as Timely Filing*, 69 Fed. Reg. 56,377 (2004).[5] The proposed regulations clarify that, other than direct proof of actual delivery, a registered or certified mail receipt is the only *prima facie* evidence of delivery of documents that have a filing deadline prescribed by the tax laws. See *id.* at 56,378. Because the proposed regulations will likely eliminate any dispute about the application of the common-law mailbox

[5] The comment period expired December 20, 2004 (69 Fed. Reg. at 56,378), and a public hearing was held on January 11, 2005.

rule to documents subject to Section 7502, further review of the question presented in this case is not warranted. Cf. *Braxton* v. *United States*, 500 U.S. 344, 347-349 (1991).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
EILEEN J. O'CONNOR
Assistant Attorney General
KENNETH L. GREENE
ROBERT W. METZLER
Attorneys

JUNE 2005