Current Federal Tax Developments

Week of April 22, 2019

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ACCOUNTING
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CURRENT FEDERAL TAX DEVELOPMENTS
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Section: 199A
IRS Releases Drafts of Forms to Be Used to Calculate §199A Deduction on 2019 Income Tax Returns

Citation: Draft Forms 8895 and 8895-A, 4/16/19

While the IRS did not have time to prepare forms for 2018 returns to calculate the deduction under IRC §199A, on April 16, 2019 the IRS released a draft of Form 8995, *Qualified Business Income Simplified Computation*, and Form 8995-A, *Qualified Business Income Deduction*.

The drafts of the forms are reproduced below.

Form **8995**

Department of the Treasury
Internal Revenue Service

Qualified Business Income Deduction Simplified Computation

► Attach to your tax return.

► Go to *www.irs.gov/Form8995* for instructions and the latest information.

OMB No. XXXX-XXXX

2019

Attachment Sequence No. 55

Name(s) shown on return | **Your taxpayer identification number**

DRAFT AS OF April 15, 2019

1	(a) Trade or business name	(b) Taxpayer identification number	(c) Qualified business income or (loss)
i			
ii			
iii			
iv			
v			

2	Total qualified business income or (loss). Combine lines 1i through 1v, column (c)	2			
3	Qualified business net (loss) carryforward from the prior year	3	( )		
4	Total qualified business income. Combine lines 2 and 3. If zero or less, enter -0-	4			
5	Qualified business income component. Multiply line 4 by 20% (0.20)			5	
6	Qualified REIT dividends and publicly traded partnership (PTP) income or (loss) (see instructions)	6			
7	Qualified REIT dividends and qualified PTP (loss) carryforward from the prior year	7	( )		
8	Total qualified REIT dividends and PTP income. Combine lines 6 and 7. If zero or less, enter -0-	8			
9	REIT and PTP component. Multiply line 8 by 20% (0.20)			9	
10	Qualified business income deduction before the income limitation. Add lines 5 and 9			10	
11	Taxable income before qualified business income deduction	11			
12	Net capital gain (see instructions)	12			
13	Subtract line 12 from line 11. If zero or less, enter -0-	13			
14	Income limitation. Multiply line 13 by 20% (0.20)			14	
15	Qualified business income deduction. Enter the lesser of line 10 or line 14. Also enter this amount on the applicable line of your return ►			15	
16	Total qualified business (loss) carryforward. Combine lines 2 and 3. If greater than zero, enter -0-			16	( )
17	Total qualified REIT dividends and PTP (loss) carryforward. Combine lines 6 and 7. If greater than zero, enter -0-			17	( )

For Privacy Act and Paperwork Reduction Act Notice, see instructions. Cat. No. 37806C Form **8995** (2019)

The long form for those who are not eligible for the short form is reproduced below:

Form **8995-A**

Department of the Treasury
Internal Revenue Service

Qualified Business Income Deduction

▶ Attach to your tax return.

▶ Go to *www.irs.gov/Form8995A* for instructions and the latest information.

OMB No. XXXX-XXXX

2019

Attachment Sequence No. **55A**

Name(s) shown on return | **Your taxpayer identification number**

Part I Trade, Business, or Aggregation Information

Complete Schedule A, B, C, and/or D, as applicable, before starting Part I. Attach additional worksheets when needed. See instructions.

1	**(a)** Trade, business, or aggregation name	**(b)** Check if specified service	**(c)** Check if aggregation	**(d)** Taxpayer identification number	**(e)** Check if patron
A		☐	☐		☐
B		☐	☐		☐
C		☐	☐		☐

Part II Determine Your Adjusted Qualified Business Income

			A	B	C
2	Qualified business income from the trade, business, or aggregation. See instructions	2			
3	Multiply line 2 by 20% (0.20). If your taxable income is $160,700 or less ($160,725 if married filing separately; $321,400 if married filing jointly), skip lines 4 through 12 and enter the amount from line 3 on line 13	3			
4	Allocable share of W-2 wages from the trade, business, or aggregation	4			
5	Multiply line 4 by 50% (0.50)	5			
6	Multiply line 4 by 25% (0.25)	6			
7	Allocable share of the unadjusted basis immediately after acquisition (UBIA) of all qualified property	7			
8	Multiply line 7 by 2.5% (0.025)	8			
9	Add lines 6 and 8	9			
10	Enter the greater of line 5 or line 9	10			
11	W-2 wage and qualified property limitation. Enter the smaller of line 3 or line 10	11			
12	Phased-in reduction. Enter amount from Part III, line 26, if any. See instructions	12			
13	Qualified business income deduction before patron reduction. Enter the greater of line 11 or line 12	13			
14	Patron reduction. Enter the amount from Schedule D, line 6, if any	14			
15	Qualified business income component. Subtract line 14 from line 13	15			
16	Total qualified business income component. Add all amounts reported on line 15 . . . . . ▶	16			

For Privacy Act and Paperwork Reduction Act Notice, see separate instructions. Cat. No. 71661B Form **8995-A** (2019)

Form 8995-A (2019) Page **2**

Part III **Phased-in Reduction**

Complete Part III only if your taxable income is more than $160,700 but not $210,700 ($160,725 and $210,725 if married filing separately; $321,400 and $421,400 if married filing jointly) and line 10 is less than line 3. Otherwise, skip Part III.

					A	B	C
17	Enter amounts from line 3			17			
18	Enter the amounts from line 10			18			
19	Subtract line 18 from line 17			19			
20	Taxable income before qualified business income deduction	20					
21	Threshold. Enter $160,700 ($160,725 if married filing separately; $321,400 if married filing jointly)	21					
22	Subtract line 21 from line 20	22					
23	Phase-in range. Enter $50,000 ($100,000 if married filing jointly)	23					
24	Phase-in percentage. Divide line 22 by line 23	24	%				
25	Total phase-in reduction. Multiply line 19 by line 24			25			
26	Qualified business income after phase-in reduction. Subtract line 25 from line 17. Enter this amount here and on page 1, Part II, line 12, for the corresponding trade or business			26			

Part IV **Determine Your Qualified Business Income Deduction**

27	Total qualified business income component from all qualified trades, businesses, or aggregations. Enter the amount from Part II, line 16	27			
28	Qualified REIT dividends and publicly traded partnership (PTP) income or (loss). See instructions	28			
29	Qualified REIT dividends and PTP (loss) carryforward from prior years	29	( )		
30	Total qualified REIT dividends and PTP income. Combine lines 28 and 29. If less than zero, enter -0-	30			
31	REIT and PTP component. Multiply line 30 by 20% (0.20)	31			
32	Qualified business income deduction before the income limitation. Add lines 27 and 31 ▶			32	
33	Taxable income before qualified business income deduction	33			
34	Net capital gain. See instructions	34			
35	Subtract line 34 from line 33. If zero or less, enter -0-			35	
36	Income limitation. Multiply line 35 by 20% (0.20)			36	
37	Qualified business income deduction before the domestic production activities deduction (DPAD) under section 199A(g). Enter the smaller of line 32 or line 36 ▶			37	
38	DPAD under section 199A(g) allocated from an agricultural or horticultural cooperative. Don't enter more than line 33 minus line 37			38	
39	Total qualified business income deduction. Add lines 37 and 38 ▶			39	
40	Total qualified REIT dividends and PTP (loss) carryforward. Combine lines 28 and 29. If zero or greater, enter -0-			40	( )

Form **8995-A** (2019)

Form 8995-A (2019) Page 3

Schedule A Specified Service Trades or Businesses

Complete Schedule A only if your trade or business is a specified service trade or business (see instructions) and your taxable income is more than $160,700 but not $210,700 ($160,725 but not $210,725 if married filing separately; $321,400 and $421,400 if married filing jointly). If your taxable income isn't more than $160,700 ($160,725 if married filing separately; $321,400 if married filing jointly) and you're not a patron of an agricultural or horticultural cooperative, don't file this form; instead, file Form 8995, Qualified Business Income Deduction Simplified Computation. Otherwise, complete Schedule D before beginning Schedule A. If your taxable income is more than $210,700 ($210,725 if married filing separately; $421,400 if married filing jointly), your specified service trade or business doesn't qualify for the deduction.

Part I Non-Publicly Traded Partnership

				SSTB 1	SSTB 2	SSTB 3
1a	Trade or business name		1a			
b	Taxpayer identification number		1b			
2	Qualified business income or (loss) from the trade or business		2			
3	Allocable share of W-2 wages from the trade or business		3			
4	Allocable share of the UBIA of all qualified property		4			
5	Taxable income before qualified business income deduction	5				
6	Threshold. Enter $160,700 ($160,725 if married filing separately; $321,400 if married filing jointly)	6				
7	Subtract line 6 from line 5	7				
8	Phase-in range. Enter $50,000 ($100,000 if married filing jointly)	8				
9	Divide line 7 by line 8	9				
10	Applicable percentage. Subtract line 9 from 100%	10	%			
11	Applicable percentage of qualified business income or (loss). Multiply line 2 by line 10. Enter this amount on Schedule C or on page 1, Part II, line 2, for the corresponding trade or business, as appropriate. See instructions		11			
12	Applicable percentage of W-2 wages. Multiply line 3 by line 10. Enter this amount on page 1, Part II, line 4, for the corresponding trade or business, as appropriate. See instructions		12			
13	Applicable percentage of the UBIA of qualified property. Multiply line 4 by line 10. Enter this amount on page 1, Part II, line 7, for the corresponding trade or business, as appropriate. See instructions		13			

Part II Publicly Traded Partnership

			PTP SSTB 1	PTP SSTB 2	PTP SSTB 3
14	Trade or business name	14			
15	Taxpayer identification number	15			
16	Qualified PTP income or (loss)	16			

17	Total PTP SSTB income or (loss). Combine all amounts on line 16	17	
18	Taxable income before qualified business income deduction	18	
19	Threshold. Enter $160,700 ($160,725 if married filing separately; $321,400 if married filing jointly)	19	
20	Subtract line 19 from line 18	20	
21	Phase-in range. Enter $50,000 ($100,000 if married filing jointly)	21	
22	Divide line 20 by line 21	22	
23	Applicable percentage. Subtract line 22 from 100%	23	%
24	Applicable percentage of qualified PTP income or (loss). Multiply line 17 by line 23. Include this amount on page 2, Part IV, line 28	24	

Form **8995-A** (2019)

Schedule B Aggregation of Business Operations

Aggregation 1:

1 Provide a description of the aggregated trade or business and an explanation of the factors met that allow the aggregation in accordance with Regulations section 1.199A-4. In addition, if you hold a direct or indirect interest in a relevant pass-through entity (RPE) that aggregates multiple trades or businesses, you must attach a copy of the RPE's aggregations.

2 Has this trade or business aggregation changed from the prior year? This includes changes in the aggregation due to a trade or business being formed, acquired, disposed of, or ceasing operations. If yes, explain.

3	(a) Name of trade or business	(b) Taxpayer identification number	(c) Qualified business income/(loss)	(d) W-2 wages	(e) UBIA
4	**Totals.** Total columns (c), (d), and (e). Enter the total amounts on Schedule C or on page 1, Part II, for the corresponding aggregation, as appropriate. See instructions				

Aggregation 2:

1 Provide a description of the aggregated trade or business and an explanation of the factors met that allow the aggregation in accordance with Regulations section 1.199A-4.

2 Has this trade or business aggregation changed from the prior year? This includes changes in the aggregation due to a trade or business being formed, acquired, disposed of, or ceasing operations. If yes, explain.

3	(a) Name of trade or business	(b) Taxpayer identification number	(c) Qualified business income/(loss)	(d) W-2 wages	(e) UBIA
4	**Totals.** Total columns (c), (d), and (e). Enter the total amounts on Schedule C or on page 1, Part II, for the corresponding aggregation, as appropriate. See instructions				

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Aggregation 3:

1 Provide a description of the aggregated trade or business and an explanation of the factors met that allow the aggregation in accordance with Regulations section 1.199A-4.

DRAFT AS OF April 15, 2019

2 Has this trade or business aggregation changed from the prior year? This includes changes in the aggregation due to a trade or business being formed, acquired, disposed of, or ceasing operations. If yes, explain.

3	(a) Name of trade or business	(b) Taxpayer identification number	(c) Qualified business income/(loss)	(d) W-2 wages	(e) UBIA
4	**Totals.** Total columns (c), (d), and (e). Enter the total amounts on Schedule C or on page 1, Part II, for the corresponding aggregation, as appropriate. See instructions				

Form **8995-A** (2019)

Section: 1361

Proposed Regulations Issued for ESBTs with NRA Potential Current Beneficiary Subject to Grantor Trust Rules

Citation: Proposed Regulations REG-117062-18, 4/19/19

The IRS has moved to plug a potential loophole created when Congress changed the law in the Tax Cuts and Jobs Act (TCJA) to allow an electing small business trust (ESBT) to have a nonresident alien (NRA) potential current beneficiary (PCB). In proposed regulations REG-117062-18 the IRS provides that if such an NRA would be treated as the owner of trust corpus under the grantor trust rules for such a trust, the grantor will not be treated as the owner of the S corporation portion of the ESBT.

In the preamble to the proposed regulations, the IRS points out that the committee reports related to the TCJA had stated that allowing NRAs to be PCBs of ESBTs did not pose a risk that the S corporation income would not be subject to U.S. tax, since tax is imposed on the trust and not the beneficiary for S corporation income when shares are held by an ESBT.

However, previously the IRS had taken the position that the grantor trust rules overrode the ESBT rules. So if a trust elected ESBT status that was fully or partially a grantor trust, the deemed owner under the grantor trust rules would be treated as the owner of some or all of the S corporation shares and subject to tax on such income. Now that an NRA can be a PCB of a electing small business trust, it is possible under a number of scenarios that the S corporation income could escape U.S. taxation if that treatment were permitted to continue.

To prevent this from happening, the IRS is proposing to add the following to Reg. §1.641(c)-1(b). In Proposed Reg. §1.641(c)-1(b)(1)(ii) the IRS provides that, in such a case, "the items of income, deduction, and credit from that grantor portion must be reallocated from the grantor portion to the S portion … of the ESBT." In that case, the trust would pay tax directly on the income from the S corporation.

Example 6 is added at Proposed Reg. §1.641(c)-1(l)(6) to illustrate the application of this provision:

> *Example 6: NRA as potential current beneficiary. Domestic Trust (DT) has a valid ESBT election in effect. DT owns S corporation stock. The S corporation owns U.S. and foreign assets. The foreign assets produce foreign source income. B, an NRA, is the grantor and the only trust beneficiary and potential current beneficiary of DT. B is not a resident of a country with which the United States has an income tax treaty. Under section 677(a), B is treated as the owner of DT because, under the trust documents, income and corpus may be distributed only to B during B's lifetime. Paragraph (b)(2)(ii) of this section requires that the S corporation income of the ESBT that otherwise would have been allocated to B under the grantor trust rules must be reallocated from B's grantor portion to the S portion of DT. In this example, the S portion of DT is treated as including the grantor portion of the ESBT, and thus all of DT's income from the S corporation is taxable to DT.*

The regulations are proposed to apply to all ESBTs after December 31, 2017.

Section: 1372
Self Employed Health Insurance Deduction Available to Family Members of S Corporation Shareholder

Citation: Chief Counsel Advice 201912001, 4/13/19

In Chief Counsel Advice 201912001 the IRS held that family members, who while not directly holding shares in an S corporation, are deemed to be 2% shareholders under the rules of §318 are allowed to claim the self-employed health insurance deduction under IRC §162(l) if they otherwise qualify.

Under IRC §1372, individuals holding 2% or more of the stock of an S corporation are treated as if they were partners for purposes of applying the employee fringe benefit income tax rules. IRC §1372(b) expands that definition of shareholders to include those who would be deemed to hold such shares by attribution under IRC §318.

Under IRC §106, only employees are permitted to exclude the value of employer provided health insurance from their income. Thus, partners treat the value of such insurance paid by the partnership as a guaranteed payment. Under Announcement 92-16 the S corporation shareholder treats this amount that would have been a guaranteed payment as wages for income tax purposes. Since the provisions of §1372 only apply to income tax provisions, these deemed wages are not subject to FICA, Medicare or FUTA taxes.

Family members are the first group included in the attribution rules of IRC §318. IRC §318(a) defines that family group as follows:

> *(a) General rule*
>
> *For purposes of those provisions of this subchapter to which the rules contained in this section are expressly made applicable—*
>
> > *(1) Members of family*
> >
> > *(A) In general*
> >
> > *An individual shall be considered as owning the stock owned, directly or indirectly, by or for—*
> >
> > > *(i) his spouse (other than a spouse who is legally separated from the individual under a decree of divorce or separate maintenance), and*
> > >
> > > *(ii) his children, grandchildren, and parents.*

The question raised in the advice was whether such family members, if employed by the S corporation and covered by a qualifying medical plan of the S corporation meeting the provisions of Notice 2008-1 could claim the self-employed health insurance deduction found at IRC §162(l).

IRC §162(l) allows a deduction in computing adjusted gross income for health insurance for self-employed individuals that meet certain conditions. For an S corporation the provision of the insurance must meet the requirements found in Notice 2008-1. And for all covered taxpayers, the taxpayer cannot be eligible to participate in a subsidized health plan maintained by an employer of the taxpayer or taxpayer's spouse.[1]

The advice concludes that the deemed shareholder by attribution gets the same treatment as someone directly holding the S corporation stock. The memorandum holds:

> *An individual who is a 2-percent shareholder of an S corporation pursuant to the attribution of ownership rules under § 318 is entitled to the deduction under § 162(l) for amounts that are paid by the S corporation under a group health plan for all employees and included in the individual's gross income, if the individual otherwise meets the requirements of § 162(l).*

Section: 1400Z-2
IRS Releases Second Set of Proposed Opportunity Zone Regulations

Citation: REG-120186-18, 4/17/19

The IRS issued its second set of proposed regulations dealing with Opportunity Zone issues (REG-120186-18). Tax Analysts reported in *Tax Notes Today* that Treasury officials had indicated in a press briefing related to the release of these regulations that they expect these will

[1] IRC §162(l)(2)(B)

constitute the entirety of the remaining regulations for Opportunity Zones, although they did not rule out a third set of proposed regulations if it seems necessary.[2]

The summary accompanying the proposed regulations describes them as follows:

> *This document contains proposed regulations that provide guidance under new section 1400Z-2 of the Internal Revenue Code (Code) relating to gains that may be deferred as a result of a taxpayer's investment in a qualified opportunity fund (QOF), as well as special rules for an investment in a QOF held by a taxpayer for at least 10 years. This document also contains proposed regulations that update portions of previously proposed regulations under section 1400Z-2 to address various issues, including: the definition of "substantially all" in each of the various places it appears in section 1400Z-2; the transactions that may trigger the inclusion of gain that a taxpayer has elected to defer under section 1400Z-2; the timing and amount of the deferred gain that is included; the treatment of leased property used by a qualified opportunity zone business; the use of qualified opportunity zone business property in the qualified opportunity zone; the sourcing of gross income to the qualified opportunity zone business; and the "reasonable period" for a QOF to reinvest proceeds from the sale of qualifying assets without paying a penalty. These proposed regulations will affect QOFs and taxpayers that invest in QOFs.*

The proposed regulations provide that taxpayers may rely on all of the proposed regulations, with the exception of Prop. Reg. §1.1400Z2(c)-1, for periods prior to finalization of the rules. Otherwise, the rules will apply to taxable years ending after the proposed regulations are published in the Federal Register (so, basically, they will apply to 2019 calendar year returns and those from later years).

Section: 7502
Ninth Circuit Panel Holds Taxpayers Cannot Rely on Common Law Mailbox Rule to Prove Timely Filing of Documents

Citation: Baldwin, et. ux. v. United States, CA9, No. 17-55115; No. 17-55354, 4/16/19

The Ninth Circuit Court of Appeals rejected a taxpayer's attempt to use the common law mailbox rule to prove that an amended return the taxpayer claimed to have mailed to the IRS four months before the deadline for filing the claim was timely filed. In *Baldwin, et. ux. v. United States*, CA9, No. 17-55115; No. 17-55354 the Court found that the IRS's 2011 regulations under IRC §7502 take precedence over the Ninth Circuit's prior holding that taxpayer could make use of the common law mailbox rule to prove timely filing in *Anderson v. United States*, 966 F.2d 487, 490 (9th Cir. 1992).

The facts of the situation were summarized by the panel as follows:

> *The Baldwins' 2007 tax return reported a net operating loss of approximately $2.5 million from their movie production business. They wanted to carry that loss back to the 2005 tax year in order to offset*

[2] Stephanie Cummings, "New Proposed O-Zone Regs May Be the Last, Officials Say," *Tax Notes Today*, April 18, 2019, 2019 TNT 75-1, https://www.taxnotes.com/tax-notes-today/opportunity-zones/new-proposed-o-zone-regs-may-be-last-officials-say/2019/04/18/29cz6 (subscription required)

their 2005 tax liability. Based on that carryback, the Baldwins prepared an amended 2005 tax return claiming entitlement to a refund of approximately $167,000.

To obtain a refund, the Baldwins were required to file their amended 2005 tax return by October 15, 2011 — three years from the extended due date for their 2007 tax return. See 26 U.S.C. § 6511(b)(1), (d)(2)(A). The Baldwins assert that they sent their amended 2005 tax return to the IRS by U.S. mail in June 2011, well before the October 15th deadline. But the IRS never received that return, or any other return postmarked by the October 15, 2011, deadline. The IRS did eventually receive an amended 2005 return from the Baldwins in July 2013, but it was postmarked after the statutory deadline had passed. The IRS accordingly denied the Baldwins' refund claim as untimely.

IRC §7502 governs situations where the IRS claims not to have received a document filed by the taxpayer or that the taxpayer did not timely file such a document.

IRC §7502(a) governs the issue of reliance on postmarks to show the date a return was "delivered" to the IRS and provides:

(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.

However, as the panel notes, that only covers situations where the document is actually delivered to the IRS. In this case the IRS claims never to have received such a document.

IRC §7502(c) provides a method that taxpayer may use to both establish the date *and the deemed delivery* of the document by use of registered mail or other mechanisms the IRS may approve by regulation:

(c) Registered and certified 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.

The IRS has issued such regulations with regard to certified mail and electronic filing. Similar authority was granted to the IRS to provide for the use of private delivery services and the IRS has issued guidance on that method as well.[3]

In August 2011 the IRS issued final regulations under IRC §7502 that limited the taxpayer's ability to prove actual delivery to cases where registered mail, certified mail or a private delivery service is used. Reg. §301.7502-1(e)(2) provides:

> *(i)Registered and certified mail. In the case of a document (but not a payment) sent by registered or certified mail, proof that the document was properly registered or that a postmarked certified mail sender's receipt was properly issued and that the envelope was properly addressed to the agency, officer, or office constitutes prima facie evidence that the document was delivered to the agency, officer, or office. Other than direct proof of actual delivery, proof of proper use of registered or certified mail, and proof of proper use of a duly designated PDS as provided for by paragraph (e)(2)(ii) of this section, are the exclusive means to establish prima facie evidence of delivery of a document to the agency, officer, or office with which the document is required to be filed. No other evidence of a postmark or of mailing will be prima facie evidence of delivery or raise a presumption that the document was delivered.*

The regulation had initially been proposed in 2004, and the effective date of the final regulation was tied back to that date as allowed under IRC §7805(b). Under that provision, the IRS "gives notice" of the intent to change the rules and how they will be changed. If the agency goes through with the final regulation, the rule can be applied back to the date notice was given through publishing proposed regulations. While the Baldwins mailed their returns two months before the regulations went final, they did so seven years after the IRS had put taxpayers on notice of the possibility this rule would change.

The Baldwins did not use any of the protected methods. Rather, they simply mailed the claim to the IRS. At trial they introduced testimony of their employees that they had mailed such a document in June 2011, giving more than sufficient time for the return to be delivered to the IRS.

The trial court found that the IRS regulation was invalid. In the view of the trial court, in §7502(c) Congress had merely provided a safe harbor that taxpayers could use to prove timely delivery and that it supplemented rather than replaced the common law mailbox rule. Finding the taxpayers had carried their burden under the common law mailbox rule, the court ruled the taxpayers had timely filed their claim. The IRS appealed that decision to the Ninth Circuit.

The Circuit Court reversed the trial court's holding. The Court found that while the statute could be read in the manner the trial court did, it also could be read to bar the use of evidence not specifically provided in that statute. The panel noted that, prior to the regulations and Congress's action to add the proof of filing option to IRC §7502, there had been a split in the circuits regarding whether §7502 offered the sole option of proving timely filing.

The Ninth Circuit, in the *Anderson* case noted earlier, had taken the position that the law and regulations in place in 1992 did not bar the use of the mailbox rule. But the panel noted that *Anderson* had not held that the statute unambiguously allowed for the use of the mailbox rule. Rather, *Anderson* found the statute did not mention the matter. The *Andserson* panel did not find that there were not multiple reasonable interpretations and, the current panel points out, the

[3] IRC §7502(f)

split in the circuits indicates that, in fact, such multiple reasonable interpretations existed. Even in 1992, for taxpayers in a large portion of the country use of the mailbox rule to prove timely filing was effectively barred by prior holdings of the applicable Circuit Court of Appeal.

In 2011 the IRS exercised its discretion to issue regulations resolving this ambiguity and establishing a consistent nationwide standard. The 2011 regulations clearly bar the use of the mailbox rule to establish delivery of the document to the IRS. That regulation serves to override the *Anderson* result since, like the *Anderson* decision, the regulation resolved the ambiguity in the statute.

The panel found the regulation thus properly served to obtain a consistent result across the country—and to get to that consistency the *Anderson* case no longer could serve to justify use of the mailbox rule. The IRS could have adopted the view that the mailbox rule applied—but they did not abuse their discretion in choosing to adopt the opposite holding.