

SUBJECT: AN ORDINANCE OF THE MATANUSKA-SUSITNA BOROUGH ASSEMBLY ENACTING MSB 1.15.095 STANDARDIZING RULES OF TIMELINESS, PROOF, AND PRESUMPTIONS REGARDING TAX PAYMENTS.

AGENDA OF: MAY 18, 2021

ASSEMBLY ACTION:

*Adopted without objection 6-1-21*  
*(Signature)*

MANAGER RECOMMENDATION: Introduce and set for public hearing.

APPROVED BY MICHAEL BROWN, BOROUGH MANAGER: *MB*

Route To:	Department/Individual	Initials	Remarks
	Originator	NS	
	Finance Director	<i>CF</i>	
	Borough Attorney	<i>NS</i>	
	Borough Clerk	<i>Ann 5/11/21</i>	<i>KBJ</i>

ATTACHMENT(S): Fiscal Note: YES ☐ NO ☒  
Ordinance Serial No. 21-047 (4 pp)

**SUMMARY STATEMENT:** This ordinance is sponsored by the Borough Manager to codify the rules about the timeliness of real property tax payments.

There are provisions in Borough Code relating to the due dates and the timeliness of various types of tax returns and tax payments:

- for cigarette/tobacco taxes, MSB 3.30.125 sets the due date as the last day of the calendar month following the month under which the cigarette/tobacco was taxed. For timeliness, the tax return and tax payment must be received by the finance department or postmarked on or before the due date;
- for bed taxes, MSB 3.32.050 sets the due date as 30 days after the end of each quarter. For timeliness, tax returns and tax payments must be received by the finance department on or before the due date;
- for marijuana taxes, MSB 3.60.080 sets the due date as 30 days after the end of each quarter. For timeliness, tax returns and tax payments must be received by the finance director on or before the

due date; and

- for the service area sales tax, MSB 3.70.120 sets the due date as 5 p.m. on the last business day of the month immediately following the month for which the tax was collected. For timeliness, the tax return and tax payment must be actually received and the failure of the post office or private delivery service to deliver is specifically not an excuse.

As it pertains to real property payment for taxes and special assessments (hereinafter "real property taxes"), the Borough Assembly annually sets the due dates for the first and second payments of real property taxes. For example, in the FY 2021 Budget Ordinance, Section 15 of Ordinance Serial No. 20-020 set tax real property tax due dates of August 17, 2020 for the first installment, and February 16, 2021 for the second installment of real property taxes.

However, there are no code provisions related to the timeliness, rules, or presumptions of real property tax payments. Different legal principles could apply to late payments, but none are in code. For the past few decades, the Borough has simply applied a type of mailbox rule to payment of real property taxes. In summary, if real property tax payments are received after the close of business on the due date, they are treated as timely if postmarked on or before that date. The Borough has accepted proof of mailing via post office receipt or private courier receipt in cases where there is no postmark.

Recently, a complaint was brought to the Borough Assembly regarding a tax payment. A citizen provided her daily calendar with a note that she said showed her tax payment was mailed on Friday, February 12, 2021. However, she informed the Assembly that her mailing was not postmarked until Wednesday, February 17, 2021. Since tax payments were due on Tuesday, February 16, 2021 (see Ordinance Serial No. 20-020), her tax payment was treated as delinquent under the Borough's current processes. A Borough Assemblymember made a motion to direct administration to treat her real property tax payment as timely. During discussion on that motion, the remainder of the Assembly was concerned over setting a precedent, varying the rule for one person, and potentially causing confusion among the several hundred people whose real property tax payments were late. Upon voting, the motion to treat the payment as timely failed.

In researching tax payments, due dates, and delinquencies, it has become apparent that the Matanuska-Susitna Borough needs a code provision to address the rules on what can be considered regarding timeliness of real property tax payments, and indeed, all tax payments. There are various court and administrative opinions addressing due dates, mailing, and receipt to be considered.

## Cases

In United States v. Lombardo, 241 U.S. 73 (1916) the Supreme Court of the United States considered a case where a woman failed to file an immigration statement regarding another woman whom she brought to the United States. The Supreme Court of the United States held:

Filing, it must be observed, is not complete until the document is delivered and received. 'Shall file' means to deliver to the office, and not send through the United States mails.

In Anderson v. United States, 966 F.2d 487 (9<sup>th</sup> Cir. 1992), the 9<sup>th</sup> Circuit Court of Appeals considered a case where a taxpayer sued the IRS for an income tax refund. The IRS said it never received the original return with refund, and then said it received a later request for refund too late. The issue in the case was whether the claims for refund were timely filed.

The Court began by addressing the law regarding mailing income tax payments. The court noted that Congress enacted a law (and while not mentioned in the case, the law was passed in 1954):

. . .to mitigate the harshness of the old common law physical delivery rule which had required that tax documents must be physically received by the IRS on time to be timely filed. The old common law physical delivery rule left taxpayers vulnerable to postal service malfunctioning.

Section 7502 carves out an exception to the physical delivery rule by creating a statutory "mailbox rule." The statute allows a taxpayer to prove timely filing on the basis of timely mailing notwithstanding the date of physical delivery of the tax return to the IRS.

After noting this was the law applicable, the court had to decide whether extrinsic evidence (i.e. information not contained on the document or envelope itself) could be used to establish mailing, or whether the only evidence that could be used was a postmark. After analyzing the issue, the Court held that "Neither the language of the statute nor Ninth Circuit precedent bars admission of extrinsic evidence to prove timely delivery." Therefore, the taxpayer could use other evidence to prove mailing other than the postmark.

Thereafter, the Court considered the application of the common law mailbox rule:

Under the common law mailbox rule, proper and timely mailing of a document raises a rebuttable presumption that it was received by the addressee.

In the end, the Court upheld the rulings that the taxpayer could show timely mailing by evidence other than the postmark, and that evidence raised the presumption that the claim for refund was actually received by the IRS.

After the Anderson decision, different U.S. Appellate Courts in the United States were applying different standards about allowing extrinsic evidence and applying the common law mailbox rule in different ways. This meant that taxpayers were treated differently depending on where they lived. In 2011, the United States Treasury issued a regulation to make the rules consistent nationwide. The 2011 rule was:

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 [private delivery service], are the exclusive means to establish a 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 9<sup>th</sup> Circuit Court of Appeals was called upon to decide whether this regulation was valid in Baldwin v. United States, 921 F.3d 836 (9<sup>th</sup> Cir. 2019). The Court first noted the impact of the regulation:

The regulation makes it clear that, unless a taxpayer has direct proof that a document was actually delivered to the IRS, IRC § 7502 provides the exclusive means to prove delivery. In other words, recourse to the common-law mailbox rule is no longer available.

After considering various legal principles, the Court found the rule was valid and that no other evidence could be used.

Apart from these federal cases dealing with income tax payments, mailing, and rules, an administrative decision in Alaska is also instructive on issues to be considered.

In the Matter of C.R.R. 2008 Permanent Fund Dividend is an opinion from the Alaska Office of Administrative Hearings on referral by the Commissioner of Revenue. (OAH No. 09-0483-PFD; Agency No. 2008-063-0499) In that case, the petitioner mailed three envelopes with applications for the Alaska PFD on March 31, 2009 from Soldotna. Two of the three envelopes with applications were approved. The applications in the third envelope were denied and that envelope was postmarked in Anchorage on April 1.

The petitioner testified that she was not in Anchorage on April 1, and the administrative law judge believed everything she said. However, the regulation at issue read:

It is an individual's responsibility to ensure that an application is timely delivered to the department. A paper application must be timely delivered to the department during normal business hours or delivered to the post office in sufficient time to be postmarked before the end of the application period. The department will deny a paper application postmarked after the application period, unless the individual provides the department with an official statement from the United States Postal Service or a foreign postal service that describes the specific circumstances under which the postal service incorrectly posted the individual's application or caused a delay in posting. . .

After considering this standard, the administrative law judge was sympathetic to the petitioner, but could not rule for her:

While it appears that this failure was beyond her control, the Department of Revenue is bound by its own regulations. Neither the division nor the administrative law judge has any discretion in this matter. Without the required evidence, Ms. R. is not entitled to a 2008 PFD.

## **Discussion**

It is clear from the various cases on mailing, proof, and receipt that the Matanuska-Susitna Borough needs a code section which will apply to all tax payments. Since bed tax, marijuana tax, and service area sales tax all require returns as well, the rules should apply to tax returns in the same manner as tax payments.

The Borough should codify a rule about timeliness and mailing. The Borough code should also specify what types of evidence can be presented to establish that mailing was timely done. Finally, the Borough code should specify whether and when a presumption may arise that a tax payment was actually received by the Borough.

It is also clear that no matter what the rules are, there will be people "on the margins." For example, in 2020 the Matanuska-Susitna Borough Assembly left the first installment of real property tax due as of August 17, 2020, but delayed implementation of any penalty for late payment if payment was made on or before November 16, 2020. In terms of timely payments and delinquencies, there were, on average, just as many people paying late and subject to penalty regardless of the fact that there was an extra three months to make payment without penalty. While an ordinance here will not grant relief to the person who came to complain to the Borough Assembly, it will codify the applicable rules for all to see and have knowledge of so there is no confusion, misperceptions, or unknowns. It will also allow for ease of administration and avoid the Borough having to set up an administrative hearing officer to decide claims.

The proposed ordinance here will enact provision that apply to all forms of tax payments due to the Matanuska-Susitna Borough unless otherwise specified in those particular tax codes.

First, the ordinance here will codify a rule that, unless otherwise specified in code (i.e. situations like MSB 3.70.120) that a tax return or tax payment is timely made when either received on or before the date it is due, or received after the due date, but postmarked on or before the due date.

Second, the ordinance here will specify that if a tax return or tax payment is received after the due date and is either not postmarked or is postmarked after the due date, the Borough will deny timely payment, unless the taxpayer provides an official statement from the United States Postal Service or private delivery service that describes the specific circumstances under which the postal service or private delivery service incorrectly posted the individual's application or caused a delay in posting. The only evidence which may be considered is: (1) a postmark; (2) dated proof of proper use of registered or certified mail; (3) dated proof of proper use of a private delivery service; or (4) an official statement from the United States Postal Service or private delivery service that describes the incorrect postmark or delay in posting. No other extrinsic evidence is allowed.

Third, the ordinance here will specify that the exclusive means to establish evidence of delivery of a tax return or tax payment to the Matanuska-Susitna Borough are: (1) a dated receipt from the Borough showing proof of delivery; (2) dated proof of proper use of registered or certified mail; or (3) dated proof of proper use of a private delivery service. No other evidence of delivery, postmark, mailing, or use of private delivery service will be prima

facie evidence of delivery or raise a presumption that the document was actually delivered to the Matanuska-Susitna Borough.

Finally, since the Matanuska-Susitna Borough is allowing some forms of tax payment via computer and may allow for tax returns via computer, the code section will specify that unless otherwise specified in code (i.e. situations like MSB 3.70.120) an online tax return or tax payment must be received electronically by the Borough on or before midnight Alaska Time on the date due. A taxpayers' proof of timely making an online tax return or tax payment is a copy of the computer-generated page containing the receipt for tax return or tax payment received by the taxpayer after completing the online payment process. No other evidence of online tax return or online tax payment may be considered and the failure or unavailability of any system of the taxpayer, Borough, or third party is not a consideration or excuse for failing to make timely payment.

"Taxpayer" is defined as the person paying the tax or filing a return. This is because the Matanuska-Susitna Borough code obligates returns in some situations where there may be no tax due, but the return must still be filed.

**RECOMMENDATION OF ADMINISTRATION:** Adoption of Legislation.