return in time for it to be delivered to the IRS before the [August] 15, 1998 deadline. Mr. Sorrentino has testified he properly mailed the 1994 return in early March, 1998, which provided more than ample time for the return to reach the IRS in the ordinary course of the mail before the [August] 15 deadline. Mr. Sorrentino's account of an early March mailing is supported by the March 1 signature date on the photocopied return the IRS acknowledges receiving and by Mr. Sorrentino's testimony that he followed up on the status of the return before the October 2, 1998 filing date asserted by the IRS.

[3] The district court mistakenly referred to the deadline as April 15, 1998.

the same summary judgment standard to our record examination as the district court and review its judgment de novo. See Kinross v. Utah Ry. Co., 362 F.3d 658, 660 (10th Cir. 2004). Applying this standard, we reverse and remand with instructions to dismiss Taxpayers' suit for want of subject matter jurisdiction.

II.

The Supreme Court first acknowledged the common law mailbox rule in Rosenthal v. Walker, 111 U.S. 185 (1884). In Rosenthal, a case involving fraud in bankruptcy, the Court explained:

> The rule is well settled that if a letter properly directed is proved to have been either put into the post office or delivered to the postman, it is presumed, from the known course of business in the post office department, that it reached its destination at the regular time, and was

1110. The current version of § 7502, which applies in this instance, provides in relevant part:

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[5] By its plain language, § 7502(a)(1) applies only when a tax return is in fact delivered to the IRS. See 26 C.F.R. § 301.7502-1(e). The postmark is deemed the date of filing. A Senate report explained the amendment:

> The bill . . . provides that the timely mailing of a tax return or payment is to be considered timely filing or timely payment. As a result, where the postmark on an envelope in which an individual income tax return and

[6] In Carroll v. Commissioner, 71 F.3d 1228, 1231 (6th Cir. 1995), the Sixth Circuit reluctantly reaffirmed Miller despite the taxpayer's "unimpeachable proof of mailing." Id. The court noted it had recently reaffirmed Miller

The Ninth Circuit followed Wood's reasoning in Anderson, a tax refund suit. In Anderson, the taxpayer testified at trial that she witnessed the postal clerk postmark

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of delivery upon proof of first class mailing cannot be used to supply the delivery requirement of § 7502." Id.

any view of the law" to establish timely filing of a refund claim:

> Even if [taxpayer] were given the benefit of the more liberal approaches of the Eighth and Ninth Circuits, his own uncorroborated testimony would be insufficient to prove timely filing of his refund claim. . . . [I]n Wood, the taxpayer triggered the presumption of timely receipt by the IRS through testimony of the postal worker who handled, stamped, and postmarked the refund claim. The taxpayer in Anderson offered corroborating testimony from a person who accompanied her to the post office. [Taxpayer] presented no testimony, other than his own, to establish that hderson

[9] Judge Hartz criticizes the venerable rule of construction (of which Congress undoubtedly is aware) that statutes in derogation of the common law should be strictly

Eighth Circuit, I would require more than mere proof of mailing, such as direct proof of postmark which is "verifiable beyond any self-serving testimony of a taxpayer who claims

[10] As Judge Seymour suggests, allegations of non-receipt may be as difficult to disprove as allegations of receipt. See Dissent. Op. at 23. The critical difference is the burden of proof in these types of cases is on the taxpayer, not the IRS. Only after the taxpayer proffers sufficient proof to raise a presumption of timely mailing does the burden of production shift to the IRS to proffer sufficient proof of non-receipt.

[11] A taxpayer who timely mails his tax return should
of the limitations period whether the IRS in fact received the r
expiration of the filing period, a xpayer claiming a refund may
refund within forty-five days s I.R.C. § 6611(e), well within § 6
te of li ation.

recitation of the mailbox rule reveals, see id. at 22, proper and timely mailing raises a rebuttable presumption that the mailing was in fact received by the addressee. I simply would hold Taxpayers to their burden of making a meaningful evidentiary showing of "proper and timely" mailing before invoking the presumption.

In their respective depositions, Taxpayers stated they signed and dated their 1994 joint return on March 1, 1998. Perhaps so, but unlike Judge Seymour, I do not find such particularly probative of "proper and timely" mailing. See id. at 23. Importantly, on this point, Mrs. Sorrentino offers no proof--she did not mail the return or see Mr. Sorrentino prepare the return for mailing or take the return to the post office. Mr. Sorrentino could not recall the specific date he mailed the return, but stated he mailed it to the IRS, postage affixed, sometime during the first five days of March 1998. He did not use certified or registered mail; nor did he see any postal worker stamp a postmark on the envelope. Mr. Sorrentino further stated that in September 1998, over six months after mailing his return, he contacted the IRS to inquire on the status of the refund. When informed the IRS had no record of receiving the return, he faxed the IRS a copy of the return which was stamped "Received 10-2-98, IRS, Austin Texas." Under any view of

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> (2) Certified mail.—The Secretary [of the Treasury] is authorized to provide by regulations the extent to which the provisions of paragraph (1) of this subsection with respect to prima facie evidence of delivery and the postmark date shall apply to certified mail.

If the common-law mailbox rule survived enactment of § 7502, this new paragraph is problematic in two ways. First, why did Congress bother to enact a provision enabling the Secretary to issue a certified-mail regulation? Under I.R.C. § 7805(a) the Secretary has general authority to "prescribe all needful rules and regulations for the enforcement of [the I.R.C.]." This authority is frequently and forcefully exercised. An interpretative regulation under § 7805 could have set forth how the common-law mailbox rule applies to certified mail. I recognize that under current law an explicitly authorized regulation

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Judge Baldock's analysis of the matter invokes the "'well-established principle of statutory construction that the common law ought not to be deemed to be repealed, unless the language of the statute be clear and specific for this purpose.'" Op. at 13-14 (quoting Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co.Ÿ?YKlŸGlKlmyyxDylKz

judgment stage and erects an unreasonable barrier to the mailbox rule's implementation.

"Under the common law mailbox rule, proper and timely mailing of a document raises a rebuttable presumption that it is received by the addressee." Anderson v. United States, 966 F.2d 487, 491 (9th Cir. 1992) (citing Rosenthal v. Walker, 111 U.S. 185, 193-94 (1884)). According to Judge Baldock, the Sorrentinos' "self-serving testimony, without corroborating evidence, is insufficient to raise a presumption the IRS [timely] received Taxpayers' 1994 tax return." Op. at 17. But any testimony by a party to a suit is self-serving, yet it is clearly admissible to support his or her case in a motion for summary

in which the parties are presently involved"). The I.R.S. might very me(lIT(Gat the factual presumption crGated by the Sorrentinos' evidence by successfully attacking the