

17-50816

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

CHRISTOPHER HAYNES, *et al.*,

Plaintiffs-Appellants,

—v.—

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION
EP-16-CV-112-KC

BRIEF OF AMICUS CURIAE
AMERICAN COLLEGE OF TAX COUNSEL
IN SUPPORT OF APPELLANTS AND REVERSAL

PETER J. CONNORS
Counsel of Record
STEPHEN C. LESSARD
ORRICK, HERRINGTON
& SUTCLIFFE LLP
51 West 52nd Street
New York, New York 10019
Telephone: (212) 506-5000
Facsimile: (212) 506 5151
pconnors@orrick.com
slessard@orrick.com

JONATHAN B. FORMAN
ALFRED P. MURRAH PROFESSOR
UNIVERSITY OF OKLAHOMA
COLLEGE OF LAW
300 Timberdell Road
Norman, Oklahoma 73019
Telephone: (405) 325-4699
Facsimile: (405) 325-0389
jforman@ou.edu

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	12
I. The U.S. Government has promoted electronic filing of tax returns over paper filing.	12
II. There is greater complexity to electronic filing.	15
III. Taxpayers do not always have an effective method to personally ensure that they are in compliance with electronic filing requirements.....	16
IV. <i>Boyle</i> 's bright line rule should not apply to the electronic filing of a tax return.....	19
V. The <i>Beard</i> test should apply to all tax returns without regard to the method of transmittal.	24
VI. A taxpayer should not be <i>per se</i> responsible for failure of an accountant to verify IRS acceptance of an electronically filed return.	27
CONCLUSION	28

TABLE OF AUTHORITIES

Cases

Badaracco v. Comm’r, 464 U.S. 386 (1984).....24

Beard v. Comm’r, 793 F.2d 139 (6th Cir. 1986)11

Beard v. Comm’r, 82 T.C. 766 (1984)..... 11, 24, 25, 27, 28

Green v. Comm’r, 322 F. App’x 412 (5th Cir. 2009) (unpublished).....25

United States v. Boyle, 469 U.S. 241 (1985) . 2, 3, 4, 8, 9, 10, 11, 19, 20, 22, 23, 26, 28, 29

United States v. Davis, 603 F.3d 303 (5th Cir. 2010).....24

Zellerbach Paper Co. v. Helvering, 293 U.S. 172 (1934).....24

Statutes

26 U.S.C. § 6011(e)7

26 U.S.C. § 6011(e)(3).....13

26 U.S.C. § 6011(f).....7

26 U.S.C. § 6651(a)(1)..... 6, 26

26 U.S.C. § 7502..... 22, 26

26 U.S.C. § 7502(f)(2)8

Pub. L. No. 105-206, § 2001, 112 Stat. 685, 723 (1998)..... 7, 13

Regulations

26 C.F.R. § 301.6011-7.....13

26 C.F.R. § 301.6651-1(a)6

26 C.F.R. § 301.6651-1(c)(1)..... 7, 19

Other Authorities

Andrew Velarde, *News Analysis: Does the Rise of E-Filing Mean It’s Time to Reexamine Boyle?* 147 TAX NOTES 25 (2015)23

Bryan C. Skarlatos & Christopher M. Ferguson, *Penalties: Reconsidering the “Reliance on Professional” Defense to Delinquency Penalties in the Age of E-Filing*, 14 J. TAX PRAC. & PROC. 9 (2012)23

H&R Block, *Tax Info Center Newsroom, IRS Deadlines and Extensions: Three Things to Know Before the Tax Deadline* (Mar. 15, 2017), <https://www.hrblock.com/tax-center/newsroom/irs/deadlines-and-extensions/three-things-to-know-before-the-tax-deadline/>15

Internal Revenue Manual § 3.30.123.12.2(2) (Jan. 1, 2017).....25

Internal Revenue Service, *Current Year Transcript Availability*, <https://www.irs.gov/individuals/transcript-availability> (last visited Nov. 18, 2017).....17

Internal Revenue Service, *Electronic Tax Administration Advisory Committee, 2016 Annual Report to Congress* (June 2016) 17, 18, 20, 25

Internal Revenue Service, *Electronic Tax Administration Advisory Committee, 2017 Annual Report to Congress* (June 2017) 8, 12, 13, 16, 17

Internal Revenue Service, *Fact Sheet: IRS E-File: A History, FS-2011-10* (June 2011) 7, 9, 12, 13

Internal Revenue Service, *Form 8879, IRS e-file Signature Authorization* (2017)18

Internal Revenue Service, *Form 8948, Preparer Explanation for Not Filing Electronically* (Rev. Sept. 2012)..... 14, 21

Internal Revenue Service, *Frequently Asked Questions: E-file Requirements for Specified Tax Return Preparers (sometimes*

referred to as the e-file mandate), <https://www.irs.gov/e-file-providers/frequently-asked-questions-e-file-requirements-for-specified-tax-return-preparers-sometimes-referred-to-as-the-e-file-mandate> 14, 21

Internal Revenue Service, *Most Tax Return Preparers Must Use IRS e-file*, <https://www.irs.gov/e-file-providers/most-tax-return-preparers-must-use-irs-e-file> 10, 15, 20

Internal Revenue Service, *Pub. 1345, Handbook for Authorized IRS e-file Providers of Individual Income Tax Returns* (Apr. 2014).....25

Internal Revenue Service, *Seven Reasons Taxpayers Should E-file Their Taxes in 2017*, <https://www.irs.gov/newsroom/seven-reasons-taxpayers-should-efile-their-taxes-in-2017>14

Internal Revenue Service, *Tax Help Available for Those Who Still Need to File for 2016*, <https://www.irs.gov/newsroom/tax-help-available-for-those-who-still-need-to-file-for-2016>15

Internal Revenue Service, *Welcome to Get Transcript*, <https://www.irs.gov/individuals/get-transcript>17

Notice 2011-26, 2011-17 I.R.B. 720 7, 8, 13

Rev. Proc. 2007-40, 2007-1 C.B. 1488..... 4, 10, 15, 20

**BRIEF OF
AMERICAN COLLEGE OF TAX COUNSEL
AS *AMICUS CURIAE*
IN SUPPORT OF APPELLANTS**

American College of Tax Counsel (the “College”) respectfully submits this brief as *amicus curiae* in support of Appellants Christopher and Priscilla Haynes.

STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE

The College is a nonprofit professional association of tax lawyers in private practice, in law school teaching positions, and in government, who are recognized for their excellence in tax practice and for their substantial contributions and commitment to the profession. The purposes of the College are:

- To foster and recognize the excellence of its members and to elevate standards in the practice of the profession of tax law;
- To stimulate development of skills and knowledge through participation in continuing legal education programs and seminars;
- To provide additional mechanisms for input by tax professionals in development of tax laws and policy; and
- To facilitate scholarly discussion and examination of tax policy issues.

The College is composed of approximately 700 Fellows recognized for their outstanding reputations and contributions to the field of tax law, and is governed by a Board of Regents consisting of one Regent from each federal judicial circuit, two

Regents at large, the Officers of the College, and the last retiring President of the College.

This *amicus* brief is submitted on behalf of the College's Board of Regents and does not necessarily reflect the views of all members of the College, including those who are government employees.

An effective tax system based on voluntary compliance requires uniform, predictable and comprehensible rules that taxpayers can follow; however, it is sometimes necessary to avoid the broad mechanical application of bright line rules in order to not subject taxpayers to unnecessarily harsh results. The College submits this *amicus* brief because it is concerned that the lower court's application of the "bright line" rule in *United States v. Boyle*, 469 U.S. 241 (1985), to preclude reliance on a professional tax preparer to timely transmit a return is not consistent with the applicable "ordinary business care and prudence" standard. Here, the district court granted the U.S. Government's motion for summary judgment and entered an order dismissing the Appellants' suit for the refund of the amount of penalty that was assessed against them for the late filing of their 2010 income tax return, holding that *Boyle* applied both to paper filed returns and electronically filed returns. ROA.698. Proper application of the "ordinary business care and prudence" standard should preclude extension of the *Boyle* bright line rule to electronically filed returns and, instead, allow a facts and circumstances analysis in order to determine whether a

taxpayer can show reasonable cause for penalty abatement. Because of the unique and technical nature of electronic filing, such an analysis may result in a rule that is different from the rule expressed in *Boyle*, which involved the “ordinary business care and prudence” that must be exercised with respect to the transmittal of a paper tax return. Such an analysis has not been sufficiently conducted with respect to the electronic submission of this tax return to the Internal Revenue Service (the “IRS”).

Appropriately applied, *Boyle* has a specialized role to play in promoting an efficient tax system. Mechanically and broadly applied, however, it treats similarly situated taxpayers who have exercised the same “ordinary business care and prudence” differently based on the method that they use to transmit their income tax return to the IRS.

The College’s Board of Regents has authorized the undersigned counsel to file this *amicus* brief in support of Appellants on behalf of the College. All parties have consented to the filing of an *amicus* brief by the College. No party’s counsel authored this brief in whole or in part, and no party or party’s counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The question posed by this case is simple: Should identical tax returns be treated differently based on the method of transmitting the tax return to the IRS? This Court must decide whether a taxpayer is effectively precluded from arguing that he or she has reasonable cause to rely on his or her professional tax return preparer where (i) the preparer is an Authorized IRS e-file Provider¹ presumptively required to electronically transmit the income tax returns they prepare (a complicated procedure strongly encouraged, if not mandated, by the Internal Revenue Code), (ii) the tax return is transmitted to the IRS on or before the applicable filing deadline, (iii) the Authorized IRS e-file Provider informs the taxpayer that his or her return was electronically filed, (iv) the taxpayer has no readily available means of personally confirming the transmittal to and receipt by the IRS of the tax return, and (v) the tax return is rejected when electronically filed but the same tax return would have been accepted by the IRS if transmitted in paper form. Under these circumstances, a taxpayer should not be precluded by the bright line rule in *Boyle* from showing that he or she met the criteria of exercising “ordinary business care and prudence” and, therefore, should have “reasonable cause” to rely upon the assistance provided by the professional tax return preparer.

¹ An “Authorized IRS e-file Provider” is defined as a participant approved by the IRS to participate in the IRS e-file program. Rev. Proc. 2007-40, 2007-1 C.B. 1488.

On April 18, 2011, Appellants' Authorized IRS e-file Provider electronically transmitted, and the IRS received, Appellants' request for a six-month extension of time to file their 2010 income tax return (because October 15, 2011 fell on a Saturday, with the extension Appellants had until October 17, 2011, to file their return). ROA.198. On October 17, 2011, Appellants' Authorized IRS e-file Provider transmitted their 2010 income tax return to the IRS using the Lacerte computer software program. ROA.569. Appellants' Authorized IRS e-file Provider informed them that their 2010 income tax return was electronically filed with the IRS on October 17, 2011. ROA.394, 396. However, on October 18, 2011, the IRS rejected Appellants' electronically filed return because of Error Code 0242 ("Schedule C-EZ – Employer ID Number (SEQ 0060) cannot equal Primary SSN . . . or Secondary SSN . . . of Form 1040"). ROA.198, 201. Notice of the IRS rejection of Appellants' income tax return was not received by Appellants or their Authorized IRS e-file Provider. ROA.569. As late as January 14, 2014, the 2010 e-file Activity Report produced by the Lacerte computer software program indicated that Appellants' income tax return had been received, validated, and transmitted to the IRS on October 17, 2011, and "sent to the IRS" was the current status of the return. ROA.563. Appellants received a letter from the IRS dated August 20, 2012, informing them that their 2010 income tax return was overdue. ROA.645. This was the first communication from the IRS Appellants received that indicated that there

might be a problem with the filing of their 2010 tax return. On October 30, 2012, the Appellants mailed a paper return with the same information contained in the previously transmitted electronic return, and that paper return was accepted by the IRS as filed. ROA.675.

On April 5, 2016, Appellants filed a complaint seeking a refund of the delinquency penalty paid to Appellee for their late-filed 2010 income tax return. ROA.6. On October 27, 2016, Appellee filed a motion for summary judgment. ROA.238. On November 14, 2016, Appellants filed their own cross-motion for summary judgment. ROA.383. On June 15, 2017, the district court issued an order granting Appellee's motion, denying Appellant's motion, and holding that *Boyle* sets a bright line rule that e-filing a tax return is a non-delegable duty and, therefore, Appellants' actions cannot constitute reasonable cause. ROA.688.

The Internal Revenue Code of 1986, as amended (the "Internal Revenue Code"), imposes a penalty for failure to timely file a tax return. 26 U.S.C. § 6651(a)(1). The penalty is equal to 5% of the net amount of tax due on the return for each month the return is delinquent, up to a maximum of 25%. *Id.* A taxpayer seeking to avoid the failure to file penalty must establish the existence of reasonable cause and that the failure to file was not due to willful neglect. *Id.* ("unless it is shown that such failure is due to reasonable cause and not due to willful neglect"); 26 C.F.R. § 301.6651-1(a) ("unless the failure to file the return within the

prescribed time is shown to the satisfaction of the district director or the director of the service center to be due to reasonable cause and not to willful neglect”); *see also* 26 C.F.R. § 301.6651-1(c)(1) (“If the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time, then the delay is due to a reasonable cause.”).

Since the first electronic filing pilot program in 1986, the U.S. Government has progressively promoted the filing of tax returns by electronic transmission over paper submissions. The U.S. Government has determined that it and taxpayers receive benefits from the electronic transmissions that would not be received with paper submissions, and, therefore, the U.S. Government has adopted policies that actively promote, and sometimes require, electronic filing of tax returns. *See, e.g.*, Pub. L. No. 105-206, § 2001, 112 Stat. 685, 723 (1998) (adding *inter alia* 26 U.S.C. § 6011(f)); Internal Revenue Service, *Fact Sheet: IRS E-File: A History, FS-2011-10* (June 2011). The electronic filing of tax returns has been incorporated into the Internal Revenue Code and is generally required for a growing number of taxpayers. *See, e.g.*, 26 U.S.C. § 6011(e); Notice 2011-26, 2011-17 I.R.B. 720. Reflecting the growing complexity of the income tax laws, a significant number of taxpayers seek the assistance of professional tax return preparers, many of whom are presumptively required to file returns electronically. *See* Internal Revenue Service, *Electronic Tax*

Administration Advisory Committee, 2017 Annual Report to Congress 41 (June 2017); Notice 2011-26, 2011-17 I.R.B. 720.

The electronic filing of a tax return is not a simple, ministerial task like the transmittal of a paper return to the IRS by a specified due date. Rather, electronic filing requires the use of specialized computer software programs, Authorized IRS e-file Providers and, sometimes, the assistance of a professional tax preparer, such as a certified public accountant or an attorney. Additionally, individual taxpayers do not have the means to personally transmit electronic returns to the IRS, as they do with paper returns by depositing them with the U.S. Postal Service or a private delivery service designated by the IRS. *See* 26 U.S.C. § 7502(f)(2). Instead, taxpayers must rely on third-party Authorized IRS e-file Providers to transmit their tax returns to the IRS. Similarly, there is not a readily available method for a taxpayer to personally verify that his or her tax return was received by the IRS, as a taxpayer could do if he or she requested delivery confirmation from the U.S. Postal Service or a designated private delivery service. Instead, a taxpayer who e-files his or her return must generally rely on an IRS-authorized third-party transmission provider to confirm delivery.

The *Boyle* case was decided in 1985, prior to the first electronic filing pilot program for individual taxpayers. At that time, individuals routinely filed their tax returns by mailing paper originals to the IRS using the U.S. Postal Service. IRS, *FS-*

2011-10, supra. For that paper-filing world of mailing tax returns, *Boyle* adopted the bright line rule that a taxpayer's reliance on a tax professional to transmit his or her paper tax return could never constitute "reasonable cause" for late filing. In effect, taxpayers could not delegate to their professional tax preparers the responsibility for transmitting paper tax returns to the IRS. This makes sense where a taxpayer has the ability to personally transmit a paper tax return to the IRS and to personally request and receive delivery confirmation.

Because of the distinct differences between transmitting a paper tax return and transmitting a return electronically, the bright line rule expressed in *Boyle* should apply only in the context of paper returns and should not be extended and applied in the context of electronic filing. The Supreme Court limited its holding in *Boyle* to "the effect of a taxpayer's reliance on an agent employed by the taxpayer" when the taxpayer is personally capable of meeting the required standard of ordinary business care and prudence, which in *Boyle* involved the timely transmittal of a paper tax return, an act that requires no special training or effort and can be accomplished personally by a taxpayer. *Boyle*, 469 U.S. at 248 n.6. On the other hand, electronic filing of a tax return is an act that requires special training and tools, interposes a third-party Authorized IRS e-file Provider between the taxpayer and the IRS, and provides no readily available mechanism for the taxpayer to personally verify receipt by the IRS in a timely manner. Only an Authorized IRS e-file Provider may transmit

electronic tax return data to the IRS. *See* Rev. Proc. 2007-40, 2007-1 C.B. 1488; Internal Revenue Service, *Most Tax Return Preparers Must Use IRS e-file*, <https://www.irs.gov/e-file-providers/most-tax-return-preparers-must-use-irs-e-file> (last visited Nov. 1, 2017). The IRS e-file system requires the taxpayer to transmit the tax return through a third-party Authorized IRS e-file Provider. This is true even for a taxpayer who self-prepares a return using a commercially available computer software program such as TurboTax, H&R Block, or TaxSlayer where the software provider transmits via an Authorized IRS e-file Provider. Thus, the only way a taxpayer can choose not to delegate to a third-party the submission of the taxpayer's tax return, is for the taxpayer to submit a paper return by mail or authorized private delivery service. Moreover, while taxpayers can request and personally receive delivery confirmation for a paper return using certified mail or a private delivery service, in the context of electronic filing that confirmation can only come through the Authorized IRS e-file Provider (assuming, as apparently was not the case here, that the Authorized IRS e-file Provider's confirmation process functions properly).

The circumstances of electronic filing require criteria for the “ordinary business care and prudence” standard, which are different from the criteria associated with the mailing of a paper return that were considered by the Supreme Court in *Boyle*.

Where an e-filing taxpayer reasonably relies on an IRS-authorized third-party transmission, the submission should be treated as valid so long as it meets other basic indicia of validity. The U.S. Tax Court’s opinion in *Beard v. Commissioner* enumerated several factors to determine the presumptive validity of a taxpayer submission as a tax return. *See* 82 T.C. 766, 777 (1984), *aff’d per curiam*, 793 F.2d 139 (6th Cir. 1986) (commonly referred to as the “*Beard* test”). The *Beard* test provides that when a taxpayer mails a paper income tax return to the IRS, the return is treated as valid as long as: (i) the information on the return is sufficient for the IRS to calculate the tax liability; (ii) the filed document purports to be a tax return; (iii) the return makes an honest and reasonable attempt to comply with the tax laws; and (iv) the taxpayer executes the return under penalties of perjury. *Id.* An electronically transmitted return should be treated the same way. Applying *Beard* to electronic returns allows a taxpayer to reasonably rely on a third-party Authorized IRS e-file Provider to transmit his or her return without opening the door to the kind of taxpayer negligence that concerned the Supreme Court in *Boyle* because the *Beard* test still requires a taxpayer’s diligence in monitoring the content of his or her return.

Where (i) a taxpayer exercises the appropriate “ordinary business care and prudence” for the electronic filing of his or her individual income tax return, (ii) the taxpayer relies on his or her Authorized IRS e-file Provider to electronically transmit the return, (iii) the return satisfies the requirements of *Beard* to be treated as a valid

tax return, and (iv) the return is, in fact, electronically transmitted to the IRS in a timely manner, the taxpayer should not be precluded by a bright line test from arguing that he or she exercised “ordinary business care and prudence” and should be found to have “reasonable cause,” precluding application of a late filing penalty.

ARGUMENT

I. The U.S. Government has promoted electronic filing of tax returns over paper filing.

In the 1980s, efficient tax collection was becoming more difficult because of the complex, time-consuming and error-prone process of converting paper returns and information documents into a form that could be processed by IRS computers. IRS, *FS-2011-10*, *supra*. Even the mere storage of paper tax and information returns was becoming costly for the IRS as more and more storage space was needed for the burgeoning reams of required paper forms and documents. *Id.* Additionally, paper filing exposes the IRS and state revenue agencies to a greater risk of fraud because electronic filing provides several data elements beyond the information in the return, that can help tax authorities stop fraud (e.g., origination data that is not present in a paper filed return). IRS, *ETAAC, 2017 Annual Report*, *supra*, at 21.

In 1998, Congress noted that “paperless filing should be the preferred and most convenient means of filing Federal tax and information returns” and that “it should be the goal of the Internal Revenue Service to have at least 80 percent of all such returns filed electronically by the year 2007.” Pub. L. No. 105-206, § 2001(a),

112 Stat. 685, 723 (1998). More recently, electronic filing of tax returns has increasingly become presumptively mandatory in certain circumstances. In 2006, electronic filing became mandatory for businesses and exempt organizations with assets of \$50 million or more. IRS, *FS-2011-10*, *supra*. In 2007, the threshold for businesses and exempt organizations was lowered to assets of \$10 million or more. *Id.* In 2009, Congress amended the Internal Revenue Code to require tax preparers that file more than 10 individual tax returns to file electronically, subject to narrowly enumerated exceptions. 26 U.S.C. § 6011(e)(3). As of January 1, 2012, the IRS requires that any tax return preparer that files 11 or more federal income tax returns to file electronically. 26 C.F.R. § 301.6011-7; Notice 2011-26, 2011-17 I.R.B. 720.

The efforts of the IRS to promote electronic filing have been successful. In 2010, the IRS stopped mailing paper Form 1040 packages, and by 2011, approximately three out of every four individual income tax returns were filed electronically. IRS, *FS-2011-10*, *supra*. As of 2016, the IRS received over 135 million Form 1040 individual income tax returns annually, of which about 120 million were received and processed by electronic filing. IRS, *ETAAC, 2017 Annual Report*, *supra*, at 45. The number of income tax returns that are electronically filed has grown despite the fact that taxpayers often have to pay for an e-file service.

Although an individual income taxpayer may choose to waive the requirement that his or her professional tax preparer file the return electronically and instead mail

in a paper return, taxpayers are discouraged by the IRS from filing paper returns. Preparers are required to document each client's choice to file in paper format and keep a taxpayer-signed copy of the required statement on file. Internal Revenue Service, *Frequently Asked Questions: E-file Requirements for Specified Tax Return Preparers (sometimes referred to as the e-file mandate)*, FAQ 16 <https://www.irs.gov/e-file-providers/frequently-asked-questions-e-file-requirements-for-specified-tax-return-preparers-sometimes-referred-to-as-the-e-file-mandate> (last visited Nov. 1, 2017); *see also* Internal Revenue Service, *Form 8948, Preparer Explanation for Not Filing Electronically* (Rev. Sept. 2012). The statement requires the taxpayer to acknowledge that he or she “understand[s] that electronic filing may provide a number of benefits to taxpayers, including an acknowledgment that the IRS received the returns, a reduced chance of errors in processing the returns, and faster refunds.” IRS, *FAQ, supra*. The statement also requires the taxpayer to declare “I choose to file my return on paper forms. I will mail or otherwise submit my paper return to the IRS myself. My preparer will not file or otherwise mail or submit my paper return to the IRS.” *Id.* Additionally, IRS information releases for taxpayers focus on electronic filing. *See, e.g.*, Internal Revenue Service, *Seven Reasons Taxpayers Should E-file Their Taxes in 2017*, <https://www.irs.gov/newsroom/seven-reasons-taxpayers-should-efile-their-taxes-in-2017> (last visited Nov. 1, 2017); Internal Revenue Service, *Tax Help Available*

for Those Who Still Need to File for 2016, <https://www.irs.gov/newsroom/tax-help-available-for-those-who-still-need-to-file-for-2016> (last visited Nov. 1, 2017).

II. There is greater complexity to electronic filing.

The electronic filing of a tax return is not a simple, ministerial task like transmitting a paper tax return to the IRS by a specified date. The filing of an electronic tax return requires specialized computer software and often a certain level of competence that many taxpayers do not possess. Only an Authorized IRS e-file Provider may transmit electronic tax return data to the IRS. *See* Rev. Proc. 2007-40, 2007-1 C.B. 1488; IRS, *Most Tax Return Preparers*, *supra*.

Most individual tax returns can be prepared and filed by taxpayers using commercial do-it-yourself (“DIY”) tax return software programs such as TurboTax or H&R Block. However, this DIY software is sometimes unable to handle complex tax returns. ROA.569. H&R Block advises its customers with complex returns containing self-employed income, investments, rental property, or multiple states to “get help from a tax professional.” H&R Block, *Tax Info Center Newsroom, IRS Deadlines and Extensions: Three Things to Know Before the Tax Deadline* (Mar. 15, 2017), <https://www.hrblock.com/tax-center/newsroom/irs/deadlines-and-extensions/three-things-to-know-before-the-tax-deadline/> (last visited Nov. 18, 2017).

Electronic filing is not necessarily a simple task that every taxpayer should be able to accomplish. For example, in a report to Congress, the Electronic Tax Administration Advisory Committee (“ETAAC”) examined the relatively simple requirement for a taxpayer to provide his or her prior year adjusted gross income (“AGI”) or his or her self-selected personal identification number (“PIN”) in order to sign an electronic tax return prior to transmitting the return to the IRS. As of 2017, it is estimated that 40-45% of all individual tax returns are prepared and filed using DIY tax return software. IRS, *ETAAC, 2017 Annual Report, supra*, at 19. DIY taxpayers have evidenced significant difficulty in verifying their signature using their prior year AGI or PIN. *Id.* In each of the 2015 and 2016 tax return filing seasons, the IRS reported that approximately 3.5-4.0 million e-file rejects were attributable to errors by the primary taxpayer in providing his or her prior year AGI or PIN. *Id.* In the 2017 Filing Season, ETAAC estimated that almost six million e-filed returns would be rejected for that reason. *Id.* ETAAC reported to Congress that “many taxpayers do not have access to, do not know, or cannot find their prior year AGI or PIN” and “[e]ven if they do find their returns, some taxpayers are confused as to which AGI to use.” *Id.* at 20.

III. Taxpayers do not always have an effective method to personally ensure that they are in compliance with electronic filing requirements.

Almost 60% of individual taxpayers currently engage a paid preparer to prepare their federal income tax return for them. *Id.* at 41. In turn, more than 90% of

these returns were e-filed in 2016. *Id.* As of 2016, ETAAC reported to Congress that “taxpayers don’t have an effective way to personally monitor their IRS account activity, such as return filings, payments posting, or IRS requests for more information related to compliance activity or other opportunities from which they may benefit.” Internal Revenue Service, *Electronic Tax Administration Advisory Committee, 2016 Annual Report to Congress* 33 (June 2016). Even the current IRS system today (which permits a taxpayer to access his or her tax transcript) imposes limitations that prevent some taxpayers from personally ensuring in a timely manner that their electronically filed tax return has been accepted by the IRS. The method a taxpayer uses to file his or her tax return and whether the taxpayer has a balance due affects the current year transcript availability. Internal Revenue Service, *Welcome to Get Transcript*, <https://www.irs.gov/individuals/get-transcript> (last visited Nov. 18, 2017). For example, if a taxpayer files his or her tax return electronically, the IRS’s return processing takes from two to four weeks before a transcript becomes available. Internal Revenue Service, *Current Year Transcript Availability*, <https://www.irs.gov/individuals/transcript-availability> (last visited Nov. 18, 2017). This response time by the IRS is clearly problematic for a taxpayer electronically transmitting a return close to the filing due date. The only way a taxpayer can determine the status of an electronically filed return with relative immediacy is to ask the Authorized IRS e-file Provider that transmitted the return. *See* Internal

Revenue Service, *Form 8879, IRS e-file Signature Authorization* (2017) (showing a taxpayer's "consent to allow [his or her] intermediate service provider, transmitter, or electronic return originator (ERO) . . . to receive from the IRS (a) an acknowledgement of receipt or reason for rejection of the transmission"). In the case of Appellants, their Authorized IRS e-file Provider informed them that their return was filed on October 17, 2011. ROA.394, 396. And, due to a breakdown in the Authorized IRS e-file Provider's system, it appears from the record that the Provider was not timely informed that the return, although received by the IRS, was rejected for filing due to an identification number matching problem.

Taxpayers generally assume that they are in good standing with their tax obligations until the IRS sends them a notice stating otherwise. IRS, *ETAAC, 2016 Annual Report, supra*, at 32. Access to IRS customer assistance is limited, given the lack of personnel that is available to respond to taxpayer inquiries. *Id.* at 28. For example, during the 2015 filing season, the IRS answered just 37.4% of the phone calls that it received. *Id.* Additionally, as discussed above, the current methods provided by the IRS for a taxpayer to monitor his or her tax account have limitations that reduce the effectiveness of such methods. The result is that a taxpayer effectively must rely on the Authorized IRS e-file Provider that transmitted the return in order to determine the status of an electronically filed return in a timely manner.

IV. *Boyle*'s bright line rule should not apply to the electronic filing of a tax return.

Boyle was decided in 1985, prior to the first electronic filing pilot program. The taxpayer in *Boyle* relied on his tax attorney to file his estate tax return. *Boyle*, 469 U.S. at 242. The attorney filed on the wrong date due to a clerical oversight in omitting the filing date from the attorney's master calendar. *Id.* at 243. In addressing the taxpayer's argument that the late filing should be excused due to reasonable cause, the Supreme Court noted that, while not defined in the Internal Revenue Code, a Treasury Regulation provided that to demonstrate reasonable cause, a taxpayer filing a late return must show that he or she "exercised 'ordinary business care and prudence'" and was nevertheless "unable to file the return within the prescribed time." *Id.* at 246 (quoting an earlier version of 26 C.F.R. § 301.6651-1(c)(1)).

The Court in *Boyle* focused its reasonable cause analysis on the reliance of the taxpayer on his attorney. In essence, the Court's analysis of the "ordinary business care and prudence" standard turned on whether a taxpayer should be competent to determine the issue without reliance on the attorney. In that regard, the Court reasoned that the question of whether a taxpayer should have competent knowledge of a substantive area of law is quite different from whether a taxpayer should know the filing date for submitting a return. As the Court noted, "[w]hen an accountant or attorney advises a taxpayer on a matter of tax law . . . it is reasonable for the taxpayer to rely on that advice" because "[m]ost taxpayers are not competent to discern error

in the substantive advice of an accountant or attorney.” *Id.* at 251. On the other hand, with respect to the transmittal of a paper tax return, “[i]t requires no special training or effort to ascertain a deadline and make sure that it is met” and, therefore, “[t]he failure to make a timely filing of a tax return is not excused by the taxpayer’s reliance on an agent, and such reliance is not ‘reasonable cause’ for a late filing.” *Id.* at 252. In other words, the Court held that a taxpayer cannot delegate the timely transmittal of a paper tax return and assert that he or she has exercised ordinary business care and prudence.

While determining the due date of a tax return requires no special training, electronically filing a tax return usually does. The filing of an electronic tax return also requires specialized computer software and only a third-party Authorized IRS e-file Provider may transmit electronic tax return data to the IRS. *See* Rev. Proc. 2007-40, 2007-1 C.B. 1488; IRS, *Most Tax Return Preparers*, *supra*. Even if a taxpayer does not use a professional tax preparer to electronically file a tax return, the taxpayer must use specialized computer software (such as TurboTax) that utilizes a third-party Authorized IRS e-file Provider to transmit the data the taxpayer enters into the computer software program to the IRS. Additionally, taxpayers do not currently have an effective way to personally receive confirmation from the IRS of transmittal and receipt of a tax return, as they do, for example, with certified mail. *See* IRS, *ETAAC, 2016 Annual Report*, *supra*, at 33. Taxpayers must communicate

with the Authorized IRS e-file Provider who transmitted their electronic tax return in order to confirm transmission and receipt of their tax return in a timely manner.

Thus, electronically filing a tax return imposes circumstances beyond the taxpayer's control that prevent the taxpayer from exercising the same ordinary business care and prudence that would be exercised with the filing of a paper tax return. First, if a taxpayer uses a professional tax preparer, the IRS will presumptively require the return to be filed electronically. Although a taxpayer can opt out of e-filing, the IRS requires the Authorized IRS e-file Provider to inform the taxpayer of the benefits of e-filing while no mention is made of the disparity of treatment a taxpayer may face by choosing one submission method over another (as the situation of Appellants demonstrates). IRS, *FAQ*, *supra*, at 16; *see also* IRS, *Form 8948*, *supra*. Second, there is no way for a taxpayer to personally transmit an electronic return directly to the IRS: the taxpayer must rely on a non-governmental, third-party Authorized IRS e-file Provider to transmit the return data. This is not similar to a paper return that the taxpayer can personally submit to the IRS by personally putting the tax return into the U.S. mail or utilizing an authorized private delivery service. The IRS e-file system requires the taxpayer to delegate the submission of his or her tax return to a third-party Authorized IRS e-file Provider.

Finally, the ability of a taxpayer to personally verify in a timely manner that a return was electronically filed is limited, as the tax return filing information that a

taxpayer can access is not always immediately available to the taxpayer and only a third-party Authorized IRS e-file Provider can provide such information to the taxpayer in a timely manner. With a paper tax return, taxpayers can rely on section 7502 of the Internal Revenue Code to personally determine whether a timely mailing will be treated as timely filing. *See* 26 U.S.C. § 7502. In this case, Appellants were informed by their Authorized IRS e-file Provider that their tax return was timely filed and did not learn that their tax return had not been accepted by the IRS until they received a letter from the IRS dated August 20, 2012. ROA.645. These circumstances, which are different from the circumstances of submitting a paper tax return to the IRS, should be taken into account in a “reasonable cause” analysis for purposes of determining the criteria necessary to demonstrate that the taxpayer exercised “ordinary business care and prudence.” Here, the professional tax return preparer was a certified public accountant with significant experience in the electronic filing of tax returns. ROA.672-674. The electronic filing of a tax return requires special tools and the actions of an Authorized IRS e-file Provider in order to transmit the return to the IRS. Few taxpayers are certified as Authorized IRS e-file Providers. In today’s world, reliance on a third-party Authorized IRS e-file Provider is required to electronically file a tax return.

The Court in *Boyle* appreciated the potential for “the wide range of issues that might arise in future cases under the statute and regulations” governing the filing of

tax returns and explicitly stated that its holding was “necessarily . . . limited” to the effect of a taxpayer’s reliance on an agent when the taxpayer is personally capable of meeting the required standard of ordinary business care and prudence, which in *Boyle* was the mailing of a paper tax return by the due date. *Boyle*, 469 U.S. at 248 n.6. Electronic filing was certainly not contemplated by the Supreme Court when it decided *Boyle*. See Bryan C. Skarlatos & Christopher M. Ferguson, *Penalties: Reconsidering the “Reliance on Professional” Defense to Delinquency Penalties in the Age of E-Filing*, 14 J. TAX PRAC. & PROC. 9 (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2282665. It is appropriate to recognize that the bright line rule in *Boyle* was formulated under the circumstances of the filing of paper returns. “The ‘bright line’ rule established by *Boyle* concerning the obligation to timely file a tax return appears to be both outdated and unfair under the IRS’s current e-file regime.” *Id.* at 68; see also Andrew Velarde, *News Analysis: Does the Rise of E-Filing Mean It’s Time to Reexamine Boyle?*, 147 TAX NOTES 25 (2015), <https://www.taxnotes.com/tax-notes-today/tax-system-administration/news-analysis-does-rise-e-filing-mean-its-time-reexamine-boyle/2015/04/07/fs92>. In short, the Court should distinguish *Boyle* for the new world of e-filing and limit its bright line rule precluding reliance on a tax professional to the context of transmitting paper returns.

V. The *Beard* test should apply to all tax returns without regard to the method of transmittal.

Where a taxpayer exercises ordinary business care and prudence in relying on a third-party Authorized IRS e-file Provider to file his or her return, that return should be treated as valid so long as it meets the *Beard* criteria. When a taxpayer mails a *paper* income tax return to the IRS, the return is treated as valid as long as: (1) the information on the return is sufficient for the IRS to calculate the tax liability; (2) the filed document purports to be a tax return; (3) the return makes an honest and reasonable attempt to comply with the tax laws; and (4) the taxpayer executes the return under penalties of perjury. *Beard*, 82 T.C. at 777; *see also Zellerbach Paper Co. v. Helvering*, 293 U.S. 172, 180 (1934) (noting that, for purposes of the commencement of the statute of limitations, “[p]erfect accuracy or completeness is not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such, and evinces an honest and genuine endeavor to satisfy the law. This is so even though at the time of filing the omissions or inaccuracies are such as to make amendment necessary.” [citations omitted]); *Badaracco v. Comm’r*, 464 U.S. 386, 397 (1984) (citing *Zellerbach* for support that a fraudulent return is not a nullity for statute of limitations purposes where the original returns similarly purported to be returns, were sworn to as such, and appeared on their faces to constitute endeavors to satisfy the law); *United States v. Davis*, 603 F.3d 303, 306-307 (5th Cir. 2010)

(citing the *Beard* test); *Green v. Comm'r*, 322 F. App'x 412, 415 (5th Cir. 2009) (unpublished) (citing the *Beard* test with approval).

A paper-filing taxpayer thus satisfies his or her filing obligation when his or her timely transmitted return establishes the diligence and good faith required by *Beard*. Under the IRS's view, however, an electronic taxpayer's good faith and diligence are irrelevant if a third-party Authorized IRS e-file Provider makes a technical error in transmission. The IRS rejects e-filed returns for a variety of non-substantive reasons well beyond the reasons outlined in *Beard*. See IRS, *ETAAC, 2016 Annual Report, supra*, at 30 n.71. If the IRS rejects the return, the return is not considered filed. Internal Revenue Service, *Internal Revenue Manual* § 3.30.123.12.2(2) (Jan. 1, 2017); Internal Revenue Service, *Pub. 1345, Handbook for Authorized IRS e-file Providers of Individual Income Tax Returns* 8 (Apr. 2014).

In this case, if Appellants had mailed their 2010 individual income tax return to the IRS on October 17, 2011, it would have been accepted by the IRS as a timely filed income tax return. In fact, on October 30, 2012, Appellants did mail a paper return that contained the exact same information that was in the previously transmitted electronic return, and that paper return was accepted by the IRS as filed. ROA.675. In this case, however, the IRS rejected Appellants' e-filed return on October 18, 2011, because of a technical defect in the return, even though the return itself would certainly have met the *Beard* test. ROA.198-201. Accordingly, had the

taxpayers instead mailed their 2010 income tax return to the IRS on October 17, 2011, it surely would have been accepted by the IRS as timely filed, and no late filing penalty would have been imposed.² This fact is indicative of how reliance on *Boyle* produces a harsh result that is unnecessary: A paper return would have been accepted, but an electronically filed version of the return with the exact same information would not.

In short, Appellants' certified public accountant electronically transmitted the Appellant's income tax return to the IRS on October 17, 2011. ROA.674. Even though the IRS acknowledges that it received that tax return electronically on the relevant due date, the IRS takes the position that no return was electronically "filed" with it. ROA.198–199. Through some error, either on the part of the IRS or the Authorized IRS e-file Provider's Lacerte software program, it appears that Appellants did not receive notice of the rejection of their tax return by the IRS until August 2012 and were not given the opportunity to correct the minor defect; the IRS simply asserted that no return was "filed" on October 17, 2011, and assessed the late filing penalty that is the subject of this appeal.

For purposes of the late filing penalty under section 6651(a)(1) of the Internal Revenue Code, it seems unjust to treat the conveyance and receipt of identical tax

² Under the applicable "mailbox rule," mailing their return on October 17, 2011, would have been timely. 26 U.S.C. § 7502.

return information differently based solely on the means of submission to the IRS. Accordingly, this Court could hold that for purposes of the late filing penalty, where a taxpayer who relies on an Authorized IRS e-file Provider to electronically transmit his or her income tax return and that return satisfies the *Beard* test, the taxpayer should be treated as having filed the tax return when it is electronically transmitted to the IRS, even if that e-filed return is “rejected” by the IRS. The *Beard* test implicitly requires the IRS to have actually received a tax return that allows the IRS to calculate the tax liability (and that satisfies the other conditions noted above), so there is little risk that applying the *Beard* test to electronically transmitted returns will open the floodgates for taxpayer abuse. Even if this Court concludes that timely transmitting an electronic return that is rejected by the IRS is insufficient to constitute a timely filed return, it could decide that the timely transmission of a proper return should be taken into account in the calculus as to whether a taxpayer exercised ordinary business care and prudence and, therefore, has reasonable cause for late filing his or her return.

VI. A taxpayer should not be *per se* responsible for failure of an accountant to verify IRS acceptance of an electronically filed return.

Perhaps, Appellants’ accountant should have followed up on his electronic transmission of Appellants’ return to be certain that the return had been accepted by the IRS, and if not, why not. But the accountant’s failure to follow up should not *per se* be attributed to Appellants whose last knowledge was that their return had been

e-filed by the accountant. ROA.127, 134, 394, 396. Here Appellants have followed the U.S. Government's encouragement to electronically file their income tax return as a result of engaging a professional tax preparer, and that professional tax preparer advised them that their income tax return had been filed on October 17, 2011. *Id.* Nothing more should be expected of Appellants. If Appellants exercised the appropriate "ordinary business care and prudence" for the electronic filing of a tax return, then Appellants should be found to have had "reasonable cause" for the late "filing" of their individual income tax return, and no late filing penalty should be imposed.

CONCLUSION

Because of the distinct differences between filing a paper tax return and doing so electronically, the facts and circumstances of an electronic return filing should be analyzed, as the Supreme Court did in the case of the paper return filing in *Boyle*, to determine the criteria necessary for a taxpayer to demonstrate that he or she exercised "ordinary business care and prudence" and, therefore, should have reasonable cause to rely upon an Authorized IRS e-file Provider to transmit the taxpayer's return to the IRS. Where (i) a taxpayer exercises the appropriate "ordinary business care and prudence" for the electronic filing of his or her individual income tax return, (ii) the taxpayer relies on his or her Authorized IRS e-file Provider to electronically transmit the return, (iii) the return satisfies the requirements of *Beard*

to be treated as a valid tax return, and (iv) the return is, in fact, electronically transmitted to the IRS in a timely manner, the taxpayer should not be precluded by a bright line test from arguing that he or she exercised “ordinary business care and prudence” and should be found to have “reasonable cause,” precluding application of a late filing penalty. If the record is insufficient for the Court to come to those conclusions, then the matter should be remanded for the district court to make a determination as to whether the facts and circumstances show that the taxpayer had reasonable cause for the late filing.³

Dated: November 27, 2017

ORRICK, HERRINGTON &
SUTCLIFFE LLP

By: /s/ Peter J. Connors

Peter J. Connors
pconnors@orrick.com

51 West 52nd Street
New York, NY 10019-6142
Telephone: +1 212 506 5000
Facsimile: +1 212 506 5151

Attorney for Amicus Curiae

³ On remand, we expect the district court would conduct fact finding with respect to all of the relevant circumstances regarding whether Appellants acted in accordance with the ordinary business care and prudence standard required by *Boyle* and whether actions by Appellants after e-filing impact application of the ordinary business care and prudence standard. As part of that fact finding, the district court likely would evaluate the specific facts with respect to Appellants’ tax return (including the communications between Appellants and their tax return preparer, the Appellant’s prior compliance history and dealings with the IRS, and whether Appellants owed taxes or expected a refund).

CERTIFICATE OF SERVICE

This is to certify that the foregoing BRIEF OF AMERICAN COLLEGE OF TAX COUNSEL AS AMICUS CURIAE IN SUPPORT OF APPELLANTS AND REVERSAL was filed this 27th day of November, 2017 by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Peter J. Connors
PETER J. CONNORS

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

**Certificate of Compliance with Type-Volume Limit,
Typeface Requirements, and Type-Style Requirements**

1. This document complies with the type-volume limit of FED. R. APP. P. 29(a)(5) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f):

- this document contains 6,497 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), **or**
- this brief uses a monospaced typeface and contains [*state the number of*] lines of text.

2. This document complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because:

- this document has been prepared in a proportionally spaced typeface using Microsoft Word 2013 with 14-point Times New Roman, **or**
- this document has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and type of type style*].

By: /s/ Peter J. Connors

Peter J. Connors

Attorney for Amicus Curiae

Dated: November 27, 2017