AMERICAN COLLEGE OF TAX COUNSEL

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August 8, 2019

Michael J. Desmond, Esq.
Chief Counsel, Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Dear Mr. Desmond:

On behalf of the officers and Board of Regents of the American College of Tax Counsel (the "College"),[1] we write to express our concerns with respect to the extension of the bright-line rule announced in *United States v Boyle*[2] (the "Bright-Line Test") to taxpayers who submit their returns electronically ("e-filers"). In *Boyle*, the Supreme Court adopted the Bright-Line Test (*i.e.*, a taxpayer's reliance on a tax professional to transmit his or her paper tax return could never constitute "reasonable cause" for the abatement of penalties for a late filing). Under *Boyle,* and its progeny discussed further below, taxpayers are unable to delegate to their professional tax preparers the responsibility for transmitting tax returns to the IRS.

The College is concerned that the application of the *Boyle* "bright line" to prohibit taxpayers from relying on a professional tax preparer to electronically transmit a return contradicts the "ordinary business care and prudence" standard for the reasonable cause abatement of late filing penalties under the Treasury Regulations, and the Congressional mandate that the IRS promote paperless filing. We propose that the Internal Revenue Service (the "IRS") reject the application of the Bright Line Test to electronically filed returns, and we suggest an approach to addressing this issue for your consideration, which has three components that are described below.

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[1] Several Officers and current and former Regents of the College made significant contributions to the preparation of this letter, including Maxine Aaronson, Alice G. Abreu, Frank Agostino, Larry A. Campagna, Caroline D. Ciraolo, Peter J. Connors, and Jonathan B. Forman. This letter 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.

[2] 469 U.S. 241 (1985).

Background

Based on statistics released by the IRS for the 2018 filing season, over 135 million returns were e-filed out of over 154 million total returns received by the IRS.[3] The percentage of e-filed returns is expected to increase in the 2019 filing season and will continue to increase with the encouragement of the IRS and the tax preparer community. This is an important issue for the administration of the tax system.

Application of the Bright-Line Test to e-filed returns precludes a taxpayer from establishing 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 Provider[4] required to electronically transmit the income tax returns he or she prepares;
(ii) the tax return is transmitted to the IRS by the filing deadline;
(iii) the Authorized IRS e-file Provider informs the taxpayer that his or her return was electronically transmitted;
(iv) the taxpayer has no readily available means of confirming the transmittal to and receipt by the IRS of the tax return; and
(v) the tax return is rejected after it is electronically transmitted.

Because of the Congressional mandate that the IRS promote paperless filing, the College believes that it is inappropriate for the IRS to penalize taxpayers by not allowing them to demonstrate "ordinary business care and prudence" in authorizing an authorized third party to file returns on their behalf.

The issue was recently addressed in *Haynes v. United States,*[5] where the taxpayer's social security number was erroneously entered on the line designated for an employer identification number, and the IRS rejected the return. The taxpayers did not receive a rejection notice from the IRS, the preparer, or the Authorized IRS e-file Provider until 10 months later when they received a notice of nonpayment from the IRS by regular mail. To remedy the deficiency, the taxpayers filed a paper return. Once it was received, the IRS assessed a late filing penalty, which the taxpayers paid and filed a request for abatement of the penalty for reasonable cause. The IRS denied their request, and the taxpayers sued seeking a refund in federal district court.[6] The district court granted the government summary judgment, concluding that as a matter of law

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[3] 2018 Filing Season Statistics for Week Ending November 23, 2018, Internal Revenue Service, available at: https://www.irs.gov/newsroom/filing-season-statistics-for-week-ending-november-23-2018. The most recent 2019 statistics are available at: https://www.irs.gov/newsroom/filing-season-statistics-for-week-ending-may-10-2019.

[4] 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.

[5] 760 Fed. Appx. 324, (5th Cir. 2019) (No. 17-50816). See also, Brief of Amicus Curiae American College of Tax Counsel in Support of Appellants and Reversal, *Haynes v. United States*, available at https://www.actconline.org/wp-content/uploads/2018/02/ACTC_Amicus_Brief_Haynes.pdf.

[6] See, e.g., 760 Fed. Appx. at 325, 326.

under *Boyle* the taxpayers could not rely on their accountant to satisfy a return filing obligation. The 5th Circuit Court of Appeals remanded the case to the district court for the resolution of a factual dispute before it could even get to the legal issue:

> Whether it was reasonable for [the preparer] to assume, based on the IRS's silence, that it had accepted the Hayneses' return or whether ordinary business care and prudence would demand that he personally contact the IRS to ensure acceptance is a genuine question of material fact for the jury to decide. Because Dunbar is the Hayneses' agent, if a jury determines that his actions meet the reasonable-cause standard, it must find the same to be true for the Hayneses—barring any determination of independent negligence by them. After all, principals are not only bound by their agents' failures, as in *Boyle*, but also by their diligence.[7]

Citing both *Boyle* and *Haynes*, the District Court for the Middle District of Tennessee, Nashville Division, recently dismissed the plaintiffs' claim for a refund of a late filing penalty in *Intress v. United States.*[8] *Intress* involved the following facts: On April 15, 2015, the tax preparer completed Form 4868 to extend the time to file the taxpayers' 2014 tax return and queued up the document through e-file software. The tax preparer failed to hit "send" (mistakenly believing she had), and the Form 4868 was not electronically received by the IRS on the April 15, 2015 deadline. The filing mistake went undiscovered until October 2015. While acknowledging that "Plaintiffs are correct in their assertion that IRS tax filing procedure has changed significantly since *Boyle* was decided in 1985," the Court rejected the argument that the taxpayer cannot employ the specialized software used by the tax return preparer. The Court stated:

> Although true that the use of e-file software necessarily involves an agent or intermediary, the obligation to use e-file software currently arises only if the taxpayer enlists a "specified tax return preparer" to file his return. The decision to use such a service *is* within the taxpayer's control. The taxpayer is amply capable of either using a tax preparer who is still permitted to paper-file or preparing his return himself.

In conclusion, the Court held that "(i)t appears that at least until e-filing is universally mandatory, or paper filing becomes sufficiently unwieldy, *Boyle* will continue to apply. Because *Boyle* applies, it is a straightforward conclusion that Plaintiffs' reliance on their agent was not reasonable cause."

Recommendations of the College

We suggest three recommendations for your consideration, each of which is necessary to address the issues that arise as a result of electronic return filings, as follows:

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[7] 760 Fed App 324, at p. 329 (Under 5th Cir. R. 47.5, the Court determined that the opinion should not be published and is not precedent, except for the limited circumstances set forth in 5th Cir. R. 47.5.4).
[8] 12 AFTR 2d 2019-XXXX 8/2/2019, Dkt. No. 3:18-cv-00851 (M.D. Tenn. 2019).

1. The IRS should simply not apply the Bright-Line Test to e-filed returns.
2. The IRS Should Require the ERO to Send Confirmations of the Acceptance of e-filed Returns and e-File Rejection Notices to the Taxpayer Within a Reasonable Time of Receipt.
3. The IRS should implement a Systemic First-Time Penalty Abatement of the penalty.

Recommendation No. 1 – *The Bright-Line Test Should Not Apply to E-Filed Returns.*

The Internal Revenue Code of 1986, as amended (the "Code"), imposes a penalty for failure to timely file a tax return.[9] The penalty is equal to 5% of the net tax due on the return for each month the return is delinquent, up to a maximum of 25%.[10] 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.[11]

In 1985, the Supreme Court adopted the *Boyle* Bright-Line Test (*i.e.*, a taxpayer's reliance on a tax professional to transmit his or her paper tax return could never constitute "reasonable cause" for late filing). Stated simply, the Bright-Line Test means that taxpayers could not delegate to their professional tax preparers the responsibility for transmitting paper tax returns to the IRS.

Boyle was decided before the first electronic filing pilot program for individual taxpayers. When the Court decided *Boyle*, taxpayers routinely filed their tax returns by mailing paper originals to the IRS using the U.S. Postal Service. For that paper-filing world of mailing tax returns, the Bright-Line Test makes sense (*i.e.*, where a taxpayer can transmit a paper tax return to the IRS and request and receive delivery confirmation, the taxpayer can control compliance with his or her non-delegable duty to file). Because of the distinct differences between transmitting a paper tax return and transmitting a return electronically, the Bright-Line Test should apply only to paper-filed returns and should not be extended and applied in cases of electronic filing.

First, since 1986, the U.S. Government has progressively promoted filing tax returns by electronic transmission over paper submissions. The U.S. Government has determined that it and taxpayers receive benefits from the electronic transmissions not received with paper submissions, and, therefore, the U.S. Government has adopted policies that actively promote, and

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[9] 26 U.S.C. § 6651(a)(1).
[10] *Id.*
[11] *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 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.").

sometimes require, electronic filing of tax returns.[12] Congress determined that "paperless filing should be the preferred and most convenient means of filing Federal tax and information returns,"[13] and authorized the Secretary to promote such filing through "mass communications and other means," including "the payment of appropriate incentives for electronically filed returns."[14] The electronic filing of tax returns has been incorporated into the Internal Revenue Code and is now required for many taxpayers.[15]

Second, the complexity of the income tax laws results in many taxpayers seeking the assistance of professional tax return preparers, many of whom must file returns electronically. In addition, most taxpayers do not have the means to 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.[16] Instead, taxpayers must rely on third-party Authorized IRS e-file Providers to transmit their tax returns to the IRS. Authorized IRS e-file Providers include Electronic Return Originators (EROs), intermediate service providers, and transmitters, all of whom are certified by the IRS.[17]

Third, 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 the submission of the taxpayer's tax return to a third party is for the taxpayer to submit a paper return by mail or authorized private delivery service. While taxpayers can request and receive delivery confirmation for a paper return using certified mail or a private delivery service, when electronic filing is used, that confirmation can only come through the Authorized IRS e-file Provider (assuming that the Authorized IRS e-file Provider's confirmation process functions properly).

Fourth, 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 and Authorized IRS e-file Providers.

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[12] *See, e.g.*, Pub. L. No. 105-206, § 2001, 112 Stat. 685, 723 (1998) (adding 26 U.S.C. § 6011(f)); Internal Revenue Service, Fact Sheet: IRS E-File: A History, FS-2011- 10 (June 2011).
[13] Pub. Law No. 105-206, § 2001.
[14] *See* 26 U.S.C. § 6011(f).
[15] *See, e.g.*, 26 U.S.C. § 6011(e); Notice 2011-26, 2011-17 I.R.B. 720.
[16] *See* 26 U.S.C. § 7502(f)(2).
[17] *See* IRS Publication 1345, Handbook for Authorized IRS e-file Providers of Individual Income Tax Returns 10 (Feb. 2019), https://www.irs.gov/pub/irs-pdf/p1345.pdf ("PUB 1345"). An ERO, a transmitter, and a processor are all authorized IRS e-file Providers. Authorized e-filing Providers may share taxpayer information related to e-filing with other authorized e-file providers without a taxpayer's consent. Treas. Reg. § 301.7216-2(d)(1). An ERO originates the electronic submission of returns to the IRS. A transmitter transmits a return directly to the IRS. An intermediate service provider receives information from an ERO or a taxpayer who uses commercial tax preparation software, processes that information, then sends it to a transmitter or back to the taxpayer or ERO.

Electronic filing of a tax return requires special training and tools and interposes a third-party Authorized IRS e-file Provider between the taxpayer and the IRS.[18]

Fifth, there is currently no readily available method for a taxpayer to verify that his or her tax return or other filing (such as the application for extension of time to file in *Intress)*, 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.[19]

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 can personally meet the required standard of ordinary business care and prudence. In *Boyle*, that 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.[20]

Against this background, the College believes that the circumstances of electronic filing suggest different criteria for "ordinary business care and prudence" from the criteria associated with the mailing of a paper return 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 and the return should be considered timely filing for penalty purposes so long as it meets other basic indicia of validity.

> ***Recommendation No. 2*** – *The IRS Should Require the ERO to Send Confirmations of the Acceptance of e-filed Returns and e-file Rejection Notices to the Taxpayer Within a Reasonable Time of Receipt.*

A few simple changes would make the e-filing system work even better than it does today and would also promote voluntary compliance and the public's confidence in the e-filing system.

First, the IRS should also require EROs to provide proof of the IRS's acceptance of an e-filed return or other filing, such as an application for an extension of time to file a return, to both the taxpayer and the preparer. Taxpayers should be able to rely on such proof provided by the ERO to defend against the late filing penalty.

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[18] *See* Rev. Proc. 2007-40, 2007-1 C.B. 1488.

[19] The current e-filing process is sorely lacking in transparency when viewed from the taxpayer's perspective. Once the Form 8879 is sent to the preparer (or a self-prepared return is sent to an ERO) the taxpayer is in the dark about what has or has not happened to the return. While the IRS website provides a "Check My Refund" process for those individual taxpayers who are expecting a refund, that option is not available for entity returns or for those individual taxpayers who are not expecting a refund of tax. One solution might be to expand the "Check My Refund" function on IRS.gov into a "Check My Filing" function that covered all income tax returns for both individuals and entities, regardless of whether a refund was expected.

[20] *Boyle*, 469 U.S. at 248, n.6.

Second, because the time to correct returns rejected by the IRS without incurring a penalty is short, the ERO should be required to send rejection notices to the taxpayer electronically within a reasonable time of receipt by the ERO, unless the reason for the rejection can be promptly rectified and the ERO can successfully file the return electronically.[21] The rejection notice should specifically advise the ERO and ultimately the taxpayer of the reason or problem that causes the return to be rejected, and what the taxpayer needs to do to rectify the rejected filing. The notice should be sent to the taxpayer's email address if they have one, and for those taxpayers without an email address, the preparer should be required to promptly contact them by telephone, email, or regular mail. This change would allow the taxpayer to insist on the timely correction of a rejected tax return.

Recommendation No. 3 – *There Should Be Systematic First-Time Penalty Abatement.*

An effective tax system based on voluntary compliance requires uniform, predictable, and comprehensible rules. The IRS provides first-time penalty abatement ("FTA") to taxpayers regarding the failure to file, failure to pay, and failure to deposit penalties.[22] For the relief to be available, it must be the first time the taxpayer is subjected to one or more of the covered penalties on a single return, and the taxpayer must have filed all required returns and must have paid all taxes due.[23]

Considering the above, the College maintains that the penalties associated with e-filing failures by an Authorized IRS file Provider should be abated based on reasonable cause where the taxpayer reasonably relied on the return preparer. However, many taxpayers will simply pay a penalty imposed without asserting their rights in this regard. Moreover, taxpayers must request an abatement either based on reasonable cause or via First Time Abatement. This creates a burden on the taxpayer and promotes an uneven application of the abatement rules as not every taxpayer will be aware of the possibility of an abatement. To promote fairness as well as the continued use of e-filing, the IRS should automate first-time abatements.[24] Such a change can be implemented by suppressing the penalty using existing software.[25] The IRS has estimated that

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[21] Similar rules might apply to VITA preparers and sites (not paid professionals). VITA site coordinators are supposed to follow up on rejections within 24 hours: "If the IRS rejects the electronic portion of the taxpayer's individual income tax return for processing and the reason for the rejection cannot be rectified, the site coordinator or designee must take reasonable steps to inform the taxpayer of the rejection within 24 hours." https://www.irs.gov/pub/irs-pdf/p3189.pdf, at p. 93. Professionally designed preparer software presently gives return preparers the option to automatically notify taxpayers when the return is accepted, but not before the acceptance. *See, e.g.*, Drake Software, 10847: Form 9325 After IRS Acceptance - Notifying the Taxpayer, http://kb.drakesoftware.com/Site/Browse/Form-9325-After-IRS-Acceptance-Notifying-the-Taxpayer.

[22] Included in the First Time Abate program are penalties under IRC §§ 6651(a)(1), 6698(a)(1), 6699(a)(1), 6651(a)(2), IRC 6651(a)(3), and IRC 6656. IRM 20.1.1.3.3.2.1 (Nov. 21, 2017).

[23] IRM 20.1.1.3.3.2.1 (Nov. 21, 2017).

[24] Nat'l Taxpayer Advocate 2019 Objectives Report to Congress 120 (2019), https://taxpayeradvocate.irs.gov/Media/Default/Documents/2019-JRC/JRC19_Volume1.pdf (citing IRS Office of Servicewide Penalties, *Decision Document Regarding Whether to Continue to Apply First Time Abatement (FTA) Before Reasonable Cause; and Whether FTA Should Be Applied Systemically* 1 (Jan. 30, 2018)).

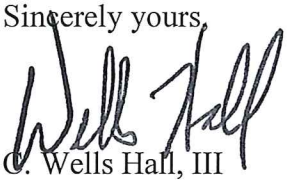
[25] *See* Office of Chief Counsel Memorandum, POSTN-117216-17, at 2 (Sept. 28, 2017).

automation would increase the number of first-time abatements almost five times at a moderate administrative cost.[26]

Neither the IRS nor compliant e-filers should be required to devote resources to penalties that automation can evaluate systemically. At the same time, there must be a procedure whereby taxpayers can have the IRS reconsider prior First Time Abatements on the grounds of reasonable cause, thereby allowing taxpayers to preserve their right to a First Time Abatement in later years.

We hope that the information in this letter is helpful in addressing the issues we have identified. Please feel free to contact the undersigned if you have questions or comments.

Sincerely yours,



C. Wells Hall, III
President

cc: Charles P. Rettig, Commissioner, Internal Revenue Service
Bridget T. Roberts, Acting National Taxpayer Advocate

[26] *See id.*