Tax Counsel Group Sends Letter to IRS Chief Counsel

ACTC urges IRS to re-evaluate the application of U.S. v. Boyle to the modern era of e-filing

On August 8, 2019, the Board of Regents of the American College of Tax Counsel (the "College") sent a letter to the IRS Chief Counsel, urging that the "Bright-Line Test" holding the taxpayer responsible for verifying tax filings announced in *United States v. Boyle*, 469 U.S. 241 (1985) should not be extended to taxpayers who submit their returns electronically. The College believes that applying *Boyle* to e-filers is unfair to taxpayers, who have no way of verifying whether their filings have been received under the current system.

What is the Boyle "Bright-Line Test"?

The Boyle case concerned the assessment of a late-filing penalty against a taxpayer who used a professional tax preparer and relied on that professional to file his return. The penalty for failure to file a timely tax return is 5% of the net tax due for each month the return is delinquent, up to 25% of the tax due. Treasury Regulations allow taxpayers to appeal for abatement of a late-filing penalty for "reasonable cause" absent willful neglect, such as where the taxpayer used "ordinary business care and prudence." However, the Supreme Court in *Boyle* adopted a Bright-Line Test that a taxpayer's reliance on a tax professional to transmit the return could never constitute "reasonable cause."

According to the College, this rule may have made sense back in the day when tax returns and other filings were paper documents submitted to the IRS through the mail. In those days, the taxpayer had ways to verify that filings were received – such as by mailing documents via certified mail, return receipt requested – so it may have seemed reasonable to place this ultimate responsibility on the taxpayer. In Boyle's day, the taxpayer could personally meet the required standard of ordinary business care and prudence by submitting a paper return, so reliance on the preparer was seen as an insufficient excuse to avoid a late-filing penalty. This same logic does not apply to the era of e-filing, the College contends.

As the U.S. District Court for the Middle District of Tennessee recently noted in *Intress v. United States*, 12 AFTR 2d 2019-XXXX 8/2/2019, Dkt. No. 3:18-cv-00851 (M.D. Tenn. 2019), "IRS tax filing procedure has changed significantly since Boyle was decided in 1985." Nowadays, the government promotes electronic filing of tax returns and other filings, and in some cases, e-filing is actually the required method of transmission. Additionally, many professional tax preparers must file electronically. Even taxpayers who prepare their own returns using tax preparation software do not e-file their return directly to the IRS. Rather, their return goes to a third-party authorized IRS e-file provider, known as an Electronic Return Originator, or ERO. The ERO is the party which actually transmits the return to the IRS, and the taxpayer has no way to verify that his or her filing has been received by the IRS.

Although the *Intress* case pointed out how times have changed since *Boyle*, the court there held that it is still within the taxpayer's discretion to use a preparer who must e-file or use a preparer who can paper file or prepare the return personally and paper file it. The *Intress* court opined that Boyle should apply until e-filing is universally mandatory or paper filing becomes "sufficiently unwieldy." Until then, the court held, it does not constitute reasonable cause for abatement for a taxpayer to rely on an agent to file the return. A similar issue recently arose in the U.S. Fifth Circuit Court of Appeals as well, in the case of *Haynes v. United States* (760 Fed App 324).

The day of universal e-filing may not be far off, it seems. Of the 154 million returns filed for the 2018 tax year, 135 million were filed electronically.

In its letter to the Chief Counsel, the College recommends three changes: 1) don't apply *Boyle* to e-filed returns; 2) require EROs to send confirmation of acceptance and rejection notices to the taxpayer within a reasonable time; and 3) implement a systemic first-time penalty abatement. These changes, the College believes, will allow the IRS to better assess a taxpayer's exercise of ordinary business care and prudence in a world of e-filed returns.