You Can't Rely on Your Tax Preparer to Avoid Failure to File Penalties

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In *Lee v. United States*,[1] the Federal Court of Appeals for the Eleventh Circuit held that a taxpayer could not avoid late filing and late payment penalties because of the failure of his CPA to electronically file his returns timely. The court ruling is technically correct, but a re-work of e-filing responsibilities may be appropriate to timely inform taxpayers whether their agents electronically filed the returns.

The taxpayer relied on his CPA to prepare and file his individual income tax returns for taxable years 2014, 2015, and 2016. The taxpayer also made estimated payments for each of the years. The returns were due April 15th of each subsequent year with six-month extensions. Because the taxpayer's CPA filed more than ten returns per year, the CPA was a "specified tax return preparer" and was required to file all individual returns for his clients electronically.[2] The CPA had the taxpayer sign Form 8879 authorizing the CPA to file the taxpayer's tax returns. In December 2018, long after the due dates of the 2014, 2015, and 2016 returns, an IRS agent asked the taxpayer why his returns were not filed. The taxpayer contacted the CPA who admitted that his tax return software could not prepare the taxpayer's complex returns. The taxpayer then obtained paper copies and promptly filed the returns.

A taxpayer is subject to late filing and late payment penalties unless the lateness is due to reasonable cause *and* not due to willful neglect.[3] The IRS assessed the penalties, which the taxpayer paid. The taxpayer then sued for refund in federal district court, arguing that CPA's failure to file electronically was reasonable cause for the taxpayer's failure to file timely. The district court denied the refund. The taxpayer appealed to the court of appeals, which affirmed the denial, relying on a 1985 Supreme Court case, *United States v. Boyle*,[4] which established a "bright line" test for a taxpayer's filing and payment responsibilities:

"It requires no special training or effort to ascertain a deadline and make sure that it is met. The 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…."

The taxpayer in *Lee* argued that *Boyle* was decided in the pre-electronic filing era and does not apply to electronic filings. By signing Form 8879 authorizing the CPA to sign and file the returns, the taxpayer no longer had control of the filing. The court rejected the argument because Form 8879 is only an authorization form. It did not prohibit the taxpayer from exercising ordinary business care and prudence to ensure that his agent, the CPA, timely filed the returns. The taxpayer could have prepared and filed the returns himself, taken the prepared returns from the CPA and filed them himself, or confirmed that the CPA had the requisite software to file the returns.[5]

The *Lee* case is the first federal court of appeals case to apply *Boyle's* bright-line test to electronic filing responsibilities. The court's description of ordinary business care and prudence is somewhat disquieting. Preparing a tax return, oneself, may be daunting; asking the CPA if he filed provides no assurance of candor; and obtaining a paper copy from the CPA and then mailing it, at a minimum, defeats the purpose of e-filing efficiency.

The IRS rule on electronic filing might suggest a possible way for taxpayers to confirm that their electronically filed their returns:

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"*At the request of the taxpayer*, the ERO [electronic return originator] must provide the Submission ID and the date the IRS accepted the electronic individual income tax return data. The ERO may use Form 9325, Acknowledgment and General Information for Taxpayers Who File Returns Electronically for this purpose. If requested, the ERO must also supply the electronic postmark if the Transmitter provided one for the return."[6]

Perhaps EROs should be required to send Form 9325 to every taxpayer for whom they file an electronic return. [7]

If you have questions or would like to discuss these issues further, please contact your Miller Canfield attorney or one of the authors of this alert.

[1] --F.4th--, 2023 WL 6979257 (11th Cir. Oct. 24, 2023).

[2] IRC §6011(e)(3).

[3] IRC §6651(a)(1), -(2).

[4] 469 U.S. 241, 252 (1985).

[5] The court's description of ordinary business care and prudence is inapplicable to any corporation, partnership, and other filer for which electronic filing is mandatory. IRC §6011(e).

[6] IRS Pub 1345, page 26 (emphasis added.).

[7]In *Lee*, the taxpayer's failure to pay the amounts of tax shown on the 2015 and 2016 income tax returns was caused by an inability to credit to those returns an overpayment of tax on the 2014 return. The 2014 return showing the overpayment was a claim for refund, but because it was filed late, the time to claim the refund had expired, IRC §6511 (b)(2), with the result that 2014 overpayment could not be credited to 2015 and 2016. The taxpayer argued for the first time in the court of appeals that disallowances of credits claimed on the 2015 and 2016 returns were not a basis to impose the failure to pay penalty. The taxpayer analogized the disallowance of the carryforward 2014 credits to a disallowance of general business credits, for which no failure to pay penalty is imposed. In its brief, the Government responded that a general business credit is an above-the-line credit, which decreases the amount of tax shown on the return and does not result in a failure to pay the tax shown on the return. IRC §6651(a)(2). The estimated tax credit carryforward is a below-the-line credit which does not decrease the amount of tax shown on the return. Its disallowance results in a failure to pay the amount of tax shown on the return. The court of appeals refused to consider the argument. The taxpayer waived the argument by not first presenting it in federal district court. The Government's argument on the merits appears correct.