

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOHN J. PETITO, CPA, PLLC	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 827055
Failure to E-file under Article 1 of the Tax Law for the	:	
Year 2012.	:	

Petitioner, John J. Petito, CPA, PLLC, filed a petition for redetermination of a deficiency or for refund of failure to e-file under article 1 of the Tax Law for the year 2012.

A joint hearing was held before Winifred M. Maloney, Administrative Law Judge, on September 20, 21 and 22, 2016 in New York City,¹ with all briefs to be submitted by October 5, 2017, which date began the six-month period for issuance of this determination. Petitioner appeared by John J. Petito. The Division of Taxation appeared by Amanda Hiller, Esq. (Robert J. Tompkins, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation improperly listed petitioner's tax type as corporation in the notice and demand for payment of tax due.

II. Whether reasonable cause exists to abate the failure to electronically file penalties

¹ The joint hearing also addressed the petition filed by petitioner in protest of notice and demands L-042258157 and L-042357329, dated December 8, 2014 and January 8, 2015, respectively, issued for tax year ended December 31, 2013. Notice L-042258157 asserted penalties for failure to electronically file (e-file) individual income tax returns and notice L-042357329 asserted penalties for failure to e-file corporation tax returns. The Division of Tax Appeals assigned DTA No. 827385 to that petition. A separate determination issued on the same date addresses the issues raised in that petition.

asserted by the notice and demand for payment of tax due.

FINDINGS OF FACT

1. Petitioner, John J. Petito, CPA, PLLC, prepares tax returns for individuals, businesses, estates, trusts, and nonprofits. It also provides accounting and bookkeeping services for various types of entities, and management services for “different businesses.”

2. Petitioner files a U.S. Return of Partnership Income, form 1065. The record includes redacted copies of page 1 of petitioner’s federal partnership returns for the years 2012 and 2013.² On page 1 of each of these returns, petitioner reported, among other things, a business address of North Woodmere, New York; a business start date of November 29, 2005; and schedules K-1 for two partners. John J. Petito, CPA, was the only partner identified during the hearing.

3. The Division of Taxation (Division) issued to petitioner a notice and demand for payment of tax due (Assessment ID L-040800216), dated March 3, 2014 (notice and demand), asserting a penalty of \$1,900.00 for the tax year ended December 31, 2012. A tax type of “corporation” was listed in the upper right corner of page 1 of the notice and demand. The computation section of the notice stated, in part, as follows:

“Our records indicate that you were subject to the e-file mandate for tax documents filed for the period ended 12/31/12 and have failed to e-file mandated tax documents.

Article 1 Section 29 of the New York State Tax Law provides a \$50 penalty per tax document for failing to e-file, unless you can establish reasonable cause.

Your penalty has been computed as shown:

Number of tax documents not e-filed	38
Per tax document	\$50.00”

² Redacted items on page 1 of each of these returns included all income, expenses and total assets reported, and the return preparation date.

The notice and demand included a list of 38 New York State Corporation Franchise tax return documents that were paper filed by petitioner. The list contained the legal name of each corporation and the type of form filed. Specifically, petitioner paper filed 19 six-month extension to file forms CT-5 or CT-5.4, and 19 New York S corporation franchise tax returns for the listed corporations.

4. In protest of the subject assessment, among other assessments,³ petitioner filed a request for conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS), dated March 6, 2015, that was received by BCMS on March 11, 2015. By a conciliation order dismissing request (CMS No. 265414) dated March 27, 2015, BCMS dismissed petitioner's request as late filed.

5. On June 26, 2015, petitioner timely filed a petition with the Division of Tax Appeals challenging the notice and demand.⁴ In its petition, petitioner asserted that it has an "IRS Administrative Exemption"; it is unable to get an "EFIN" necessary to e-file because John J. Petito is blocked out from trying to open an "e-services" account; and it is a PLLC partnership, not a corporation as claimed by New York State on the notice and demand.

6. The Division filed its answer, dated February 24, 2016, denying each and every material allegation of fact contained in the petition, and affirmatively stating the provisions of Tax Law § 29, explaining petitioner's obligation to e-file, and that, among other things, petitioner was subject to the e-file mandate of Tax Law § 29 (b) for tax documents filed for the period ended

³ Among the other assessments protested in petitioner's request for a conciliation conference were notice and demands L-042357329 and L-042258157, issued for tax year ended December 31, 2013

⁴ On August 7, 2015, a notice of intent to dismiss (NOI) was issued to petitioner because the relevant conciliation order was issued on March 27, 2015, but the petition was not filed until June 26, 2015, or 91 days later. By order, dated January 14, 2016, the undersigned administrative law judge found the petition was timely filed and the NOI was withdrawn.

December 31, 2012.

7. On June 1, 2015, the Division filed tax warrant E-017303949-W031-9 with the office of the Nassau County clerk, in connection with assessment L-040800216. The total amount due on the tax warrant was \$2,084.90, consisting of the \$1,900.00 from the assessment plus \$184.90 in interest. On September 8, 2015, tax compliance levy E-017303949-L033-3, in connection with the tax warrant, in the amount of \$2,129.06, was levied against petitioner's assets at JP Morgan Chase Bank, N.A. (JP Morgan). The levy in the amount of \$2,129.06 was paid by JP Morgan Cashier's Check dated September 30, 2015. On November 26, 2015, a satisfaction of judgment for warrant E-0173949-W031-9 was filed in the office of the Nassau County clerk.

8. An "Authorized IRS e-file Provider" (Provider) is a business or organization authorized by the Internal Revenue Service (IRS) to participate in IRS e-file. It may be a sole proprietorship, partnership, corporation or other entity. The firm submits an e-file application, meets the eligibility criteria, and must pass a suitability check before the IRS assigns an electronic filing identification number (EFIN). Applicants accepted for participation in IRS e-file are Providers. A Provider may be an electronic return originator (ERO), intermediate service provider, transmitter, software developer, or reporting agent. Providers may also be tax return preparers.

9. The IRS has a three-step process for becoming a Provider. Step one requires the creation an IRS e-services account, step two requires the submission of the application to become a Provider, and step three requires the passage of a suitability check conducted by the IRS.

10. Each principal or responsible official in a firm must sign up for an IRS e-services account that facilitates electronic interaction with the IRS. To apply for an e-services account, the individual must:

- a) provide his/her legal name, social security number, date of birth, phone number, e-mail address and home mailing address;
- b) provide his/her adjusted gross income from the current or prior tax year;
- c) create a username, a password and a PIN and provide an answer to a question to recover that username;
- d) make sure that every principal and responsible official in the firm signs up for e-services; and
- e) return to e-services to confirm registration within 28 days of receiving the confirmation code in the mail.

11. Once all principals have created their e-services accounts, a firm can begin the IRS e-file application by logging in to e-services and accessing the e-file application. As part of the application process, the firm selects its Provider Options, such as ERO; enters its identification information, as well as services provided to taxpayers; enters the name, home address, social security number, date of birth and citizenship status for each principal and responsible official; and enters the current professional information for principals and responsible officials if an attorney, certified public accountant, enrolled agent, officer of a publicly traded corporation, or a bonded bank official. Any principal or responsible official who is not an attorney, certified public accountant, enrolled agent, officer of a publicly traded corporation, or a bonded bank official must be fingerprinted. In addition, each principal and responsible official must answer several personal questions; sign the “terms of agreement” using the PIN selected at the time the individual created an e-services account; and declare under penalty of perjury that the personal information is true. The IRS provides a tracking number at the time the e-file application is

successfully submitted.⁵

12. The IRS conducts a suitability check on the applicant and on all principals and responsible officials listed on the e-file application. A suitability check may include: a criminal background check; a credit history check; a tax compliance check to ensure that all required returns are filed and paid, and to identify assessed fraud penalties; and a check for prior non-compliance with IRS e-file requirements. If a firm, principal or a responsible official fails the suitability check, the IRS notifies the applicant of denial to participate in IRS e-file, the date when the applicant may reapply and that a reapplication may be made sooner if the suitability issues are resolved. In most circumstances, the denied applicant, principal or responsible official may appeal the decision through administrative review. An applicant, principal or responsible official denied because a federal or state court enjoined them from filing returns or a federal or state legal action prohibits them from participating in IRS e-file may not appeal their denial. If the injunction or other legal action expires or is reversed, the denied applicant may reapply to participate in IRS e-file.

13. The record includes a copy of IRS Revenue Procedure, Rev. Proc. 2011-25 (2011), that applies to all specified tax return preparers, as defined in Internal Revenue Code (IRC) § 6011 (e) (3) (B) and 26 CFR 301.6011-7 (a) (3),⁶ who seek a waiver of the electronic filing

⁵ Any signed fingerprint cards, along with the tracking number provided after successful transmission of the application, are mailed to the IRS, EFU Acceptance, in Andover, Massachusetts.

⁶ A specified tax return preparer means, with respect to any calendar year, any tax return preparer within the meaning of IRC § 7701 (a) (36) and 26 CFR 301.7701-15, who prepares any individual income tax return unless such tax return preparer reasonably expects to file 10 or fewer individual income tax returns in the calendar year, and if a person who is a tax preparer is a member of a firm, that person is a specified tax return preparer unless the person's firm members in the aggregate reasonably expect to file 10 or fewer individual income tax returns in a calendar year. Solely for the 2011 calendar year, a tax return preparer was not considered a specified tax return preparer if the preparer reasonably expected, or if the preparer was a member of a firm, the firm's members in the aggregate reasonably expected, to file fewer than 100 individual income tax returns in that calendar year.

requirement in cases of undue hardship. This procedure provides guidance to specified tax return preparers regarding the time for filing and the manner (form and content) of requests for waiver of the electronic filing requirement due to undue hardship, under IRC § 6011 (e) (3) and 26 CFR 1.6011-7 and 26 CFR 301.6011-7. It also provides guidance regarding how to document a taxpayer's choice to file the taxpayer's individual income tax return⁷ in paper format when the return is prepared by the preparer but filed by the taxpayer. A review of Rev. Proc 2011-25 indicates that:

- a) the IRS "will ordinarily grant undue hardship waivers only in rare cases";
- b) an undue hardship waiver will not ordinarily be granted for more than one calendar year period;
- c) to request an undue hardship waiver the specified tax return preparer must complete Form 8944, Preparer e-file Hardship Waiver request (preparer e-filed hardship waiver request), and submit the completed form and any required documentation to the IRS;
- d) the request for an undue hardship waiver must be submitted between October 1 of the calendar year preceding the applicable calendar year and February 15 of the applicable calendar year; and
- e) the IRS will review and process an undue hardship waiver request in a timely manner and will send the specified tax return preparer written notice of any approval or denial of the undue hardship waiver request.

14. The record includes a copy of Internal Revenue Bulletin 2011-17, Notice 2011-26, that applies to tax return preparers who are required by law to electronically file certain income tax

⁷ IRC § 6011 (e) (3) (C) and 26 CFR 301.6011-7 (a) (2) define an individual income tax return as any return of individual income tax imposed by subtitle A on individuals, estates, and trusts.

returns for individuals, estates and trusts. This notice provides, in relevant part, the following administrative exemptions to the electronic filing requirement pursuant to IRC § 6011 (e) (3) and corresponding Treasury regulations:

A. Exempt preparers that include the following:

“1. Preparer Members of Certain Religious Groups. A tax return preparer who is a member of a recognized religious group that is conscientiously opposed to its members using electronic technology, including for the filing of income tax returns electronically, and that has existed continuously since December 31, 1950.

* * *

3. Certain Preparers Ineligible for IRS e-file. A tax return preparer who is currently ineligible for the IRS e-file program due to an IRS e-file sanction. To qualify for this exemption, the tax return preparer must have received a letter from the IRS enforcing the sanction and the sanction must be in effect for some or all of the calendar year in which the individual income tax return or returns are being filed. This exemption ends on the date the sanction period ends or the date the IRS accepts the tax return preparer into the IRS, whichever date occurs first. If, however, the tax return preparer has a pending application for the IRS e-file program filed with the IRS at the time the sanction period ends, the exemption will continue until the date the IRS renders a decision on the tax return preparer’s application.”

B. Exempt individual income tax returns due to the following preparer’s technology difficulties:

1. rejected e-filed returns;
2. forms or schedules not supported by the preparer’s software package; and
3. a tax return preparer or a specified tax return preparer who experiences a short-term inability to electronically file the return or returns due to some other verifiable and documented technological problem.

C. Exempt individual income tax returns due to IRS e-file limitations, as follows:

1. returns currently not accepted electronically; and

2. required documentation or attachments not accepted electronically.

This notice further provides that a tax return preparer or specified tax return preparer who qualifies for an exemption described in it does not have to request an exemption from the IRS or otherwise obtain the IRS's approval. The exemptions are automatic for those who meet the criteria provided in the notice. While there is no need to apply for an administrative exemption or to maintain any specific information, the notice states that the burden is on the tax return preparer or specified tax return preparer to show entitlement to an administrative exemption, and the preparer will be required to demonstrate the applicability of an administrative exemption or exemptions upon request by the IRS. The notice further states "that undue hardship waiver requests are unnecessary for purposes of claiming an administrative exemption and should not be submitted by or for an exempt specified tax return preparer, or for an exempt individual income tax return." In addition, the notice indicates that the IRS created Form 8948, Preparer Explanation for Not Filing Electronically, and includes, among other reasons listed thereon, the exemptions listed in sections A and B above.

15. By letter dated March 8, 2011, "Electronic Product & Services Support" notified petitioner and Mr. Petito that the application to participate in IRS e-file had been received. However, participation in IRS e-file was denied because IRS records showed a "balance due on form 1065 for tax years 2006, 2007, 2008 and 2009" that "may include tax and/or penalties." The letter advised that an installment agreement could be set up by calling IRS Customer Service, and that the denial affected all the EFINs with which the firm and Mr. Petito were associated. The letter further advised that the denial could be appealed; however, a detailed response needed to be received within 30 days from the date of the letter. In addition, the letter stated that if the IRS did not receive petitioner's appeal within that time frame, the letter would

be considered petitioner's notice that it was denied participation in IRS e-file. The letter further stated that petitioner could reapply to the program on or after January 17, 2013.

16. By letter dated April 1, 2011, petitioner was notified that its preparer e-file hardship waiver request form for calendar year 2011 had been approved by the IRS.⁸ This letter advised that the waiver was valid for calendar year 2011 only. It also advised that in order to obtain a hardship waiver for future calendar years, petitioner must submit a request for each year and show the existence of continuing hardship. The letter indicated that petitioner should enter the waiver number and approval letter date in box 2 of form 8948, and attach a completed form 8948 to each of the paper forms 1040, 1040A, 1040EZ and 1041 filed for its clients.

17. At the hearing, petitioner presented the testimony of John J. Petito. According to Mr. Petito, the IRS assessed penalties against petitioner for late filing its partnership returns for tax years 2006 through 2009. He testified that the balance due, referenced in the IRS letter dated March 8, 2011, consisted of an undisclosed amount penalties, plus interest. Mr. Petito further testified that petitioner could only afford to make payments in undisclosed amounts towards that balance due.

18. With respect to the IRS's issuance of the 2011 hardship waiver to petitioner, Mr. Petito, at the hearing, explained the circumstances surrounding the issuance of such hardship waiver. After learning in 2010 that the federal government was going to require all tax preparers to electronically file their clients' individual income tax returns, Mr. Petito instituted a federal lawsuit in the Second Circuit, Eastern District of New York, entitled *Petito et al. v Halpern et al.* (2:2010cv03497). Mr. Petito testified that to end his lawsuit, the IRS granted petitioner a

⁸ Waiver number 201100034 appears at the top of this letter.

hardship waiver that was to go automatically to the first 1,000 applicants in that year. He further testified that an agreement was also executed by him and the U.S. Attorney, on behalf of the Department of the Treasury, giving petitioner a permanent administrative exemption from e-filing, in exchange for ending the lawsuit. According to Mr. Petito, his copy of the purported executed agreement was lost as a result of the destruction of petitioner's office on October 29, 2012. Mr. Petito admitted that he has never requested another copy of the purported agreement from either the Department of the Treasury or the U.S. Attorney. The only document submitted regarding the lawsuit was a one-page printout from "Justia Dockets & Filings" that listed, among other things, certain named individuals, the Department of Treasury, the Internal Revenue Service and the Internal Revenue Service Office of General Counsel as the defendants; "Does 1-100 and John J. Petito" as the plaintiffs; a filing date of July 30, 2010; the nature of suit as "Civil Rights: Other"; and the cause of action as "18:241 Conspiracy Against Citizen Rights."

19. Until October 29, 2012, petitioner's office was located in the basement of Mr. and Mrs. Petito's North Woodmere, New York, residence. In addition to petitioner's office, the basement also housed all the mechanicals and equipment for the house, including the electric panel, telephone, internet, heating units, and a full-sized elevator that accessed the basement, first and second floors of the house.

20. On October 29, 2012, Hurricane Sandy devastated parts of Long Island and Staten Island, including the hamlet of North Woodmere. Around 7:00 P.M. on October 29, 2012, the electricity went out at the Petito home because of the storm. At that time, the sump pumps located in the basement stopped working, and water began coming up from the ground into the basement. Eventually, the entire basement filled with water and the water began rising up the stairs to the first floor. Mr. Petito, who was home alone with his two dogs, began shoveling the

water down the stairs to keep it from coming into the first floor. At some point, Mr. Petito walked out the front door and saw that a five-foot tidal wave had covered his four cars and was coming up to the front stoop and front door. He began shoveling that water away. According to Mr. Petito, the water never made its way into the first floor. However, the basement was totally filled with water and, as a result, everything was “knocked out,” including the electricity and all of the equipment. In addition, all four vehicles were damaged. Gas generators were purchased to power some of the appliances. Garbage was hauled away and the slow process of clean-up and restoration began. Because Mr. and Mrs. Petito did not have flood insurance, their home insurance carrier refused to pay for any storm-related damages to the basement. Mr. and Mrs. Petito applied for and received two monetary grants for home repairs from the Federal Emergency Management Agency (FEMA). By the beginning of February 2013, Mr. and Mrs. Petito had heat and electricity. Around the same time, telephone and dial-up internet services were restored. A new electric panel was installed upstairs around June 2013, at which time the cable company was able to restore high speed internet services to the house. Although the electric panel was relocated upstairs by June 2013, heat and air conditioning was not restored to all the zones of the house at that time. According to Mr. Petito, as of the date of the hearing, portions of the house continue to remain without heat and air conditioning.

21. As a result of the water flooding the basement of the Petito home, petitioner’s office was destroyed. After the hurricane, Mr. Petito purchased a laptop to conduct petitioner’s business. For a time, he met with clients at his friend’s house located across the street from the Petito home. In addition, Mr. Petito also used his car as an office and to power his laptop. Mr. Petito slowly began to rebuild petitioner’s office on the second floor of his house. Once the electricity was restored in February 2013, petitioner began using that makeshift office.

Telephone lines were reinstalled and petitioner had dial-up internet service. In order to restore high speed internet service to the house in June 2013, the cable company had to install hard wires. However, sometime between June 2013 and October 2013, a special router was installed to allow uninterrupted high speed internet service to the second floor office. By January 2014, petitioner's second floor office was fully functional.

22. As of March 22, 2012, Mr. Petito became an minister of the Universal Life Church via its online ordination. The record includes printouts from the Universal Life Church website. Review of those printed web pages reveals that the Universal Life Church is a non-denominational church which "believes that it is every person's responsibility to act holistically, to do nothing to impinge on the rights of others, and to uphold religious diversity." The Universal Life Church also believes that everyone "must be able to practice their spiritual and religious beliefs without interference or threat from any government, religious, or societal force." According to Mr. Petito, his beliefs, as an ordained minister of the Universal Life Church include, among other things, not compromising his clients' sensitive personal information by e-filing their tax returns. The record does not include the date on which the Universal Life Church came into existence.

23. For tax year 2012, petitioner used TaxWorks, Inc. software created and manufactured by RedGear Technologies, Inc. (RedGear), a wholly-owned subsidiary of H & R Block, Inc. (H & R Block). The version of TaxWorks software for the 2012 tax year was marketed as "improved" software. However, the tax software did not include many of the proposed new features, botched many functional elements of previous versions of the software, and was a failure. By April 16, 2013, the tax and accounting business of Thomson Reuter had acquired select assets of the TaxWorks software line from RedGear. Documents in the record indicate

that a class action lawsuit related to the 2012 TaxWorks software was filed against TaxWorks, RedGear and H & R Block. The 2012 TaxWorks software required an EFIN to be able to e-file with the software, and it did not allow for de-linking and e-filing a New York State tax return unless a federal tax return was e-filed.

24. Mr. Petito testified that he made attempts to reapply for an IRS e-services account in 2013 and 2014, but those attempts were unsuccessful because he was blocked out by the IRS. The record does not include any evidence regarding those application attempts.

25. As part of the BCMS review of petitioner's protest of notice and demand L-042258157 (asserting penalties for failure to e-file individual income tax documents for the tax year 2013), Erin Bray, a Taxpayer Services Specialist I in the Division's individual liability resolution unit, reviewed all documentation sent in by petitioner related to its claim of reasonable cause. In a letter, dated March 25, 2015, Ms. Bray advised petitioner that its claim of having a valid federal waiver number from e-filing was unverifiable. Her letter further advised that the Division required documentation from the IRS showing that its hardship waiver number 201100034 was approved and active for tax year 2013.

26. Shortly after petitioner received Ms. Bray's letter, Mr. Petito contacted the IRS by telephone and requested copies of the letters the IRS sent him in response to his e-file hardship waiver requests for calendar years 2012, 2013 and 2014. Lenita Johnson, Chief, e-help Operations, in a responding letter, dated July 28, 2015, indicated that the attached letter was a reproduction of the letter sent to him in response to his preparer e-file hardship waiver request for calendar years 2012, 2013 and 2014. Her letter further indicated that the attached letter was reproduced because the information available on the original letter was no longer retrievable. The attached form letter, bearing a date of May 10, 2012, and waiver number 991201181, stated,

in part, as follows:

“We received your Form 8944, ‘Preparer e-file Hardship Waiver Request’ for calendar year 2012.

You are not required to file a request. You indicated you are covered by an administrative exemption, Therefore, you are not required to request a waiver for future calendar years. Should your circumstances change, you will need to resubmit Form 8944 before February 15 of the calendar year you are requesting the waiver.”

27. The record includes a copy of petitioner’s preparer e-file hardship waiver request filed for calendar year 2012, hand-dated December 7, 2011. In section 8 of the form, box d “Other” was checked as the reason for the hardship waiver request. Section 10 of the form contains the follow explanation of the section 8d hardship:

“I HAVE WAIVER #201100034, DATED 2/15/11 FOR YEARS 2010 & ONWARD.

*I STILL AM RELIGIOUSLY AGAINST ELECTRONICALLY PUTTING PEOPLE’S INFO AT RISK OF THEFT, CLIENTS REFUSE TO ELECTRONIC FILE, & IRS WON’T ALLOW ME TO EVEN APPLY TO ELECTRONIC FILE. ALSO HAVE 155+ TAX COURT CASES.”

28. The record includes a copy of the preparer e-file hardship waiver request form filed for calendar year 2013, hand-dated January 22, 2013. In section 7 of the form, boxes c “Presidential Disaster Area,” and d “Other” are checked as the reasons for the hardship waiver request. Next to section 7, box d, the handwritten words “HAVE WAIVER ALREADY” appear. Mr. Petito, in the section 9 explanation of the section 7c and 7d hardship, indicated, among other things, that: he had waiver number 201100034 for years 2010 and onward; the IRS “refused to still allow” him “to get an e-services account (needed to apply for ERO)”; he was a certified minister; and on October 29, 2012, Hurricane Sandy devastated and submerged his “home/office entire equipment (no electricity, no heat, no internet, no office running).”

29. The record includes a copy of form letter, dated March 10, 2016 and bearing waiver number "N/A," from Lenita J. Johnson, IRS e-help Operation Manager, acknowledging receipt of Mr. Petito's preparer e-file hardship waiver request for calendar year 2013. This letter advised that Mr. Petito was not required to file a request because he indicated he was covered by an administrative exemption, or did not reasonably expect (or if he was a member of a firm, the firm members in total did not reasonable expect) to file more than 10 individual, estate, and trust income tax returns in the current calendar year. The letter further advised that he was not required to file electronically. This form letter also stated that in order to request a waiver for a future calendar year, he would need to resubmit the preparer e-file hardship waiver request before February 15 of the calendar year for which he was requesting the waiver.

30. At the hearing, the Division presented the testimony of Robin Siciliano, a Taxpayer Services Specialist 3, who was in the Division's business liability resolution center until shortly before the date of the hearing. While in the business resolution center, one of her many duties was to review any informal protest regarding the corporation tax return e-file mandate assessments, and with the assistance and input of business tax management, decide whether the assessments should be sustained or whether they should be abated, based upon compliance with the New York State e-file mandate for corporation tax returns.

31. Ms. Siciliano reviewed the two notice and demands, L-0040800216 and L-042357329, issued for the tax year ended December 31, 2012 and December 31, 2013, respectively, each of which asserted penalties for failure to e-file corporation franchise tax documents. She used the noncompliant list of corporations sent with each notice and demand, did a history on each of those corporations for which petitioner filed returns and verified whether or not the returns were electronically filed. She also reviewed the corporation franchise tax forms for tax years 2012 and

2013 filed for those corporations, and found that petitioner had attached federal forms referring to personal income tax at the federal level to most of those corporation franchise tax forms.⁹ She also found that all returns filed for those listed corporations for tax years 2012 and 2013 were prepared using Drake software. In addition, Ms. Siciliano reviewed all correspondence submitted by petitioner in conjunction with its request for conciliation conference. She found no evidence that petitioner had moved forward towards compliance with the e-file mandate in any way.

32. The Division's online services website does not require an EFIN and allows a tax return preparer to file clients' extensions of time electronically. Ms. Siciliano indicated that a tax return preparer's filing of clients' extensions of time to file through the Division's online services website would count as e-filed returns. She also indicated that the Division's imposition of the failure to e-file penalty is the method to get tax return preparers into compliance with the e-file mandate, not a method to collect revenue. Had Ms. Siciliano seen any evidence that petitioner was working towards compliance, such as by filing its clients' extensions of time to file through the Division's online website, she would have recommended abatement of the penalties to business tax management.

33. Prior to the hearing, Ms. Siciliano reviewed the Division's computer system to see if there was any evidence of compliance with the e-file mandate by petitioner. She found no evidence that petitioner was now e-filing any tax documents.

34. The Division will never consider a tax return preparer's failure to get an EFIN as reasonable cause to abate the failure to e-file penalty. Ms. Siciliano confirmed that Drake

⁹ Ms. Siciliano was unable to recall whether the federal form attached to most of the corporation franchise tax forms was form 8944 or form 8948.

software did not allow e-filing if the tax return preparer did not have an EFIN.

35. The Division issued to petitioner a notice and demand, dated December 12, 2011, asserting a penalty of \$12,200.00 for the tax period ended December 31, 2010. A tax type of “Income-Prtnrship” was listed in the upper right corner of page 1 of the notice and demand. The notice asserted failure to e-file penalty of \$50.00 for each New York State individual tax return filed by sending a paper return, instead of e-filing. The notice and demand included a list of 244 documents that were paper filed. Documents in the record indicate that BCMS subsequently canceled this notice and demand because the IRS’s April 1, 2011 letter granted petitioner a waiver from e-filing tax documents with the IRS during the 2011 calendar year, and the Division agreed to waive the e-filing requirements for the same period.

36. Petitioner was granted the opportunity to submit documentation post-hearing including, among other things, account transcripts of what it owed the IRS in 2012 through 2014. Petitioner did not submit its IRS account transcripts. Rather, petitioner submitted income tax examination changes reports, forms 4549, reflecting July 2016 audit adjustments made to Mr. and Mrs. Petito’s federal income tax returns for the years 2005 through 2010.¹⁰ Each of these reports, issued by an examiner in the IRS’s Buffalo, New York, office, reflect a deficiency in tax, and the imposition of penalties in the years 2005, 2007 and 2010.

CONCLUSIONS OF LAW

A. Tax Law § 29 (e) provides, in relevant part, as follows:

“Failure to electronically file or electronically pay. (1) If a tax return preparer is required to file authorized tax documents electronically pursuant to subdivision (b) of this section, and that preparer fails to file one or more of those documents electronically, then that preparer will be subject to a penalty of fifty

¹⁰ Each of these reports stated that it superseded a report dated December 3, 2014.

dollars for each failure to electronically file an authorized tax document, unless it is shown that the failure is due to reasonable cause and not due to willful neglect.

* * *

(3) The penalties provided for by this subdivision must be paid upon notice and demand, and will be assessed, collected and paid in the same manner as the tax to which the electronic transaction relates. However, if the electronic transaction relates to another matter administered by the commissioner, then the penalty will be assessed, collected and paid in the same manner as prescribed by article twenty-seven of this chapter.”

Tax Law § 29 (b) provides as follows:

“If a tax return preparer prepared more than one hundred original tax documents during any calendar year beginning on or after January first, two thousand seven, and if, in any succeeding calendar year that tax return preparer prepares one or more authorized tax documents using tax software, then, for that succeeding calendar year and for each subsequent calendar year thereafter, all authorized tax documents prepared by that tax return preparer must be filed electronically, in accordance with instructions prescribed by the commissioner.”

B. In the instant matter, the Division imposed penalties on petitioner pursuant to Tax Law § 29 for failing to electronically file its clients’ corporation franchise tax documents for the tax year 2012. The notice and demand at issue asserted penalty in the total amount of \$1,900.00 for petitioner’s failure to electronically file 38 corporation franchise tax documents for that year.

Petitioner does not dispute that it was a tax return preparer required by Tax Law § 29 to electronically file its clients returns. Nor does petitioner dispute the number of corporation franchise tax documents filed by paper instead of by electronic filing that were the basis for the \$50.00 per document penalty. Rather, petitioner seeks cancellation of the notice and demand because the Division imposed a corporation tax against it, a professional limited liability company that files a partnership tax return. Petitioner contends that tax type: corporation appearing in the upper right corner of page 1 of the notice and demand invalidates the penalty charged on the same. Petitioner’s contention is without merit. The notice and demand clearly

stated that the penalty imposed was for petitioner's failure to electronically file its clients corporation franchise tax documents that were listed in an attachment (*see* Tax Law § 29 [e] [3]).

C. As noted, Tax Law § 29 (e) (1) subjects a tax return preparer to a penalty of \$50.00 dollars for each failure to file an authorized tax document, unless it is shown that such failure was due to reasonable cause and not due to willful neglect. 20 NYCRR 2392.1 provides examples of grounds for reasonable cause. 20 NYCRR 2392.1 (d) (5) provides that “[a]ny other ground for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly indicates an absence of willful neglect may be determined to be reasonable cause.”

D. It is clear from the record that the devastation caused by Hurricane Sandy in October 2012 impacted petitioner through the 2013 tax preparation and filing period. Up until October 29, 2012, petitioner's office was located in the basement of Mr. and Mrs. Petito's North Woodmere residence. Due to a power outage, water totally flooded their basement. In addition, their four cars were submerged by a wave of water. Gas generators powered the Petito residence for months. They applied for and received grants from FEMA for house repairs. However, the repair and restoration of their home took many months due to the costs involved in performing the same. As a result of the devastation and damage caused by Hurricane Sandy, the Petito residence was without electricity and heat until February 2013. Around the same time, telephone and dial-up internet services were also restored. A new electric panel was installed upstairs around June 2013. In order to restore high speed internet service, the cable company installed hard wires in June 2013. Although the electric panel was relocated upstairs by June 2013, heat and air conditioning was not restored to all zones of the house at that time. As a result of the water flooding the basement of the Petito home, petitioner's office was destroyed. After the

hurricane, Mr. Petito purchased a laptop to conduct petitioner's business. At first, he met with clients at his friend's house located across the street from the Petito home, and he also used his car as an office. Over time, Mr. Petito began to rebuild petitioner's office on the second floor of his house. Once the electricity was restored in February 2013, petitioner began using that makeshift office. By that time, telephone lines had been reinstalled and petitioner had dial-up internet services. Sometime between June 2013 and October 2013, a special router was installed to allow uninterrupted high speed internet service to petitioner's second floor office. By January 2014, petitioner's second floor office was fully functional. Given the circumstances surrounding the destruction of petitioner's office and its efforts to rebuild the same, it is determined that petitioner has met its burden of proving reasonable cause and the absence of willful neglect. The Division is therefore directed to abate the penalties assessed.

E. The petition of John J. Petito, PLLC is granted, and the notice and demand, dated March 3, 2014, is hereby cancelled.

DATED: Albany, New York
April 5, 2018

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE