

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
RONALD P. BELLANTONIO	:	DETERMINATION
AND RICHARD ROCK	:	DTA NOS. 828044
	:	AND 828045
for Redetermination of Deficiencies or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law for	:	
the Years 2013 and 2014.	:	

Petitioner, Ronald P. Bellantonio and Richard Rock,¹ filed petitions for redetermination of deficiencies or for refund of personal income tax under article 22 of the Tax Law for the years 2013 and 2014.

A consolidated hearing was held before Barbara J. Russo, Administrative Law Judge, on November 27, 2018 in New York, New York, with all briefs to be submitted by June 6, 2019, which date began the six-month period for issuance of this determination. Petitioner appeared by John Juva, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Ellen Krejci, Esq., of counsel).

ISSUE

Whether reasonable cause exists to abate the failure to electronically file penalties asserted by notices and demands for payment of tax due.

FINDINGS OF FACT

1. Petitioner, Ronald Bellantonio and Richard Rock, certified public accountants,

¹ Petitioner conducted business as a partnership under the name Ronald Bellantonio and Richard Rock.

conducted business as a partnership during the years at issue and prepared tax returns for individuals, partnerships, corporations, and fiduciaries.²

2. Mr. Bellantonio estimated that petitioner prepared and filed at least 472 tax returns of various types for tax year 2013 or 2014, but could not recall the specific period.

3. For the years 2013 and 2014, petitioner prepared personal income tax returns for approximately 98 and 90 clients, respectively, and filed those returns as paper returns rather than electronic file (e-file). Petitioner used tax software on an off-line computer for the preparation of the returns.

4. Prior to the issuance of the notices at issue herein, the Division of Taxation (Division) issued to petitioner a notice and demand for payment of tax due (notice and demand) L-042284090, asserting a penalty of \$4,900.00 for the tax year ended December 31, 2013.³ This notice and demand was incorrectly issued as a corporate assessment and was canceled in December, 2015.

5. On December 7, 2015, the Division issued to petitioner a new notice and demand, L-044070520, asserting a penalty of \$4,900.00 for the tax year ended December 31, 2013. This notice and demand listed the tax type as "Income-Prtnship" in the upper right corner of page 1. The notice and demand shows a payment/credit in the amount of \$4,900.00 and zero current balance due.⁴ Attached to the notice and demand is a list of 98 taxpayers for whom petitioner filed paper returns for tax year 2013.

² Mr. Rock died prior to the commencement of these proceedings.

³ Notice and demand L-042284090 was not submitted into the record and there was no testimony regarding the date it was issued.

⁴ This payment was applied from petitioner's prior payment towards notice and demand L-042284090.

6. The Division issued to petitioner a notice and demand L-044367740, dated February 4, 2016, asserting a penalty of \$4,500.00 for the tax year ended December 31, 2014. A tax type of “Income-Prtnship” 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:

“You were required to e-file documents during calendar year 2014, but haven’t done so.

You’re subject to a \$50 penalty for each document that you were required to e-file, unless you can establish reasonable cause.

We’re imposing this penalty because you filed paper returns for individual taxpayers that should have been filed electronically. We’ve attached a list of those taxpayers.”

Attached to the notice and demand is a list of 90 taxpayers for whom petitioner filed paper returns for tax year 2014.

7. In protest of the subject notice and demands, petitioner filed a request for conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). A conciliation conference was held on April 19, 2016. Subsequently, BCMS issued conciliation orders (CMS Nos. 269081 and 269553), dated November 18, 2016, denying petitioner’s request and sustaining notice and demands L-044070520 and L-044367740, respectively.

8. On January 17, 2017, petitioner filed petitions with the Division of Tax Appeals protesting the subject notice and demands for the years 2013 and 2014. In the petitions, petitioner asserted, in part, that the tax returns at issue were filed for clients who were:

“all elderly, frail and not astute in the areas of tax and money. Some of them require assistance in completing everyday financial activities. Some do not even open their bank statements. The taxpayer is very fearful that these clients may be targets of identity theft.”

9. A consolidated hearing was held for both tax years 2013 and 2014. During the hearing,

Mr. Bellantonio testified that the clients for whom petitioner filed paper personal income tax returns were “middle-aged, older and elderly clients” and that he “did not e-file any personal income tax returns because [the clients] are all in that category or substantially all of them are.” However, on cross-examination, Mr. Bellantonio admitted that some of the paper returns at issue were for clients ranging in age from 20 to 36.

10. In rebuttal to petitioner’s argument that all of the clients for whom petitioner filed paper returns were “middle-aged, older and elderly” or otherwise particularly vulnerable to identity thefts, the Division presented into the record copies of paper returns filed by petitioner for clients with the following dates of birth and occupations:

Tax Year of Return	Client Date of Birth	Client Occupation
2013	07/02/1959	Personnel/Real Estate
2013	04/12/1996	Student
2013	07/18/1988	Asst. Coach
2013	06/28/1984	Asst. Teacher
2013	06/25/1994	Student
2014	06/16/1990	Sales
2014	01/12/1984	Drug Safety Pharmaceutical
2014	04/07/1978	Senior Clerk
2014	10/23/1985	Teacher
2014	10/17/1962	Administrator
2014	10/23/1980	Attorney
2014	05/15/1982	Teacher Assistant

The Division also presented returns of three taxpayers that indicated that for the year prior to becoming petitioner’s clients, these taxpayers personally e-filed their returns.

11. In support of its argument that its clients were elderly, petitioner submitted 50 returns

of clients with the following dates of birth and occupations:

Tax Year of Return	Client Date of Birth	Client Occupation
2013	08/18/1936	Retired
2013	01/18/1942	Retired
2013	02/22/1954 (spouse 08/30/1956)	None (spouse clerk)
2013	07/02/1959	Personnel/Real Estate
2013	09/27/1946	Bus Driver/Retired
2013	03/08/1928	Retired
2013	04/07/1947 (spouse 03/13/1956)	Sociologist/Author/Edit (spouse Artist & Professor)
2013	07/04/1929	Retired
2013	10/04/1951	None
2013	05/23/1918 (spouse 03/10/1923)	Executive (spouse Executive)
2013	01/17/1921	Retired
2013	04/16/1951 (spouse 09/02/1949)	Outside Salesman (spouse Homemaker)
2013	01/18/1953	Teacher
2013	08/27/1926	Retired
2013	04/10/1935 (spouse 01/14/1936)	Executive (spouse Homemaker)
2013	04/15/1949 (spouse 10/19/1948)	Dentist (spouse Retired)
2013	01/30/1943	Retired
2013	01/11/1950 (spouse 07/28/1952)	Guidance Counselor (spouse Social Worker)
2013	07/10/1946 (spouse 04/04/1953)	Retired (spouse Manager)
2013	12/29/1936 (spouse 11/16/40)	Physician (spouse Artist)

2013	07/07/1951 (spouse 07/27/1946)	Attorney (spouse Retired)
2013	02/13/1929	Retired
2013	05/07/1952	Attorney
2013	06/25/1926	Retired
2013	04/21/1936	Administrator
2014	07/30/1952 (spouse 01/21/1948)	Manager (spouse Bookkeeper)
2014	06/01/1941 (spouse 07/11/1945)	Manager (spouse Retired)
2014	02/13/1946 (spouse 12/06/1946)	Physician (spouse Photography)
2014	01/11/1926	Retired
2014	12/11/1951	Musician/Composer
2014	06/16/1954 (spouse 10/29/1954)	Police Officer (spouse Homemaker)
2014	07/30/1927	Part Time Cashier
2014	09/04/1955	Administrative
2014	01/22/1955	Insurance Sales
2014	10/08/1947 (spouse 09/03/1951)	Executive (spouse Administrative)
2014	02/01/1964 (spouse 04/05/1965)	Service Manager (spouse Teacher/Clerk)
2014	12/29/59 (spouse 06/11/1957)	Auto Mechanic Manager (spouse Bookkeeper)
2014	02/04/1931	Clerical/Retired
2014	09/08/1925	Retired
2014	02/03/1945 (spouse 05/04/1963)	Teacher (spouse Teacher)
2014	08/18/1941 (spouse 11/13/1943)	Executive (spouse Administrative)

2014	08/12/1936 (spouse 01/16/1940)	Retired (spouse Retired)
2014	11/20/1948 (spouse 10/20/1948)	Fur Dealer (spouse Teacher)
2014	09/11/1939	Retired
2014	08/27/1948	Professor
2014	04/21/1955 (spouse 09/04/1963)	Film/Video Producer (spouse Office Manager)
2014	05/31/1942	Retired/Agent
2014	08/17/1941	Retired
2014	07/08/1914	Retired
2014	05/06/1941	Printing/Tattoo Suppl.

12. Mr. Bellantonio testified that for federal purposes, petitioner filed form 8948, preparer explanation for not filing electronically, with each client's personal income tax returns for the years at issue, stating that for federal purposes the clients elected to file paper tax returns.

CONCLUSIONS OF LAW

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

“(b) 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.

* * *

(e) 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 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.”

Reasonable cause is not defined in Tax Law § 29. However, the commissioner’s regulations set forth grounds for reasonable cause, where clearly established by the taxpayer, as follows: (1) death, illness or absence of the taxpayer; (2) destruction of place of business or business records; (3) inability to timely assemble information; (4) pending petitions, actions or proceedings; (5) other grounds 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 (20 NYCRR 2392.1 [d]).

B. In the instant matter, the Division imposed penalties on petitioner pursuant to Tax Law § 29 for failing to electronically file its clients’ individual income tax returns. Notice and demand L-044070520 asserted penalty in the amount of \$4,900.00 for petitioner’s failure to electronically file 98 personal income tax returns for tax year 2013. Notice and demand L-044367740 asserted penalty in the amount of \$4,500.00 for petitioner’s failure to electronically file 90 individual income tax returns for tax year 2014. 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 individual income tax returns 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 subject notices and demands on the basis of reasonable cause, contending that for federal purposes, the clients elected to file paper tax returns, and that for the New York State

returns, it exercised professional judgment in not wanting to subject its clients' personal information to possible cyber theft. While petitioner elected to file paper returns for federal purposes, it was aware that New York State does not have an opt-out provision for electronic filing. Indeed, Tax Law § 29 was specifically amended in 2010 to remove a taxpayer's election to not electronically file as a basis for reasonable cause.⁵ This amendment to the Tax Law indicates the legislature's clear intent that reasonable cause does not include a taxpayer's election to not electronically file.

C. Petitioner's argument that its clients are particularly vulnerable to cyber theft in that they are "substantially all" "middle-aged, older and elderly" is not grounds for reasonable cause and further is not factually supported by the record. A fear of possible cyber theft does not fall within the examples of reasonable cause listed in the regulations. The "additional grounds" for reasonable cause which provide for "any 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" (20 NYCRR 2392.1 [d] [5]) (emphasis added) clearly applies only to delays in filing, and not to an outright refusal to electronically file as required by Tax Law § 29.

Moreover, petitioner's assertion in its petition that its clients are "all elderly, frail and not astute in the area of tax and money" and Mr. Bellantoni's testimony that "substantially all" of the clients are "middle-aged, older and elderly" is not supported by the record. Of the returns presented into evidence, most of the clients listed professional occupations and a number of the returns were for clients who were not "middle-aged, older and elderly" at the time of filing.

⁵ As originally enacted, Tax Law §29 (e) provided that, "[f]or purposes of this paragraph, reasonable cause shall include, but not be limited to, a taxpayer's election not to electronically file the authorized tax document" (L 2008, ch 57, pt UU-1, § 1). This language was deleted from the statute in 2010 (*see* L 2010, ch 57, pt. G, § 1).

D. Petitioner further argues that its payment towards notice and demand L-042284090, which was subsequently canceled, was misapplied to notice and demand L-044070520 and that it had the right to appeal the notice without the necessity of payment. Contrary to petitioner's argument, Tax Law § 29 (e) (3) provides that the penalties for failure to electronically file "must be paid upon notice and demand" Moreover, Tax Law § 173-a (2) denies petitioner a right to a hearing with respect to a notice and demand and the Division correctly informed petitioner that in order to protest such notice, it must first pay it and then seek a refund. As such, petitioner was not prejudiced by the application of its payment to the revised notice.

E. For the foregoing reasons, I find that petitioner has failed to establish reasonable cause, and not willful neglect. As such, the penalties must be sustained.

F. The petitions of Ronald P. Bellantonio and Richard Rock are hereby denied, and the notices and demands L-044070520 and L-044367740, dated December 7, 2015 and February 4, 2016, respectively, are sustained.

DATED: Albany, New York
December 5, 2019

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE