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# News Analysis: Does the Rise of E-Filing Mean It's Time to Reexamine *Boyle*?

**Andrew Velarde**

Summary by taxanalysts

In news analysis, Andrew Velarde considers whether a facts and circumstances standard as opposed to a bright-line test should be applied to taxpayers who e-file tax returns late.



Thirty years may be an epoch when it comes to computer and networking technology. In 1985 the Internet was in its infancy. That year saw the formation of the National Science Foundation Network (NSFNET), a program designed to promote networking among research institutions. The program included a physical network linking five supercomputer centers from Princeton University, the University of Pittsburgh, the University of California at San Diego, the University of Illinois at Urbana-Champaign, and Cornell University. The network transferred data at 56 kilobits per second.

By contrast, Comcast announced this year that it would start offering home customers data transfer services of 2 gigabits per second. For those not mathematically inclined, that's more than 35,000 times faster than what the NSFNET was capable of in 1985. A lot has changed since then.

Also in 1985, the Supreme Court, in *United States v. Boyle*, 469 U.S. 241 (1985), unanimously held that a failure to timely file an estate tax return is not excused by an executor's reliance on an agent and that that reliance is not "reasonable cause" that would avoid the late-filing penalty of section 6651(a)(1).

Numerous court cases, including those outside the estate tax return context, have since cited *Boyle* and its bright-line rule on filing deadlines. *Boyle*, however, came before the advent of e-filing, now common in the tax world.

"To put that in perspective, that's four years before Intuit was founded," Anson H. Asbury of Asbury Law Firm said, referencing the company that provides services for a large portion of e-filers. Further, the IRS did not even conduct its first test of electronic filing until 1986.

The respondent in *Boyle* was a sympathetic one. Executor of his mother's will, Robert W. Boyle

had retained an attorney to handle the estate, provided the attorney with all the relevant information and records, cooperated fully with the attorney, and inquired numerous times about the tax return preparation, only to be assured that it would be filed "in plenty of time." Despite that assurance, the attorney filed the return late because of a clerical oversight. The Supreme Court held Boyle liable for the penalty, even though the code and regulations provide that reasonable cause excuses a failure to timely file. To show reasonable cause, a taxpayer must demonstrate that he "exercised ordinary business care and prudence." In making its bright-line rule, the Court held that while relying on an accountant or attorney for advice on a matter of law, such as whether a liability exists, is reasonable, recognizing filing dates does not require that expertise. Meeting the duty of timeliness for filing is not delegable.

"One does not have to be a tax expert to know that tax returns have fixed filing dates and those taxes must be paid when they are due. In short, tax returns imply deadlines. Reliance by a lay person on a lawyer is of course common; but that reliance cannot function as a substitute for compliance with an unambiguous statute. . . . It requires no special training or effort to ascertain a deadline and make sure that it is met," the Court held.

## Changing Landscape

As stated in the Internal Revenue Service Restructuring and Reform Act of 1998, it is Congress's policy to promote paperless filing of tax returns. That act establishes a plan "to eliminate barriers, provide incentives, and use competitive market forces to increase electronic filing gradually over the next 10 years."

In 2011 the Treasury Department published final regulations (T.D. 9518) that require specified tax return preparers to file individual income tax returns electronically under section 6011. A specified tax return preparer is one who reasonably expects to file 11 or more individual returns in a calendar year.

The IRS has posted statements on its website that encourage return preparers to e-file clients' returns: "IRS e-file is the fastest and most accurate way to file your individual and business clients' returns. If you are just beginning your practice, there's no question that you will want to go electronic. If you are converting from a paper-based practice, it's going to take some effort, but it's really going to pay off. Once you are set up, you will begin saving time and money. By the second year, you'll wonder why you waited to make the switch. IRS e-file enables you to provide better service to your clients. . . . It's the smart way for you to meet and exceed your client's expectations." In encouraging e-filing, the IRS also states that e-filed returns result in fewer notices from the IRS and that the IRS acknowledges their receipt.

Speaking on a webcast on March 20 sponsored by the Practising Law Institute, Bryan C. Skarlatos of Kostelanetz & Fink LLP argued that the increase in e-filing and encouragement from the IRS to engage in the practice should mean new law for penalties applicable to late filings.

"Is it really the taxpayer's fault if he listens to the IRS, has his accountant electronically file [for him], and for some reason it gets kicked back? The IRS is telling him to rely on the accountant," Skarlatos said. "The IRS is not requiring taxpayers to electronically file their own returns; it is expecting them to go to tax return preparers who handle electronic filing." He added that he has gotten relief in appeals for his clients facing penalties in those circumstances but not without a fight from the IRS agent who had been imposing the penalty. He said he expects cases addressing penalties and delinquent e-filers to arrive in the Tax Court in the next few years.

Language in the regulations appears to emphasize the significance of the return preparer's role in e-filing. According to the preamble of the 2011 regulations, "the burden of compliance with the electronic filing requirement is on the tax return preparer." Asbury cautioned not to draw too broad a conclusion from the preamble, however, arguing that the IRS may be underscoring the role of the preparer in meeting the e-filing requirement when the preparer prepares more than 10 returns. Treasury is likely not addressing where the burden falls -- with the taxpayer or the preparer -- with any particular e-filed return, he said.

Why does e-filing make it more difficult to recognize deadlines? The Supreme Court's rationale in *Boyle* appears at first glance to be just as valid today as it was in 1985. But in an interview with Tax Analysts, Skarlatos argued that while e-filing doesn't necessitate switching from the *Boyle* standard, the section 6011 regulations and the requirement that a taxpayer file Form 8879, "IRS E-File Signature Authorization," when he does e-file, mean that the time is ripe for change.

"You get a lot of preparers telling clients, 'I must e-file your return, and all you have to do is sign this piece of paper authorizing me to e-file,'" Skarlatos said. In the IRS's encouragement of e-filing, it has created a complex filing procedure that is more likely to lead taxpayers to exercise ordinary care and prudence but not read all the guidance under section 6011. Thus, taxpayers may think that they have discharged their responsibility by signing authorizations with their accountants.

"Now you've signed an IRS form, and for all intents and purposes, it looks like you've discharged your obligation, and you've given it to the accountant," Skarlatos said.

Form 8879 includes a statement from the taxpayer declaring that he has examined his electronic tax return and attests to its veracity. Whether the taxpayer sees the tax return and signs the e-file signature authorization form after the accountant has prepared the return is another matter. Taxpayers may sign the forms at the time they hire accountants to prepare their taxes.

"In 1985 taxpayers expected to see a paper return and, if not sign it directly, at least sign off on the physical copy that had been mailed or faxed to them. If the taxpayer met with a return preparer in January, he expected to see a paper return for review or signature before it was filed," Asbury said. He contrasted that with the modern practice when a taxpayer "may walk away thinking he doesn't need to see something again," after his initial meeting with the accountant.

Even though the accountant is supposed to receive a receipt after he e-files a return, he doesn't always communicate it to the taxpayer, Skarlatos said. Exercising ordinary business care and prudence therefore may not entail the taxpayer's receiving an e-file confirmation.

"Try to call an accountant on April 15 [and ask], 'Did you get the receipt?' He's busily e-filing. He's not worried about collecting receipts and spitting them back," Skarlatos said.

If the return preparer has waited until the last minute to file, an e-filing status may not reach him until after the normal deadline. According to IRS Publication 3112, *IRS E-File Application and Participation*, an e-filing receipt should be received within 24 hours of filing. Likewise, according to Publication 1345, *Handbook for Authorized IRS E-File Providers of Individual Income Tax Returns*, if the IRS rejects the e-filed return and the electronic return originator (ERO) cannot rectify the reason for the rejections, the ERO must take reasonable steps to inform the taxpayer of the rejection within 24 hours. Notably, the IRS provides perfection periods for rejected submissions during which time a retransmission will be deemed accepted on the date of the first rejection if it is made within that period.

## Extensions and Alternative Tests

The *Boyle* standard has been applied in the context of the filing of extension requests, with courts holding that the duty there is also non-delegable. As the Second Circuit opined in *McMahan v. Comm'r*, 114 F.3d 366 (2d Cir. 1997), "By allowing delegation of filing the extension form, the IRS gives taxpayers an inch; but by seeking exemption from liability for the delegated agent's failure to file an extension form, the taxpayer tries to take a mile."

Asbury noted that that decision came down before the 1998 IRS reform act that adopted the goal of 80 percent e-filed returns. Like *Boyle, McMahan* does not take into account modern e-filing, he said. "Has the world passed [these cases] by a little bit? I think maybe," Asbury said.

If a taxpayer's request for extension isn't granted, he may face a 5 percent penalty per month without knowing it, said Skarlatos, who characterized that rule as a "real sleeper." The failure to file penalty includes a penalty of 5 percent of the unpaid taxes for each month or part of a month that the return is late, up to 25 percent.

Skarlatos suggested a facts and circumstances test as the standard for determining penalties from e-filing delinquency. But achieving efficient tax administration could be a challenge if the government adopted that kind of test in the context of revenue collection. "The Government has millions of taxpayers to monitor, and our system of self-assessment in the initial calculation of a tax simply cannot work on any basis other than one of strict filing standards. Any less rigid standard would risk encouraging a lax attitude toward filing dates," the Court wrote in *Boyle*.

Asbury said the government's concern over simplicity to minimize resource allocation in addressing late filings was practical but not necessarily fair. "It's a harsh result for the taxpayer that is acting responsibly," he said, adding that the taxpayers most likely affected by *Boyle* and *McMahan* are those with the more complicated returns, such as partners who may not receive their Schedule K-1 on a timely basis.

"It's [about] balancing. That's what judges do. . . . But now it's more complicated with e-filing and signature authorization," Skarlatos said. Perhaps the issue is just awaiting the right litigant, though it may prove difficult to find one more sympathetic than Boyle. "The danger is that it comes up in the Tax Court in a case that is a close call and that the Tax Court just reaffirms the bright-line test . . . rubber-stamping *Boyle*," Skarlatos said.

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## Tax Analysts Information

**Code Sections:** Section 6011 -- Return Filing Requirement
Section 6651 -- Failure to File or Pay
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