

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition  
of  
**RONALD P. BELLANTONIO  
AND RICHARD ROCK**  
for Redetermination of Deficiencies or for Refund of  
Penalties for Failure to E-File under Article 1 of the Tax  
Law for the Years 2013 and 2014.

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DECISION  
DTA NO. 828044  
and 828045

Petitioner, Ronald P. Bellantonio and Richard Rock,<sup>1</sup> filed an exception to the determination issued on December 5, 2019. Petitioner appeared by John Juva, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Ellen Krejci, Esq. of counsel).

Petitioner did not file a brief in support. The Division of Taxation filed a brief in opposition. Petitioner filed a letter brief in reply. Oral argument was heard by teleconference on January 28, 2021, which date began the six-month period for issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Monaco took no part in the consideration of this matter.

***ISSUE***

Whether reasonable cause exists to abate the penalties for failure to electronically file as provided under Tax Law § 29.

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

### ***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge, except we have added additional findings of fact, numbered 13 and 14. These additional findings of fact, together with the facts as determined by the Administrative Law Judge, are set forth below.

1. Petitioner, Ronald Bellantonio and Richard Rock, certified public accountants, conducted business as a partnership during the years at issue and prepared tax returns for individuals, partnerships, corporations, and fiduciaries.<sup>2</sup>

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.<sup>3</sup> 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.

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<sup>2</sup> Mr. Rock died prior to the commencement of these proceedings.

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

The notice and demand shows a payment/credit in the amount of \$4,900.00 and zero current balance due.<sup>4</sup> Attached to the notice and demand is a list of 98 taxpayers for whom petitioner filed paper returns for tax year 2013.

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 notices 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 notices 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 notices 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:

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<sup>4</sup> This payment was applied from petitioner’s prior payment toward notice and demand L-042284090.

“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 theft, the Division presented into the record copies of paper returns filed by petitioner for its 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<br>(spouse 08/30/1956) | None<br>(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<br>(spouse 03/13/1956) | Sociologist/Author/Edit<br>(spouse Artist & Professor) |
| 2013               | 07/04/1929                        | Retired  |

|      |                                   |  |
|------|-----------------------------------|--|
| 2013 | 10/04/1951                        | None   |
| 2013 | 05/23/1918<br>(spouse 03/10/1923) | Executive<br>(spouse Executive)              |
| 2013 | 01/17/1921                        | Retired                                      |
| 2013 | 04/16/1951<br>(spouse 09/02/1949) | Outside Salesman<br>(spouse Homemaker)       |
| 2013 | 01/18/1953                        | Teacher                                      |
| 2013 | 08/27/1926                        | Retired                                      |
| 2013 | 04/10/1935<br>(spouse 01/14/1936) | Executive<br>(spouse Homemaker)              |
| 2013 | 04/15/1949<br>(spouse 10/19/1948) | Dentist<br>(spouse Retired)                  |
| 2013 | 01/30/1943                        | Retired                                      |
| 2013 | 01/11/1950<br>(spouse 07/28/1952) | Guidance Counselor<br>(spouse Social Worker) |
| 2013 | 07/10/1946<br>(spouse 04/04/1953) | Retired<br>(spouse Manager)                  |
| 2013 | 12/29/1936<br>(spouse 11/16/40)   | Physician<br>(spouse Artist)                 |
| 2013 | 07/07/1951<br>(spouse 07/27/1946) | Attorney<br>(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<br>(spouse 01/21/1948) | Manager<br>(spouse Bookkeeper)               |
| 2014 | 06/01/1941<br>(spouse 07/11/1945) | Manager<br>(spouse Retired)                  |
| 2014 | 02/13/1946<br>(spouse 12/06/1946) | Physician<br>(spouse Photography)            |
| 2014 | 01/11/1926                        | Retired                                      |
| 2014 | 12/11/1951                        | Musician/Composer                            |
| 2014 | 06/16/1954<br>(spouse 10/29/1954) | Police Officer<br>(spouse Homemaker)         |
| 2014 | 07/30/1927                        | Part Time Cashier                            |
| 2014 | 09/04/1955                        | Administrative                               |
| 2014 | 01/22/1955                        | Insurance Sales                              |
| 2014 | 10/08/1947<br>(spouse 09/03/1951) | Executive<br>(spouse Administrative)         |
| 2014 | 02/01/1964<br>(spouse 04/05/1965) | Service Manager<br>(spouse Teacher/Clerk)    |
| 2014 | 12/29/59<br>(spouse 06/11/1957)   | Auto Mechanic Manager<br>(spouse Bookkeeper) |
| 2014 | 02/04/1931                        | Clerical/Retired                             |
| 2014 | 09/08/1925                        | Retired                                      |
| 2014 | 02/03/1945<br>(spouse 05/04/1963) | Teacher<br>(spouse Teacher)                  |
| 2014 | 08/18/1941<br>(spouse 11/13/1943) | Executive<br>(spouse Administrative)         |

|      |                                   |  |
|------|-----------------------------------|--|
| 2014 | 08/12/1936<br>(spouse 01/16/1940) | Retired<br>(spouse Retired)                    |
| 2014 | 11/20/1948<br>(spouse 10/20/1948) | Fur Dealer<br>(spouse Teacher)                 |
| 2014 | 09/11/1939                        | Retired  |
| 2014 | 08/27/1948                        | Professor                                      |
| 2014 | 04/21/1955<br>(spouse 09/04/1963) | Film/Video Producer<br>(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.

13. Following the hearing, the Administrative Law Judge held the record open until January 4, 2019, for petitioner to submit records in support of its arguments, and the Division was given until February 4, 2019, to reply to any such submission. Petitioner submitted 50 tax returns of its clients within the time frame permitted.

14. The Administrative Law Judge issued her determination in this matter on December 5, 2019. On December 19, 2019, petitioner filed a motion to reopen the record and for reargument pursuant to 20 NYCRR 3000.16. The Division filed a letter brief in opposition on February 7, 2020. On August 6, 2020, the Administrative Law Judge issued an order denying petitioner's motion.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge began her determination by citing Tax Law § 29, which provides for a \$50.00 penalty for each non-electronically filed return filed by a tax return preparer, unless it is shown that the failure to electronically file was due to reasonable cause and not due to willful neglect. As observed by the Administrative Law Judge, reasonable cause is not defined by Tax Law § 29, but the Division's regulations state grounds for a finding of reasonable cause.

The Administrative Law Judge noted that the Division imposed penalties on petitioner for failure to electronically file tax returns, and that petitioner did not dispute that it was a tax return preparer subject to the electronic filing requirement or the number of returns that formed the bases for the penalties. Rather, according to the Administrative Law Judge, petitioner sought cancelation of the notices and demands on the basis of reasonable cause in its exercise of its professional judgement in not wanting to subject its clients' personal information to possible identity theft. The Administrative Law Judge also noted that petitioner was aware that New York did not have an opt-out provision for electronic filing following the 2010 amendment of Tax Law § 29, unlike the discretion afforded to federal return filers. To the Administrative Law Judge, the 2010 statutory amendment of Tax Law § 29 clearly set forth the Legislature's intent to remove a taxpayer's election to not electronically file as reasonable cause for non-compliance.

The Administrative Law Judge rejected petitioner's characterization of its client base for whom it filed paper returns as "substantially all" "middle aged, older and elderly" as not factually supported by the record. Furthermore, according to the Administrative Law Judge, a fear of possible cyber theft does not fall within the examples of reasonable cause listed in the regulations. The Administrative Law Judge also found that the additional grounds permitted to

be considered under the regulations that would appear to a reasonable person as reasonable cause for delay only applies to cases of delay in filing, and not where the taxpayer simply refuses to comply with the requirements of the Tax Law.

Next, the Administrative Law Judge considered petitioner's argument that it was deprived of its right to a pre-payment appeal of the notice and demand after its payment for a canceled notice and demand (assessment no. L-042284090) was applied to a subsequently issued notice and demand (assessment no. L-044070520). The Administrative Law Judge observed that under Tax Law § 29, the penalty for failure to electronically file tax returns must be paid upon notice and demand, and Tax Law § 173-a(2) specifically denies taxpayers the right to a hearing with respect to a notice and demand. Thus, petitioner was not prejudiced by the application of its payment to the revised notice. The Administrative Law Judge found that petitioner failed to establish reasonable cause, and not willful negligence, for its failure to comply with the requirements of Tax Law § 29, and accordingly denied the petition and sustained the notices and demands here at issue.

On August 6, 2020, the Administrative Law Judge issued an order denying petitioner's motion to reopen the record and reargue. In its motion, petitioner alleged misconduct by the Division by its failure to identify which specific tax returns would be submitted at the hearing and failure to provide copies of the bill jackets referred to in the Division's hearing memorandum. With respect to petitioner's first argument, the Administrative Law Judge observed that our Rules of Practice and Procedure provide that documents not included on a hearing memorandum may be introduced for the limited purposes of rebuttal or impeachment of a witness. As the records here at issue were introduced to rebut petitioner's claim that its clients were substantially all elderly and vulnerable to identity theft, acceptance of those records was

permitted under our Rules. The Administrative Law Judge also found bill jackets of legislative acts to be public records, and that the Division included an adequate citation in its hearing memorandum. The Administrative Law Judge noted that a motion to reargue a prior determination is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts or misapplied a controlling principle of law. The Administrative Law Judge found that petitioner established neither of these factors, and accordingly denied the motion.

### ***ARGUMENTS ON EXCEPTION***

Petitioner argues that it exercised reasonable care and good judgment in choosing to file some of its clients' personal income tax returns in physical form with the Division rather than electronically, and therefore the penalties imposed for failing to electronically file those returns should be abated. Petitioner states that the decision to file such returns for a select group of elderly taxpayers was done to protect those taxpayers from potential identity theft and was not due to willful neglect of the requirements of the Tax Law. Even if petitioner was required to electronically file the income tax returns in question, petitioner claims that its substantial compliance with the electronic filing mandate justifies abatement of the penalties imposed. Petitioner alleges that the Administrative Law Judge erred in failing to consider its substantial compliance as documented in the schedule submitted at the hearing detailing petitioner's overall electronic filing compliance rate. Petitioner asks that the notices of deficiency be canceled and all funds applied to the assessments contained therein be refunded.

The Division states that the Administrative Law Judge correctly determined that petitioner failed to establish that the notices of deficiency were erroneous or improper. It argues that Tax Law § 29, which imposes penalties on tax return preparers for failure to file their clients' returns

electronically, does not contain a professional discretion exception to the statutory mandate and thus the penalty was properly imposed. According to the Division, abatement of penalties is only proper where a taxpayer can show that the actions or inactions that led to the imposition of penalties were due to reasonable cause and not willful neglect. The Division argues that petitioner has not shown reasonable cause in this instance and asks that the determination of the Administrative Law Judge be affirmed.

### *OPINION*

We begin our decision in this matter with Tax Law § 29, which requires professional tax return preparers that meet certain requirements to file tax returns electronically with the Division. The statute provides, in relevant part:

“(b)(1) 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.

(2) If a tax return preparer prepared authorized tax documents for more than ten different taxpayers during any calendar year beginning on or after January first, two thousand twelve, and if in any succeeding calendar year that tax return preparer prepares one or more authorized tax documents using tax software, then, for such 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 (Tax Law § 29 [b] [1]-[2]).”

If a qualified tax return preparer does not comply with the electronic filing requirement of Tax Law § 29, the statute authorizes the Division to impose a \$50.00 penalty for each tax return that was not filed electronically, unless it is shown that the failure was “due to reasonable cause and not due to willful neglect” (Tax Law § 29 [e] [1]). Such penalty is payable upon notice and

demand and is assessed and collected in the same manner as the tax to which the electronic transaction relates (Tax Law § 29 [e] [3]).

Petitioner does not dispute the number of returns that resulted in the amount of penalties imposed by the Division for 2013 and 2014. Rather, petitioner challenges these penalties on the basis that its fear of its clients being potentially subjected to identity theft constituted reasonable cause and not willful neglect.

“Reasonable cause” is not defined in Tax Law § 29, but the Division’s regulations set forth grounds constituting reasonable cause (*see* 20 NYCRR 2392.1 [d]). These grounds include death, illness or absence of the taxpayer; destruction of place of business or business records; inability to timely assemble information; pending petitions, actions or proceedings; and 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 (*id.*). Petitioner maintains here, as it did below, that its exercise of its professional judgment in deciding to protect its clients from possible identity theft by filing physical tax returns with the Division, notwithstanding the statutory electronic filing mandate, constituted reasonable cause and not willful neglect. We do not agree.

Reasonable cause, as described under the regulations, does not include substitution of professional discretion for legislative intent as expressed in the statute. As noted by the Administrative Law Judge in her determination, Tax Law § 29 was amended to remove a taxpayer’s election as reasonable cause not to file electronically (*compare* Tax Law former § 29 [e] *with* Tax Law § 29; *see also* L 2010, ch 57, pt G, § 1). Tax Law § 29, as amended, reflects the legislature’s intent that reasonable cause not include a taxpayer’s election to forgo electronic filing (*see Matter of Stein*, 131 AD2d 68, 72 [2d Dept 1987], *appeal dismissed* 72 NY2d 840

[1988] [“[b]y enacting an amendment of a statute and changing the language thereof, the Legislature is deemed to have intended a material change in the law”]; *see also* McKinney's Cons Laws of NY, Book 1, Statutes §§ 191, 193).

We also agree with the Administrative Law Judge's dismissal of petitioner's argument that the advanced age and lack of financial sophistication of substantially all of its clients constituted reasonable cause to not file their tax returns electronically. As observed by the Administrative Law Judge, this is neither a ground expounded in the regulations nor is it borne out in the facts of this case. Furthermore, the last ground listed under the reasonable cause regulations is clearly applicable to cases of taxpayer delay and delinquency, and not to an outright refusal to comply with the requirements of the Tax Law (*see* 20 NYCRR 2392.1 [d] [5]). In our view, a tax return preparer's knowing refusal to comply with a statutory requirement amounts to willful neglect.

Petitioner also argues that its overall compliance with the New York electronic filing mandate should be considered in making the determination of whether to abate the Tax Law § 29 penalties. In support thereof, petitioner offered a printout from what appeared to be a website of the Division that lists factors to be taken into consideration when making a reasonable cause determination. While overall compliance is one factor to be taken into consideration, petitioner's evidence in support thereof is simply not complete enough to draw a conclusion about petitioner's overall compliance with the electronic filing mandate. For this reason, we find that petitioner did not establish that its compliance record justifies abatement of the penalties here at issue.

Lastly, we address petitioner's exception to the Administrative Law Judge's denial of its motion to reopen the record and for reargument. Petitioner argues that it was prejudiced by the Division's failure to list the tax returns the Division would be discussing at the hearing, as well

the Division's failure to provide copies of the legislative bill jackets referred to in the hearing memorandum prior to the hearing. Petitioner argued in its motion below that the Division's failure to share these documents prior to the hearing amounted to misconduct, which necessitates reopening the record and reargument. The Administrative Law Judge rejected petitioner's arguments in her order, and we agree. Under our Rules, an administrative law judge may vacate a determination and grant a motion to reopen the record or for reargument where the movant establishes: 1) new evidence which would probably have produced a different result (and could not have been discovered with reasonable diligence); or 2) fraud, misrepresentation or other misconduct of the opposing party (20 NYCRR 3000.16 [a]). There is no question that petitioner had a list of the returns that formed the basis for the penalties that the Division imposed, as such a list was attached to each of the notices and demands here at issue. Even if such a list were not attached to the notices, the returns in question were introduced for the limited purpose of rebutting petitioner's claims regarding the age and vulnerabilities of its clients (*see* 20 NYCRR 3000.14 [d] [2] ["[d]ocuments and testimony introduced only for purposes of rebuttal or to impeach a witness may be allowed without inclusion on the hearing memorandum"]). Accordingly, the Division's introduction of the documents for purposes of rebuttal was permitted by our Rules and was not misconduct as alleged by petitioner. We also agree with the Administrative Law Judge's characterization of the legislative bill jackets as public records and that the Division's hearing memorandum contained adequate citations to these records. The purpose of a motion to reargue a prior determination is to afford a party an opportunity to establish that a court overlooked or misapprehended relevant facts or misapplied a controlling principle of law, not to "serve as a vehicle to permit the unsuccessful part to argue once again the

very questions previously decided” (*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979], *lv denied* 56 NY2d 507 [1982]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Ronald P. Bellantonio and Richard Rock is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Ronald Bellantonio and Richard Rock are denied; and
4. The conciliation orders, dated November 18, 2016, are sustained.

DATED: Albany, New York  
July 22, 2021

/s/ Anthony Giardina  
Anthony Giardina  
President

/s/ Dierdre K. Scozzafava  
Dierdre K. Scozzafava  
Commissioner