

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

ESTATE OF CAROLINE H. WALSH      v.      COMMISSIONER OF REVENUE

Docket No. C347505

Promulgated:  
June 26, 2024

This is an appeal filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, § 39 from the refusal of the Commissioner of Revenue ("Commissioner" or "appellee") to grant abatement of penalties and interest assessed against the Estate of Caroline H. Walsh ("appellant") pursuant to G.L. c. 62C, § 32 ("§ 32") and G.L. c. 62C, § 33(a) and (b) ("§ 33(a)" and "§ 33(b)") for a late-filed estate tax return and late payment of estate tax.

Chairman DeFrancisco heard this appeal. Commissioners Good, Elliott, Metzger, and Bernier joined him in the decision for the appellee.

These findings of fact and report are made pursuant to a request by the appellant under G.L. c. 58A, § 13 and 831 CMR 1.32.<sup>1</sup>

*Michael Walsh, Esq.*, for the appellant.

*Jodi B. Meade, Esq.*, and *Timothy Stille, Esq.*, for the appellee.

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<sup>1</sup> This citation is to the regulation in effect prior to January 5, 2024.

## **FINDINGS OF FACT AND REPORT**

Based on testimony and exhibits admitted into evidence at the hearing of this appeal, the Appellate Tax Board ("Board") made the following findings of fact.

Caroline H. Walsh died on January 28, 2012, and her only child, John H. Walsh ("Mr. Walsh"), was appointed executor on July 18, 2012. A Massachusetts Estate Tax Return, Form M-706, was due on October 28, 2012, but it was not filed until seven years later, on October 9, 2019. Together with Form M-706, the appellant also submitted a check in the amount of \$224,654 for the underlying tax obligation as reflected on the return and also filed an abatement application seeking abatement of all penalties and interest in anticipation of an assessment by the Commissioner.

On March 18, 2021, the Commissioner issued a Notice of Assessment, assessing statutory penalties of \$112,327.10 and interest of \$145,674.60 for the appellant's untimely filing of the estate tax return and payment of the estate tax. On July 18, 2022, the Commissioner denied the appellant's request for abatement.<sup>2</sup> On September 15, 2022, the appellant seasonably filed a petition with

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<sup>2</sup> The appellant consented to allow the Commissioner more than six months from its filing to act on the appellant's abatement application pursuant to G.L. c. 58A, § 6.

the Board.<sup>3</sup> Based on these facts, the Board found and ruled that it had jurisdiction to hear and decide the instant appeal.

The circumstances of the significant delay in filing the estate tax return are the subject of this appeal, specifically whether an appellant can demonstrate reasonable cause sufficient for abatement of the late-file and late-payment penalties.

According to Mr. Walsh, who testified at the hearing of this appeal, soon after his appointment as personal representative, he contacted accountant Ed Sherman to complete federal and state estate tax returns and final income tax returns for the decedent. Mr. Walsh testified that “[w]e had a couple of initial meetings,” but “things just kind of fell by the wayside” for “close to a year.” He further testified that, based on his initial conversation with Mr. Sherman, he understood that it was important that Form M-706 be accurate, and he did not believe there was any rush to submit the return.

Mr. Sherman died unexpectedly on July 7, 2013, almost a year after Mr. Walsh was appointed as personal representative. Mr. Walsh testified that after a few months, he retrieved the file from the accountant’s widow and walked the file across the hall to his usual accountant, Carmine Mastrogiovanni.

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<sup>3</sup> While the petition was stamped as having been docketed by the Board on September 21, 2022, the envelope containing the appeal bore a United States Postal Service postmark of September 15, 2021. Pursuant to G.L. c. 58A, § 7, the Board considered the date of postmark to be the date of filing.

According to their records, Mr. Mastrogiovanni's practice received the estate's file and began reviewing it in December 2013. On or about January 6, 2014, Mr. Mastrogiovanni sent to Mr. Walsh a list of documents and information that he needed for tax return preparation purposes. An undated handwritten note from Mr. Mastrogiovanni informed Mr. Walsh that he could not complete the returns and that "I have been waiting too long for this info and need everything A.S.A.P. or I will be forced to let it go until after the tax season 2015." Over a year after Mr. Mastrogiovanni took over the file, Mr. Walsh replied by letter dated February 6, 2015, apologizing for his delay, and enclosing some, but not all, of the information requested. By letter dated May 19, 2015, Mr. Mastrogiovanni sent to Mr. Walsh a list detailing eighteen items needed to complete Form M-706 as well as the personal income tax returns for the decedent and the estate's income tax returns, and he asked Mr. Walsh to "get the documents to us as soon as possible."

Mr. Mastrogiovanni became semi-retired sometime in 2016, and his partner, Heather Denehy, became the lead accountant at the practice.<sup>4</sup> Mr. Walsh testified that, to the best of his recollection, he was in communication with Ms. Denehy throughout

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<sup>4</sup> Ms. Denehy was subpoenaed by the Commissioner to testify at the hearing. The appellant claimed that it lacked prior notice of her testimony and moved to strike the testimony, citing M.R.C.P. 45(d). While the Board follows the Massachusetts Rules of Civil Procedure with respect to the summoning of witnesses (see 831 CMR 1.24 as in effect during the relevant time), the appellant cited the wrong rule. Unlike deposition subpoenas, there is no requirement for notice to the opposing party in a trial subpoena. See M.R.C.P. 45(e).

2016 and 2017 about once every few months, with her seeking information to complete the estate tax return. An email dated October 16, 2017 from Ms. Denehy to Mr. Walsh entitled "open items" referenced many outstanding items needing to be resolved before completing the estate tax return. Several of these "open items" were the same as those included on the list generated by Mr. Mastrogiovanni over two years prior in May 2015, specifically the value of property owned by the decedent. Mr. Walsh testified that his delay in resolving these matters was due to his considerable concern with securing an accurate appraisal of the decedent's property. He testified that he was dissatisfied with earlier appraisals because, in his opinion, they did not properly value the decedent's valuable furnishings.

Mr. Walsh testified that, from January to April 2018, he was required to take a leave of absence from work and temporarily stay in Florida with his daughter, who was having health complications and needed help with her children.

Mr. Walsh testified that an appraisal meeting his standards was finally completed sometime in the later part of 2018 and that he sent that appraisal to Ms. Denehy. On October 9, 2018, Ms. Denehy sent Mr. Walsh a completed Form M-706 ("Denehy return"). Ms. Denehy's attached letter indicated an estate tax due of \$224,654.00 and advised Mr. Walsh to file the enclosed return "as soon as possible." Mr. Walsh testified that, based on his review

of the Denehy return, he believed it to include some "problematic" items. He testified that he was "[f]eeling guilty about the time I dragged her along not getting the appraisal" completed, so he "felt awkward going back to her about that." When pressed for what he opined to be "problematic" about the Denehy return, Mr. Walsh provided no specific reason, simply stating, "I don't recall. I'm not an accountant."

After nearly a year, Mr. Walsh hired a new accountant, Michael DiCorato. Mr. DiCorato completed Form M-706 ("DiCorato return") in early October, and Mr. Walsh filed it on October 9, 2019. The DiCorato return reflected the same tax due as the Denehy return - \$224,654.00. The appellant did not proffer as evidence the Denehy return for comparison with the DiCorato return.

While the appellant focused on the unexpected death of the original accountant as a cause of delay, an entire year transpired between the appointment of Mr. Walsh as personal representative and the accountant's death during which no extension was filed and, as Mr. Walsh admits, "things just kind of fell by the wayside." The appellant's further claim that the second accountant wasted time is refuted by evidence of numerous communications from Mr. Mastrogiovanni displaying frustration with Mr. Walsh's delay and repeatedly requesting many needed documents and valuations. These communications occurred prior to Mr. Mastrogiovanni's retirement as well as Mr. Walsh's temporary relocation to Florida.

Additionally, while Mr. Walsh claimed he could not secure an accurate appraisal before 2018, no appraisals were entered into evidence to compare their supposed stark contrast with the appraisal that was ultimately used for the estate tax return. Similarly, the appellant's claims that the third accountant was incompetent is not credible where Mr. Walsh admitted that he "dragged her along" and could not identify specific errors, and the final estate tax figure on both the Denehy return and the DiCorato return were the same. Without corroborating evidence, the appellant's claims are merely self-serving statements attempting to justify a prolonged delay in filing the required return and paying the requisite tax.

Based on the evidence of record, the Board found that the appellant failed to demonstrate that it exercised reasonable care in filing the estate tax return and paying the estate tax and thus failed to meet its burden of proving reasonable cause that justifies abatement of the late-file and late-payment penalties. The appellant also failed to offer a legal basis for the abatement of interest.

Therefore, the Board issued a decision for the appellee.

## OPINION

General Laws c. 62C, § 17 provides that, when an estate is liable for estate tax, an estate tax return must be filed within nine months after the date of death of the decedent. The appellant did not timely fulfill its obligation to file Form M-706 and pay the estate tax due. The authority for the Commissioner to assess late-file and late-payment penalties is found in §§ 33(a) and (b), which provide that:

- (a) If any return is not filed with the commissioner on or before its due date or within any extension of time granted by him, **there shall be added** to and become a part of the tax, as an additional tax, a **penalty** of one per cent of the amount required to be shown as the tax on such return for each month or fraction thereof during which such failure continues, not exceeding, in the aggregate, twenty-five per cent of said amount.
- (b) If any amount of tax is not paid to the commissioner on or before the date prescribed for payment of such tax, determined with regard to any extension of time for payment, **there shall be added** to the amount shown as tax on such return **a penalty** of one per cent of the amount of such tax for each month or fraction thereof during which such failure continues, not exceeding, in the aggregate, twenty-five per cent of said amount.

(emphasis added). As indicated in bold, the initial imposition of the penalties for late filing of a return and late payment of tax is mandatory. See **Stella, Executor v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports 2003-44, 53 (citing **Fogarty**



**v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports 1987-219).

Pursuant to G.L. c. 62C, § 33(f) ("§ 33(f)"), the Commissioner has discretion to waive or abate this penalty, but will do so only where the taxpayer can show that "any failure to file a return or to pay a tax in a timely manner is due to reasonable cause and not due to willful neglect. See generally **Commissioner of Revenue v. Wells Yachts South, Inc.**, 406 Mass. 661, 663 (1990). The appellant also bears the burden of proving facts sufficient to establish reasonable cause. See **Blakeley v. Commissioner of Revenue**, 28 Mass. App. Ct. 499, 501 (1990), *rev. denied*, 407 Mass. 1103 (1990); **Q Holdings Corp. v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports 1996-412, 419.

The Supreme Judicial Court has defined "reasonable cause" in § 33(f) as establishing an "objective standard," whereby "[a]t a minimum, the taxpayer must show that he exercised the degree of care that an ordinary taxpayer in his position would have exercised." **Wells Yachts South**, 406 Mass. at 665. This objective standard requires a factual analysis to determine if the taxpayer exercised "ordinary business care" with respect to filing returns and paying taxes in a timely manner. **Id.**

The circumstances of this appeal fail to establish reasonable cause for the seven-year period that preceded the filing of Form M-706. Almost an entire year passed between Mr. Walsh's appointment

as personal representative and the passing of the first accountant during which time no extension was filed and, as Mr. Walsh himself admits, "things just kind of fell by the wayside." Mr. Walsh then failed to respond, and finally responded inadequately, to Mr. Mastrogiovanni's repeated and frustrated requests for information.

The Board further found that the few months during which Mr. Walsh was relocated to Florida to care for his daughter were hardly as relevant to the overall delay as the years during which he failed to act in a timely manner to file extensions, respond to repeated inquiries from Mr. Mastrogiovanni and Ms. Denehy, and finally hire Mr. DiCorato.

Moreover, the appellant failed to advance any evidence to substantiate its claims that previous appraisals and the Denehy return were inadequate, particularly when he failed to present the prior appraisals and the Denehy return for comparison. See **Chan Market, Inc. v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports 2013-1258, 1263 (finding the taxpayer failed to prove its claim when he "presented no evidence whatsoever, beyond his own self-serving statements, to corroborate his assertion").

The appellant additionally argued that the assessment of penalties in this appeal constituted excessive fines in violation of the Eighth Amendment to the United States Constitution. However, the Board did not find this argument persuasive. Citing the Supreme Court's finding of the "remedial character" of penalties as being

"provided primarily as a safeguard of the protection of the revenue," the Ninth Circuit Court of Appeals has ruled that tax penalties are not regarded as punitive, such that the Eighth amendment does not apply to restrict their assessment. **Little v. C.I.R.**, 106 F.3d 1445, 1454 (9<sup>th</sup> Cir. 1997) (quoting **Helvering v. Mitchell**, 303 U.S. 391, 401 (1938)).

Based on the foregoing, the Board found and ruled that the appellant failed to meet its burden of proving reasonable cause for the delay in filing Form M-706 and paying the requisite estate tax due.

Finally, the appellant challenged the statutory accrual of interest. Interest accrues with no limitation pursuant to G.L. c. 62C, § 32(a) ("§ 32(a)"). The appellant contended that interest is subject to the same 25 percent limit as penalties assessed under §§ 33(a) and (b). The appellant cited G.L. c. 62C, § 32(c), which provides that "a penalty under § 33(a) and (b) shall include interest," reading this phrase to mean that interest becomes part of the penalties which are limited by § 33(a) and (b).

The Board disagrees. Penalties and interest are two distinct charges governed by separate statutes. While there are limits in §§ 33(a) and (b), there is none in § 32(a). It is well-settled that the "imposition of interest is mandatory and there is no provision for an appeal." **Moss v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports 1989-270, 278-79; see also **Blue**

**Jay Corporation v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports 1994-140, 142 (stating that "there is no provision for abating interest accrued on a tax validly due").

Accordingly, the Board decided this appeal for the appellee, upholding the assessments of penalties and interest at issue.

**THE APPELLATE TAX BOARD**

By: /S/   
Mark J. DeFrancisco, Chairman

A true copy,

Attest: /S/   
Clerk of the Board