COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

# JONATHAN HAAR v. COMMISSIONER OF REVENUE

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Docket No. C315058   Promulgated:

  July 23, 2014

This is an appeal filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, § 39(c) from the refusal of the appellee, Commissioner of Revenue (“Commissioner” or “appellee”), to grant an abatement of a penalty assessed to the appellant, Jonathan Haar, (“Mr. Haar” or “appellant”), for the tax year ended December 31, 2010 (“tax year at issue”).

Commissioner Scharaffa heard this appeal and was joined by Chairman Hammond and Commissioners Rose, Chmielinski, and Good in a decision for the appellant.

These findings of fact and report are made pursuant to a request by the appellee under G.L. c. 58A, § 13 and 831 CMR 1.32.

*Jonathan Haar, pro se,* for the appellant.

*Bensen V. Solivan*, Esq., and *Timothy R. Stille*, Esq. for the appellee.

## FINDINGS OF FACT AND REPORT

1. **INTRODUCTION**

On the basis of a Statement of Agreed Facts and the testimony and exhibits offered into evidence at the hearing of this appeal, the Appellate Tax Board (“Board”) made the following findings of fact.

This appeal involves the Commissioner’s assessment of a $100 penalty, pursuant to G.L. c. 62C, § 33(g) (“§ 33(g)”), because of the appellant’s failure to electronically submit the payment that accompanied his Form-4868, Application for Automatic Six-Month Extension of Time to File Massachusetts Income Tax Return (“extension application”) for the tax year at issue. Although the penalty was assessed for tax year 2010, a portion of the appellant’s compliance history is relevant and is therefore briefly recounted below.

1. **APPELLANT’S FILING AND PAYMENT HISTORY**

On April 15, 2006, the appellant filed a paper extension application for the tax year ended December 31, 2005. The paper extension application was accompanied by a $5,000 payment in the form of a check (“paper payment”). The paper extension application and paper payment did not comply with the requirements set forth in ***Technical Information Release (“TIR”) 04-30*** (“***TIR 04-30***”), which states that if a payment accompanying an extension application equals $5,000 or more, such extension application and payment must be submitted electronically. *See* ***TIR 04-30 (II)(D)***.

Under § 33(g), the Commissioner is required to notify taxpayers of their first failure to comply with the electronic filing and payment mandates, but is not required “to send the notice for subsequent instances of noncompliance.” Thus, by notice dated May 2, 2006, the Commissioner informed the appellant that the paper extension application and paper payment for the 2005 tax year did not comply with the electronic filing and payment mandates and that any further instance of non-compliance would result in the assessment of a $100 penalty. The appellant was assessed a $100 penalty for failing to make an electronic payment with his extension application for the 2006 tax year, but complied with the Commissioner’s electronic filing and payment mandates for the 2007 tax year. Because the amount accompanying his extension applications for tax years 2008 and 2009 did not exceed the $5,000 threshold, the appellant’s paper extension applications and paper payments did not run afoul of ***TIR 04-30***, and no penalties were assessed for those tax years.

On April 15, 2011, the appellant filed a paper extension application for the tax year at issue, which was accompanied by a paper payment in the amount of $19,517.00. By Notice of Assessment dated October 24, 2011, the Commissioner assessed a $100 penalty to the appellant for his failure to make an electronic payment in connection with his extension application for the tax year at issue.[[1]](#footnote-1)

On December 15, 2011, the appellant applied in writing to the Commissioner, seeking an abatement of the $100 penalty. By Notice of Abatement Determination dated March 14, 2012, the Commissioner denied the appellant’s abatement request. On April 3, 2012, the appellant timely filed his appeal with the Board. On the basis of these facts, the Board found and ruled that it had jurisdiction to hear and decide this appeal.

1. **APPELLANT’S TESTIMONY**

The appellant testified that each year, he applies to the Commissioner for an extension to file his Massachusetts income tax return, because a portion of his income is derived from a Texas partnership in which he has an interest with his uncle, who resides in Texas. For the tax year at issue, the appellant engaged a paid professional tax preparer to file his income tax return because he determined that it was a complicated return.

Mr. Haar maintained that the Commissioner’s electronic payment mandate is a “serious invasion of both [his] privacy and [his] personal business practices,” as it exposes his finances to risk of cyber attack. On his abatement application, Mr. Haar explained, “I intentionally do no electronic banking nor direct bill paying, I have none of my credit cards linked to my bank accounts directly and I think anyone who does any of the above is exposing themselves to multiple risks of cybercrime and identity theft.” At the hearing, Mr. Haar testified that he does not link his “bank account information in any electronic way to any other electronic medium” because he believes it is a “very foolish thing to do.” Mr. Haar further expressed doubts as to the security of the computer systems used by the Department of Revenue (“DOR”), noting that “if the Pentagon can be hacked,” he had little confidence that DOR could protect his – or any other taxpayer’s – personal data from theft.

1. **COMMISSIONER’S CASE**

It was the Commissioner’s position in this appeal that, pursuant to G.L. c. 62C, §§ 5, 33(g) and 85, she has the authority to mandate electronic filing and payment and to assess penalties if, after notice, a taxpayer failed to comply with the prescribed filing and payment mandates. While § 33(g) provides that the penalties may be abated if a taxpayer can demonstrate “reasonable cause” for non-compliance, the Commissioner maintained that the appellant did not establish reasonable cause because ***Administrative Procedure 633*** (“***AP 633***”) provides that “[t]he fact that a taxpayer does not own a computer or is uncomfortable with electronic data or funds transfer will not support a claim for reasonable cause.” ***AP 633(II)(D)***.

In support of her position, the Commissioner offered the testimony of two witnesses, Robert Allard and Theresa O’Brien- Horan, both longtime employees of DOR. Mr. Allard, who is a Tax Auditor, testified regarding Mr. Haar’s tax filing and payment history. Based upon records maintained by DOR’s MASSTAX computer system, Mr. Allard was able to determine that the personal income tax return ultimately filed by Mr. Haar for the tax year at issue was electronically filed with the assistance of a paid preparer. However, MASSTAX records showed that Mr. Haar, as he did with the $19,517.00 check he mailed with his extension request, paid the amount shown on the return as the tax due, $1,926.00, by check.

Ms. O’Brien-Horan testified that she has been employed by DOR for 26 years in several senior positions. At the time of the hearing, she was a Deputy Commissioner assigned to the Commissioner’s Office as a participant in the development of MASS TAX 2, DOR’s new integrated computer system. Prior to her assignment in the Commissioner’s Office, she served as Deputy Commissioner of the Taxpayer Service Division and Deputy Commissioner of the Processing Division. Ms. O’Brien-Horan, who was part of the management team that implemented the electronic filing and payment mandates at issue here, described the policy reasons behind their implementation.

She testified that DOR was “looking for ways to make compliance easier for taxpayers, to enable them to file more simply [and] improve our services.” Ms. O’Brien-Horan observed that, in the 1990s, many taxpayers were turning to software, such as Turbo Tax®, to prepare and file tax returns, “but they were pressing print and mailing us the paper, rather than pressing send and transmitting the documents electronically.” Therefore, DOR began looking for ways to incentivize more taxpayers to use electronic options for tax filing, including a free on-line application, which was successfully utilized by numerous taxpayers. However, even though the number of taxpayers filing electronically was growing, Ms. O’Brien-Horan testified that DOR was still processing a large volume of paper returns.

With the 2002 amendment of G.L. c. 62C, § 5, which authorized the Commissioner to require electronic filing and payment, DOR began mandating electronic filing and payment for certain taxpayers above specific dollar thresholds, originally, those businesses that owed a combined total of more than $100,000 in 3 specific trustee taxes[[2]](#footnote-2): wage withholding, room occupancy, and sales and use taxes. *See* ***TIR 02-22.*** No such mandate was put in place by ***TIR 02-22*** for individual taxpayers filing personal income tax returns. Through the issuance of a series of TIRs, however, DOR gradually expanded the scope of the mandates. For example, the threshold for electronic filing with respect to businesses submitting certain trustee taxes was gradually lowered from $100,000 to $10,000, while the threshold for tax return preparers required to electronically file was lowered from over 200 returns to over 10 returns. *See* ***TIR 02-22***, ***TIR 03-11***, ***TIR 04-30*** and ***TIR 11-13.*** Ms. O’Brien-Horan testified that these thresholds were lowered in order to capture more and more taxpayers.

According to Ms. O’Brien-Horan, electronic data and funds transfer is preferable to paper returns and payment because it: (1) is the fastest and most accurate way to transmit data and payment; (2) reduces DOR’s processing costs; and (3) facilitates DOR’s data analysis, allowing it to make more accurate budget projections.

Ms. O’Brien-Horan testified that the mandate at issue in this appeal – requiring individual taxpayers who apply for an extension with an accompanying payment of $5,000 or more to file and pay electronically – is helpful to DOR because it maximizes up-front revenue intake. According to Ms. O’Brien-Horan, the $5,000 threshold was chosen because it would “impact 17% of the taxpayers, but get . . . the money banked for 84% of the revenue.” She elaborated that when DOR analyzed the population of taxpayers that would be affected by the $5,000 threshold, it determined that 98% of such taxpayers were already filing using a software package, so DOR “didn’t think [the mandate] would be too burdensome.” She further testified that many taxpayers choose to file and pay electronically, even when not required to by the mandates, because they recognize the benefits of electronic filing and payment, including a reduction in calculation errors by taxpayers and processing errors by DOR, as well as faster refunds.

In response to questioning by the hearing officer regarding whether DOR was eventually going to require all taxpayers to file and pay electronically, including all individual taxpayers filing Form 1 Personal Income Tax Returns, Ms. O’Brien-Horan responded that although she would “encourage” taxpayers to file electronically and would “love to get all of our data electronically,” there is no present requirement for all income tax payers to file and pay electronically, but she acknowledged that DOR is “certainly . . . looking for more ways” to obtain electronic data and tax payments.

Ms. O’Brien-Horan noted that the penalty imposed by § 33(g) can be waived if the taxpayer demonstrates reasonable cause for non-compliance. When asked by counsel for DOR if reasonable cause was the Massachusetts “equivalent of an opt-out” of electronic filing and payment requirements, she answered in the affirmative.

1. **BOARD’S FINDINGS**

On the basis of the foregoing facts, the Board initially found that the appellant timely filed his extension application with an accompanying payment for the tax year at issue, albeit in the form of a paper extension application and paper payment. Further, the appellant’s filing history indicated that he was neither untimely nor otherwise neglectful in his tax filing and payment obligations; rather, he simply filed and paid in a form other than that prescribed by ***TIR 04-30.***

However, despite the appellant’s timely payment of the amount accompanying his extension request for the tax year at issue, G.L. c. 62C, § 33(g) provides that the paper payment was “considered not to have been” made because of the electronic payment mandate of ***TIR 04-30***. Accordingly, the Board addressed the question of whether the appellant’s reasons for failing to conform to the Commissioner’s prescribed payment method constituted reasonable cause.

The Board found credible the appellant’s testimony that he was concerned that transmitting his personal financial information electronically would expose him to a serious risk of security breaches. Given his reference to the hacking of the Pentagon’s computer systems, and in light of the many well-publicized instances of large-scale thefts of financial information following computer security breaches at businesses and other institutions, and the appellant’s consistent practice of avoiding electronic payment of all of his bills, including his tax obligations, the Board found that the appellant’s failure to utilize the Commissioner’s mandated electronic tax payment to be reasonable. In finding that the appellant’s testimony concerning his consistent practice of avoiding electronic payment of bills was credible, the Board considered the fact that the appellant made an electronic payment of the amount accompanying his tax year 2007 extension request. However, the Board determined that this single instance of an electronic payment, some 3 years prior to the paper payment giving rise to the penalty at issue, did not undermine the credibility of the appellant’s concerns regarding electronic payment during the period at issue. *See* ***Commissioner of Revenue v. Wells Yachts South, Inc.,*** 406 Mass. 661, 664 (1990) (ruling that, in determining whether there is reasonable cause, the fact finder “must look to the time when the returns or tax payments were due”). The Board therefore found and ruled that the appellant’s paper payment of the tax accompanying his extension request in lieu of electronic payment was consistent with the degree of care that an ordinary taxpayer in his position would have exercised.

Accordingly, the Board found and ruled that the appellant demonstrated reasonable cause for his failure to comply with the Commissioner’s electronic-payment mandate for the period at issue. The Board therefore issued a decision for the appellant in this appeal and granted an abatement of the $100 § 33(g) penalty, along with statutory additions.

**OPINION**

Pursuant to a 2002 amendment to G.L. c. 62C, § 5,[[3]](#footnote-3) the Legislature granted to the Commissioner broad authority to require that documents, including tax returns and extension applications, be filed electronically and that payments made in connection with those filings also be remitted electronically. Section 5 provides, in pertinent part, that: “Any return, document or tax payment required or permitted to be filed under this chapter shall be filed with or transmitted to the commissioner in such manner, format and medium as the commissioner shall from time to time prescribe.”

As detailed in the foregoing findings, the Commissioner, through a series of ***TIR***s beginning in 2002, just a few months after the effective date of the amended § 5, and extending through 2011, has gradually expanded the scope of the electronic filing and payment mandates so as to impact more and more taxpayers. For example, ***TIR 02-22*** required taxpayers who collect withholding, sales and use, and room occupancy taxes in excess of $100,000 combined for all three categories of tax to file and pay electronically. The following year, the Commissioner significantly expanded the electronic filing and payment mandates, by, among other things, requiring tax return preparers who file more than 200 returns to file electronically and reducing the filing and payment threshold established in ***TIR 02-22*** for withholding, sales and use, and room occupancy taxes from $100,000 to just $10,000. *See* ***TIR 03-11.***  More recently, the Commissioner reduced the electronic filing threshold for tax return preparers from over 200 returns to now over 10 returns. *See* ***TIR 11-13***. The obvious effect of this series of ***TIR***s is to require more taxpayers to file and pay electronically.

Shortly after the first expansion of electronic filing and payment mandates in ***TIR 03-11,*** the Legislature enacted G.L. c. 62C, § 33(g), which imposes a penalty for failing to comply with the Commissioner’s mandate to electronically file any return, document, or information or electronically pay a  tax, without reasonable cause. *See* St. 2003, c. 143, § 2, effective December 4, 2003.  Section 33(g) provides, in pertinent part:

If after the commissioner has required taxpayers either to prepare or file any required return, document, or information, or to make a required tax payment or estimated payment, by way of a specified automated or electronic means, format, method, or medium, a taxpayer fails to comply with the prescribed method for the filing, data transfer, or payment, thetaxpayer shall be considered not to have made the required filing or the required payment. Upon a failure to comply, the commissioner, in addition to other remedies available to him, shall send the taxpayer a notice of improper filing or payment specifying the nonconformity therein, but shall not be required to send the notice for subsequent instances of noncompliance. ***Thereafter, if the taxpayer, without reasonable cause, fails to conform any filing, data transfer or payment with the method prescribed by the commissioner in tax years beginning on or after January 1, 2005, there shall be added to and become a part of the tax required to be paid a penalty in an amount not greater than $100 for each improper return, document or data transmission, and for each improper payment. .*** . . ***A penalty imposed by the commissioner for an improper filing or payment shall be subject to subsection (f) relative to the waiver of penalties.***

(emphasis added). Accordingly, a penalty imposed under § 33(g) may be waived if the taxpayer’s failure to comply with the Commissioner’s prescribed filing and payment methods are due to “reasonable cause.”

For the tax year at issue, ***TIR 04-30(II)(D)*** required that “any extension request and payment made by or on behalf of a taxpayer filing Forms 1 or 1-NR/PY must be made using electronic means if a payment of $5,000 or more accompanies the extension request.” In the present appeal, there was no dispute that the payment accompanying the appellant’s extension request for the tax year at issue was more than $5,000 but was not made electronically, thereby failing to conform to the ***TIR 04-30(II)(D)*** mandate. Further, the appellant did not deny that he had received a notice from the Commissioner five years earlier for failure to comply with the electronic filing and payment mandates for the 2005 tax year. Accordingly, the only issue raised by the parties in the present appeal was whether the appellant demonstrated reasonable cause for failing to comply with the electronic payment mandate of ***TIR 04-30(II)(D)***. Because the appellant bears the burden of proving his right to an abatement, he also bears the burden of establishing reasonable cause. ***Blakeley v. Commissioner of Revenue***, 28 Mass. App. Ct. 499, 501, *rev. denied*, 407 Mass. 1103 (1990); ***Q Holdings Corp. v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 1996-412, 418.

Section 33(g) expressly states that penalties imposed thereunder shall be “subject to subsection (f) relative to the waiver of penalties.” Massachusetts courts, and this Board, have had frequent occasion to consider “reasonable cause” for purposes of G.L. c. 62C, § 33(f) (“§ 33(f)”). The Supreme Judicial Court has consistently held that the determination of reasonable cause requires 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.” ***Geoffrey, Inc. v. Commissioner of Revenue,*** 453 Mass. 17, 26 (2009), (quoting***Wells Yachts South***, 406 Mass. at 665). The determination of whether a taxpayer has met the objective standard of exercising the degree of care of an ordinary taxpayer in his position requires a factual analysis of the circumstances existing at the time the return or tax payment was due. ***Wells Yachts South,*** 406 Mass. at 664.

Reasonable cause is a federal principle which Massachusetts adopted in 1980,[[4]](#footnote-4) and as such, “[i]n determining the existence of reasonable cause, Massachusetts courts and this Board have looked for guidance to federal cases and regulations promulgated under Internal Revenue Code § 6651(a), the federal counterpart to G.L. c. 62C, § 33(f).” ***Morris Electrical Supply Co., Inc. v. Commissioner of Revenue,*** Mass. ATB Findings of Fact and Reports 1996-403, 408. Federal cases have consistently held that the determination of reasonable cause requires a factual inquiry in order to establish whether the taxpayer exercised “ordinary business care and prudence.” *See, e.g.,* ***United States v. Boyle,*** 469 U.S. 241, 246, n.4 (1985); ***Daly v. United States,*** 480 F.Supp. 808, 811 (D.N.D. 1979); *see also* 26 CFR 301.6651-1(c) (defining reasonable cause for late filing of return and late payment of tax under Internal Revenue Code as the exercise of "ordinary business care and prudence”).

The Commissioner argued that the following language in ***AP 633(II)(D)*** precludes a finding that the appellant had reasonable cause for failing to electronically pay the tax accompanying his abatement request: “The fact that a taxpayer does not own a computer or is uncomfortable with electronic data or funds transfer will not support a claim for reasonable cause.” However, this blanket pronouncement is contrary to the clear line of Massachusetts and federal cases that require a factual analysis to determine whether a taxpayer exercised ordinary business care and prudence, and is also contrary to the Commissioner’s own regulation on electronic funds transfer. *See* 830 CMR 62C.78.1(8)(a) (“[t]he [DOR] will evaluate each case on an individual basis to determine whether failure to transmit payments by EFT was due to reasonable cause and not willful neglect.”).

In ***Cocco v. Commissioner of Revenue,*** Mass. ATB Findings of Fact and Reports 2013-1089, the Board held that a taxpayer who did not own a computer, did not know how to use one, and had credible concerns regarding the privacy of financial information transmitted electronically, established reasonable cause for her failure to comply with the Commissioner’s electronic filing mandate, despite the blanket pronouncement of ***AP 633***. The Board held that Administrative Procedures do not have the force of law, but “are informational only; they do not ‘supersede, alter or otherwise affect any provision of the Massachusetts General Laws, Massachusetts regulations, Department rulings, or any other sources of law.’” ***Cocco,*** Mass. ATB Findings of Fact and Reports at 2013-1103 (quoting 830 CMR 62C.3.1.(10)(c)(2)). Accordingly, consistent with its decision in ***Cocco,*** the Board ruled in the present appeal that the blanket pronouncement of ***AP 633,*** that a taxpayer’s discomfort with electronic data or funds transfer can never constitute reasonable cause for purposes of § 33(g)***,*** is inconsistent with the objective standard, to be determined by the trier of fact, of what constitutes the degree of care that an ordinary taxpayer in the appellant’s position would have exercised. ***Wells Yachts South***, 406 Mass. at 665.

Applying that “objective standard” to the facts of the present appeal, the Board found and ruled that the appellant demonstrated reasonable cause for failing to comply with the Commissioner’s electronic payment mandate. The Board found credible the appellant’s testimony that it was his consistent practice to avoid electronic payment of all bills, not just his tax obligations, and to keep his bank account information separate from his e-mail and other electronic media. The Board further found that his concerns regarding the electronic transmission of his personal financial data to be reasonable in these circumstances, given his reference to the hacking of the Pentagon’s computer systems and in light of the many well-publicized instances of large-scale thefts of financial information following computer security breaches at businesses and other institutions. *See, e.g*., ***In re: TJX Companies Retail Security Breach Litigation.***  ***Amerifirst Bank, et al v. TJX Companies, Inc., et al,*** 564 F.3d 489 (1st Cir. May 5, 2009); *see also* America the Virtual: Security, Privacy and Interoperability in an Interconnected World: Comment: Identity Crisis: Seeking a Unified Approach to Plaintiff Standing for Data Security Breaches of Sensitive Personal Information, 62 Am. U.L. Rev. 1365.

In making this finding, the Board noted that the appellant was not tardy or otherwise neglectful with respect to his extension application and payment for the tax year at issue or in previous tax years. *See* ***Cocco***, Mass. ATB Findings of Fact and Reports at 2013-1108 (weighing the taxpayer’s “exemplary” record of tax compliance in its consideration of reasonable cause not to file electronically). The appellant’s sole transgression was his use of paper, rather than the electronic means required by ***TIR 04-30***. As it did in ***Cocco***, and as have other taxing jurisdictions, the Board recognized that there are “meritorious reasons for individual taxpayers to decline to use computers to file their returns and pay their taxes.” *See* ***Cocco,*** Mass. ATB Findings of Fact and Reports at 2013-1106-07.

As the Board noted in ***Cocco***, the Commissioner’s blanket pronouncement in ***AP 633*** runs contrary to the treatment of electronic filing and payment requirements by the federal government and other state taxing jurisdictions, which are instructive on the issue of ordinary business care and prudence. ***Cocco,*** Mass. ATB Findings of Fact and Reports at 2013-1104-07. The United States Code in 26 U.S.C. § 6011(a) provides, “[w]hen required by regulations prescribed by the Secretary [of the Treasury] any person made liable for any tax imposed by this title, or with respect to the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary.” This language is similar to the language used in G.L. c. 62C, § 5 in that both statutes enable the Secretary or Commissioner to prescribe the form and manner in which tax returns must be filed.

However, Congress went further by enacting 26 U.S.C. § 6011(e)(1), which explicitly states that: “the Secretary may not require returns of any tax imposed by subtitle A on individuals, estates, and trusts to be other than on paper forms supplied by the Secretary.” The only exception to this rule is for tax preparers who file more than 10 tax returns for their clients; these preparers must electronically file their clients’ returns, unless the individual client does not wish to have their return filed electronically. 26 U.S.C. § 6011(e)(3). Thus, federal law provides for an opt-out provision for those taxpayers who use a paid tax return preparer. ***Rev. Proc. 2011-25, § 9.01***. Therefore, under federal law, there is no mandate for an individual to file returns or pay taxes by electronic means.

Instead of a mandate, Congress enacted 26 U.S.C. § 6011(f), Promotion of electronic filing, stating:

1. In general.-– The Secretary is authorized to promote the benefits of and encourage the use of electronic tax administration programs, as they become available, through the use of mass communications and other means.

1. Incentives.—- The Secretary may implement procedures to provide for the payment of appropriate incentives for electronically filed returns.

The incentives that the Internal Revenue Service employs to encourage electronic filing include faster processing time, fewer errors, faster refunds, and the delay of out-of-pocket taxpayer expense by allowing for credit-card payment of taxes. *See, e.g.,* IRS Publication 3112. *See also* Recommendations of the National Commission on Restructuring the IRS to Expand Electronic Filing of Tax Returns*,* Subcommittee on Oversight, 105th Cong. (1997) (statement of Donald Lubick, Acting Asst. Secretary for Tax Policy, U.S. Treasury) (“[W]e’re concerned about mandates or their functional equivalents through specific targets and we’re afraid that this will introduce a rigidity in an area where flexibility is really the order of the day.”).

Likewise, while other state jurisdictions have enacted electronic-filing mandates for certain tax types, they also include opt-out provisions or exceptions. *See, e.g*., Cal. Rev. & Tax Code § 19170(b) and N.J. Stat. Ann. 54A: 8-6.1(c) (permitting an opt-out for individual taxpayers who do not wish to have their individual income tax return filed electronically by a tax preparer who is otherwise required to file returns electronically); NY CLS Tax § 29(c) (electronic filing mandate applies only to taxpayers who use computer software to prepare their returns); Handbook for Electronic Filers of Rhode Island Tax Returns, RI-1345 (e-file mandate includes a broad “undue hardship” exception allowing for a case-by-case inquiry and also an opt out for taxpayers who request their preparer not to file electronically); Wisc. Admin. Code Tax 2.08(3)(c) (allows opt out for preparers where taxpayer does not want return filed electronically) and 2.08(3)(e)(1) (recognizes as undue hardship excusing electronic filing the fact that taxpayer does not have a computer connected to the Internet).

While the Board is cognizant that G.L. c. 62C, § 5 gives the Commissioner broad authority to prescribe methods of tax filing and payment, and it is equally mindful of the administrative convenience and other benefits derived from the promotion of electronic filing and payment, the Board also recognizes that the penalty under §33(g) for failing to comply with the Commissioner’s electronic payment mandates was not intended to be mandatory in all circumstances. Rather, the Legislature in enacting § 33(g) recognized, as have Congress and the various state legislatures discussed above, that a taxpayer may have reasonable cause for failing to file returns or pay taxes electronically. By employing “reasonable cause” language in § 33(g) and specifically providing that the waiver of penalties imposed under § 33(g) are subject to § 33(f), with its established body of case law requiring a factual analysis to determine if the taxpayer exercised the degree of care that an ordinary taxpayer in his position would have exercised, the Legislature ensured that taxpayers had an opportunity to establish that their failure to comply with electronic filing and payment mandates was justified. *See, e.g.,* ***Alliance to Protect Nantucket Sound, Inc., et al v. Energy Facilities Siting Board, et al,*** 457 Mass. 663, 673 (2010) (recognizing that Legislature acts with “full knowledge of existing law”).

On the facts of this appeal, particularly the appellant’s credible testimony concerning his consistent practice of avoiding the payment of his bills electronically, the Board found and ruled that the appellant exercised the degree of care that an ordinary taxpayer in his position would have exercised when he made his timely payment by check, contrary to the Commissioner’s electronic payment mandate. The Board therefore found and ruled that the appellant met his burden of proving reasonable cause under § 33(g) for his failure to remit payment electronically in connection with his extension application for the tax year at issue.

Accordingly, the Board issued a decision for the appellant in this appeal and granted an abatement of the $100 penalty, along with statutory additions.

**THE** **APPELLATE TAX BOARD**

**By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**Thomas W. Hammond, Jr., Chairman**

**A true copy,**

**Attest: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**Clerk of the Board**

1. Although ***TIR 04-30*** likewise specified that the appellant should have filed his extension application electronically, the Commissioner did not separately assess a penalty to the appellant for his failure to file the extension application electronically. [↑](#footnote-ref-1)
2. A trustee tax is a tax which an entity “collects from those with whom it does business and is obliged to pay over to the Commonwealth.” ***Genaitis v. Commissioner of Revenue,*** Mass. ATB Findings of Fact and Reports 2006-704, 713. [↑](#footnote-ref-2)
3. *See* St. 2002, c. 300, § 8(A). [↑](#footnote-ref-3)
4. St. 1980, c. 27, § 4. [↑](#footnote-ref-4)