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Federal Income Tax

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In 2023, the United States Court of Appeals for the Eleventh Circuit issued several published opinions involving U.S. federal income tax issues.[1] In two opinions authored by Judge Brasher, the court addressed issues of first impression. The court's opinion in *Gregory v. Commissioner*[2] addressed whether hobby expense deductions are miscellaneous itemized deductions. The court's opinion in *Lee v. United States*[3] addressed an issue of first impression for any circuit: whether a taxpayer's reliance on an agent to electronically file a federal income tax return constitutes reasonable cause for failing to file a return and pay the associated taxes. This Article surveys both of those opinions.

I. *GREGORY V. COMMISSIONER*

The characterization of an item of deduction significantly impacts its value to taxpayers. In *Gregory v. Commissioner*, the United States Court of Appeals for the Eleventh Circuit considered whether hobby expense deductions are miscellaneous itemized deductions.[4] Answering the question in the affirmative, the court upheld the Tax Court's decision.[5]

A. Statutory Structure

Generally speaking, tax deductions can be grouped into two main categories. The first category, which tax practitioners often call

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1. For an analysis of the court's cases involving U.S. federal income taxation during the prior survey period, see Andrew Todd, *Federal Income Taxation, Eleventh Circuit Survey*, 74 MERCER L. REV. 1447 (2023), https://digitalcommons.law.mercer.edu/jour_mlr/vol74/iss4/10/ [https://perma.cc/5Q5M-ULYG].

2. 69 F.4th 762 (11th Cir. 2023).

3. 84 F.4th 1271 (11th Cir. 2023).

4. *Gregory*, 69 F.4th at 764.

5. *Id.* at 764, 772.

"above-the-line deductions," are deductions that taxpayers are allowed to subtract from their gross income in calculating adjusted gross income.[6] Section 62[7] contains an exclusive list of these above-the-line deductions.[8] The second category, which tax practitioners often call "below-the-line deductions," are itemized deductions. Itemized deductions[9] are subtracted from an individual's adjusted gross income to determine taxable income.[10] Itemized deductions can be further classified as either itemized deductions or "miscellaneous itemized deductions." All itemized deductions are miscellaneous itemized deductions, except for twelve itemized deductions listed in section 67(b).[11]

Not all tax deductions are created equal. Taxpayers are permitted to deduct the full amount of certain expenses,[12] but deductions for other expenses are subject to floors, caps, or phase-outs.[13] In particular, taxpayers are allowed to deduct miscellaneous itemized deductions only to the extent that the aggregate amount of their miscellaneous itemized deductions exceed 2% of their adjusted gross income.[14] Moreover, under legislation known as the "Tax Cuts and Jobs Act,"[15] the deduction for miscellaneous itemized deductions has been disallowed for taxable years beginning after December 31, 2017, and before January 1, 2026.[16] Thus, the characterization of a deduction significantly impacts its value.

For U.S. federal income tax purposes, individuals generally are not allowed to deduct expenses incurred in activities not engaged in for profit

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6. *See* I.R.C. § 62(a).

7. I.R.C. § 62. All references to "Section," "section," or "§" in this Article are to sections of the Internal Revenue Code of 1986, as amended (the Code), unless indicated otherwise.

8. I.R.C. § 62(a) (providing that an individual's "adjusted gross income" means "gross income minus the following deductions[.]").

9. In determining taxable income, individuals are permitted to deduct either the standard deduction or their itemized deductions, whichever is greater. *See* I.R.C. § 63(b), (d), (e).

10. I.R.C. § 63(d).

11. I.R.C. § 67(b).

12. *E.g.*, I.R.C. § 162(a) (allowing a deduction for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business[.]")

13. *E.g.*, I.R.C. § 213(a) (allowing a deduction for medical expenses that exceed 7.5% of the taxpayer's adjusted gross income); I.R.C. § 164(b)(6)(B) (limiting the deduction allowed to individuals under section 164(a) for state and local taxes paid to $10,000 per taxable year for taxable years beginning after December 31, 2017, and before January 1, 2026); I.R.C. § 221(b)(2) (phasing out the deduction for student loan interest paid based on the taxpayer's modified adjusted gross income).

14. I.R.C. § 67(a).

15. Act of Dec. 22, 2017, Pub. L. No. 115-97, 131 Stat. 2054.

16. I.R.C. § 67(g).

(e.g., hobbies).[17] Under section 183(b),[18] however, individuals are allowed two specific deductions with respect to hobbies. First, taxpayers are allowed to deduct hobby expenses if the item would otherwise be deductible without regard to whether the activity was engaged in for profit.[19] The items deductible under section 183(b)(1),[20] which would include items such as state and local taxes, are deductible without regard to the hobby's income.[21] Additionally, taxpayers are allowed a deduction equal to the amount to what would be allowable if the hobby were engaged in for profit, but only to the extent of the hobby's gross income.[22] Thus, the deduction allowed under section 183(b)(2)[23] is limited to the amount of the hobby's gross income minus the deductions allowed under section 183(b)(1). It is this latter deduction that was at issue in *Gregory*.

B. Facts of the Case

Carl and Leila Gregory (the Gregorys) incorporated CLC Ventures, Ltd. (CLC) in 2011 "to own and charter a yacht named *Lady Leila*."[24] CLC was a Cayman Islands corporation, and in 2012 the Gregorys elected for CLC to be a disregarded entity for U.S. federal income tax purposes.[25] Because CLC elected to be a disregarded entity, CLC's items of income and expense were reported on the Gregorys' personal U.S. federal income tax returns.[26]

The Gregorys reported CLC's income and expenses on Schedule C (Profit or Loss from Business) on their joint income tax returns for 2014 and 2015.[27] The Internal Revenue Service (IRS) audited the Gregorys' 2014 and 2015 tax returns and concluded that the Gregorys lacked a profit motive with respect to CLC's activities.[28] Consequently, the income

17. I.R.C. § 183(a).

18. I.R.C. § 183(b).

19. I.R.C. § 183(b)(1).

20. *Id.*

21. *Id.*

22. I.R.C. § 183(b)(2).

23. *Id.*

24. *Gregory*, 69 F.4th at 764; *see also* Gregory v. Comm'r, T.C. Memo 2021-115 at *2–3 (Sept. 29, 2021).

25. *Gregory*, T.C. Memo. 2021-115 at *3; *Gregory*, 69 F.4th at 764. For U.S. federal income tax purposes, "foreign eligible entities" with more than one owner will default to classification either as a corporation (if all of the equity owners have limited liability) or a partnership (if any equity owner has unlimited liability) but can elect to be disregarded as an entity separate from its owners. Treas. Reg. § 301.7701-3(b)(2)(i), (c)(1)(i) (2024).

26. *Gregory*, 69 F.4th at 764.

27. *Gregory*, T.C. Memo 2021-115 at *3; *Gregory*, 69 F.4th at 764.

28. *Gregory*, T.C. Memo 2021-115 at *3.

from CLC's activities was recharacterized as "other income" and the expenses from CLC's activities (the CLC Expenses) were recharacterized as miscellaneous itemized deductions under section 183.[29]

The Gregorys reported CLC Expenses of $342,173 and $313,825 for taxable years 2014 and 2015, respectively.[30] Of these amounts, the IRS determined that expenses of $750 and $126 were deductible under section 183(b)(1) for taxable years 2014 and 2015, respectively.[31] The remaining $341,423 and $313,699 of expenses for 2014 and 2015, respectively, were recharacterized as miscellaneous itemized deductions.[32] Because the remaining CLC Expenses did not exceed 2% of the Gregorys' adjusted gross income for the respective years, the IRS disallowed those deductions under section 67(a) and assessed over $300,000 in interest and penalties.[33]

After receiving a notice of deficiency, the Gregorys filed a timely petition in the United States Tax Court.[34] Although the Gregorys did not challenge the determination that they lacked a profit motive with respect to CLC's activities,[35] they challenged the IRS's determination that the CLC Expenses were miscellaneous itemized deductions, moving for partial summary judgment on the issue.[36] The Tax Court denied the Gregorys' motion and concluded that the CLC Expenses were miscellaneous itemized deductions.[37]

C. Issue Presented: Are Hobby Losses Miscellaneous Itemized Deductions?

The sole issue on appeal was whether the Tax Court correctly determined that the CLC Expenses were miscellaneous itemized deductions. After examining the statutory text, the Tax Court concluded that the text of sections 63,[38] 67,[39] and 183[40] clearly indicated that the

29. *Id.*

30. *Id.*

31. *Id.* at *3–4.

32. *Id.* at *4.

33. *Id.*; *Gregory*, 69 F.4th at 765. Although the Gregorys' adjusted gross income for 2014 and 2015 was not in the record, all parties agreed that their adjusted gross income was too high to permit the Gregorys a deduction if the losses were treated as miscellaneous itemized deductions. *Gregory*, 69 F.4th at 765 n.1.

34. *Gregory*, T.C. Memo 2021-115 at *4.

35. *Id.* at *3 n.4.

36. *Id.* at *5.

37. *Id.* at *14.

38. I.R.C. § 63.

39. I.R.C. § 67.

40. I.R.C. § 183.

CLC Expenses were miscellaneous itemized deductions.[41] The Eleventh Circuit agreed and denied the Gregorys' petition for review of the Tax Court's decision.[42]

1. The Statutory Text Clearly Indicates that Hobby Losses are Miscellaneous Itemized Deductions

The Eleventh Circuit began by examining the text of section 183, noting three relevant provisions.[43] First, section 183(a)[44] provides the general rule that hobby losses are not deductible.[45] Second, section 183(b)(1) grants to hobbies the same deductions allowable for income tax purposes where the deduction is not conditioned on the presence of a profit motive.[46] Finally, section 183(b)(2) allows a deduction equal to the amount that would be deductible if the activity were engaged in for profit, but caps the deduction at the hobby's gross income less the deductions allowed under section 183(b)(1).[47] Although section 183 does not speak to the character of the deduction (i.e., above-the-line or below-the-line), the court observed that section 183 is consistent with numerous other deductions which are granted in one section but limited in another section.[48]

The Gregorys resisted that reasoning, making two text-based arguments that section 183 addresses the treatment of hobby losses.[49] First, the Gregorys argued that section 183(b)(2) establishes a framework that requires hobby expenses to be treated as trade or business expenses for all purposes.[50] According to the Gregorys, because section 183(b)(2) calculates the amount of the deduction by reference to the amount that would be deductible if the hobby were engaged in for profit, the expenses deductible under section 183(b)(2) receive the same treatment as trade or business expenses—i.e., they become above-the-line deductions.[51] Second, the Gregorys argued that because section 183(b)(2) limits the deduction for hobby losses to the amount of

41. *Gregory*, T.C. Memo 2021-115, at *8–10.
42. *Gregory*, 69 F.4th at 764.
43. *Id.* at 767.
44. I.R.C. § 183(a).
45. *Gregory*, 69 F.4th at 767.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 767–68.

the hobby's gross income, the deduction is intended to reduce the taxpayer's gross income and, therefore, belongs above-the-line.[52]

The Eleventh Circuit quickly rejected the Gregorys' arguments.[53] First, the court observed that section 183(b)(2) refers to business activities only when setting the *amount* of the deduction.[54] Apart from determining the amount of the deduction, the statute does not provide for treatment of hobby expenses as trade or business expenses.[55] Additionally, the court explained that the reference to gross income in section 183(b)(2) when setting the cap on deductible hobby expenses does not transform a hobby expense deduction into an above-the-line deduction.[56] The phrase "gross income derived from [the hobby]" means just that—the gross income *from the hobby*.[57] It does not mean the taxpayer's total gross income.[58] The statutory reference to gross income is simply a benchmark that sets the maximum amount of the deduction rather than "a command to apply hobby loss deductions against a taxpayer's total gross income."[59] Thus, section 183 addresses only the amount of hobby expense deductions, not their treatment.

Having concluded that section 183 does not indicate how hobby expense deductions are to be treated, the Eleventh Circuit turned to other code sections and found a clear answer.[60] The court observed that section 62 sets forth an exclusive list of above-the-line deductions.[61] Section 183 deductions were not identified as an above-the-line deduction in section 62, so hobby loss deductions are not above-the-line deductions.[62]

Next, the court observed that section 63 defines the term "itemized deductions" as all deductions except for (1) the above-the-line deductions listed in section 63 and (2) four deductions specifically listed in section 63(b).[63] Because section 183 is not included in the two groups of deductions excluded from the definition of itemized deductions, hobby loss deductions are itemized deductions.[64]

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52. *Id.* at 768.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 768–69.
61. *Id.* at 769.
62. *Id.*
63. *Id.*; I.R.C. § 63(b).
64. *Gregory*, 69 F.4th at 769.

Finally, the court observed that section 67(a)[65] subjects miscellaneous itemized deductions to a floor equal to 2% of the taxpayer's adjusted gross income.[66] The term "miscellaneous itemized deductions" is defined as all "itemized deductions" other than the twelve itemized deductions specifically listed in section 67(b).[67] Notably absent from that list are section 183(b)(2) expenses.[68] Therefore, hobby loss expenses are miscellaneous itemized deductions that are only deductible to the extent they exceed 2% of a taxpayer's adjusted gross income.[69]

2. The Gregorys' Alternative Arguments Fail

The Gregorys launched a salvo of five alternative arguments in response to the plain text analysis, each one missing the mark. First, the Gregorys argued that the court's decision in *Brannen v. Commissioner*[70] indicated a recognized connection between deductions under section 183 and section 162.[71] The court explained that *Brannen* described the relationship between section 162 and section 183(b)(2), but only in the context of determining profit motive.[72] *Brannen* did not address the placement of hobby losses, and section 67 was not enacted until a few years after *Brannen* was decided.[73] Thus, *Brannen* does not stand for the proposition that hobby loss expenses are above-the-line deductions.[74]

Second, the Gregorys argued that the court's interpretation was inconsistent with Congressional intent.[75] Pointing to legislative history, the Gregorys contended that section 183 was enacted to prevent wealthy taxpayers from improperly reducing their taxable income with artificial losses, not to prevent the deduction of legitimate hobby expenses.[76] However, the court pointed out that the Gregorys *do* have a deduction under section 183; they just cannot benefit from that deduction because of the floor established by section 67(a).[77] Congress revealed its intent

65. I.R.C. § 67(a).
66. *Gregory*, 69 F.4th at 769.
67. *Id.*
68. *Id.*
69. *Id.*
70. 722 F.2d 695 (11th Cir. 1984).
71. *Gregory*, 69 F.4th at 770; I.R.C. § 162.
72. *Gregory*, 69 F.4th at 770.
73. *Id.*
74. *Id.* at 770–71.
75. *Id.* at 771.
76. *Id.*
77. *Id.*

when it enacted section 67 and limited taxpayers' ability to benefit from existing deductions, and the court "must give effect to" that intent.[78]

Third, the Gregorys argued that any statutory ambiguities should be resolved in their favor because the canons of statutory interpretation require ambiguous tax statutes to be construed against the government.[79] However, a straightforward reading of the relevant statutes clearly established that hobby loss deductions are below-the-line deductions.[80] Thus, there was no ambiguity to resolve.[81]

Fourth, the Gregorys argued that the court's reading of sections 62, 63, and 67 impliedly repeals section 183(b)(2), and that the canon against implied repeals proscribes such a result.[82] The court explained (again) that section 183 grants the deduction for hobby loss expenses, sections 62 and 63 characterize the deduction as an itemized deduction, and section 67 renders it a miscellaneous itemized deduction subject to a floor equal to 2% of the taxpayer's adjusted gross income.[83] These statutes interact harmoniously, rendering the presumption against implied repeal inapposite.[84]

Finally, the Gregorys argued that the court's reading of the statutes should be disregarded under the absurdity doctrine.[85] The Gregorys contended that the court's reading was absurd because they would need either a very low income, or very large hobby losses and hobby income to benefit from the deduction.[86] Noting that the absurdity doctrine should only be invoked when the absurdity is so extreme that is "shock[s] the general moral or common sense[,]"[87] and not to "revise purposeful dispositions."[88] Congress can reduce or eliminate deductions, and it did so here. The result may be unfavorable to the Gregorys, but it is not absurd.

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78. *Id.* (quoting Miller v. French, 530 U.S. 327, 336 (2000)).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 772.

87. *Id.* (quoting Packard v. Comm'r, 746 F.3d 1219, 1222 (11th Cir. 2014) (quoting Crooks v. Harrelson, 282 U.S. 55, 60 (1930)) (cleaned up).

88. *Id.* (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 37 at 239 (2012)).

3. Judge Wilson's Concurrence

Judge Wilson agreed with the court's holding, but would have reached the conclusion by looking to the legislative history for guidance.[89] According to Judge Wilson, section 183 is ambiguous because it does not indicate whether hobby expenses are deductible as above-the-line or below-the-line deductions and both the Gregorys and the IRS advanced an interpretation of the statute that "based on a facial reading of the plain text . . . seems plausible."[90] Rather than look to other code sections, he would look to the legislative history to determine how Congress intended for hobby expenses to be treated.[91] The conference report for the Tax Cuts and Jobs Act included the deduction for hobby expenses in an illustrative list of miscellaneous itemized deductions which would be disallowed under the new section 67(g).[92] Accepting that legislative history as clear indication that Congress intended for hobby expenses to be treated as miscellaneous itemized deductions, Judge Wilson agreed that the court properly denied the Gregorys' petition.[93]

D. Conclusion

The court's decision in *Gregory* provides clarity to taxpayers in the Eleventh Circuit, eliminating any outstanding confusion as to the characterization of hobby expense deductions. Arriving at a conclusion that is consistent with the decisions of several lower courts, Treasury regulations, and the opinions of numerous practitioners and commentators, the court reached the correct result.

II. *LEE V. UNITED STATES*

In *Lee v. United States*, the United States Court of Appeals for the Eleventh Circuit addressed whether a taxpayer's reliance upon an agent to electronically file a U.S. federal income tax return, without anything more, constitutes reasonable cause for failing to timely file an income tax return and pay the associated taxes.[94] Although the Supreme Court of the United States had addressed the question decades earlier in the context of paper returns filed by mail,[95] no circuit had addressed the issue

89. *Id.* at 772 (Wilson, J., concurring).

90. *Id.* at 772–73 (Wilson, J., concurring).

91. *Id.* at 773 (Wilson, J., concurring).

92. *Id.* (Wilson, J., concurring) (citing H.R. Rep. No. 115-466, at 273, 276 (2017) (Conf. Rep.)); I.R.C. § 67(g).

93. *Gregory*, 69 F.4th at 773 (Wilson, J., concurring).

94. Lee v. United States, 84 F.4th 1271, 1273 (11th Cir. 2023).

95. *See* United States v. Boyle, 469 U.S. 241 (1985).

with respect to electronically filed (e-filed) tax returns.[96] The Eleventh Circuit concluded that the Supreme Court's bright-line rule established in *United States v. Boyle*[97] applies to e-filed tax returns and affirmed the district court's decision.[98]

A. Facts of the Case

Wayne Lee (Lee) retained a certified public accountant (CPA) firm to prepare and file his federal income tax returns for 2014, 2015, and 2016.[99] Lee, a Florida surgeon, reported gross income of approximately $1 million each year and six-figure overpayments for each taxable year.[100] Each year, Lee chose to apply the overpayment against his estimated tax liability for the following year.[101]

Lee's CPA firm was required to electronically file all individual income tax returns that it prepared.[102] Once the CPA had prepared the returns, Lee reviewed them and signed IRS Form 8879, which authorized the CPA to electronically file the tax returns on Lee's behalf.[103] Lee's return, however, was complex, and due to that complexity, the CPA's tax preparation software was unable to electronically file the returns.[104]

The CPA allegedly informed the IRS that his firm's software was incapable of electronically filing the returns due to their complexity.[105] However, the returns were not filed until December 2018, when Lee learned about the problem after receiving a visit from an IRS agent at his office.[106] By the time Lee's returns were actually filed, the statute of limitations for claiming credit for his overpayments had run and the IRS disallowed his claims for refund.[107] Because Lee had elected to apply each

96. *Lee*, 84 F.4th at 1273; *see* Haynes v. United States, 760 F. App'x 324, 327 (5th Cir. 2019).

97. 469 U.S. 241 (1985).

98. *Lee*, 84 F.4th at 1273.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* Tax return preparers who prepare and file more than 10 individual income tax returns in a calendar year are generally required to electronically file all such individual returns electronically in that calendar year. I.R.C. § 6011(e)(3); *see also* Treas. Reg. §§ 301.6011-7(a)(3), 301.6011-7(b).

103. *Lee*, 84 F.4th at 1273.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 1274. Taxpayers can generally only claim a refund for overpayments made within the three years (plus the period of any extension of time to file) immediately preceding the date on which the return is filed. I.R.C. § 6511(b)(2)(A).

year's overpayment against his estimated tax liability in subsequent years, he owed tax for 2015 and 2016, as well as over $70,000 of penalties for failure to timely file his returns and failure to timely pay his tax owed.[108]

After paying the tax and penalties, Lee sued for a refund in the United States District Court for the Middle District of Florida.[109] The government moved to dismiss Lee's refund suit, arguing that under *United States v. Boyle* Lee's reliance on his CPA to file his tax returns did not constitute reasonable cause for either the failure to file or the failure to pay.[110] After converting the government's motion to dismiss into a motion for summary judgment,[111] the district court concluded that *Boyle*'s holding applies equally to e-filed returns.[112] Applying *Boyle*, the district court concluded that Lee's reliance on his CPA to e-file his tax returns, without more, did not constitute reasonable cause for either his failure to file or his failure to pay.[113] Thus, the district court granted the government's motion and entered judgment in the government's favor.[114]

B. Issue Presented: Did Lee's Reliance on His CPA to Electronically File his Tax Return Constitute Reasonable Cause for Failing to Timely File his Tax Return and Pay the Tax Owed?

The sole issue on appeal was whether Lee's reliance on his CPA to e-file his tax returns, without more, was reasonable cause for his failure to timely file his tax returns and pay the tax due.[115] Under section 6651,[116] taxpayers are subject to a civil penalty for failing to file a tax return by its due date.[117] Taxpayers are also subject to a civil penalty for failing to pay tax shown as due on a tax return by the due date for the associated return.[118] These penalties do not apply, however, if the taxpayer shows that such failure is due to "reasonable cause" and not "willful neglect."[119]

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108. *Lee*, 84 F.4th at 1274.

109. Lee v. United States, No. 21-cv-1579, 2022 U.S. Dist. LEXIS 22559, *1–2 (M.D. Fla. Feb. 8, 2022).

110. *Id.* at *1.

111. *Id.*

112. *Id.* at *2.

113. *Id.* at *2–3.

114. *Id.* at *3.

115. *Lee*, 84 F.4th at 1274.

116. I.R.C. § 6651.

117. I.R.C. § 6651(a)(1).

118. I.R.C. § 6651(a)(2).

119. I.R.C. § 6651(a)(1)–(2).

"[T]he seminal case on the scope of [the] reasonable cause" exception is *United States v. Boyle*.[120] There, a taxpayer retained an attorney to prepare an estate tax return.[121] Despite the taxpayer having provided his attorney with all necessary records and repeatedly checking on the status of the return, the attorney failed to file the return by the statutory deadline.[122] Observing that the code imposed the duty to file returns on *taxpayers* and that the statutory due date is unambiguous,[123] the Supreme Court concluded that "failure to make a timely filing of a tax return is not excused by the taxpayer's reliance on an agent, and such reliance is not 'reasonable cause' for a late filing under [section] 6651(a)(1)."[124]

The Eleventh Circuit applied *Boyle* and rejected Lee's three arguments.[125]

1. IRS Form 8879 Does Not Render *Boyle* Distinguishable

Taxpayers must complete and sign IRS Form 8879 before a tax preparer may electronically file a taxpayer's return. By signing IRS Form 8879, the taxpayer does two things: (1) declares under penalties of perjury that the tax return is, to the best of his knowledge, correct and complete; and (2) authorizes an electronic return originator (ERO)—often the tax preparer—to affix the taxpayer's electronic signature (which often takes the form of a PIN generated by the tax preparer's software) to the tax return and then transmit it to the IRS.[126] Although IRS guidance does not prescribe a deadline by which the ERO must file the return, EROs must begin transmission of the return as soon as possible following receipt of a signed IRS Form 8879.[127]

Lee argued that *Boyle* was distinguishable because Lee ensured that his CPA prepared the tax returns by the due date and he provided his CPA with a signed IRS Form 8879 before the filing deadline each year, whereas the taxpayer in *Boyle* delegated to his attorney the task of merely preparing the return and informing the taxpayer of when the

120. *Lee*, 84 F.4th at 1274 (citing United States v. Boyle, 469 U.S. 241 (1985)).

121. *Boyle*, 469 U.S. at 242.

122. *Id.* at 242–43.

123. *Id.* at 249–50.

124. *Id.* at 252. The Eleventh Circuit has held that Boyle's bright line rule also applies to failure to pay penalties imposed under section 6651(a)(2). In re Sanford, 949 F.2d 1511, 1514 n.8 (11th Cir. 1992).

125. Lee made a brief fourth argument, but the Court found that Lee waived that argument because it was raised for the first time on appeal. *Lee*, 84 F.4th at 1280.

126. IRS Form 8879, Part II.

127. INTERNAL REVENUE SERV., DEP'T OF TREASURY, PUB. NO. 1345, AUTHORIZED IRS E-FILE PROVIDERS OF INDIVIDUAL INCOME TAX RETURNS, at 23 (2023).

return was due.[128] According to Lee, once he provided the CPA with a signed IRS Form 8879, there was nothing left for him to do and any failure to file the return was beyond his control.[129]

The court found several problems with this argument. First, authorizing an ERO to transmit a tax return electronically to the IRS is not the same thing as actually filing a tax return.[130] Simply signing an e-file authorization on IRS Form 8879 does not relieve a taxpayer of his duty to ensure that his tax return actually gets filed.[131]

Second, although the Supreme Court's decision in *Boyle* did except taxpayers from failure to file penalties for circumstances beyond their control, those exceptions are limited to situations where taxpayers objectively cannot exercise "ordinary business care and prudence."[132] Authorizing his CPA to e-file his tax return did not make Lee incapable of exercising ordinary business care and prudence to ensure that his return was filed on time.[133]

Finally, the court held Lee to be materially indifferent from the taxpayer in *Boyle*.[134] Both taxpayers relied on agents to prepare and file their returns.[135] Although *Boyle* involved a paper return and Lee's situation involved an e-filed return, in both cases the situation was "out of the taxpayer['s] hands."[136] Just like the taxpayer's reliance on an attorney in *Boyle* did not relieve him of his duty to timely file his tax return, Lee's reliance on his CPA to e-file his tax return does not relieve him of his duty to timely file his tax return.[137]

2. The IRS E-Filing Program Does Not Shift the Legal Obligation of Timely Filing Tax Returns to EROs

The IRS has issued detailed guidance that EROs must follow in order to e-file tax returns. That guidance specifies that EROs should e-file returns as soon as possible following the receipt of a signed IRS Form 8879 and that EROs should not "stockpile" returns—i.e., waiting more than three days to transmit the return to the IRS.[138] According to

128. *Lee*, 84 F.4th at 1275–76.
129. *Id.* at 1276.
130. *Id.*
131. *Id.*
132. *Id.* (citing *Boyle*, 469 U.S. at 248 n.6).
133. *Id.*
134. *Id.* at 1275.
135. *Id.* at 1276.
136. *Id.*
137. *Id.*
138. IRS Pub. 1345, *supra* note 127, at 23.

Lee, this guidance in IRS publications imposes a legal obligation on the ERO that undermines *Boyle*'s bright-line rule.[139]

The Eleventh Circuit reiterated that Lee retained full control over the return preparation process and could have confirmed that his CPA's software could handle his returns, selected a different preparer, prepared the return himself, or elected to file his returns in paper format.[140] Next, IRS Publication 1345, on which Lee based his argument, states that an e-filed return is not considered filed until the IRS acknowledges acceptance of the return, so providing his CPA with a signed IRS Form 8879 did not complete the filing process.[141] Finally, and perhaps most fatal to Lee's argument, an IRS publication lacks the force of law and cannot displace Supreme Court precedent.[142]

3. Lee Did Not Demonstrate Reasonable Cause

The Supreme Court in *Boyle* recognized that certain circumstances beyond the taxpayer's control can constitute reasonable cause that exempts a taxpayer from a failure to file penalty.[143] In what the court characterized as a "final salvo" that recycled his first argument, Lee claimed that he exercised ordinary care and prudence and should not be penalized because he hired a third-party tax preparer.[144] Unsurprisingly, the Eleventh Circuit, reiterating its conclusion that *Boyle*'s bright-line rule applies to e-filed returns, was unpersuaded the second time around.[145] In fact, the court observed that if it were to agree with Lee and conclude that complex e-filing procedures are so far beyond the taxpayer's control that the taxpayer is incapable of exercising ordinary business care and prudence, then the "overwhelming majority" of taxpayers would have reasonable cause for late filings—a decision that would "raze the tax filing regime[.]"[146]

The court continued, concluding that, even without *Boyle*, Lee failed to demonstrate reasonable cause for both failure to file and failure to pay.[147] To show reasonable cause for failure to file on time, the taxpayer must show that he "exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time[,]"

139. *Lee*, 84 F.4th at 1276–77.
140. *Id.* at 1277.
141. *Id.* (citing IRS Pub. 1345, *supra* note 127, at 9).
142. *Id.* at 1277–78.
143. *Id.* at 1278 (citing *Boyle*, 469 U.S. at 248 n.6).
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 1279.

a standard which the court observed is strict.[148] Noting that both its predecessor and several lower courts have concluded that reliance on an agent does not constitute reasonable cause, the Eleventh Circuit reiterated that Lee's reliance on his CPA, without more, does not amount to reasonable cause for failure to file his return on time.[149]

Nor did Lee show reasonable cause for failing to pay his tax on time. To show reasonable cause in the failure to pay context, the taxpayer must show that he "exercised ordinary business care and prudence in providing for payment of [the] tax liability *and* was nevertheless either unable to pay the tax or would suffer an undue hardship" by paying the tax when due.[150] To show undue hardship, the taxpayer must show, based on all facts and circumstances of his financial condition, that he will sustain a substantial financial loss rather than merely an inconvenience.[151] Even if the court believed that Lee demonstrated ordinary business care, Lee is still required to show that paying the tax on time would cause undue hardship. Having made no showing (or even any contention) that he would suffer significant financial hardship if required to pay the tax on time, Lee fails to demonstrate reasonable cause for failing to pay his tax on time.[152]

4. Special Concurrence

Judge Lagoa specially concurred to "highlight the risks facing taxpayers" who rely on preparers to e-file their tax returns.[153] Many taxpayers need—indeed, rely on—third party preparers to assist with preparing and filing their tax returns, and the low statutory and regulatory threshold for mandatory e-filing of individual income tax returns subjects a significant majority of tax preparers to the e-filing system by default.[154] Under this system, *Boyle*'s bright-line leaves taxpayers on the hook for their preparer's failure to e-file their returns. According to Judge Lagoa, tax preparers should advise their clients of their responsibilities for filing their return on time so that taxpayers are fully aware of the "hidden danger" lurking about.[155]

148. *Id.* (quoting Treas. Reg. § 301.6651-1(c)(1)).
149. *Id.*
150. *Id.* at 1280 (quoting Treas. Reg. § 301.6651-1(c)).
151. *Id.* (citing Treas. Reg. § 1.6161-1(b)).
152. *Id.*
153. *Id.* at 1281 (Lagoa, J., concurring).
154. *Id.* at 1281–82 (Lagoa, J., concurring).
155. *Id.* at 1283 (Lagoa, J., concurring).

C. Conclusion

The United States Court of Appeals for the Eleventh Circuit's decision in *Lee* is a logical and appropriate extension of *Boyle* to e-filed returns. Other circuits will likely find the court's decision to be persuasive if the same issue arises before them. In light of the court's decision, some may consider the e-filing process to be perilous (and perhaps a bit unfair). But these "hidden dangers" are not unique to the tax system. For example, a statute of limitations will bar a litigant's untimely legal claim, notwithstanding that the litigant may have relied on an agent—their attorney—to prosecute their legal claim. Relying on an agent creates a risk that the agent will not adequately complete the task for which the agent was retained. Thus, in addition to confirming a taxpayer's obligation to ensure his tax returns are timely filed, the court's decision in *Lee* illustrates the risks of relying on agents and the importance of carefully vetting tax professionals before deciding to use their services.