

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

GEORGE A. STELLA, EXECUTOR v. COMMISSIONER OF REVENUE
OF THE ESTATE OF MILDRED ASH

Docket No. C260792

GEORGE A. STELLA, EXECUTOR v. COMMISSIONER OF REVENUE
OF THE ESTATE OF ABRAHAM ASH

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Promulgated:
February 3, 2003

These are appeals under the formal procedure pursuant to G.L. c. 58A, § 7 from the refusal of the appellee to abate penalties assessed against the appellant pursuant to G.L. c. 62C, § 33(a) and (b) for late-filed estate tax returns and late payment of estate tax.

Commissioner Rose heard these appeals and was joined in the decisions for the appellee by Chairman Burns and by Commissioners Gorton and Egan.

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

George A. Stella, Esq. for the appellant.

John J. Connors, Jr., Esq. and *Laura S. Kershner, Esq.*
for the appellee.

FINDINGS OF FACT AND REPORT

On the basis of a Statement of Agreed Facts and testimony and exhibits introduced at the hearing of these appeals, the Appellate Tax Board ("Board") made the following findings of fact. Abraham Ash, a physician and a Massachusetts resident, died on December 22, 1995. His wife, Mildred Ash, died less than two months later on February 2, 1996. The appellant, George A. Stella ("Executor"), had been involved in Ash family estate planning in some capacity at least as far back as August of 1990 when he notarized wills for both Abraham and Mildred and amendments to the Abraham Ash Trust. The couple had engaged the Law Offices of Michael T. Stella, Sr. ("Law Offices"), with which the appellant was affiliated, to prepare these documents. The appellant then notarized codicils to the couple's respective wills in June of 1993. Abraham's will designated the appellant as the Executor of the estate, and Mildred's will designated the appellant as the successor Executor in the event that Abraham, the primary Executor, predeceased Mildred. Accordingly, the appellant was appointed Executor of the Estate of Abraham Ash ("Abraham's Estate") on March 18, 1996 and of the Estate of Mildred Ash ("Mildred's Estate") on April 8, 1996 by the Essex Probate Court.

Pursuant to a valid extension, the Executor timely filed a joint 1995 Massachusetts Income Tax Return for the decedents with the Commissioner of Revenue ("Commissioner") on August 12, 1996. The Executor also timely filed an individual 1996 Massachusetts Income Tax Return for Mildred Ash on April 15, 1997.¹

However, the Executor did not timely file M-706s for Abraham's Estate or Mildred's Estate. The Massachusetts Estate Tax Return ("M-706") for Abraham's Estate was due on September 22, 1996, and the M-706 for Mildred's Estate was due on November 4, 1996. The Executor filed the returns for both estates on March 3, 1997, four months late for Mildred's Estate and six months late for Abraham's Estate. The Executor at no time sought an extension of time for filing the M-706s.

The Executor paid the estate tax reported as due on the respective returns at the time of filing. The estate tax liability reported as due on Abraham's Estate was \$58,983.50. The estate tax liability reported as due on Mildred's Estate was \$198,948.00. Along with each return, the Executor requested that the Commissioner waive any penalties and interest which he assumed may have been due

¹ The Executor employed the Ashes' accountants to prepare these income

from the estates. The Executor explained that the decedents had been nearly ninety years old at the time of their deaths and thus "did not have their full mental capabilities," they did not have any children, and they died "within forty days of each other." Accordingly, "their financial records, were to say the least, in complete disorder." The appellant testified that the records were stashed in numerous boxes and files, all stored "in a damp, wet basement, many having been destroyed, and it was a problem to reconstruct their vast financial records."

By letter dated May 20, 1997, the Executor requested an expedited release of lien to complete the sale of the deceased couple's real estate. Thereafter, on July 1, 1997, the Executor tendered additional payments of \$7,934.00 for Abraham's Estate and \$21,580.00 for Mildred's Estate. Copies of these checks submitted as evidence indicate that the checks were intended to be applied towards "Penalties & Interest" expected to be assessed against the respective estates.

By letter dated October 6, 1997, the Executor informed the Massachusetts Department of Revenue ("DOR") that the Internal Revenue Service ("Service") had abated all

tax returns.

penalties previously assessed against Mildred's Estate. The Service had not assessed any penalties against Abraham's Estate because that estate did not owe any federal estate tax. In that letter, and then by letter dated February 6, 1998, the Executor asked the DOR when he could expect a refund of the amounts he had previously paid as interest and penalties on behalf of both estates.

By letter dated January 22, 1999, the Executor submitted to the Commissioner a copy of the Federal Estate Tax Closing Letter for Abraham's Estate, and by letter dated January 25, 1999, the Executor submitted a copy of the Federal Estate Tax Closing Letter for Mildred's Estate. By letter dated April 20, 1999, the Executor then submitted to the Commissioner a copy of the Federal Estate Tax Final Examiner's Report on Mildred's Estate.

By letters dated November 15, 1999, the Commissioner separately denied the Executor's requests for a waiver of penalties for both estates. On December 2, 1999, the Commissioner sent the Executor a Notice of Assessment ("NOA") showing an assessment against Abraham's Estate for interest of \$2,951.88 and penalties of \$5,308.48. After crediting the Executor's payments totaling \$66,917.00, the NOA reflected a balance due of \$326.36. On or about January 11, 2000, the Commissioner received the Executor's

payment of this balance. The Commissioner issued an Estate Tax Closing Letter, dated July 27, 2000, showing the tax, interest, and penalties paid in full for Abraham's Estate.

By letter dated January 7, 2000, the Executor submitted a Massachusetts Report of Federal Estate Tax Change ("Form M-706FC") reporting an increase in tax from \$198,948.00 to \$221,864.82 on Mildred's Estate. The Executor did not make any payments with the filing of this return. By a Notice of Intention to Assess ("NIA") dated January 8, 2000, the Commissioner notified the Executor of his intention to assess additional estate taxes against Mildred's Estate. The Commissioner then sent the Executor an NOA dated February 15, 2000, indicating the following:

Tax Liability	Interest	Penalty	Payments	Balance Due
\$ 22,916.00 ²	\$ 1,731.15	\$ 916.64	\$ 21,580.00	\$ 3,983.79
\$198,948.00	\$11,267.00	\$11,936.00	\$198,948.00	\$23,204.47

The NOA thus reflected a balance due of \$27,188.26. The Executor paid this additional assessment by a check dated April 4, 2000. The Executor then paid the Commissioner an

² The Commissioner apparently dropped \$0.82 from the tax liability as reflected on the M-706FC for Mildred's Estate.

additional \$150.64 on or about June 28, 2000, apparently reflecting a payment of additional interest and penalties.³ Thereafter, the Commissioner issued an Estate Tax Closing Letter, dated July 28, 2000, indicating the following:

Tax Liability	Interest	Penalty	Payments	Balance Due
\$221,864.00	\$13,139.91	\$12,862.99	\$247,866.90	\$0.00

On October 2, 2000, the Executor sent the Commissioner Applications for Abatement requesting an abatement of the penalties for both estates. By Notices of Abatement Determination dated May 23, 2001, the Commissioner informed the Executor that his Applications for Abatement had been denied. On June 21, 2001, the Executor timely filed Petitions to the Board on behalf of both estates. On the basis of these facts, the Board found it had jurisdiction over these appeals.

During the hearing of these appeals, the Executor testified to the extreme disarray of the decedents' records and the monumental task of discovering all the assets held

³ The parties do not indicate, nor is it specified in the record, why Mildred's Estate owed this additional amount after the Commissioner issued the NOA. The Estate Tax Closing Letter issued for Mildred's Estate indicates an increase in interest assessed by the NOA of \$141.76 and an increase in penalty assessed of \$10.35. This increase equals \$152.11. However, the Commissioner apparently credited \$0.82 from the Executor's payment of taxes resulting from the M-706FC, leaving a discrepancy of only \$0.65. The parties do not raise this shortfall as

by the couple and their values. Moreover, he testified that Mildred had dementia and was being cared for in the house, attributing to its "deplorable condition." He explained that he had a close personal and professional relationship with the Ashes. Therefore, when their accountants refused to complete their estate tax return, citing the disarray of the financial documents, he, as the Executor, agreed to take on the task, even though he had no prior experience preparing estate tax returns. The appellant admitted that the accountants explained to him the deadline for filing the respective returns, and they "might have" explained the availability of a request for extension, but he also testified that the accountants speculated that the Service and the DOR would waive any penalties associated with late filing of returns in these circumstances.

As will be explained more fully in the Opinion, the Board found that the exercise of reasonable care in the circumstances of these appeals required the appellant to at least file for valid extensions of time for the filing of the requisite estate tax returns. Accordingly, the appellant failed to prove that there was reasonable cause for abating the penalties assessed against the two estates.

an issue in these appeals, nor did the Board consider it in its

The Board also found that the delay on the part of the DOR in responding to the appellant's request for abatement of penalties did not prejudice the taxpayer. On this basis, the Board found for the appellee in these appeals.

OPINION

G.L. c. 62C, § 17 requires the Executor or administrator of an estate to file a return within nine months after the date of death of the decedent in all cases where the Massachusetts gross estate exceeds the exemption allowed under G.L. c. 65C, § 3(a).⁴ The appellant did not timely fulfill his obligation to file the estate tax returns at issue with the Commissioner. The Commissioner, therefore, assessed late penalties against the respective estates pursuant to his authority to assess penalties for late filing of returns and late payment of tax. This authority is found in G.L. c. 62C, §§ 33(a) and (b), which provide that:

- (a) If any return is not filed with the commissioner on or before its due date or

decision.

⁴ G.L. c. 65C, § 3(a), as then in effect allowed an exemption from the Massachusetts estate tax if the Massachusetts net estate was \$500,000 or less for decedents dying after December 31, 1994 and on or before December 31, 1995 (Abraham Ash died on December 22, 1995), and an exemption from the estate tax if the net estate was \$600,000 or less for decedents dying after December 31, 1995 and on or before December 31, 1996 (Mildred Ash died on February 2, 1996).

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-half 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 from the language in bold print, the initial imposition of the penalties for late filing of a return and late payment of tax is mandatory. *Fogarty v. Commissioner of Revenue*, 8 Mass. App. Tax Bd. Rep. 135, 138 (1987). The Commissioner has some discretion to abate this penalty, but it is limited:

The only means of avoiding the penalty is found in subsection (f) of § 33 which provides: "If it is shown 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, any penalty or addition to tax under this section may be waived by the commissioner, or if such penalty or addition to tax has been assessed, it may be abated by the commissioner, in whole or in part."

Commissioner of Revenue v. Wells Yachts South, Inc.,
406 Mass. 661, 663 (1990) (emphasis added).

The issue in this case is whether the appellant's failure to file Massachusetts estate tax returns and pay the requisite estate taxes in a timely manner was due to reasonable cause, thereby relieving the estates of the penalty provisions cited above. Because the appellant bears the burden of proving its right to the 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**, 19 Mass. App. Tax Bd. Rep. 96, 99 (1996). Accordingly, the appellant in the present appeals bore the burden of proving the existence of reasonable cause for his failure to file Massachusetts estate tax returns and to pay the taxes in a timely manner for the respective estates. The Board found that the appellant failed to meet that burden.

The Supreme Judicial Court has defined "reasonable cause" in G.L. c. 62C, § 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.* Moreover, in reversing the Board's previous decision in *Wells Yachts South*, the Court indicated that there was no place in this objective analysis for a consideration of what one might consider fairness or equity. The Court in that case found that the corporation's poor management under the previous owners could not establish reasonable cause for the abatement of penalties which were ultimately paid by the subsequent owner who inherited the corporation's financial woes. In so finding, the Court held that despite the present owners' apparent lack of responsibility for the failure to file returns and to pay taxes, the Board erred in "focus[ing] on what it perceived to be the equities involved in requiring the corporation, as owned and managed in 1988, to pay penalties for acts the [B]oard attributed to prior owners and managers." *Id.* at 664.⁵

The Board has found reasonable cause to abate late file and late payment penalties in certain circumstances.

⁵ Aside from the substance of the test, *Wells Yachts South* also established a "temporal framework" for the analysis, finding that a court must not look to considerations that existed at the time of the appeal, but rather must "determin[e] whether there is 'reasonable

In particular, the Board has found reasonable cause to exist when a taxpayer reasonably relied on the advice of a competent tax professional. For example, in **Samia v. Commissioner of Revenue**, 15 Mass. App. Tax Bd. Rep. 73 (1993), the appellants, husband and wife, were domiciled in Florida during the tax year at issue when the limited partnerships with which Mr. Samia was associated disposed of certain assets and distributed some of the proceeds to him. *Id.* at 73. In deciding whether to report this to Massachusetts, the appellants sought the advice of an attorney specializing in Massachusetts tax matters. *Id.* at 74. Mr. Samia's conversation with his tax expert led the tax expert to believe that the appellants received profits from the sale of partnership **interests**, rather than partnership **assets**. Therefore, the tax expert initially advised the appellants that they did not owe Massachusetts tax on the subject transaction. *Id.* at 75-76. After "the advent of relevant new or proposed regulations, certain legislative changes, and informal discussions with other tax practitioners, [the tax expert] contacted Mr. Samia, reversed his earlier opinions, and advised the appellants to pay taxes and interest to Massachusetts." *Id.* at 76.

cause' . . . [at] the **time when the returns or tax payments were due.**" *Id.* at 664 (emphasis in original). *Id.*

The Commissioner subsequently assessed late-file and late-pay penalties against the appellants. *Id.* at 74.

In abating the late-file and late-pay penalties, the Board found that "the appellants made, or in good faith attempted to make, full disclosure of all relevant information to their tax attorney regarding the tax matter in issue, [] the appellants' tax attorney was a competent tax expert . . . [and] the tax attorney's advice was on the specific tax matter at issue." *Id.* at 76. Therefore, the Board found that "the appellants reasonably relied upon their tax attorney's opinion in failing to timely file their Massachusetts nonresident personal income tax return and pay the tax," and accordingly, "the appellants exercised ordinary business care and prudence." *Id.* See also *Universal Instruments, Corp. v. Commissioner of Revenue*, 23 Mass. App. Tax Bd. Rep. 364, 368 (1998) (finding reasonable cause for failure to file and pay in timely manner where taxpayer relied on the Director of the parent company's tax department, a certified public accountant and tax attorney, who in turn, in the absence of a Massachusetts Department of Revenue promulgation, had relied upon Public Law 86-272 and relevant Massachusetts tax cases in rendering his opinion); *Q Holdings Corp.*, 19 Mass. App. Tax Bd. Rep. at 99 (finding that appellant's

failure to file was due to reasonable cause where appellant relied upon "a nationally recognized certified public accounting firm doing substantial business in Massachusetts").

However, the courts and this Board have found that various forms of hardships, including financial hardships, do not constitute reasonable cause to relieve a taxpayer of late-file or late-pay penalties. For example, in ***Sign of the Surf, Inc. v. Commissioner of Revenue***, 47 Mass. App. Ct. 830, rev. denied, 430 Mass. 1111 (1999), the restaurant taxpayer's delinquencies arose when the owner was sued for divorce and "was the subject of a series of payment orders and contempt findings (one of which ordered incarceration)" from April, 1989 until June, 1993, when a new judge finally allowed his motion for relief from judgment. The owner argued that the restaurant's penalties for failure to file and pay sales taxes should be abated "on the ground that the orders of the original judge were so excessive in relation to his ability to pay that he faced an impossible dilemma: whether to resign himself to incarceration, thus guaranteeing the collapse of the restaurant for want of supervision, or invade the restaurant's proceeds to stave off the Probate Court." ***Id.*** at 831. Analyzing the situation for objective ordinary care rather than "the

equities involved," (*Wells Yachts South*, 406 Mass. at 664), the Massachusetts Appeals Court affirmed the Board's finding that neither "personal financial problems" nor "[c]ommercial necessity" can alone constitute reasonable cause for purposes of § 33(f), and accordingly, the taxpayer did not meet his burden for the abatement of penalties. *Sign of the Surf*, 47 Mass. App. Ct. at 831.

In another case, *Blue Jay Corp. v. Commissioner of Revenue*, 16 Mass. App. Tax Bd. Rep. 134, 134-35 (1994), the appellant cited "street renovation and construction by the city [which] interfered with the traffic, parking, and public access to its restaurant, seriously disrupting its business, during the periods at issue" and "contended that the resulting economic hardship constituted reasonable cause for its failure to file returns and pay sales taxes during those periods, even though it had collected the taxes from its customers." Analyzing the situation from an objective standpoint, the Board did not address the taxpayer's financial woes but instead found and ruled that a taxpayer exercising the degree of ordinary business care and prudence that was required in the situation would have complied with the provisions relative to filing tax returns and remitting tax proceeds collected from customers. *Id.* at 135-36.

Finally, in a case similar to the instant appeals, ***Itrato v. Commissioner of Revenue***, 13 Mass. App. Tax Bd. Rep. 57 (1990), the Board found and ruled that the appellants failed to meet their burden of proving that they exercised ordinary care when their failure to file and pay taxes in a timely manner resulted from the death of their accountant and the inability of the accountant's successor to locate their records regarding a sale of real estate. The Board found that the appellants failed to explain why the accountant was the only possible source of information on the taxable capital gain and, more importantly, why "[t]hey made no attempt to request an extension of time to file their return." ***Id.*** at 58. Accordingly, the Board found and ruled that no reasonable cause existed for the abatement of late-file and late-pay penalties. ***Id.*** at 60.

An important point illustrated by these cases is that the reasonable cause exception in § 33(f) requires the exercise of ordinary care, such as consulting a tax expert who, after being advised in good faith by the taxpayer as to all material facts, advises the taxpayer that taxes are not due in a particular circumstance; § 33(f) is not merely an opportunity for a taxpayer to voice his excuse for not filing a return or paying taxes, no matter how equitable

the situation may appear. See, e.g., **Wells Yachts South**, 406 Mass. at 664-65.

In these appeals, it is apparent that the Executor faced significant difficulties in the filing of the estate tax returns. However, the appellant offered no reason why he did not seek a valid extension of time to file the estate tax returns. In fact, he conceded that the Ashes' accountants "might have" suggested that he should seek an extension. While the Ashes' accountants apparently informed the appellant that the IRS and the DOR might abate the penalties, the accountants did not advise him that no taxes were due or that no return would have to be filed. As pointed out by the Commissioner, a quick review of the decedents' joint 1995 Massachusetts Income Tax Return indicated that the decedents had significant interest and dividend income suggesting extensive assets. This factor, along with his involvement in the decedents' affairs, should have put the Executor on notice that estate tax returns would be due. The Board found and ruled that the exercise of ordinary care under § 33(f) required that the appellant at least seek a valid extension for filing the returns rather than rely on a statement of probability by the Ashes' accountants that the penalties might be abated. See **Itrato**, 13 Mass. App. Tax Bd. Rep. at 60 (finding that

the appellants, knowing the likelihood that they would owe taxes, should have "at least request[ed] an extension of time to file their return"). The Board found that his failure to file for an extension for the returns at issue could not constitute ordinary care in these appeals. *Id.*

Additionally, the Board has established that the abatement of penalties at the federal level does not impact whether Massachusetts penalties should be abated. *Fogarty*, 8 Mass. App. Tax Bd. Rep. at 138 ("Without inquiring as to the terms of the federal penalty provisions, which the appellant neither cites nor quotes, the [B]oard notes that both of the quoted paragraphs of G.L. c. 62C, § 33 state that a penalty 'shall be added' to the tax.").

Finally, the appellant raised the Commissioner's delay in responding to his requests for abatement of penalties, prior to the issuance of the NOA, as further reason for abatement of these penalties. However, the Board found and ruled that nowhere in § 33(f) does it indicate that the timeliness of the Commissioner's response is a factor in determining the existence of reasonable cause. Moreover, the appellant failed to prove that the passage of time in any way prejudiced him. *Cf., Tambrands, Inc. v. Commissioner of Revenue*, 46 Mass. App. Ct. 522, 527 (1999) (suggesting that, in the absence of a precise time limit

for the performance of a duty by the tax authority, "attendant circumstances" should be considered, including whether the taxpayer has been prejudiced by the delay). Accordingly, the Board rejected the appellant's argument that the Commissioner's alleged delay warranted an abatement of penalties.

The Board found and ruled that the appellant did not exercise ordinary business care in failing to file returns and pay Massachusetts estate tax in a timely manner. Accordingly, the Board issued a decision for the appellee in these appeals.

APPELLATE TAX BOARD

By: _____
Abigail A. Burns, Chairman

A true copy:

Attest: _____
Clerk of the Board