

Challenging Penalties: What Are the Standards?

by Lynn A. Gandhi

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In this installment of *Smitten With the Mitten*, Gandhi examines two recent court decisions addressing the abatement of penalties that she argues reveal the inconsistent standards taxpayers face when seeking penalty abatement.

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States have a wide range of standards for when penalties may be abated. Some adopt federal definitions and assurance levels, while others lack definitions and have subjective measurements. The issue is arising with increasing frequency — especially for states that impose a substantial understatement of tax penalty. This article examines two seemingly unrelated judicial decisions released in January that upheld penalties against the taxpayers and showcase the inconsistent burdens and challenges taxpayers face when seeking relief.

StubHub Inc. v. Wisconsin Department of Revenue

On January 13 the Wisconsin Court of Appeals released its long-awaited opinion on whether StubHub Inc. was subject to sales tax collection obligations for sales of admissions to recreational events in the state that had occurred on its

platform.¹ The audit period was 2008 through 2023, with the first 11 years (2008-2019) predating Wisconsin's adoption of its marketplace provider law.² The basis for the Department of Revenue's assessment was that StubHub met the statutory definition of a seller and thus was subject to the sales tax on amusement of Wis. Stat. section 77.52(2)(a)2.³

The court of appeals found StubHub to be a seller, and in addition to upholding the assessments, upheld the DOR's imposition of a 25 percent negligence penalty because the court determined that StubHub had been negligent in ignoring the DOR's published guidance notifying ticket brokers that sales tax was due on their transactions.

¹The matter came to the Wisconsin Court of Appeals, District 1, from an order of the Dane County Circuit Court, which had reversed a decision of the Wisconsin Tax Appeals Commission. *StubHub Inc. v. Wisconsin Department of Revenue*, No. 2024AP455 (Wis. Ct. App. Jan. 13, 2026), *rev'g* No. 2023CV665 (Dane County Cir. Ct. Feb. 1, 2024), *rev'g* No. 16-S-268 (Wis. Tax App. Comm'n Feb. 23, 2023). The tax appeals commission upheld the DOR's assessment but abated the penalty, finding that StubHub's position that it was not a ticket broker was reasonable. *StubHub*, No. 2024AP455, at 6. The court of appeals addressed both the merits issue and the penalty abatement.

²Wisconsin enacted its marketplace provider law in 2019. See 2019 Wis. Act 10, sections 11, 12, 22, 24. The DOR argued, and the court of appeals agreed, that Wisconsin's marketplace provider law merely clarified existing law and was adopted with the intent to minimize the growing number of businesses challenging their responsibility for Wisconsin sales tax collection.

³Wisconsin broadly defines a seller as "every person selling." Wis. Stat. section 77.51(17). Regarding the merits issue, the court examined whether StubHub's actions in facilitating sales between ticket holders and those looking to purchase tickets constituted retail sales by a seller. Under the tax imposition statute, it is presumed that "all receipts are subject to the tax until the contrary is established." Wis. Stat. section 77.52(13). Yet, other than a "Cf." citation (which, according to Bluebook Rule 1.2(a), means "Cited authority supports a proposition different from the main proposition but sufficiently analogous to lend support") the court failed to square its analysis with *Kollasch v. Adamany*, 313 N.W.2d 47 (Wis. 1981), which recognized that a seller "engag[es] in a transaction for which the gross receipts are subject to the sales tax" (alteration in original). *StubHub*, No. 2024AP455, at 10 (quoting *Kollasch*, 313 N.W.2d 47). The court acknowledged that StubHub did not retain the gross receipts from the sale.

In Wisconsin, judicial review of administrative actions is confined to the record set at the administrative level review, unless irregularities in procedure have been alleged.⁴ The court may set aside or modify an agency's action only if the agency has erroneously interpreted a provision of law.⁵ The court will not substitute its judgment for that of the agency regarding the weight of evidence on a disputed fact,⁶ and "due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved."⁷ However, deference is not afforded to the agency's interpretation of law.⁸

Putting aside the decision on the merits, which found StubHub to be a seller, the opinion is notable due to the court upholding the 25 percent negligence penalty, which the circuit court had abated.⁹

Wisconsin's penalty statute provides:

In case of failure to file any return required under authority of [section] 77.58 by the due date . . . and upon a showing by the Department under [section] 73.16(4), there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is not for more than one month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate.¹⁰

According to the statutory language, the DOR must demonstrate that a taxpayer has acted with willful neglect and not reasonable cause to impose the penalty.¹¹ The term "willful neglect" is not defined, and it is surprising that the court of appeals did not seek to apply a commonly accepted dictionary definition. Instead, it examined whether StubHub's actions had been reasonable. The DOR relied on its guidance from Wisconsin Tax Bulletin 172, which it claimed "should have made clear to StubHub that it was subject to the sales tax, and because StubHub ignored this clear guidance from [the] DOR, StubHub is properly subject to a penalty."¹²

The guidance was a single Wisconsin tax bulletin issued in July 2011.¹³ A bulletin is merely a newsletter, not promulgated rules or advisories. The DOR publishes them quarterly. They are generally divided into sections, including:

- (1) articles (containing information on tax laws, administrative rules, and return filing requirements);
- (2) reports on litigation (summaries of Wisconsin tax cases decided by the Wisconsin Tax Appeals Commission and the courts);
- (3) tax releases (interpretations of Wisconsin tax laws); and
- (4) private letter rulings.¹⁴

Wisconsin Tax Bulletin 172 referred to the "Sales and Use Tax Report." The report included an article called "Sourcing Sales of Admissions." That article referenced (and the tax bulletin included a reprint of) a new tax release titled "Admissions to Amusement, Athletic, Entertainment, or Recreational Events or Places,"¹⁵ which explained the proper sourcing of

⁴Wis. Stat. section 227.57(1).

⁵Wis. Stat. section 227.57(6).

⁶Wis. Stat. section 227.57(10).

⁷Wis. Stat. section 227.57(10).

⁸Wis. Stat. section 227.57(11).

⁹The court noted that the parties had acknowledged that it was "highly likely" sales tax had been incurred by the ticket holder (defined by the court as the seller on StubHub's website) on its purchase of the tickets. But because there was no evidence in the record, there was no mention of whether StubHub should be afforded a credit against the assessment. It does not appear that overcollection is a worry to the DOR. *StubHub*, No. 2024AP455, at 4.

¹⁰Wis. Stat. section 77.60(4).

¹¹Wis. Stat. section 73.16(4) provides that the negligence penalty of section 77.60(4) cannot be imposed "unless the department shows that the taxpayer's action or inaction was due to the taxpayer's willful neglect and not to reasonable cause."

¹²*StubHub*, No. 2024AP455, at 16.

¹³Wis. Tax Bulletin 172 (July 2011).

¹⁴Wisconsin tax bulletins are available on the Wisconsin DOR website at "Wisconsin Tax Bulletins (WTBs)." Bulletins are a useful resource to stay current and can be received electronically. However, they are newsletters and so are not promulgated under the state's administrative procedures act.

¹⁵Wis. Tax Bulletin 172, at 42.

sales of admissions to events occurring after October 1, 2009. Although not referenced in its title, the tax release also explained who is responsible for remitting Wisconsin sales tax on sales of those admissions.¹⁶

The court noted that Example 19 of the bulletin¹⁷ addressed when a ticket holder's tickets are sold using a ticket broker's website but the broker does not have possession of the tickets.¹⁸ StubHub and the Wisconsin Tax Appeals Commission relied on the common understanding of the term "ticket broker" as a basis for penalty abatement. StubHub did not consider itself a ticket broker, generally did not have possession of the tickets, and did not market itself as a ticket broker. The commission agreed when it determined that StubHub had not engaged in willful neglect and had reasonable cause to believe it was not a ticket broker. However, the court of appeals disagreed, finding that analysis too narrow.¹⁹

According to the court of appeals, reviewing the bulletin in its entirety "clearly demonstrates that [the] DOR considered that StubHub was a ticket broker subject to the sales tax."²⁰ Thus, despite acknowledging that the court does not provide deference to DOR interpretations, the court seemingly found sufficient grounds for determining that StubHub acted negligently when in 2008 it failed to adhere to nonbinding guidance issued in 2011.²¹ The court believed that such nonbinding guidance "should have made clear to StubHub that it was subject to the sales tax, and because StubHub ignored this clear guidance . . . StubHub is properly subject to a penalty."²² Thus, the court found StubHub to have acted with willful neglect when it failed to file sales tax returns for the facilitated sales. The court

did not address the basis for imposing the penalty to periods prior to the issuance of the Wisconsin tax bulletin. Contrast this holding with the one below.

NBCUniversal Enterprise Inc. and NBC Universal Inc.

In the companion cases of *NBCUniversal Enterprise Inc. v. Department of Revenue* and *NBC Universal v. Department of Revenue*, the Oregon Tax Court, Magistrate Division, upheld the penalty for the substantial understatement of taxable income, finding that the taxpayers' position was not supported by substantial authority nor was there a reasonable basis for the tax treatment taken.²³

The taxpayers had contested the imposition of the substantial understatement penalty for tax years 2006 through 2010 (NBC Universal Inc.) and for tax years 2011-2013 (NBCUniversal Enterprise Inc.).²⁴ The merits issue concerned whether the companies had substantial nexus with Oregon for the audit periods based on contracts with affiliate stations in the state.²⁵ The Oregon DOR determined that the entities had met the nexus standard and imposed corporate franchise tax. The taxpayers relied on the physical presence standard of *Quill*²⁶ as their basis for not filing returns. The merits issue was determined against the taxpayers,²⁷ and the sole issue before the Oregon Tax Court was whether relief from the substantial underpayment penalty was warranted.

²³ *NBCUniversal Enterprise Inc. v. Department of Revenue*, TC-MD 170037R and TC-MD 170278R (Or. Tax Ct. Magistrate Div. Jan. 7, 2026).

²⁴ Or. Rev. Stat. section 314.402 permits the DOR to impose a 20 percent penalty on the amount of any substantial underpayment of tax. Substantial is defined, for C corporations, to be \$3,500. Or. Rev. Stat. section 314.402(2)(b).

²⁵ *NBCUniversal*, TC-MD 170037R, at 4 (Jan. 7, 2026).

²⁶ *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), overruled by *South Dakota v. Wayfair Inc.*, 585 U.S. 162 (2018). In *Quill*, the Supreme Court held that vendors who lacked physical presence in a state did not have the necessary substantial nexus with the taxing state to require sales tax collection duties under the commerce clause. *Quill*, 504 U.S. at 311-313. The plaintiffs relied on *Quill* because at the time the returns were filed, *Wayfair* had not yet been decided and *Quill* was the latest U.S. Supreme Court decision addressing nexus.

²⁷ The Oregon Tax Court previously issued partial summary judgment orders in the *NBCUniversal* combined cases, finding that the taxpayers were interstate broadcasters (Aug. 17, 2022), and then determined that the taxpayers' business activities created substantial nexus to permit the imposition of corporate franchise tax (Mar. 25, 2025).

¹⁶ A reader skimming the table of contents of the tax bulletin might think that an article including the term "sourcing" would address sourcing issues, not necessarily legal liability for the tax.

¹⁷ The court does not clarify that Example 19 is part of the tax release reprinted in the bulletin.

¹⁸ *StubHub*, No. 2024AP455, at 16.

¹⁹ *Id.*

²⁰ *Id.* In my experience, "clear" or "clearly" is not proper terminology, is subjective, and generally spells trouble. Most courts rely on the plain language of the statute or regulations when noting a lack of ambiguity.

²¹ The court of appeals did not clarify how StubHub could have known in 2008 of guidance published in July 2011.

²² *StubHub*, No. 2024AP455, at 15-16.

Or. Rev. Stat. section 314.402(4)(b) permits the DOR to reduce the substantial underpayment penalty when a taxpayer's claim for certain treatment was either supported by substantial authority or was adequately disclosed in the taxpayer's return and there is a reasonable basis for the tax treatment of the item by the taxpayer.²⁸

The statute permits abatement from penalty if:

(A) The tax treatment of any item by the taxpayer if there is or was substantial authority for such treatment; or

(B) Any item with respect to which:

(i) The relevant facts affecting the item's tax treatment are adequately disclosed in the return or in a statement attached to the return; and

(ii) There is a reasonable basis for the tax treatment of the item by the taxpayer.²⁹

Thus, the first step to determine applicability for abatement was whether substantial authority existed for the taxpayer's position.

Defining Substantial Authority

Oregon adopts the definition of substantial authority included in U.S. Treas. reg. section 1.6662-4(d), which provides an objective standard based on the weight of legal authorities supporting the taxpayer's position relative to those supporting a contrary position.³⁰ Reg. section 1.662-4(d) provides:

The substantial authority standard is *an objective standard* involving an analysis of the law and application of the law to relevant facts. The substantial authority standard is *less stringent than the more likely than not standard (the standard that is met when there is a greater than 50-percent*

likelihood of the position being upheld), but more stringent than the reasonable basis standard as defined in section 1.6662-3(b)(3). [Emphasis added.]³¹

Thus, the level of measurement are as follows³²:

More likely than not: >50%
 Substantial Authority: 40% to 50%
 Reasonable: 20%
 Merely Arguable/Colorable Claim: 0% to 19%
 Patently False: < 0%

Reg. section 1.6662-4(d)(3)(i) further clarifies how substantial authority should be weighed:

There is substantial authority for the tax treatment of an item *only if the weight of the authorities supporting the treatment is substantial in relation to the weight of authorities supporting contrary treatment.* All authorities relevant to the tax treatment of an item, including the authorities contrary to the treatment, are taken into account in determining whether substantial authority exists. The weight of authorities is determined in light of the pertinent facts and circumstances in the manner prescribed by paragraph (d)(3)(ii) of this section. *There may be substantial authority for more than one position* with respect to the same item. Because the substantial authority standard is an objective standard, *the taxpayer's belief that there is substantial authority for the tax treatment of an item is not relevant* in determining whether there is substantial authority for that treatment. [Emphasis added].

The regulation provides that an authority's weight also depends on its relevance and persuasiveness and the age and type of document.³³ In determining which types of documents can be relied on to determine the existence of substantial authority, the court

²⁸Or. Rev. Stat. section 314.402(6) permits the DOR to waive all or any part of the penalty if there was reasonable cause for the understatement and the taxpayer acted in good faith. This basis for relief was not before the court.

²⁹Or. Rev. Stat. section 314.402(4)(b).

³⁰Or. Admin. R. 150-314-0209(1)(a) ("Substantial authority" has the same meaning as used in Treasury Regulation 1.6662-4(d).").

³¹*NBCUniversal*, TC-MD 170037R, at 5 (Jan. 7, 2026) (quoting reg. section 1.662-4(d)).

³²The percentages are from the Treasury regulations and are also in *Santa Fe Natural Tobacco Co. v. Department of Revenue*, TC 5372, at 41 n.32 (Or. Tax Ct. Aug. 23, 2022), *aff'd*, 551 P.3d 909 (Or. 2024).

³³*NBCUniversal*, TC-MD 170037R, at 5 (Jan. 7, 2026).

indicated that review should be limited to statutory provisions, rules constructing such statutes, court cases, legislative history, and administrative pronouncements.³⁴

The taxpayers argued that they met both bases for penalty reduction. For their claim of substantial authority for their position that physical presence was necessary, they relied on *Quill* because at the time the returns were filed, *Wayfair*³⁵ had not yet been decided and *Quill* was the latest U.S. Supreme Court decision addressing nexus.³⁶ In response, the DOR cited Or. Admin. R. 150-317.010, which had been adopted in 2008 and provided that it was not necessary for a taxpayer to have physical presence in Oregon for substantial nexus to exist — “substantial nexus exists where a taxpayer regularly takes advantage of Oregon’s economy to produce income for the taxpayer and may be established through the significant economic presence of a taxpayer in the state.”³⁷ Case law in Oregon had upheld this statutory standard for the imposition of income tax nexus.³⁸

Following the roadmap laid out in the Treasury regulations, the court noted that the taxpayers cited no authority extending *Quill*’s physical presence requirement to other taxes, nor had they addressed Oregon case law supporting the state’s position that physical presence was not constitutionally required for the imposition of income tax in Oregon. Thus, the court found that the plaintiffs had not demonstrated that substantial authority existed for their position, particularly because the weight of the authority

for the contrary position existed in Oregon and throughout the United States.³⁹

The court next examined whether the plaintiffs could qualify for penalty abatement under the reasonable basis standard with adequate disclosure on their returns. Oregon also adopts the Treasury regulation to define when a reasonable basis exists.⁴⁰

Defining a Reasonable Basis

The court explained the reasonable basis standard by quoting reg. section 1.662-3(b)(3):

Reasonable basis is a relatively high standard of tax reporting, that is, *significantly higher than not frivolous or not patently improper*. The reasonable basis standard is *not satisfied by a return position that is merely arguable or that is merely a colorable claim*. If a return position is reasonably based on one or more of the authorities set forth in section 1.6662-4(d)(3)(iii) (taking into account the relevance and persuasiveness of the authorities, and subsequent developments), *the return position will generally satisfy the reasonable basis standard even though it may not satisfy the substantial authority*. [Emphasis added].⁴¹

³⁹ *NBCUniversal*, TC-MD 170037R, at 8 (Jan. 7, 2026). The court cited cases in other jurisdictions that had declined to extend *Quill* beyond sales and use tax — *Geoffrey Inc. v. South Carolina Tax Commission*, 437 S.E.2d 13 (S.C. 1993) (“holding that the physical presence requirement of *Quill* has not been extended to other types of taxes, such as taxes on royalty income”); *A&F Trademark Inc. v. Tolson*, 605 S.E.2d 187 (N.C. Ct. App. 2004) (“holding that physical presence is not the *sine qua non* of a state’s jurisdiction to tax under the Commerce Clause for purposes of income and franchise tax”); *Lanco Inc. v. Director, Division of Taxation*, 879 A.2d 1234 (N.J. Super. Ct. 2005) (“stating ‘*Quill* does not apply to taxes other than sales and use taxes’”); *Tax Commissioner v. MBNA America Bank N.A.*, 640 S.E.2d 226 (W. Va. 2006) (“holding that ‘*Quill*’s physical-presence requirement for showing a substantial Commerce Clause nexus applie[d] only to use and sales taxes and not to business franchise and corporation net income taxes”); *Bridges v. Geoffrey Inc.*, 984 So. 2d 115 (La. Ct. App. 2008) (“finding that ‘the language in *Quill* impliedly suggests that the physical presence requirement is limited to the area of sales and use taxes and does not apply to the imposition of other state taxes”); *Lamtec Corp. v. Department of Revenue*, 215 P.3d 968 (Wash. Ct. App. 2009) (“holding that physical presence is not required for a business and occupation excise tax”); *In re Washington Mutual Inc.*, 485 B.R. 510 (Bankr. D. Del. 2012) (“agreeing with the Oregon Department of Revenue that *Quill*’s ‘bright-line physical presence test ‘makes little sense in today’s world’”).

⁴⁰ See Or. Rev. Stat. section 314.680.

⁴¹ *NBCUniversal*, TC-MD 170037R, at 9 (Jan. 7, 2026) (quoting reg. section 1.6662-4(d)(3)(iii)).

³⁴ *Id.* (citing reg. section 1.6662-4(d)(3)(iii)).

³⁵ *Wayfair*, 585 U.S. 162.

³⁶ *NBCUniversal*, TC-MD 170037R, at 6 (Jan. 7, 2026).

³⁷ Or. Admin. R. 150-317.010. The tax court explained that the rule was renumbered in 2016 to Or. Admin. R. 150-317-0020. See *NBCUniversal*, TC-MD 170037R, at 6 n.7 (Jan. 7, 2026).

³⁸ *American Refrigerator Transit Co. v. State Tax Commission*, 395 P.2d 127 (Or. 1964).

For the types of authorities that may be reviewed to substantiate that a reasonable basis existed for the taxpayer's position, the court again cited the Treasury regs and limited the taxpayers' reliance to "statutory provisions, revenue rulings, and court cases."⁴² Finding that the taxpayers failed to provide authority for their position beyond *Quill*, the court needed to determine only whether reliance solely on *Quill* was reasonable.⁴³

The court noted that the wording throughout the *Quill* opinion was limited to sales and use taxes and that the U.S. Supreme Court expressly confirmed this when it wrote: "We have not, in our review of other types of taxes, articulated the same physical-presence requirement that [National] *Bella Hess [Inc. v. Department of Revenue*, 386 U.S. 753 (1967)] established for sales and use taxes" and the benefit of imposing a bright-line rule for sales and use taxes.⁴⁴ Finding that the taxpayers' extension of *Quill* to corporate income tax lacked significant analysis of or citation to other supporting authority, the court noted that case precedence in Oregon⁴⁵ and other states "consistently declined to apply *Quill* beyond sales and use tax."⁴⁶

Thus, despite acknowledging that the reasonable basis standard is less stringent than the substantial authority standard, the court found the taxpayers lacked sufficient recognized legal authorities to rely on and stated it "does not permit reliance on subjective beliefs or unsupported claims."⁴⁷ The court concluded that the taxpayers' claims were "at most, 'merely arguable' or 'colorable'"⁴⁸ and did not meet the reasonable basis standard.⁴⁹ The understatement penalty was upheld.

⁴² *Id.* at 9-10 (citing reg. section 1.6662-4(d)(3)(iii)).

⁴³ *Id.* at 11.

⁴⁴ *Id.* at 10 (quoting *Quill*, 504 U.S. at 314, 316).

⁴⁵ See *Capital One Auto Finance Inc. v. Department of Revenue*, TC 5197 (Or. Tax Ct. 2016), *aff'd*, 423 P.3d 80 (Or. 2018). It's troubling that the *NBCUniversal* court did not explain how a 2016 opinion would impede the plaintiffs' reasonable reliance on *Quill* when filing returns for periods before 2016.

⁴⁶ *NBCUniversal*, TC-MD 170037R, at 11 (Jan. 7, 2026).

⁴⁷ *Id.*

⁴⁸ *Id.* Merriam-Webster defines colorable as "seemingly valid or genuine" as well as "intended to deceive." It isn't a common term.

⁴⁹ *NBCUniversal*, TC-MD 170037R, at 11 (Jan. 7, 2026). Finding that there was no reasonable basis, the court did not need to address whether the statements included in the returns provided adequate disclosure.

Conclusion

The two decisions demonstrate the challenges in seeking penalty abatement. What are the state standards? Is there promulgated guidance or case law to guide a request? While many states may offer abatement for the first imposition of penalties, or when a taxpayer can show reliance on the advice of tax professionals, not all penalties have the same standard for review and abatement. With the increased use of substantial understatement penalties, taxpayers are advised to conduct thorough research in preparing their request for penalty abatement, because, unlike fine wine, penalties don't improve with age. ■