



# Reliance on Expert's Erroneous Advice for Filing and Payment Dates

Can reliance on an expert be reasonable cause that protects against penalties for late filing of an estate tax return or paying the tax?

MICHAEL S. STRAUSS

**T**he executor of an estate that is required to file a federal estate tax return is obligated, under Section 6075(a), to file the return within nine months after the date of the decedent's death. For a return not timely filed (including extensions), under Section 6651(a)(1), a penalty of 5% of the tax due is imposed for each month (or partial month) of delay in filing the return, up to a maximum penalty of 25%. For a tax not timely paid (including extensions), under Section 6651(a)(2), a penalty of one-half of 1% of the tax due is imposed for each month (or partial month) of delay in payment, up to a maximum penalty of 25%.

Each of these penalties, however, is imposed "unless it is shown that such failure is due to reasonable cause and not due to willful neglect...." Additional guidance is found in Reg. 301.6651-1(c), which states that "[a] failure to pay will be considered to be due to reasonable cause to the extent that the

taxpayer has made a satisfactory showing that he exercised ordinary business care and prudence in providing for payment of his tax liability and was nevertheless either unable to pay the tax or would suffer an undue hardship (as described in § 1.6161-1(b) of this chapter) if he paid on the due date."

What other circumstances satisfy the reasonable cause requirements, allowing a late filing or late payment to avoid the imposition of penalties?

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## **Boyle**

The Supreme Court addressed this issue in *Boyle*.<sup>1</sup> In *Boyle*, an executor of his mother's estate retained an attorney to assist him in the preparation of his mother's federal estate tax return. The executor's sole experience with federal estate taxation was acting as executor of his father's will 20 years earlier. "It is undisputed that [the executor] relied on [his attorney] for instruction and guidance. He cooperated fully with his attorney and provided [his attorney] with all relevant information and records." Due to a clerical error at the attorney's office, however, the return was filed three months late. The executor paid the penalty assessed and filed suit for a refund. Following the holding of an earlier case,<sup>2</sup> the district court found for the executor on summary judgment, and the Seventh Circuit affirmed. Granting certiorari to resolve a split among the circuits (but setting the stage for a later cir-



cuit split, as will be discussed below), the Supreme Court reversed.

In the words of the Court, "To escape the penalty, the taxpayer bears the heavy burden of proving both (1) that the failure did not result from 'willful neglect,' and (2) that the failure was 'due to reasonable cause.'... As used here, the term 'willful neglect' may be read as meaning a conscious, intentional failure or reckless indifference.... Like 'willful neglect,' the term 'reasonable cause' is not defined in the Code, but the relevant Treasury Regulation calls on the taxpayer to demonstrate that he exercised 'ordinary business care and prudence' but nevertheless was 'unable to file the return within the prescribed time.'"

The Court further stated, "The time has come for a rule with as 'bright' a line as can be drawn consistent with the statute and implementing regulations.... Congress has charged the executor with an unambiguous, precisely defined duty to file the return within nine months; extensions are granted fairly routinely. That the attorney, as the executor's agent, was expected to attend the matter does not relieve the principal of his duty to comply with the statute."

"This case is not one in which a taxpayer has relied on the erroneous advice of counsel concerning a question of law. Courts have frequently held that 'reasonable cause' is established when a taxpayer shows that he reasonably relied on the advice of an accountant or attorney that it was unnecessary to file a return, even when such advice turned out to have been mistaken.... This Court also has implied that, in such a situation, reliance on the opinion of a tax

<sup>1</sup> 469 U.S. 241, 55 AFTR2d 85-1535 (1985).

<sup>2</sup> Rohrabough, 610 F.2d 211, 45 AFTR2d 80-1720 (CA-7, 1979).

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advisor may constitute reasonable cause for failure to file a return.... When an accountant or attorney *advises* a taxpayer on a matter of tax law, such as whether a liability exists, it is reasonable for the taxpayer to rely on that advice. Most taxpayers are not competent to discern error in the substantive advice of an accountant or attorney. To require the taxpayer to challenge the attorney, to seek a 'second opinion,' or to try to monitor counsel on the provisions of the Code himself would nullify the very purpose of seeking the advice of a presumed expert in the first place.... By contrast, one does not have to be a tax expert to know that tax

returns have fixed filing dates and that taxes must be paid when they are due.... The 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 § 6651(a)(1)." Further, "[w]hether the elements that constitute 'reasonable cause' are *present* in a given situation is a question of fact, but what elements *must* be present to constitute 'reasonable cause' is a question of law."

**Specht.** Delegation to an agent of the duty to file a return has been held to not constitute reasonable cause for failing to timely file, even



where the agent actively misled the executor multiple times as to the filing of the return and the administration of the estate. In *Specht*,<sup>3</sup> the executor, the decedent's 73-year-old cousin with no formal education past high school and no experience with acting as an executor, engaged the attorney who had drafted the decedent's will to represent the estate.

**Delegation to an agent of the duty to file a return has been held to not constitute reasonable cause for failing to timely file.**

While the executor was able to procure tax releases from each of decedent's 23 banks, the executor otherwise let the attorney handle the estate. "Unbeknownst to [the executor], [the attorney] was suffering from brain cancer, and her competency was deteriorating." The attorney continued to assure the executor that all was well, and relying on the attorney, the executor took no action despite receiving multiple notices and warnings from the probate court, friends of the decedent, and the Ohio Department of Taxation. Finally, after learning that stock which needed to be liquidated to pay the tax had not been liquidated, the executor fired the attorney, and hired a new attorney. Within the next three months, the estate had liquidated the stock, paid the tax, and filed the federal estate tax return.

The estate settled a malpractice action against the attorney, with the attorney voluntarily surrendering her law license (and subsequently the attorney was declared incompetent and sub-

ject to a guardianship). Also, the Ohio Department of Taxation fully refunded the estate's state penalties due to hardship. The Sixth Circuit, however, held that there was no reasonable cause to avoid the late filing penalty. "[T]he relevant question is whether the *executor*, not the attorney, was reasonable in missing the deadline. Here and in *Boyle*, the executors blindly relied on their attorney's representations that the filing would be completed on time, and in both situations the deadline was missed.... We acknowledge that [the executor] was the victim of staggeringly inadequate legal counsel and there is no evidence of purposeful delay.... Although [the attorney's] representation was certainly an obstacle, [the executor] was not *unable* to file the return or pay the liability on behalf of the Estate."

**Still undecided.** While *Boyle*, and the subsequent cases relying on it, answer the question of whether reliance on an attorney or accountant is reasonable cause for missing a filing or payment deadline where the task of filing the return or paying the tax has been delegated to the attorney or accountant, it expressly left open the issue of whether reliance on an advisor as to the due date of a return can be reasonable cause. "Courts have differed over whether a taxpayer demonstrates 'reasonable cause' when, in reliance on the advice of his accountant or attorney, the taxpayer files a return after the actual due date but within the time the advisor erroneously told him was available.... We need not and do not address ourselves to this issue."<sup>4</sup> Prior and subsequent cases have sought to address this issue, although the circuits have reached different conclusions.

## Two-part analysis

One view of the question of what can be reasonable cause is the view expressed by the Ninth Circuit. In *Knappe*,<sup>5</sup> the executor engaged an accountant to assist him with the administration of the estate. The accountant correctly advised the executor of the requirement to file the return and the due date of the return being nine months from the date of the decedent's death. Prior to the filing deadline, the executor realized that he did not have sufficient time to obtain the information required to complete the return, and the accountant advised him that an extension of time could be obtained both for the filing of the return and the payment of the estate tax due.

The accountant, with the executor's permission, timely filed Form 4768 to obtain the extensions, which the IRS granted. The accountant erroneously believed, and advised the executor, however, that a one-year extension of time to file and time to pay could be and was obtained. In fact, only a six-month extension of time to file and a one-year extension of time to pay could be and was obtained.

The executor and accountant subsequently completed and filed the return and paid the tax due more than six months but less than one year after the original due date. The IRS assessed a late filing penalty under Section 6651(a)(1) which the executor paid and then sought a refund claiming that he had reasonable cause for the late filing.

<sup>3</sup> 661 Fed. Appx. 357, 118 AFTR2d 2016-5906 (CA-6, 2016).

<sup>4</sup> *Boyle*, footnote 9, *supra* note 1.

<sup>5</sup> 713 F.3d 1164, 111 AFTR2d 2013-1531 (CA-9, 2013), *cert den.* 134 S.Ct. 422 (2013).

<sup>6</sup> 632 F.3d 1140, 107 AFTR2d 2011-898 (CA-9, 2011).

<sup>7</sup> 717 F.2d 454, 52 AFTR2d 83-6446 (CA-8, 1983), *cert den.* 469 U.S. 1188 (1985).



The Ninth Circuit discussed two general categories of reasonable cause:

- The first category involves “taxpayers who delegate the task of filing a return to an expert agent, only to have the agent file the return late or not at all.”
- The second category involves taxpayers who rely “on an agent’s erroneous advice that no return is due.”

Relying on *Boyle*, the Ninth Circuit found that the first category was not reasonable cause, while the second category did constitute reasonable cause. In its analysis, the Ninth Circuit discussed how the facts in this case did not “fall squarely into either category. [The executor] neither delegated the task of filing the return to a neglectful agent nor received mistaken advice that no taxes were due. Rather, he personally filed the return after the actual deadline, but within the time

that [the accountant] erroneously had assured him was available.”

The Ninth Circuit concluded that “the question of when the estate-tax return was due once an extension had been obtained was a nonsubstantive one. For that reason, [the executor] did not exercise ordinary business care and prudence when he relied unquestioningly on [the accountant’s] advice about the extended deadline, and he unreasonably abdicated his duty to ascertain the filing deadline and comply with it.... We conclude that the question of when a return is due—even when an executor has sought an extension—is nonsubstantive.... Reliance on erroneous advice about nonsubstantive tax law issues cannot constitute reasonable cause for an executor’s failure to file a timely return.”

Other cases reach similar conclusions, either in their analysis or in their results:

- *Baccei*,<sup>6</sup> where the executor engaged an accountant who

prepared and filed a Form 4768 but where the Form did not state the date to which an extension of time to pay was requested and did not check the box indicating a request for a payment extension. The Ninth Circuit held that the executor’s reliance on the accountant to file the extension request was not reasonable cause for the failure to timely pay.

- *Estate of Kerber*,<sup>7</sup> where the executor’s attorney erroneously advised her that the estate tax return was due one year after the date of the decedent’s death. The executor hired an accountant to prepare the return, then fired him after three months during which he did no work, and next hired a second accountant. The attorney, believing that the estate had one year to file the return, did not advise the second accountant of the date of the

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decendent's death until after the return was due, whereupon the second accountant immediately sought an extension of time to file and submitted payment to the IRS. The Eighth Circuit found that the executor had not demonstrated reasonable cause for the failure to timely file, although it noted that, as it had held in prior cases, it had not "establish[ed] a rule of law that a personal representative's reliance on counsel can *never* constitute reasonable cause...."

### Three-part analysis

A second view of the question of what can be reasonable cause is expressed by the Third Circuit. In *Estate of Thouron*,<sup>8</sup> the executor retained an attorney to provide tax advice for the estate, and on the due date of the federal estate tax return filed a request for extension of time to file (but not for an extension of time to pay) and made a payment of an amount that was only a portion of the amount ultimately due. The underpayment and lack of a request for an extension of time to pay was argued to be due to the attorney's advice that the estate might have been eligible to defer some of the estate tax under Section 6166.

The estate subsequently timely filed the return and simultaneously requested an extension of time to pay, having determined that the estate did not qualify for deferral of a portion of the estate tax under Section 6166. The IRS denied this extension request as untimely and assessed a failure-to-pay penalty under Section 6651(a)(2). The estate paid the tax, penalty, and interest and sought a refund, arguing that its reliance on the advice of the attorney was reasonable cause for its failure to timely pay.

The Third Circuit interpreted *Boyle* as identifying "three distinct categories of late-filing or, by extension, late-payment cases. In the first category, a taxpayer relies on an agent for the ministerial task of filing or paying. *See Boyle*, 469 U.S. at 249–50. In the second, 'in reliance on the advice of his [or her] accountant or attorney, the taxpayer files a return after the actual due date but within the time the adviser erroneously told him [or her] was available.' *Id.* at 251 n.9. In the third, 'an accountant or attorney *advises* a taxpayer on a matter of tax law[.]' *Id.* at 251 (emphasis in original)."

**The Third Circuit interpreted *Boyle* as identifying "three distinct categories of late-filing or, by extension, late-payment cases."**

Discussing how the facts in *Boyle* covered only the first category and how *Boyle* did not address the second and third categories, the Third Circuit held that "a taxpayer's reliance on the advice of a tax expert may be reasonable cause for failure to pay by the deadline if the taxpayer can also show either an inability to pay or undue hardship from paying at the deadline.... *Boyle* dealt with a 'clerical oversight' in failing to file a return by the deadline. It did not rule on when taxpayers rely on the advice of an expert, whether that advice relates to a substantive question of tax law or identifying the correct deadline. Our case is one of the failure of expert advice, not (at least on the record before us) the failure of agent task-completion. Thus the Estate has the right to make, if it can, the show-

ings required to avoid late-payment penalties and interest."

This seems consistent with Justice Brennan's concurrence in *Boyle*, where he stated that "[t]he outcome could be different if a taxpayer were able to demonstrate that, for reasons of incompetence or infirmity, he understandably was unable to meet the standard of ordinary business care and prudence.... Thus a substantial argument can be made that the draconian penalty provision should not apply where a taxpayer convincingly demonstrates that, for whatever reason, he reasonably was unable to exercise ordinary business care."

**Another circuit agrees.** The Federal Circuit reached a similar conclusion in *Liftin*.<sup>9</sup> The decedent was survived by a spouse who was not a U.S. citizen. The executor retained an attorney to assist in the administration of the estate and timely sought a six-month extension of time to file and time to pay, which the IRS granted.

The executor and the attorney considered the issue of when the decedent's spouse would become a U.S. citizen, which would affect the estate tax due. The spouse agreed to become a U.S. citizen and began the process to apply for citizenship. However, "[t]he estate was engaged in litigation with the decedent's widow relating to her rights under a prenuptial agreement and the decedent's will." These issues remained unresolved by the extended due date to file and pay, although the estate had previously made an estimated tax payment of "an amount sufficient to cover the taxes due even if the estate could not claim the marital deduction."

<sup>8</sup> 752 F.3d 311, 113 AFTR2d 2014-2082 (CA-3, 2014).

<sup>9</sup> 754 F.3d 975, 113 AFTR2d 2014-2462 (CA-F.C., 2014).



The attorney advised the executor that “a late Form 706 could be filed after the extended due date.” More than a year after the extended due date, the spouse became a U.S. citizen. Over six months later, the estate and the spouse resolved the litigation. The return, filed more than two months after the date of the resolution, claimed the marital deduction and sought a refund for excess taxes paid.

The IRS assessed a late filing penalty under Section 6651(a)(1). The Court of Federal Claims, in hearing this issue, divided the delay into two periods, the first period being the 14 months between the due date and the date that the spouse became a U.S. citizen, for which it found reasonable cause, and the second period being the subsequent nine months from the date that the spouse became a U.S. citizen and the date on which the return was filed, for which it found no reasonable cause.<sup>10</sup> The Federal Circuit also found no reasonable cause for the second period.

In its analysis, the Federal Circuit looked at the reasonableness of the legal advice given to the executor. “In applying the ‘reasonable cause’ provision of section 6651(a)(1) to the claimed reliance on legal advice here, we think it appropriate to borrow the relevant component of the IRS’s formal regulatory implementation of ‘reasonable cause’ in the closely analogous setting of section 6664(c)(1). The statutory language of ‘reasonable cause’ is the same. That language readily permits an interpretation that asks if the basis for the advice clears a threshold of reasonableness.”

Finding that the advice given by the attorney that the filing of the return could be delayed while ancillary matters were addressed was “simply unreasonable,” the Federal Circuit found no reasonable cause for the delay and upheld the imposition of the late filing penalty. However, by considering the reasonableness of the advice, it would appear that under this analysis, advice that was reasonable could be considered reasonable cause for a late filing or late payment, apparently including advice regarding the timing of the filing of a return or the payment of the tax due, in contrast to the Ninth Circuit’s finding that the determination of the due date of a return is non-substantive (and thus presumably reliance on such advice would not be reasonable).

**Other courts.** Other cases reach similar conclusions, either in their analysis or in their results:

- *Estate of Bradley*,<sup>11</sup> where the executor engaged an accounting firm to prepare the federal estate tax return. The accountant erroneously advised that the return was due 18 months after the date of decedent’s death, believing that the executor was inquiring about the due date of the Kentucky State inheritance tax return. Relying on this advice, the federal estate tax return was filed after the due date but within the 18 months that the executor had been advised was available. The IRS assessed a late filing penalty under Section 6651(a)(1), but the Tax Court, later affirmed by the Sixth Circuit, found that the executor had not delegated the task of filing the return, but rather relied on advice as to the due date of the return,

which the court found to be reasonable cause for the late filing. “To sustain [the IRS’s] argument would require a holding that an executor may rely upon the advice of an expert on substantive tax law questions but, as a matter of law, may not do so with respect to the requirements of the law as to the due date of tax returns—that he must research that question for himself. We decline to so hold.”

**The Tax Court found that the executor had reasonably relied on the erroneous advice from the attorney and thus the late filing penalty did not apply.**

- *Sanderling, Inc.*,<sup>12</sup> where a corporation dissolved and directed its accountant to prepare an income tax return for the final short tax year. The return was filed late, and the IRS assessed a penalty under Section 6651(a)(1), but the Third Circuit reversed, finding that (under the facts of the case) the IRS had failed to prove that the taxpayer did not have reasonable cause for the delay and discussing how the IRS itself was confused as to the proper due date of the return.
- *Estate of La Meres*,<sup>13</sup> where the executor, on the advice of counsel, applied for and was granted a six-month extension of time to file and a one-year extension of time to pay, but, when still unable to file the return by the extended due date, was advised by counsel that the estate could obtain a

<sup>10</sup> *Estate of Liftin*, 108 AFTR2d 2011-7108 (Ct. Fed. Cl., 2011).

<sup>11</sup> TCM 1974-17, *aff’d* 511 F.2d 527, 35 AFTR2d 75-1629 (CA-6, 1975).

<sup>12</sup> 571 F.2d 174, 41 AFTR2d 78-831 (CA-3, 1978).

<sup>13</sup> 98 TC 294 (1992).



second six-month extension of time to file, which the executor applied for prior to the extended due date. The federal estate tax return was subsequently filed late, and the IRS assessed a penalty under Section 6651(a)(1). The Tax Court found that the executor had reasonably relied on the erroneous advice from the attorney and thus the late filing penalty did not apply. "[T]he Tax Court has consistently held that erroneous legal advice with respect to the date on which a return must be filed can constitute reasonable cause for failure to file timely a return if such reliance was reasonable under the circumstances."<sup>14</sup>

- *Estate of Hake*,<sup>15</sup> where, under similar facts as in *Knappe*, the executors relied on their tax advisor's erroneous advice that they had been granted a one-year extension of time to file and time to pay, when in fact they had obtained only a six-month extension of time to file and a one-year extension of time to pay. "To demonstrate that their failure to file a timely return was 'due to reasonable cause and not to willful neglect,' 26 U.S.C. § 6651(a)(1), the Third Circuit explained that the executors would need to show that they 'exercised ordinary business

care and prudence and [were] thus nevertheless unable to file the return within the prescribed time[.]' *Thouren*, 752 F.3d at 314 n.1 (citing Treas. Reg. § 301.6651-1(c)(1)). The Tax Court has held that reasonable cause may be found to exist when a taxpayer files a return after the due date, but does so in reliance upon an expert's erroneous advice. See *Estate of La Meres v. Commissioner*.... This case aptly illustrates how such reliance upon expert advice can be objectively reasonable." In finding for the estate on summary judgment, the court noted that it is "bound to follow the interpretive guidance that our court of appeals provided in *Thouren*, which carefully isolated the holding of *Boyle* and construed it to apply to first-category cases only, where executors have delegated entirely their obligations to prepare and file returns and make payment of taxes owed. The Supreme Court has not yet held that in the second category of cases—where the executor relied upon the advice of tax counsel when filing a return after the actual deadline but within the period instructed by counsel—an executor may not demonstrate that such reliance was reasonable."

## Conclusion

The Supreme Court's decision in *Boyle* made clear that reliance on an agent to timely file or timely pay is not reasonable cause where the agent fails to do so. The *Boyle* decision and the circuits are also consistent in holding that, under appropriate circumstances, a taxpayer's reliance on the advice of an attorney as to a question of law can be reasonable cause for late filing or late payment.

Whether the advice of an attorney or accountant as to the due date or extended due date for filing a return or paying a tax can be reasonable cause for late filing or late payment is less clear, given the split in the circuits on this issue, and depends on whether the advice is considered non-substantive (and thus presumably not reasonable; see the Ninth Circuit in *Knappe*), or whether the reasonableness of the reliance on the advice is relevant (see the Federal Circuit in *Liftin* and the Tax Court in *La Meres*). ■

<sup>14</sup> See also *Estate of Hinz*, TCM 2000-6, where the Tax Court, in discussing the Section 6651(a)(2) penalty and finding reasonable cause for late payment while not finding reasonable cause for late filing (and thus the Section 6166 election was ultimately rejected as untimely), stated that "[b]ecause reasonable cause must have existed when the tax was due, the significance of the Internal Revenue Service's action or inaction regarding a section 6166 election [where the Service tentatively approved and later rejected the Section 6166 election] is in determining the taxpayer's reasonableness in believing that a valid election was made at the time the tax was due."

<sup>15</sup> 234 F. Supp. 3d, 119 AFTR2d 2017-727 (DC Pa., 2017).