NOTES

LATE FILING OF FEDERAL ESTATE TAX RETURNS: RELIANCE ON ATTORNEY AS REASONABLE CAUSE

More often than not, a spouse, relative or family friend is named executor of the estate of the deceased. He or she generally has little or no knowledge of the tax laws and relies upon an attorney or accountant in the preparation and filing of estate tax returns. The executor, as well as the attorney, may be unaware that the errors of the attorney could result in a penalty to the executor of up to twenty-five percent of the total tax due if the return is filed late. The penalty is imposed unless the executor's reliance upon the attorney constitutes "reasonable cause" for late filing. When imposed upon the executor, the penalty is frequently passed on to the expert upon whom the executor relied in the preparation and filing of the federal estate tax return.

I. SECTION 6651

Section 6651 of the Internal Revenue Code[1] imposes a penalty for failure to timely file federal estate tax returns.[2] The penalty is imposed unless the executor[3] establishes that the late filing was "due to reasonable cause and not due to willful neglect."[4] Treasury regulations provide that "[i]f the

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1. I.R.C. § 6651 (1976). The pertinent part of the section reads as follows:

(a) Addition to the tax. —In case of failure—

(1) to file any return . . . on the date prescribed therefor . . . , unless it is shown that such failure is due to reasonable cause and not due to willful neglect, 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 for not more than 1 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 . . . .

Id.

2. If a federal estate tax return is required, it must "be filed within 9 months after the date of the decedent's death." I.R.C. § 6075(a) (1976). Prior to 1970, an executor had 15 months following decedent's death to file a return.

3. Section 6018 requires the *executor* to make a return with respect to the decedent's estate in all cases where the gross estate at death exceeds $225,000 in 1982, $275,00 in 1983 etc. I.R.C. § 6018 (emphasis added).

4. I.R.C. § 6651 (1976). Treasury regulations provide: "If the district director . . . determines that the delinquency was due to a reasonable cause and not to willful neglect, the addition to the tax will not be assessed." 26 C.F.R. § 301.6651-1(c) (1977).

taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time, then the delay is due to a reasonable cause."[5] This Note will examine whether the executor's reliance on expert counsel constitutes "reasonable cause" within the meaning of section 6651.[6]

II. Background

As the relevant case law has developed, the determination of whether the executor exercised ordinary business care and prudence, thereby satisfying the "reasonable cause" prong of section 6651, has been factual, effectively precluding the development of predictable standards by which the executor's actions could be judged. While some courts have held that whether the executor exercised ordinary business care and prudence is a question of fact to be determined from all the circumstances in a particular case,[7] others have held that the elements which must be present to constitute reasonable cause is a question of law, while the question of whether such elements are present in a given situation is one of fact.[8] Even among the latter, there has been little agreement as to what constitutes reasonable cause as a matter of law.[9]

Although it dealt with income taxes, the 1947 Third Circuit case of *Hatfried, Inc., v. Commissioner*[10] is cited extensively in estate tax cases. *Hatfried* involved a corporate taxpayer which relied upon a certified public accountant to file all necessary tax returns. The accountant failed to file

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5. *Id.*

6. *See generally* Arth, *Avoiding the Penalty for Late Filing of the Estate Tax Return: An Analysis*, 48 J. Tax'n 358 (1978); Harris & Warner, *Estate Late Filing Penalty Under Section 6651: New Stricter Interpretations*, 57 Taxes 275 (1979); Note, *Reasonable Cause for the Late Filing of Estate Tax Returns*, 11 Ind. L. Rev. 621 (1978).

7. Rohrabaugh v. United States, 611 F.2d 211 (7th Cir. 1979); Estate of Geraci, 502 F.2d 1148 (6th Cir. 1974), *aff'g*, 73 T.C.M. (P-H) ¶ 73,094 (1973); Coates v. Commissioner, 234 F.2d 459 (8th Cir. 1956); Sheehan v. United States, 44 A.F.T.R.2d (P-H) ¶ 148,342, at 6127 (N.D. Ohio 1979); Gray v. United States, 453 F. Supp. 1356 (W.D. Mo. 1978); Estate of Duttenhofer v. Commissioner, 49 T.C. 200 (1967), *aff'd*, 410 F.2d 302 (6th Cir. 1969).

8. Boeving v. United States, 650 F.2d 493 (8th Cir. 1981); Lillehei v. Commissioner, 638 F.2d 65 (8th Cir. 1981); United States v. Kroll, 547 F.2d 393 (7th Cir. 1977); Commissioner v. American Ass'n of Eng'rs Employment Soc., 204 F.2d 19 (7th Cir. 1953); Haywood Lumber & Mining Co. v. Commissioner, 178 F.2d 769 (2d Cir. 1950); Clum v. United States, 424 F. Supp. 2 (S.D. Ohio 1976); Giesen v. United States, 369 F. Supp. 33 (W.D. Wis. 1973).

9. *See* Haywood, 178 F.2d at 771 (reliance on the advice of counsel or expert accountant is "reasonable cause" for failure to file a tax return); *In re* Fisk's Estate, 203 F.2d 358, 360 (6th Cir. 1953) (the rule in *Haywood* "applies to the filing of tax returns as well as to reliance upon technical advice in complicated legal matters"). *Cf.* Kroll, 547 F.2d at 396 ("when there is no question that a return must be filed, the taxpayer has a personal, nondelegable duty to file the tax return when due"); Stephens v. United States, 44 A.F.T.R.2d (P-H) ¶ 148,347, at 6140 (D. Ariz. 1979) (the taxpayer "has a nearly absolute, non-delegable duty to see that it is filed on time").

10. 162 F.2d 628 (3d Cir. 1947).

personal holding company returns, believing that the corporation was not a personal holding company and that it was therefore not required to do so.[11] On these facts, the trial court found that the corporation failed to show reasonable cause for its failure to file and a penalty was imposed.[12] On appeal, the Third Circuit Court of Appeals recognized "that the burden of establishing 'reasonable cause' is on the taxpayer, . . . and that what constitutes 'reasonable cause' is a question of fact in the first instance for the Tax Court's determination."[13] The court nevertheless held that the imposition of the penalty under these facts was without "any substantial basis."[14] The court identified two principles upon which it based its decision:

> (1) Reasonable cause means nothing more than the exercise of ordinary business care and prudence[15] and (2) the penalties imposed under the revenue laws were designed to attach to conduct of a taxpayer "which is intentional, or knowing, or voluntary, as distinguished from accidental"[16] as evidenced by the words in Section 291[17] "and not due to willful neglect."[18]

The *Hatfried* court concluded that the Tax Court was "mistaken" as to the meaning of reasonable cause[19] and that the corporate taxpayer, "*in fact and in law,* exercised such ordinary business care and prudence" in relying on expert advice as to constitute reasonable cause.[20] The court rejected the notion that taxpayers, as principals, should be "liable for the conduct of [their] fiscal agents,"[21] since "[t]hat conception does violence to the plain intent of Congress as expressed in Section 291."[22]

A later Third Circuit case, *Haywood Lumber & Mining Co. v. Commissioner,*[23] has also played a significant role in the development of case law. *Haywood* also involved a failure to file personal holding company returns, and in that case the court established that "[w]hen a corporate taxpayer

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11. *Id.* at 632.
12. *Id.* at 630. The penalty was imposed under I.R.C. section 291, which was the predecessor of section 6651.
13. *Id.* at 631.
14. *Id.* at 631-32.
15. *Id.* at 632 (citing Southeastern Finance Co. v. Commissioner, 153 F.2d 205 (5th Cir. 1946)).
16. *Id.* (quoting United States v. Murdock, 290 U.S. 389, 394 (1933)).
17. Section 291 is similar to the current I.R.C. Section 6651. *Id.* "[O]riginally Section 291 of the Revenue Act of 1934 made mandatory the imposition of a penalty [for] failure to file a return." *Id.* Section 291 was amended in 1936 to provide for the imposition of the penalty ". . . unless it is shown that such failure is due to reasonable cause and not due to willful neglect . . . . " *See id.;* Estate of Kirchner, 46 B.T.A. 578, 584-85 (1942).
18. 162 F.2d at 632.
19. *Id.* at 634.
20. *Id.* at 635 (emphasis added).
21. *Id.* at 634-35.
22. *Id.* at 635.
23. 178 F.2d 769 (2d Cir. 1950).

selects a competent tax expert, supplies him with all necessary information, and requests him to prepare proper tax returns, we think the taxpayer has done all that ordinary business care and prudence can reasonably demand."[24] The *Haywood* test was later applied in cases involving the late filing of estate tax returns, as well as in income tax cases.[25]

By the early 1950s, it was established that reliance upon expert advice satisfied the "reasonable cause" standard where the taxpayer: (1) selected a competent tax expert; (2) supplied him with all necessary information; and (3) requested that he prepare proper tax returns.[26]

Since the various circuits have approached the section 6651 cases differently, this Note will focus upon those circuits which have dealt with the issue individually. The Ninth Circuit cases will be explored first, as that circuit developed an early body of case law in the area after which the other circuits fashioned their analysis.

III. Ninth Circuit

While there are relatively few recent Ninth Circuit cases in the area of estate tax penalties under section 6651, the 1957 case of *Ferrando v. United States*[27] has played a significant role in the developing case law. In that case, the court held that the executors' failure to file the estate tax return when due was *not* due to "reasonable cause" since they knew that a return was required and "made no attempt to determine" whether the attorney with whom they had entrusted the task was acting with diligence.[28] The *Ferrando* court imposed a duty upon the executor to retain some control over the matters of the estate, since "[t]he filing of a tax return when due is a personal, nondelegable duty of the taxpayer . . . ."[29] Since the executors

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24. *Id.* at 771. The *Haywood* court rejected the notion that the taxpayer should be chargeable with his agent's negligence where the taxpayer exercised ordinary business care and prudence, since "[t]he standard of care imposed by section 291 is personal to the taxpayer." *Id.*

25. *See, e.g.*, Rohrabaugh v. United States, 611 F.2d 211 (7th Cir. 1979); Sanderling, Inc. v. Commissioner, 571 F.2d 174 (3d Cir. 1978); *In re* Fisk's Estate, 203 F.2d 358 (6th Cir. 1953); Staff v. United States, 46 A.F.T.R.2d (P-H) ¶ 148,404, at 6144 (W.D.N.Y. 1980); Daley v. United States, 480 F. Supp. 808 (D.N.D. 1979); Giesen v. United States, 369 F. Supp. 33 (W.D. Wis. 1973); Estate of Lammerts, 54 T.C. 420 (1970), *modified*, 456 F.2d 681 (1972); Estate of Duttenhofer, 49 T.C. 200 (1967), *aff'd*, 410 F.2d 302 (6th Cir. 1969); Estate of Mayer, 43 T.C. 403, 406 (1964), *aff'd*, 351 F.2d 617 (2d Cir. 1965), *cert. denied*, 383 U.S. 935 (1966).

26. Haywood Lumber & Mining Co. v. Commissioner, 178 F.2d 769 (2d Cir. 1950); Hatfried, Inc. v. Commissioner, 162 F.2d 628 (3d Cir. 1947).

27. 245 F.2d 582 (9th Cir. 1957). The pertinent statute was I.R.C. section 3612(d)(1) (1940) which provided for a penalty for failure to file "within the time prescribed by law . . . except that when a return is filed after such time and it is shown that the failure to file it was due to a reasonable cause and not to willful neglect, no such addition shall be made to the tax . . . ." *Id.* at 587.

28. *Id.*

29. *Id.* at 589. The court relies upon *Annot.*, 2 A.L.R.2d 617, 619 (1949), which states: The filing of a tax return when due is a personal, nondelegable duty of the taxpayer;

failed to discharge their duties, the court upheld the trial court decision imposing the statuatory penalty.[30] It should be noted that in *Ferrando* the executors received no advice that a return was not required. They simply relinquished the task of filing returns, which they knew were due, to the attorney for the estate.

The *Ferrando* holding was followed with a similar result in the 1970 case of *Pfeiffer v. United States*,[31] in which the executrix relied completely on her attorney to handle the affairs of the estate. Pfeiffer contended that her inexperience in business and tax matters rendered her delegation of duties to a tax expert "reasonable and prudent" under the circumstances.[32] The court rejected the argument, holding that as the executrix she was under an *obligation to ascertain her duties and oversee the activities of her attorney*.[33]

Finally, in 1979 the United States District Court for the Eastern District of Arizona decided *Stephens v. United States*.[34] *Stephens* followed *Ferrando* and *Pfeiffer*, but the court's holding was framed more narrowly. The court distinguished between two classes of cases—those in which "the taxpayer relies upon the advice of an attorney or accountant as to *whether* a return is due" and those in which "the taxpayer knows a return is due but relies on an attorney or accountant to prepare it."[35] The court recognized that the former may constitute reasonable cause,[36] but held that the latter did not,[37] since the taxpayer has a "*nearly absolute, non-delegable* duty" to see that the return is filed on time.[38] Since both administratrixes knew the return was due nine months after decedent's death and "merely relied on

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as a general proposition, it is no valid excuse for him to say that the matter was put in charge of an employee or accountant or attorney, no matter how trustworthy that person may be.

30. *Id.*

31. 315 F. Supp. 392 (E.D. Cal. 1970).

32. *Id.* at 396. The court noted that the executrix *voluntarily* assumed the position of executrix and received a commission for her services. *Id.* (emphasis added).

33. *Id.* (emphasis added). Pfeiffer signed a Form 704 Preliminary Notice on which it was stated that an estate tax return was due within fifteen months of decedent's death, which, according to the court, should have put her on notice that she might be liable for penalties if the deadline was not met. *Id.*

34. 44 A.F.T.R.2d (P-H) ¶ 148,347, at 6138 (D. Ariz. 1979).

35. *Id.* at 6140.

36. *Id.* (citing *Haywood Lumber*, 178 F.2d 769 (2d Cir. 1950) and Burton Swartz Land Corp. v. Commissioner, 198 F.2d 558 (2d Cir. 1952)).

37. *Id. See also* United States v. Kroll, 547 F.2d 393 (7th Cir. 1977); Logan Lumber v. Commissioner, 365 F.2d 846 (5th Cir. 1966); Janice Leather Imports v. United States, 391 F. Supp. 1235 (S.D.N.Y. 1974); Bar L Ranch v. Phinney, 272 F. Supp. 249 (S.D. Tex. 1967); Sanderling v. Commissioner, 66 T.C. 743 (1976); Qualley v. Commissioner, 76 T.C.M. (P-H) ¶ 76,208, at 876 (1976); Estate of De Vos v. Commissioner, 75 T.C.M. (P-H) 75,216, at 915 (1975); Maudlin v. Commissioner, 60 T.C. 749, 762 (1973); Paula Const. Co. v. Commissioner, 58 T.C. 1055 (1972).

38. 44 A.F.T.R.2d (P-H) ¶ 148,347, at 6140.

the accountant to fulfill their own personal legal liability," the court found that "this very *failure to act*," as a matter of law, constituted "a failure to exercise ordinary business care and prudence."[39]

Based upon the *Ferrando, Pfeiffer* and *Stephens* decisions, the Ninth Circuit law is clear. Reliance upon an attorney or accountant to file a tax return *never* constitutes reasonable cause for the late filing of a federal estate tax return, while reliance on an expert's specfic advice that a return need not be filed amounts to the exercise of ordinary business care and prudence under section 6651.

IV. Sixth Circuit

The Court of Appeals for the Sixth Circuit decided one of the more important estate tax cases in 1953. In *In re Fisk's Estate v. Commissioner,*[40] the court, in reversing a Tax Court decision,[41] found that the executrix met the reasonable cause standards established in *Haywood.*[42] The executrix of the Fisk estate relied upon her attorney to timely file the federal estate tax return. The return was mailed on the due date, but arrived one day late, resulting in the imposition of a penalty of 5% of the tax due.[43] The court concluded that reliance by the executrix upon her attorney amounted to the exercise of ordinary business care and prudence.[44] Notably, unlike the Ninth Circuit cases which narrowly construed the "reasonable cause" language of section 6651, the *Fisk* court held that reliance upon counsel constitutes reasonable cause as a matter of law when the taxpayer relies upon an attorney to file the return, as well as when the taxpayer relies upon technical advice

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39. *Id.* at 6141.

40. 203 F.2d 358 (6th Cir. 1953).

41. Tax Court decisions are appealable to the Court of Appeals for the circuit in which is located the legal residence of the petitioner, or to any United States Court of Appeals stipulated by the taxpayer and designated by the Secretary. I.R.C. § 7482 (1976).

42. 203 F.2d 358 (citing Haywood Lumber & Mining Co. v. Commissioner, 178 F.2d 769 (2d Cir. 1950)).

43. 203 F.2d at 359. The executrix offered no explanation as to why the return was mailed on its due date. The court speculated that the attorney presumed that if he mailed the return on the due date it would be timely filed. *Id. See* I.R.C. § 7502 (1976).

44. *Id.* The court noted that the Tax Court has repeatedly decided that reliance upon counsel constitutes reasonable cause for failure to timely file necessary tax returns. *Id.* (citing Diana McFaden Houk v. Commissioner, 6 T.C.M. (CCH) 751 (1957) (taxpayer who relied upon her "customary reputable source of information" had reasonable cause for failure to file); Brooklyn & Richmond Ferry Co. v. Commissioner, 9 T.C. 865 (1947)(taxpayer showed reasonable cause where he acted in good faith in entrusting the determination of whether the filing of the returns was necessary, despite the fact that his accountant reached the wrong conclusion); Safety Tube Corp. v. Commissioner, 8 T.C. 757 (1947); C.R. Lindback Foundation v. Commissioner, 4 T.C. 652 (1945) (advice of reputable counsel that a taxpayer was not liable for the tax is held to constitute reasonable cause where it is accompanied by other circumstances showing the taxpayer's good faith)).

that a return need not be filed.[45]

In 1970, the Sixth Circuit Court of Appeals affirmed a decision of the Tax Court in a *per curiam* opinion, distinguishing *Fisk* on its facts. In *Estate of Duttenhofer v. Commissioner*,[46] the estate tax return was filed over five months late. The co-executors hired an attorney for the estate and entrusted the tax matters to him. Both signed a Form 704 which contained notice that failure to file within fifteen months of the death of the decedent might render the executors liable for penalties.[47] The Tax Court rejected the executors' argument that their reliance upon counsel to prepare and timely file the return constituted reasonable cause, finding that more was required of an executor than simply signing any documents prepared by his attorney.[48] The fact that the executors signed the Form 704, which stated the due date, seemed to be a controlling factor in the Tax Court's decision.[49] The court concluded that where a taxpayer, "*without knowledge* that a return was required, relied upon a competent tax adviser to prepare the proper papers, this good-faith reliance constituted reasonable cause under section 6651."[50] In the court's estimation, however, the same result did *not* follow "where a third person is relied upon to prepare and timely file a tax return for a taxpayer who knows that a return must be filed."[51] In its *per curiam* opinion, the Court of Appeals held that the Tax Court's finding was not clearly erroneous and affirmed that decision.[52]

In *Estate of Rose v. Commissioner*,[53] the Tax Court[54] held that the ex-

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45. 203 F.2d at 360. The court concluded that its broad construction of "reasonable cause" was in accord with the principles espoused by the United States Supreme Court in *United States v. Murdock*, 290 U.S. 389, 394 (1933)(the penalties under the revenue laws were designed to be imposed upon conduct "which is intentional, or knowing, or voluntary, as distinguished from accidental"). *Id.*

46. 410 F.2d 302 (6th Cir. 1969), *aff'g per curiam* 49 T.C. 200 (1967).

47. 49 T.C. 200, 202-03, *aff'd per curiam*, 410 F.2d 302 (6th Cir. 1969).

48. *Id.* at 204. The Tax Court added that "petitioners did fail to act as ordinarily intelligent and prudent businessmen by blindly acquiescing in all of Mongan's [attorney's] decisions and thus giving him effective control of administering the estate, whereas the responsibility was basically their own." *Id.*

49. *Id.* at 205. The court indicated that there was no evidence that the executrix in *Fisk* knew, or had reason to know, that a return was due. *Id.* at 206. A reading of the *Fisk* opinion, however, indicates that the executrix turned the preparation and filing of the return over to an attorney and supplied him with information necessary to complete the schedules listed in the estate tax return. Fisk, 203 F.2d at 359. There is no indication whatsoever in *Fisk* that the executrix was unaware that a return was due. Moreover, her conduct is evidence to the contrary, so this seems to be an inappropriate basis for the distinction the Tax Court attempts to draw in *Duttenhofer*.

50. Duttenhofer, 49 T.C. at 206.

51. *Id.* (emphasis added).

52. 410 F.2d 302 (6th Cir. 1969).

53. 32 T.C.M. (CCH) 461 (1973).

54. Prior to 1970, the Tax Court rejected the idea that it was bound by the decisions of the Courts of Appeals, although its decisions are subject to review by the various United States

ecutor had "a positive duty to ascertain the nature of his responsibilities."[55] His failure to do so did not amount to the exercise of ordinary business care and prudence, even though he relied upon an attorney to file the necessary returns.[56]

The Tax Court found the executor's conduct to satisfy the "ordinary business care and prudence" standard in *Estate of Bradley v. Commissioner*.[57] In *Bradley* the executor, an attorney, relied upon the mistaken advice of an accountant that the return was due within eighteen months of death.[58] Since the executor made a good faith attempt to ascertain the correct due date, no penalty was imposed.[59]

The Sixth Circuit Court of Appeals, in another *per curiam* opinion, affirmed the Tax Court memorandum decision in the case of *Estate of Geraci v. Commissioner*.[60] The executrix in *Geraci* relied entirely upon the attorney for the estate to file the federal estate tax return. The attorney was mistaken as to the due date and filed the return late.[61] The Tax Court held that the executrix had a duty to ascertain when the return was due and to take steps to see that it was filed.[62] The attorney's mistake as to the due date did not constitute reasonable cause, since there was no question as to whether a return need be filed.[63] In affirming, the Court of Appeals expressed its reluc-

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Courts of Appeals pursuant to I.R.C. section 7482. *See* Authur L. Lawrence v. Commissioner, 27 T.C. 713, 716-20 (1957). The court reversed its position in *Jack E. Golsen v. Commissioner*, 54 T.C. 742 (1970), holding itself bound by a decision of the United States Court of Appeals having appellate venue over the case before it. As the result of *Golsen*, the Tax Court will follow a court of appeals decision which is squarely on point where appeal lies to that court. Where the views of the applicable court of appeals have not yet been expressed, the Tax Court will continue to "foster uniformity" by giving effect to its own views. *Id.*

55. 32 T.C.M. (CCH) at 464 (citing Estate of Lammerts, 456 F.2d 681, 683 (2d Cir. 1972)).

56. *Id.*

57. 33 T.C.M. (CCH) 70 (1974).

58. *Id.* at 70.

59. *Id.* at 73. The court refused to hold that since the executor was an attorney he was charged with the knowledge of the due date, since the evidence revealed that he consistently relied upon others for advice on tax matters. *Id.*

60. 502 F.2d 1148 (6th Cir. 1974) *aff'g per curiam* 73 T.C.M. (P-H) ¶ 73,094, at 418 (1973), *cert. den.*, 420 U.S. 992 (1975).

61. *Id.* at 1149. The attorney believed that the return was due fifteen months from the date of the appointment of the executrix rather than from the date of death. Since the return was filed two months and one day late, the Commissioner imposed a 15 percent penalty under section 6651. *Id.*

62. 73 T.C.M. (P-H) at 419 (1973). The Tax Court relied upon *Ferrando v. United States*, 245 F.2d 582 (9th Cir. 1957), and *Pfeiffer v. United States*, 315 F. Supp. 392 (E.D. Cal. 1970), in support of the proposition that passive reliance on counsel did not constitute reasonable cause for late filing. The court held that the "asserted illness" of the attorney did not constitute reasonable cause since the executrix was aware of his illness, relying on *Robinson's Dairy, Inc. v. Commissioner*, 302 F.2d 42, 45 (10th Cir. 1962), *aff'g* 35 T.C. 601, 608 (1961). 73 T.C.M. (P-H) at 419-20.

63. *Id.* at 420. The court noted that while there was no evidence as to whether the executrix had actual knowledge that a return was required, the "lack of knowledge that a return

tance to do so since the executrix was a housewife with little or no business experience who relied completely upon her attorney to file the return.[64] Although sympathetic to the "plight of the executrix," the court was unable to hold on the record that the findings of the Tax Court were "clearly erroneous."[65]

In 1979, the United States District Court for the Northern District of Ohio ordered the imposition of the section 6651 penalty in *Sheehan v. United States*,[66] where the executrix knew that a return was required but failed to inquire as to the due date. The attorney to whom she had entrusted that matter advised the executrix that he would be preparing the estate taxes "in a couple of weeks." She was not presented with an estate tax return to sign and failed to inquire as to when it would be completed.[67] The court held on these facts that the executrix had failed to carry her burden of demonstrating that she had exercised ordinary business care and prudence.[68]

In arriving at its holding the court discussed *United States v. Kroll*[69] and *Gray v. United States*[70] and concluded that "[t]he real distinction between *Kroll* and *Gray* is that the taxpayer in *Kroll* had evidence that would have led a reasonable person to believe that he should not rely upon his attorney to file the return on time . . . . "[71] Based on this distinction, the court found that the executrix in *Sheehan* "had evidence that would have led a reasonable person to question her legal advisors as to when the estate tax return was due and when it would be filed."[72]

It appears as though a taxpayer may always rely upon expert advice that no return need be filed in the Sixth Circuit. It is less clear whether reliance upon counsel to timely file constitutes reasonable cause. If a taxpayer knows the due date of the estate tax return, such reliance is not "reasonable cause" for late filing. Where the taxpayer knows that a return is required but is unaware of the due date, the penalty will probably be im-

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[was] required to be filed or of the due date thereof does not constitute reasonable cause," *Id.* (citing Cronin's Estate v. Commissioner, 164 F.2d 561, 566 (6th Cir. 1947), *aff'g*, 7 T.C. 1403, 1414 (1946)).

64. 502 F.2d at 1149.

65. *Id.*

66. 44 A.F.T.R.2d (P-H) ¶ 148,342, at 6131 (N.D. Ohio 1979).

67. *Id.*.

68. *Id.* at 6129.

69. 574 F.2d 393 (7th Cir. 1977), *discussed in* Sheehan v. United States, 44 A.F.T.R.2d (P-H) at 6129-30.

70. 453 F. Supp. 1356 (W.D. Mo. 1978), *discussed in* Sheehan v. United States, 44 A.F.T.R.2d (P-H) at 6130.

71. Sheehan v. United States, 44 A.F.T.R.2d (P-H) at 6130.

72. *Id.* at 6131. The "evidence" referred to by the court consisted of the fact that the executrix knew that most of her dealings were with a law clerk, and her knowledge that the clerk had experienced some difficulty with an out-of-state attorney not responding to letters. *Id.*

posed. The Court of Appeals, however, has expressed a reluctance to do so. Where the taxpayer is not aware that a return is required and relies upon an expert to handle the estate matters, it is unlikely that court will impose the section 6651 penalty.

V. Seventh Circuit

While a number of important income tax cases have been decided by the Seventh Circuit Court of Appeals,[73] emphasis here will be on more recent estate tax cases, beginning with *Giesen v. United States*[74] which was decided by a Wisconsin district court in 1973. Giesen was named executor of his mother's estate and, since he was inexperienced in tax matters, he retained an attorney to handle the estate. Giesen relied completely upon the attorney, but frequently questioned him regarding the progress of the estate. He was assured that everything was in order, and signed the return when requested to do so by the attorney. Some time later, Giesen received a notice of assessment of penalties for late filing, and subsequently brought an action to recover the penalties imposed.[75]

The *Giesen* court identified two approaches taken by the courts in similar cases:[76] the *minority view*, explained in *Ferrando v. United States*,[77] and the *majority view* espoused in *Hatfried, Inc., v. Commissioner*[78] and *Haywood Lumber & Mining Co. v. Commissioner*.[79] The court adopted the majority view that reliance on the advice of counsel constitutes reasonable cause for late filing when:

(1) the taxpayer is unfamiliar with tax law;[80]

(2) the taxpayer has made a full disclosure of all relevant facts to an attorney or accountant;[81] and

(3) the taxpayer has exercised ordinary business care and prudence.[82]

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73. Earlier Seventh Circuit cases which involved income tax returns include: *Consolidated-Hammer Dryplate & Film Co. v. Commissioner*, 317 F.2d 829 (7th Cir. 1963); *Commissioner v. American Ass'n of Eng'rs Employment, Inc.*, 204 F.2d 19 (7th Cir. 1953); *Orient Investment & Finance Co. v. Commissioner*, 166 F.2d 601 (7th Cir. 1948); *Cedarburg Canning Co. v. Commissioner*, 149 F.2d 526 (7th Cir. 1945).

74. 369 F. Supp. 33 (W.D. Wis. 1973).

75. *Id.* at 34-35.

76. *Id.* at 35-36.

77. 245 F.2d 582, 589 (9th Cir. 1957) (the filing of a tax return when due is a personal, nondelegable duty of the taxpayer).

78. 162 F.2d 628 (3d Cir. 1947) (a taxpayer's reliance on an expert to file tax returns may constitute reasonable cause).

79. 178 F.2d 769 (2d Cir. 1950) (reliance on the advice of counsel or of expert accountants is "reasonable cause" for failing to file a return).

80. 369 F. Supp. at 35. *See* Estate of Mayer v. Commissioner, 351 F.2d 617 (2d Cir. 1965), *cert. denied*, 383 U.S. 935 (1966) (executor was a certified public accountant and the court found no reasonable cause).

81. 369 F. Supp. at 36.

82. *Id.* (citing Haywood Lumber & Mining Co. v. Commissioner, 178 F.2d 769, 771 (2d

The court, finding that Giesen's actions met the "majority" test, ordered the refund of penalties paid by Giesen under section 6651.[83]

The *Giesen* rule was followed with similar results in *Fisher v. United States*,[84] involving an executrix who retained her husband, an attorney, to handle the estate. The government suggested in *Fisher* that the executrix should have hired different counsel when she discovered that her husband had not filed the estate tax return.[85] The court rejected the argument because to do otherwise would be tantamount to recommending that "marriages be split up over the late filing of income or estate tax returns."[86]

In *Clum v. United States*,[87] decided by the United States District Court for the Southern District of Ohio, the executor relied entirely upon an attorney to handle the estate. Mr. Clum was unaware of any duty to file a federal estate tax return, and made no inquiries concerning his duties. The court, applying the *Giesen* test, concluded "that considering his age, education and prior experience,"[88] Mr. Clum "acted reasonably and had no greater duty."[89]

This relatively permissive line of district court cases was interrupted abruptly by the 1977 Seventh Circuit Court of Appeals case of *United States v. Kroll*.[90] Kroll was appointed the executor of his mother-in-law's estate. He had completed one year of law school and had substantial business experience, but entrusted the estate tax matters to an attorney with tax expertise.[91]

Approximately three months after the due date, the Internal Revenue Service advised Kroll that the return was past due.[92] After notifying his attorney of the problem, Kroll did nothing further. The return was filed one year late.[93] On these facts, the court held that the section 6651 penalty should be imposed, since "when there is no question that a return must be filed, the taxpayer has a personal, nondelegable duty to file the tax return

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Cir. 1950)).

83. *Id.* at 36.

84. 36 A.F.T.R.2d (P-H) ¶ 148,010, at 6438 (W.D. Wis. 1975).

85. *Id.* at 6437.

86. *Id.* District Judge Will indicated that he was "not going to be the first judge to hold that a taxpayer who is represented by a dilatory or negligent lawyer who is his or her spouse has a duty to go hire somebody else," and found that the fact that the attorney and executrix were husband and wife an "even more compelling" reason to find that the executrix had reasonable cause for late filing. *Id.*

87. 424 F. Supp. 2 (S.D. Ohio 1976).

88. *Id.* at 4. Mr. Clum was a 60-year old farmer with a high school education and little business experience. *Id.* at 3.

89. *Id.* at 4. The court also relied upon *In re Fisk's Estate*, 203 F.2d 358, 360 (6th Cir. 1953).

90. 547 F.2d 393 (7th Cir. 1977). *Kroll* has been cited by nearly every court considering the issue of reliance on counsel as reasonable cause since 1977.

91. *Id.* at 394-95.

92. *Id.* at 395.

93. *Id.*

when due."[94] The court never reached the issue of whether Kroll's reliance was justified *prior* to receipt of notice of the tardiness since the maximum penalty could already be imposed between that time and the date the return was filed. The question of whether reliance constitutes reasonable cause where the executor has no knowledge of the due date remained unanswered after *Kroll*.[95]

Shortly after *Kroll* was decided, the United States District Court for the Eastern District of Wisconsin considered *Ruel v. United States*,[96] and on a summary judgment motion carried the *Kroll* holding one step further. Although the executor, unlike Kroll, received no notice that a return was due, the court felt bound to apply the broad language of *Kroll* and held that since there was no question that a return had to be filed, the executor had a "personal, non-delegable duty to file the tax return when due."[97]

The following year the issue was again raised in *Estate of Moran v. United States*.[98] The *Moran* court was able to distinguish *Kroll* on its facts, since the executors in *Moran* relied on their attorney's advice to file a late return rather than a timely return which would necessarily be incomplete.[99] The judge concluded that "Congress designed the 'reasonable cause' clause of [section] 6651 for unusual cases" and that the executors' decision to follow counsel's advice was reasonable and reflected ordinary business care and prudence.[100]

In 1979, the Seventh Circuit Court of Appeals followed its 1977 *Kroll* decision with *Rohrabaugh v. United States*.[101] The court's well-reasoned and relatively lengthy decision explored the history and objectives of the tax penalties. Rohrabaugh, as administratrix of her father's estate, relied completely upon her attorney to handle all estate matters. She consistently received assurances that there were no problems with the estate, and was never informed that a federal estate tax return was due.[102] Her attorney first became aware that he had failed to file the necessary return approximately

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94. *Id.* at 396.

95. *Id.* at 396 n.2. In footnote 2, the court noted that it "need not decide whether Kroll's reliance was justified prior to . . . [that] date," since almost ten months had passed since he received the I.R.S. notice, and the maximum penalty of 25 percent "can be assessed after a delay of five months." *Id.*

96. 430 F. Supp. 1122 (E.D. Wis. 1977).

97. *Id.* at 1123. Similar language was used in the 1957 *Ferrando* holding, 245 F.2d 582, 589 (9th Cir. 1957). *See supra* note 29.

98. 43 A.F.T.R.2d (P-H) ¶ 148,302, at 1274 (E.D. Wis. 1978), *rev'd*, 46 A.F.T.R.2d (P-H) ¶ 148,400, at 6138 (7th Cir. 1980). *See infra* notes 117-18 and accompanying text.

99. 43 A.F.T.R.2d (P-H) at 1275.

100. *Id.* District Judge Gordon noted that although *Kroll* held that an executor has a "nondelegable duty to file the tax return when due," the court did not hold that the duty is absolute. *Id.*

101. 611 F.2d 211 (7th Cir. 1979).

102. *Id.* at 212.

three months *after* the due date.[103] Neither Rohrabaugh nor her attorney were notified by the Internal Revenue Service concerning the delinquency.[104]

After a review of relevant authorities,[105] the court arrived at the conclusion that "the murkiness of the guidelines leaves the decision of the propriety of the penalty substantially on a case-by-case basis."[106] The court then considered *Giesen v. United States*[107] and *United States v. Kroll*,[108] finding *Kroll* clearly distinguishable since in this case Rohrabaugh had no knowledge of the due date of the return.[109] Judge Pell refused "to read *Kroll* as implicitly establishing a *per se* rule that reliance upon counsel for the timely filing of federal estate tax returns can never constitute 'reasonable cause.' "[110] Likewise, the court refused to read *Giesen* as holding that reliance upon counsel *always* constitutes reasonable cause.[111]

The *Rohrabaugh* court noted that many cases differentiate between reliance upon technical advice regarding the necessity of filing and reliance upon counsel to prepare and file the return, and found "some difficulty in not allowing the inexperienced person to rely when he has no knowledge of when a return might be due and has told the attorney to prepare and file the return . . . while saying he can rely when he is given some technical advice on some matter of tax law."[112]

Finally, the court felt compelled to "reexamine on an objective basis" the section 6651 provision,[113] concluding that "[s]uch a penalty should not be automatically imposed . . . [since] Congress presumably could have man-

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103. *Id.* at 212-13. The attorney first became aware that the federal estate tax return had not been filed when he was preparing the Indiana State Inheritance Tax Schedule, which was due within twelve months from the date of death. Since the return was filed three months and one day late, a section 6651 penalty was assessed, based upon four months, in the amount of $10,764.87. *Id.*

104. *Id.* at 213.

105. *Id.* at 214-15. The court considered: *Spies v. United States*, 317 U.S. 492 (1943); *United States v. Murdock*, 290 U.S. 389 (1933); *Commissioner v. American Ass'n of Eng'rs Employment, Inc.*, 204 F.2d 19 (7th Cir. 1953); *In re Fisk's Estate*, 203 F.2d 358, 360 (6th Cir. 1953); *Haywood Lumber & Mining Co. v. Commissioner*, 178 F.2d 769, 771 (2d Cir. 1950); *Hatfried, Inc. v. Commissioner*, 162 F.2d 628, 635 (3d Cir. 1942); *Berlin v. Commissioner*, 59 F.2d 996 (2d Cir.), *cert. denied*, 287 U.S. 642 (1932) (where the taxpayer delegates all responsibility for the preparation of tax returns, he should be held to accept his agent's efforts *cum onere*).

106. 611 F.2d at 215.

107. 369 F. Supp. 33 (W.D. Wis. 1973) (relied upon by executrix).

108. 547 F.2d 393 (7th Cir. 1977) (relied upon by the government).

109. 611 F.2d at 216.

110. *Id.*

111. *Id.* at 217 (emphasis added).

112. *Id.* The court indicated, however, that a taxpayer must do more than just retain a lawyer and leave everything to him. *Id.*

113. *Id.* at 218. The court noted that "[a] penalty of five percent for one full month is the equivalent of interest computed at sixty percent per annum; and when five percent is charged for one day the annual percentage equivalency becomes astronomical." *Id.*

dated a penalty . . . to be due and payable without regard to the circumstances causing the delinquency. Congress, however, did not do so."[114] The court noted that even if the taxpayer avoids the penalty, he will still be liable for interest from the due date.[115] The *Rohrabaugh* court held that where, as here, an inexperienced taxpayer who is unaware of the due date for filing a federal estate tax return hires competent counsel and supplies him with all necessary information and maintains contact with him, his reliance upon counsel to file the return constitutes reasonable cause under section 6651.[116]

In 1980 the Seventh Circuit considered *Moran v. United States*[117] and found *Kroll* to be controlling since the executor was aware of the deadline for filing the estate tax return.[118] Subsequently, in *Fleming v. United States*,[119] the Seventh Circuit Court of Appeals again found *Kroll* to be controlling. Fleming, who knew that a return was required and knew the due date of the return, was informed by his attorney that he had prepared an application for an extension and that the filing period was extended automatically when the application was filed.[120] Since Fleming knew the due date, the court held that he "had a personal non-delegable duty to file the return on time and [that] this duty extended to and encompassed the proper . . . filing of an application for an extension . . . ."[121]

Notwithstanding *Rohrabaugh*, the recent Seventh Circuit cases seem to

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114. *Id.*

115. *Id.* at 219. The effective interest rate for current tax underpayments is 16% as of January 1, 1983. Rev. Rul. 82-182, 1982-44 I.R.B. 9.

116. 611 F.2d at 219. Circuit Judge Swygert filed a dissenting opinion in which he expressed the concern that the majority opinion had "blunted the salutory objective" of section 6651 and "effectively immunized" a negligent attorney from a malpractice suit. *Id.* at 219-20.

117. 46 A.F.T.R.2d (P-H) ¶ 148,400, at 6138 (7th Cir. 1980). *See supra* notes 98-100 and accompanying text for a discussion of the lower court decision.

118. *Id.* The executor filed the estate tax return eleven months late because of difficulties in marshalling the assets of the estate. The court held that this did *not* constitute reasonable cause, and that the executor had a nondelegable duty to either request a filing extension or file as complete a return as possible. *Id.* at 6138-39 (emphasis added).

119. 648 F.2d 1122 (7th Cir. 1981).

120. *Id.* at 1123-24. In fact, the attorney did not file an extension application. *Id.* at 1124.

121. *Id.* at 1126-27. The court, in its holding, took a dangerous step past the *Kroll* decision when it said with regard to the attorney's negligence that "[t]he taxpayer was charged with the knowledge, or lack of it, of his agent." *Id.* at 1127.

The dissenting opinion filed by Circuit Judge Cudahy found no resemblance between this case and *Kroll*, since "this is a 'legal opinion' case where the attorney told the taxpayer that the legal effect of filing the application for an extension was to automatically extend the time for filing . . . ." *Id.* at 1128. Also, unlike *Kroll*, the taxpayer was not required "to sign the application for an extension," so "[h]e could quite reasonably and in normal course rely on his lawyer to perform this perfunctory and ministerial act." *Id.* at 1128.

Circuit Judge Cudahy also noted that the agency theory suggested by the majority was expressly rejected in *Rohrabaugh*, and implicitly rejected in "[t]he long line of cases . . . which have found 'reasonable cause' where the" taxpayer relied upon his attorney's technical advice that no return need be filed. *Id.* at 1129.

indicate that the court will look only to whether the executor knew a return was due. If so, presumably there are no facts upon which the court will find reasonable cause. If not, it is likely that the court will find that the executor had a duty to ascertain his responsibilities, but the court will be more inclined to consider the particular circumstances in each case.

VI. Eighth Circuit

The Eighth Circuit Court of Appeals has, like the Seventh Circuit, tended toward a strict interpretation of "reasonable cause" in recent years.

In *Northwestern National Bank of Sioux Falls v. United States*[122] the executor, upon the advice of his attorney, postponed the filing of the federal estate tax return until after the state supreme court had ruled on the validity of the decedent's will.[123] The district court, in a memorandum decision, held that reliance on the advice of an attorney is the exercise of ordinary business care and prudence, and ordered that the penalty assessed under section 6651 be refunded.[124]

The administratrix in *Jacobson v. United States*[125] was also found to have exercised ordinary business care and prudence. The judge listed reliance on advice of counsel as a factor to be considered by the jury in its determination as to whether the administratrix exercised reasonable care in the performance of her duties.[126] The court indicated, however, that an administratrix has some obligation to inform herself of the requirements of the law.[127]

A United States District Court in Minnesota, relying upon *Kroll* and *Pfeiffer*, found that the executor in *Richter v. United States*[128] had failed to show reasonable cause by his reliance on an attorney to file a federal estate tax return.[129] In its decision the Minnesota court identified two types of

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122. 30 A.F.T.R.2d (P-H) ¶ 147,676, at 5828 (D.S.D. 1972). Earlier eighth circuit cases include *Rubber Research, Inc. v. Commissioner*, 422 F.2d 1402 (8th Cir. 1970) and *Coates v. Commissioner*, 234 F.2d 459 (8th Cir. 1956).

123. 30 A.F.T.R.2d (P-H) at 5828. The decedent's will was held invalid in the state circuit court. The South Dakota Supreme Court upheld the will and ordered it admitted to probate on March 24, 1970. The federal estate tax return was due November 28, 1967, so the full 25% penalty was assessed. *Id.*

124. *Id.* at 5829.

125. 40 A.F.T.R.2d (P-H) ¶ 148,189, at 6274 (D.N.D. 1977). Only the instructions and jury verdict were reported in *Jacobson*. *Id.*

126. *Id.* at 6276.

127. *Id.* As to this obligation, the court instructed the jury that "[a]n administratrix has a positive duty to ascertain the nature of her responsibilities and to attempt to carry out those responsibilities. The failure to do so is not exercise of ordinary business care and prudence and so does not constitute reasonable cause." *Id.*

128. Richter v. United States, 440 F. Supp. 921, 924 (D. Minn. 1977).

129. *Id.* at 924. Although Richter contended that he was unaware of the time limitations for filing, he did sign a Form 704 which gave notice of such time limitations and warned that failure to timely file could result in a penalty. *Id.* at 922.

cases in which reliance on an attorney may be reasonable cause. First, those in which the attorney gives specific legal advice to *delay* filing,[130] and those in which *no* return is filed on the advice of the attorney.[131] Since Richter was aware that a return was due and was not advised to delay filing or to forego filing altogether, he could not avoid the section 6651 penalty by claiming reliance on an attorney to timely file.[132]

In 1978 a Missouri district court decided *Gray v. United States*,[133] holding that the executrix was entitled to rely upon her attorney to prepare and file a federal estate tax return since she had no actual knowledge as to its due date.[134] The court found *Kroll* inapplicable, since in that case the executor *knew* that the return was not timely filed and took no steps to remedy the situation.[135] The *Gray* court indicated that the *Kroll* language was far too broad, arguing that "[i]f the duty to file a return is personal and nondelegable, it is only when the taxpayer has actual knowledge of the date the return in question is due."[136] The court concluded that "reasonable cause" must be determined from all the facts in each particular case,[137] and viewed *actual knowledge* of the due date as a crucial factor to be considered,[138] refusing to hold that the executrix had a duty to ascertain the due date absent any notice that anything was wrong.[139]

The United States District Court for North Dakota in *Daley v. United States*[140] declined to follow the reasoning and result of *Gray*.[141] That court

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130. *Id.* at 923. *See* Northwestern Nat'l Bank of Sioux Falls v. United States, 30 A.F.T.R.2d (P-H) ¶147,676, at 5828 (1972).

131. 440 F. Supp. at 923 (emphasis added). *See* Haywood Lumber & Mining Co. v. Commissioner, 178 F.2d 769 (2d Cir. 1950); Hatfried, Inc. v. Commissioner, 162 F.2d 628 (3d Cir. 1947); Giesen v. United States, 369 F. Supp. 33 (W.D. Wis. 1973).

132. 440 F. Supp. at 924. Since Richter was aware of the necessity to file a return, it was incumbent upon him to ascertain the due date and ensure its timely filing. *Id.*

133. 453 F. Supp. 1356 (W.D. Mo. 1978).

134. *Id.* at 1361. While the executrix checked with her attorney from time to time regarding the estate, she did not inquire as to any deadlines for filing and never became aware of the due date for the estate tax return. *Id.* at 1358.

135. *Id.* at 1358-59.

136. *Id.* at 1360. The court stated that the cases relied upon by the *Kroll* court did *not* support its holding that the duty to file a return is personal and nondelegable when there is no question that a return must be filed, since none of those cases reached the issue. *Id.* at 1359-60 (emphasis added).

137. *Id.* at 1360.

138. *Id.* at 1361 (emphasis added). The court identified *actual knowledge of the due date* as the crucial factor in *Kroll, Logan Lumber* and *Ferrando,* arguing that without such knowledge "he would have to delve into the tax code and its regulations to find out" and that "[i]t is this task that the taxpayer is paying the lawyer to perform." *Id.* at 1361.

139. *Id.* The court rejected the government's argument that "the failure to affirmatively inquire" as to the due date amounts to willful neglect, and found that a duty to inquire arose *only* when the taxpayer has reason to believe that things are not being handled properly. *Id.* (emphasis added).

140. 480 F. Supp. 808 (D.N.D. 1979).

141. *Id.* at 812. For the purposes of its finding, the court presumed that the executrix had

placed the burden of ascertaining the filing date on the estate's personal representative.[142] Absence of actual knowledge of the due date, or even the fact that a return was due, was not found to constitute reasonable cause.[143] In so holding, the *Daley* court greatly expanded the *Kroll* decision, which was limited to a situation in which the taxpayer had actual knowledge that the return was late. That court specifically declined to rule on the issue of whether such a duty existed in the absence of actual knowledge of the due date and never even discussed the duty of an executor who has no knowledge that a return is required at all.[144]

The Eighth Circuit Court of Appeals finally reached the issues raised in the district courts in the 1981 case of *Estate of Lillehei v. Commissioner*.[145] In that case the executor retained an attorney to handle estate matters. The trial court record indicates that the executor knew that a return was due, but did not know *when* it was due.[146] He made no inquiries as to the due date, but relied completely upon his attorney to timely file. The estate tax return was filed thirty-four days late.[147] In a *per curiam* opinion, the Eighth Circuit affirmed the Tax Court's holding that "an executor has a personal and nondelegable duty to ascertain the due date of the return and to insure that the attorney prepares and files the return on time."[148]

Shortly thereafter, the same court decided *Boeving v. United States*.[149] Mrs. Boeving was appointed administratrix of her mother-in-law's estate, and having had no prior business or tax experience, she hired an attorney to represent the estate. The attorney, believing that the federal estate tax return was due one year after the decedent's death, filed the return late. The trial court found that the delay was due to "reasonable cause," since Boeving relied on her attorney, who was honestly mistaken as to the filing date.[150] On appeal, the Eighth Circuit Court of Appeals held that its recent

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no knowledge that a return was required or of the due date for filing. *Id.*

142. *Id.* The *Daley* court held that "[i]n the exercise of ordinary business care and prudence, an executrix *is required* to know that there is a deadline for the filing of estate tax returns," citing *Kroll*, *Pfeiffer*, and *Ferrando*. *Id.* (emphasis added).

143. *Id.* While the cases cited by the *Daley* court support the proposition that, when a taxpayer *knows* that a return is due, he has a personal nondelegable duty to timely file, none of the authority cited supports the court's broad proposition that such a duty exists even when the taxpayer is unaware that a return is due.

144. *Id. See* United States v. Kroll, 547 F.2d 393, 396 n.2 (7th Cir. 1977).

145. 638 F.2d 65 (8th Cir. 1981).

146. 79 T.C.M. (P-H) ¶ 79,464, at 181 (1979), *aff'd*, 638 F.2d 65 (8th Cir. 1981).

147. 638 F.2d at 66.

148. *Id.*

149. 650 F.2d 493 (8th Cir. 1981) (reversing the trial court decision reported at 493 F. Supp. 665 (E.D. Mo. 1980)). The court devoted two paragraphs to the consideration of the imposition of the penalty, concluding that the district court's decision for the taxpayer was precluded by *Lillehei*, 638 F.2d 65 (8th Cir. 1981). *Id.* at 495.

150. Boeving v. United States, 493 F. Supp. 665, 670-72 (E.D. Mo. 1980), *rev'd*, 650 F.2d 493 (8th Cir. 1981).

decision in *Lillehei* precluded such a result and that reliance on the mistaken advice of counsel did not constitute "reasonable cause" for late filing.[151]

The United States District Court for the District of North Dakota, in June of 1981, decided *Twin City Construction Company v. United States*,[152] a corporate income tax case. The court identified the crucial factor in the *Kroll, Rohrabaugh, Daley,* and *Gray* cases as the taxpayer's actual knowledge of the due date of the tax return.[153] Finding that the taxpayer had such knowledge, the court rejected the argument that reliance upon an accountant to timely file amounted to the exercise of ordinary business care and prudence.[154]

Corum v. United States[155] was decided in January of 1982 by the United States District Court for the Western District of Missouri. That court felt compelled to follow the broad language of the *Lillehei* and *Boeving* decisions, holding that since Corum knew that an estate tax was due, his reliance on counsel to handle the estate tax matters did not constitute reasonable cause under section 6651.[156]

The United States District Court for the Southern District of Iowa has recently decided two section 6651 cases. In *Shaw v. United States*,[157] the executor passively relied upon counsel to file the federal estate tax return.[158] That reliance was termed unreasonable since the taxpayer has a personal and nondelegable duty to ascertain the due date and to ensure timely filing.[159]

Most recently, the Iowa federal court decided *Crouse v. United States*.[160] Rosemary Crouse and June Brown were appointed administrators of the estate of Isabel Turner, whereupon they retained an attorney experienced in tax and probate matters to handle the estate.[161] The administrators were aware that an estate tax return was due within nine months and

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151. 650 F.2d at 495.

152. 515 F. Supp. 767 (D.N.D. 1981).

153. *Id.* at 769.

154. *Id.*

155. Corum v. United States, 49 A.F.T.R.2d (P-H) ¶ 148,512, at 1503 (W.D. Mo. 1982). The attorney upon whom Corum relied never advised him as to when the federal estate taxes would be due. Corum was not only unaware that there was a deadline for the filing of an estate tax return until told by his attorney, he was also unaware of the necessity for filing a return with respect to the Corum estate. *Id.* at 1504.

156. *Id.* at 1505.

157. Shaw v. United States, [II Estate & Gift] FED. TAXES (P-H) ¶ 148,508, at 148,115 (S.D. Iowa 1982).

158. *Id.*

159. *Id.* (citing Boeving v. United States, 493 F. Supp. 665 (E.D. Mo. 1980) and Lillehei, 638 F.2d 65 (1981)).

160. Crouse v. United States, Civ. No. 81-131-E (S.D. Iowa, Sept. 14, 1982).

161. *Id.* at 2.

remained active in the administration of the estate.[162] The attorney handling the estate repeatedly assured them "that all the required steps would be taken in regard to the filing of the estate tax return."[163]

Finally, in October of 1976, the administrators, who were aware that the return was now past due, met with their attorney.[164] At that time they executed a check in payment of the federal estate taxes.[165] The administrators did not recall whether they signed a federal estate tax return at that time.[166] They later became aware that the check had not been cashed.[167] When they brought the matter to the attention of the attorney, they were told that the IRS had "lost" the check, so a new check was executed.[168] Soon after the administrators realized that the second check also failed to clear the bank both checks were discovered in the attorney's desk by an associate.[169] The return was promptly filed and the tax paid.[170] Soon thereafter, penalties and interest in the amount of $56,557.00 were assessed for late filing and payment.[171] Crouse and Brown sought a refund of the penalties, arguing that their reliance upon the attorney to file the return was reasonable cause.[172] The government, relying upon *Boeving* and *Lillehei*, argued that "there is an affirmative non-delegable duty on behalf of the administrators and that they cannot under any circumstances delegate that to the attorney . . . ."[173] While the government's analysis of those cases was strained at best, the *Crouse* court noted that "[t]he *Boeving* case and the *Lillehei* case do not go so far as to require the administrators to "make sure that the attorney has put the [return] in an envelope and that they watched him deposit it in the U.S. mails."[174] The court was of the opinion that, while there were equities on behalf of the administrators, it was unaware of any precedent for holding that they should be relieved of any responsibility for penalties after the date they executed the check.[175] Since the question was one for the Eighth Circuit to decide, the imposition of penalties was upheld.[176]

It is apparent from a review of recent Eighth Circuit cases that an unduly harsh rule is developing. The courts have adopted the *Kroll* language regarding the taxpayer's personal, nondelegable duty to file a return when

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162. *Id.*
163. *Id.* at 3.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* at 4.
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* at 4-5.
176. *Id.* at 5.

due, but have not limited that language to the *Kroll* facts. In *Kroll* the taxpayer's liability was based on his knowledge that the return was late. That court left the question open as to whether reliance constitutes reasonable cause where the executor has *no* knowledge of the due date. The Court of Appeals found the taxpayer liable in *Lillehei* where the executor, unlike Kroll, did not know the due date, as well as in *Boeving* where the administratrix, unlike Kroll, relied upon the mistaken advice of counsel.

Since the decisions of *Lillehei* and *Boeving,* the district courts have stretched the *Kroll* language even further, finding in *Daley* and *Corum* that even in the absence of knowledge that a return is due, an executor must ascertain its due date. Hopefully the Eighth Circuit Court of Appeals will reconsider its broad application of the *Kroll* language and halt the snowball effect that that language has had in this circuit following the *Lillehei* and *Boeving* opinions. As applied, the section 6651 penalty has effectively become a strict liability penalty in complete derogation of the "reasonable cause" language contained therein.

VII. Summary

The foregoing survey of recent cases indicates a trend among the courts towards imposing upon the executor a "personal, nondelegable duty" not only to file a timely return when he knows that a return is due, but also to ascertain whether, in fact, a return is required. Only when the executor receives expert advice that a return is not required will the courts uniformly find that reliance upon the attorney constitutes the exercise of ordinary business care and prudence. If the executor, however, relies upon the advice of counsel that he *delay* the filing of the return, the courts *may* impose the penalty, although in both cases the executor is relying upon specific technical advice with respect to complicated tax matters.

The most difficult and controversial question has been whether the executor should be held liable for the section 6651 penalties when: (1) he knows that a return is due and he knows the due date of the return; (2) he knows that a return is due but is unaware of the due date; or (3) he does not know that a return is due.

Before offering a resolution to the question, a brief review of some basic propositions is appropriate.

It is well-established that taxpayers, as principals, should not be liable for the conduct of their "fiscal agents."[177] The language of section 6651 is

177. Rohrabaugh v. United States, 611 F.2d 211, 214 (7th Cir. 1979); Haywood Lumber & Mining Co. v. Commissioner, 178 F.2d 769, 771 (2d Cir. 1950); Hatfried, Inc. v. Commissioner, 162 F.2d 628, 634 (3d Cir. 1947).

The *Hatfried* court stated:

> To accord the status of "experts" on the tax laws to accountants for representation purposes and then to hold that taxpayers who entrust to them the task of preparing their tax returns run the risk of paying heavy penalties should they err in the dis-

aimed at the actions of the taxpayer personally, since it is he or she who must exercise ordinary business care and prudence. It would seem that entrusting the preparation of tax returns to an expert satisfies this duty. It is anomalous that courts have held that an executor, in entrusting complicated estate tax matters to an expert, has exercised anything *less* than ordinary business care and prudence.

One justification advanced by the courts in arriving at this peculiar result has been the "protection of the revenue." The United States Supreme Court in *Helvering v. Mitchell*[178] noted:

> The remedial character of sanctions imposing additions to a tax has been made clear by this Court in passing upon similar legislation. They are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud.[179]

The goal of protecting the revenues, while laudable, loses its force in the face of current interest rates imposed upon delinquent taxes, which now stands at 16%.[180] Since the revenues are "protected" by substantial interest penalties and taxpayer fraud is rarely, if ever, present in cases involving the late filing of estate tax returns, the addition to the tax under section 6651 must be viewed as a penalty.[181]

The United States Supreme Court noted in *Spies v. United*[182] that "[it] is not the purpose of the law to penalize . . . innocent errors made despite the exercise of reasonable care. Such errors are corrected by the assessment of the deficiency of tax and its collection with interest for the delay."[183]

Where an executor hires competent counsel to handle the affairs of an estate, supplies him with all necessary information, and maintains contact

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charge of their assignment creates an absurd situation.

Hatfried, Inc. v. Commissioner, 162 F.2d at 634.

The *Haywood* court rejected the rationale of *Berlin v. Commissioner*, 59 F.2d 996, 997 (2d Cir.), *cert. denied*, 287 U.S. 642 (1932)(where all responsibility for the preparation of tax returns is delegated to an agent, the taxpayer is chargeable with his agent's negligence). *Haywood Lumber & Mining Co. v. Commissioner*, 178 F.2d at 771.

178. 303 U.S. 391 (1938).

179. *Id.* at 401.

180. *See supra* note 115.

181. Rohrabaugh v. United States, 611 F.2d at 218.

The amount to be paid under section 6651, when it has been "determined," pursuant to the regulation, that it is owing, is described in the statute as an addition to the tax. This is a euphemism, pure and simple. It is a penalty and the next subsection of section 6651 is so captioned.

Id. See supra note 113.

182. 317 U.S. 492 (1943).

183. *Id.* at 496.

with him, his reliance upon counsel to file the return should constitute reasonable cause under section 6651. The plain language of that section imposes no greater duty.

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