No. ________

In The
Supreme Court of the United States

PETER KNAPPE, Executor of the
Estate of Ingeborg Pattee, Deceased,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a taxpayer demonstrates "reasonable cause" under 26 U.S.C. § 6651(a)(1) or "ordinary business care and prudence" under 26 C.F.R. § 301.6651-1(c)(1) when, in reliance on the advice of the taxpayer's accountant or attorney, the taxpayer files a tax return after the actual due date but within the time the accountant or attorney erroneously advised the taxpayer was available.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the Ninth Circuit are as follows:

- Peter Knappe, as executor of the Estate of Ingeborg Pattee, plaintiff, appellant, and petitioner.
- The United States of America, defendant, appellee, and respondent.

No corporations are involved in this proceeding.

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PETITION FOR WRIT OF CERTIORARI

Peter Knappe, as executor of the Estate of Ingeborg, petitions for a writ of certiori to review the opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit opinion affirming the district court's judgment (App. at 1) is reported at 713 F.3d 1164 (9th Cir. 2013). The United States District Court opinion granting summary judgment (App. at 26) is unreported. Each opinion is reproduced in the Appendix to this Petition.

STATEMENT OF JURISDICTION

The Ninth Circuit opinion was filed on April 4, 2013. This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

1. Section 6651 (App. at 49) subsection (a)(1) of Title 26 of the United States Code reads as follows:

(a) In case of failure –

(1) to file any return required under authority of subchapter A of chapter 61 (other than part III thereof), subchapter A of chapter 51 (relating to distilled spirits, wines, and beer), or of subchapter A of chapter 52 (relating to tobacco, cigars, cigarettes, and cigarette papers and tubes), or of subchapter A of chapter 53 (relating to machine guns and certain other firearms), on the date prescribed therefor (determined with regard to any extension of time for filing), 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.

2. Section 301.6651-4 (App. at 54) subsection (c)(1) of Title 26 of the Code of Federal Regulations reads as follows:

(c)(1) Except as provided in subparagraphs (3) and (4) of this paragraph, a taxpayer who wishes to avoid the addition to the tax for failure to file a tax return or pay tax must make an affirmative showing of all facts alleged as a reasonable cause for his failure to file such return or pay such tax on time in the form of a written statement containing a declaration that it is made under penalties of perjury. Such statement should be filed with the district director or the director of the service center with whom the return is required to be filed; Provided, That where special tax returns of liquor dealers are delivered to an alcohol, tobacco and firearms officer working under the supervision of the Regional Director, Bureau of Alcohol, Tobacco and Firearms; such statement may be delivered with the return. If the district director, the director of the service center, or, where applicable, the Regional Director, Bureau of Alcohol, Tobacco and Firearms, determines that the delinquency was due to a reasonable cause and not to willful neglect, the addition to the tax will not be assessed. If the 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. 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. In determining whether the taxpayer was unable to pay the tax in spite of the exercise of ordinary business care and prudence in providing for payment of his tax liability, consideration will be given to all the facts and circumstances of the taxpayer's financial situation, including the amount and nature of the taxpayer's expenditures in light of the income (or other amounts) he could, at the time of such expenditures, reasonably expect to receive prior to the date prescribed for the payment of the tax. Thus, for example, a taxpayer who incurs lavish or extravagant living expenses in an amount such that the remainder of his assets and anticipated income will be insufficient to pay his tax, has not exercised ordinary business care and prudence in providing for the payment of his tax liability. Further, a taxpayer who invests funds in speculative or illiquid assets has not exercised ordinary business care and prudence in providing for the payment of his tax liability unless, at the time of the investment, the remainder of the taxpayer's assets and estimated income will be sufficient to pay his tax or it can be reasonably foreseen that the speculative or illiquid investment made by the taxpayer can be utilized (by sale or as security for a loan) to realize sufficient funds to satisfy the tax liability. A taxpayer will be considered to have exercised ordinary business care and prudence if he made reasonable efforts to conserve sufficient assets in marketable form to satisfy his tax liability and nevertheless was unable to pay all or a portion of the tax when it became due.

STATEMENT OF THE CASE

A. Introduction

Ingeborg Pattee ("Decedent") died on November 30, 2005. Shortly thereafter, Petitioner Peter Knappe as trustee of Decedent's estate engaged Frank Burns, CPA, to prepare the Form 706 Estate Tax Return for Decedent's estate ("Estate Tax Return"). (App. 2). The original due date for the estate tax return was August 30, 2006, nine months after the date of Decedent's death. (App. 3).

Petitioner has known his accountant, Mr. Burns, since the mid 1980s and has used Mr. Burns to prepare his corporation's income tax returns since around 1987. Mr. Burns has been a certified public accountant since 1983. Petitioner found Mr. Burns' work to be accurate and timely. Although Petitioner was familiar with the individual income tax extensions, Petitioner was unfamiliar with estate tax issues and had never before served as a trustee of an estate. (App. 2-3).

By August 24, 2006, it became evident that additional real estate appraisals would be needed before the Estate Tax Return could be completed. An extension request had to be made before August 30, 2006. Petitioner authorized Mr. Burns to prepare Form 4768, the IRS form that allows taxpayers filing an estate tax return to request an extension of time to pay the estate tax and file the estate tax return. Mr. Burns advised Petitioner that the extension would provide for the same amount of time both to pay and to file. Petitioner understood this advice to mean that Petitioner as the fiduciary filing the Estate Tax Return could request an automatic six-month extension, and, at the same time, also request an additional extension to both file the Estate Tax Return and pay the estate tax beyond the automatic extension period.

Petitioner and Mr. Burns discussed the difference between the filing extensions and the payment extension. Based on Mr. Burns' advice, Petitioner believed that the filing extension for the Estate Tax Return would be either 6 months or 12 months and that the duration of the extension would be the same for both the filing and payment deadlines. (App. 5). Petitioner relied on Mr. Burns' professional advice about the availability and actual duration of the extension. (App. 6).

Mr. Burns prepared the Form 4768 and included information that he believed would request a 12-month extension of time to both file the Estate Tax Return and pay. Part II of Form 4768, Extension of Time to File, references Internal Revenue Code ("IRC") section 6081. After completing Form 4768, Mr. Burns submitted it timely to the Internal Revenue Service and sent a copy to Petitioner, who reviewed it upon receipt.

Section 6081 does not explicitly state that a taxpayer can only obtain one filing extension, receive multiple extensions, or that aggregate of all extensions may not exceed six months. In Part II of Form

4768, "Extension Of Time To File," Mr. Burns wrote "See Attachment." (App. 30). The attachment in support of the request for an extension of time to file that states, "The [executor] has a significant asset (the personal residence of the decedent) for sale. The fair market value of which will be determined by the subsequent contracted sales price."

On January 11, 2007, the IRS approved the Form 4768 but did not check any box in Part VI of Form 4768 indicating that it rejected, approved, or otherwise had comments on the request for an additional extension of time to file. Rather, the IRS hand-wrote a cryptic "2/28/07" in the part approving the initial six-month automatic extension. Mr. Burns provided a copy of the IRS approval to Petitioner, who reviewed it. (App. 5).

From the time Mr. Burns submitted the Form 4768 to the time the Estate Tax Return was filed, Mr. Burns advised Petitioner that the extension to file and the extension to pay were the same date August 30, 2007. Around November 17, 2006, Mr. Burns reviewed the Treasury Regulations for IRC sections 6081, 6151, and 6161. Despite Mr. Burns' review, he did not note that only one six-month extension of time to file was available to Petitioner. (App. 5).

During the preparation of the Estate Tax Return, Petitioner reviewed drafts provided by Mr. Burns, made comments, and asked questions concerning matters he did not understand. Petitioner relied on Mr. Burns' professional advice, experience and skill about how to comply with the IRC and Treasury Regulations. Petitioner was diligent in ensuring the Estate Tax Return was filed before the end of what he believed to be a 12-month extension. Petitioner sought to file the Estate Tax Return as soon as possible to minimize the accrual of interest on the unpaid estate tax. Petitioner selected May 2007 as the time to file the Estate Tax Return, even though he believed that the return was not due until August 30, 2007, in part, as an accommodation to Mr. Burns' work schedule during tax season after the 2006 Holidays. (App. 5-6). Petitioner could have filed the Estate Tax Return before February 28, 2007, had he known that the Estate Tax Return was due by that date. Based on Mr. Burns' advice, Petitioner waited until May 2007, to submit the Estate Tax Return to the IRS. (App. 6).

B. Administrative IRS Appeal

The IRS received the Estate Tax Return on May 29, 2007. Pursuant to IRC section 6651(a)(1), the IRS assessed $196,414.60 as a late filing penalty, plus interest. The penalty under IRC section 6651(a)(1) is calculated at 5 percent of the net tax amount required to be shown on the tax return for each month (or part of a month) that the return was late, up to a maximum of 25 percent of such net tax amount. Petitioner filed and the IRS denied a Claim for Refund and Request for Abatement ("Form 843").

C. District Court Opinion

On October 8, 2009, Mr. Knappe filed his Complaint, with a jury demand, in the United States District Court, Central District of California. The District Court had jurisdiction under 28 U.S.C. § 1346(a)(1) and § 7422 because the United States is a defendant in an action to recover an erroneously assessed tax penalty. The United States Court of Appeals has jurisdiction under 28 U.S.C. § 1291 because this is an appeal of a final judgment of the District Court.

In its answer to Petitioner's complaint, the United States District Court for the Central District of California conceded that the IRS incorrectly calculated the penalty at 20 percent (representing 4 months) instead of the correct 15 percent (representing 3 months). The Judgment awarded Petitioner $49,103.65, reflecting the difference of one month on the amount of the penalty and thereby reducing the penalty to $147,310.95 (excluding interest) – 15 percent of the total tax owed.

The United States subsequently filed and prevailed on a motion for summary judgment based on an erroneous application of the authority of *United States v. Boyle*, 469 U.S. 241 (1985) concluding that it is unreasonable for a taxpayer to rely on the advice of an accountant or attorney where the taxpayer is competent to discern error in the advice. Based on the District Court's conclusion the Court found no disputed issues of material fact to preclude summary judgment and granted Respondents' motion. The Judgment dismissing the action was entered on October 22, 2010. The Judgment disposed of all the parties' claims. The Court did not adjudicate the issue of "willfulness."

D. Ninth Circuit Opinion

Petitioner timely filed the Notice of Appeal on December 7, 2010, under Fed. R. App. P. 4(a)(1)(B). In reviewing the cases that address reasonable cause abatement for a failure to file a tax return timely, the Ninth Circuit noted that there are two general categories of authority. In the first category are cases involving 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. *Knappe v. United States*, 713 F.3d 1164, 1169 (9th Cir. 2013). In the second category of cases, the taxpayer relies on an agent's erroneous advice that no return is due. *Id*. at 1170.

The Ninth Circuit concluded that Petitioner's appeal did not fall squarely into either category because Petitioner neither delegated the task of filing the return to a neglectful agent nor received mistaken advice that no taxes were due. Rather, Petitioner personally filed the return after the actual deadline, but within the time that Mr. Burns had erroneously assured Petitioner was available. *Id*. The Ninth Circuit also acknowledged that this Court in *United States v. Boyle*, 469 U.S. 241 (1985) expressly declined to reach the question posed by Petitioner's Appeal. *Id*.

The Ninth Circuit concluded that Petitioner's Appeal more closely fell into the first category of cases based on this Court's ostensible distinction between substantive and nonsubstantive tax advice, which the Ninth Circuit noted was addressed in its recent opinion in *Baccei v. United States*, 632 F.3d 1140 (9th Cir. 2011). *Id*. at 1171. Based on *Boyle* and *Baccei*, the Ninth Circuit found that Petitioner did not exercise ordinary business care and prudence when he "relied unquestioningly on [Mr.] Burns' advice about the extended deadline" and Petitioner "unreasonably abdicated his duty to ascertain the filing deadline and comply with it." The Ninth Circuit determined that, "Taken together, *Boyle* and *Baccei* clarify that an executor's late filing will be excused only if he relied on 'substantive' advice about an issue of tax law." The Ninth Circuit concluded that the question of when a return is due – even when an executor has sought an extension – is nonsubstantive, noting that the question of how long an extension was available was not a "debatable" one. *Id.* at 1173. The Ninth Circuit further held that the line between substantive and nonsubstantive advice and delegable and nondelegable duties are coterminous. *Id*. at 1174. The Ninth Circuit ultimately held that an executor may only reasonably rely on an agent's advice about "substantive tax matters":

> Ascertaining a deadline is within the ambit of the executor's nondelegable duties, because a deadline is a nonsubstantive matter. So too is confirming that a needed extension has been sought or obtained. It follows that

> ascertaining the length of any extension so obtained is equally nondelegable, because ascertaining an extended deadline is no more a substantive matter than ascertaining a default deadline.

Id.

REASONS FOR GRANTING THE WRIT

I. *Boyle* Is the Standard by Which Reasonable Cause Abatement Is Evaluated

This case truly presents a matter that is vital to every citizen of this country, and to the Ninth Circuit. The Ninth Circuit acknowledges that its opinion will "impose a heavy burden on executors, who will affirmatively have to ensure that their agents' interpretations of filing and payment deadlines are accurate if they want to avoid penalties." The Ninth Circuit's opinion, however, extends not only to executors but also to all taxpayers located in the Ninth Circuit. As noted by the National Taxpayer Advocate in its 2012 Annual Report to Congress, the number one issue facing taxpayers today is complexity in the tax laws. National Taxpayer Advocate 2012 Annual Report to Congress, p. 3.

This case presents an important issue because it requires this Court to revisit its "as bright a line" rule that has become in the nearly 30 years since *Boyle* a confused and inconsistent mess, further confusing innocent taxpayers who thought they were acting reasonably by engaging professionals to assist with what all Americans know can be complicated tax returns.

The Internal Revenue Code imposes on taxpayers who file late tax returns a penalty of 5 percent of the tax required to be shown as due on a tax return for each month or part of a month that a tax return is late, up to a maximum of 25 percent. 26 U.S.C. § 6651(a)(1). The penalty does not apply if the taxpayer demonstrates that the failure to file timely is due to "reasonable cause and not due to willful neglect." Neither the Internal Revenue Code nor the Treasury Regulations define either "reasonable cause" or "willful neglect." The Treasury Regulations, however, do provide that a taxpayer demonstrates reasonable cause if the taxpayer, despite exercising "ordinary business care and prudence," was unable to comply with his or her filing and payment obligations. 26 C.F.R. § 301.6651-1(c).

In *United States v. Boyle*, 469 U.S. 241 (1985), this Court sought to establish a rule "with as 'bright' a line as can be drawn consistent with the statute and implementing regulations" whether a taxpayer's reliance on an attorney to prepare and file a tax return constitutes "reasonable cause and no willful neglect." *Id.* at 249. **This Court, however, *expressly* did not address "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 adviser erroneously told him was available." ***Id*****. at 251 n.9.**

This case is based on whether the "as bright-a-line" rule intended by this Court in *Boyle* extends to taxpayers who rely on the advice of their professional adviser concerning a due date for filing a return. In *United States v. Boyle*, the taxpayer sought "reasonable cause" relief from the failure-to-file penalty because the taxpayer's attorney's failed to timely file the Estate Tax Return. *Boyle*, 469 U.S. at 242-243. The taxpayer had assigned the duty of preparing and filing the estate tax return to his attorney and made no attempt to determine for himself what he was required to file or when. Although this Court in *Boyle* acknowledged that "reasonable cause" relief might be available if the executor/taxpayer receives and relies on [erroneous] tax advice, the taxpayer in *Boyle* had a nondelegable duty to make sure his own tax returns were filed timely.

In *Boyle*, the taxpayer, an executor, hired an attorney to prepare the estate tax return on his behalf. The attorney never indicated to the taxpayer when the estate tax return was due. The taxpayer contacted the attorney several times to inquire about the progress of the proceedings and the preparation of the tax return. The attorney assured the taxpayer that the taxpayer would be notified when the return was due and that the return would be filed "in plenty of time." The taxpayer inquired again a few months later only to learn for the first time that the estate tax return was already late. The attorney had overlooked the matter because of a clerical oversight. *Id*. at 242-243. The taxpayer claimed that the penalty should be removed because the taxpayer reasonably relied on the attorney to prepare and file the estate tax return timely. Based on these facts this Court noted the following in *Boyle*:

> 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. "Ordinary business care and prudence" do not demand such actions.
>
> 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. In short, tax returns imply deadlines. Reliance by a lay person on a lawyer is of course common; but that reliance cannot function as a substitute for compliance with an unambiguous statute. Among the first duties of the representative of a decedent's estate is to identify and assemble the assets of the decedent and to ascertain tax obligations. Although it is common practice for an executor to engage a professional

> to prepare and file an estate tax return, a person experienced in business matters can perform that task personally. It is not unknown for an executor to prepare tax returns, take inventories, and carry out other significant steps in the probate of an estate. It is even not uncommon for an executor to conduct probate proceedings without counsel.
>
> It requires no special training or effort to ascertain a deadline and make sure that it is met. 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).

Boyle, 469 U.S. at 251, original italics (internal citations omitted).

This Court emphasizes "***advises***" because as is evident from the facts of *Boyle*, the attorney provided no advice to the taxpayer. Instead, the taxpayer had an expectation that the attorney would file the return by the due date. The as "'bright' a line" rule in essence is that a taxpayer cannot expect relief from the penalty under reasonable cause by delegating the responsibility and act of filing the return to another. **This Court did not state that the advice relied upon must be "substantive" or a debatable matter of tax law. Courts have disagreed, and continue to disagree, whether *Boyle* bars taxpayers from claiming reasonable cause based on the taxpayer's reasonable reliance on the tax professional's advice concerning a filing deadline.**

This Court should therefore grant the petition for certiorari and review the judgment below.

II. Lower Courts Are Split on the Application of *Boyle*

Courts are split on the question of whether a taxpayer's reliance on erroneous advice with respect to the need for filing a tax return or its due date can constitute reasonable cause for failing to timely file the return. The failure to file penalty is one of the most frequently imposed penalties imposed on taxpayers. Estate tax returns are especially susceptible to high failure to file penalties because of the substantial amount of tax involved, the statutory structure for payment and filing deadlines are unique, and the time needed to process all of the required information.

The standard was and remains "ordinary business care and prudence." *United States v. Boyle* was intended to serve "as 'bright' a line as can be drawn consistent with the statute and implementing regulations." The Supreme Court has determined that a taxpayer cannot assign the responsibility to file tax returns and pay taxes due and later expect that the penalty will be removed for reasonable cause. Instead of serving as an "as 'bright' a line" rule, the standard has become turgid and capricious, depending upon the varying jurisdictions.

The Tax Court has consistently held that reliance on erroneous advice with respect to the need for filing a tax return or its due date does constitute reasonable cause. *See*, *e.g.*, *La Meres Estate v. Comm'r*, 98 T.C. 294 (1992); *Zabolotny v. Comm'r*, 97 T.C. 385 (1991), aff'd in part and rev'd in part, 7 F.3d 774 (8th Cir. 1993), nonacq., 1994-1 C.B. 1; *Paxton Estate v. Comm'r*, 86 T.C. 785 (1986); *Aiken v. Comm'r*, 56 T.C. 925 (1971), acq., 1972-2 C.B. 1; *Buring Estate v. Comm'r*, T.C. Memo 1985-610; *Bradley Estate v. Comm'r*, T.C. Memo 1974-17, aff'd, 511 F.2d 527 (6th Cir. 1975); *Kwang Lee Estate v. Comm'r*, T.C. Memo 2009-84.

The Tax Court, in *La Meres v. Commissioner*, holds "that ***reasonable reliance*** on the erroneous advice of an attorney with respect to the due date of a return can constitute 'reasonable cause' within the meaning of section 6651(a)(1)." *La Meres v. Comm'r*, 98 T.C. 294, 320 (1992) (emphasis added). In fact, *La Meres* never addresses whether the tax advice is substantive or nonsubstantive.

The Court of Federal Claims has incorporated the analysis under *La Meres* in the recent March 29, 2013, opinion of *Estate of Liftin v. United States*, 110 Fed. Cl. 119 (2013), and accepted that a tax professional's advice concerning tax filing deadlines may constitute a substantive matter of tax law. Applying a "reasonable reliance" analysis, the court concluded that reasonable cause was demonstrated by a taxpayer's reliance on the advice of a tax attorney to delay filing the estate tax return to allow for a marital deduction on an estate tax return.

Other courts agree that a taxpayer's reasonable reliance on the advice of a tax professional concerning a filing deadline can constitute "reasonable cause." These courts generally distinguish such advice from an impermissible delegation of a duty to file. Accordingly, the taxpayer should be able to reasonably rely on his tax advisor in the Seventh, Fifth, Second and Third Circuits. *See*, *e.g.*, *Comm'r v. American Ass'n of Eng'rs Employment, Inc.*, 204 F.2d 19 (7th Cir. 1953); *Burton Swartz Land Corp. v. Comm'r*, 198 F.2d 558 (5th Cir. 1952); *Haywood Lumber & Mining Co. v. Comm'r*, 178 F.2d 769 (2d Cir. 1950); *Girard Inv. Co. v. Comm'r*, 122 F.2d 843 (3d Cir. 1941).

Other courts disagree holding that each taxpayer has a personal, non-delegable duty to timely file his tax returns. These cases hold that reliance on the mistaken advice of counsel is not sufficient to constitute reasonable cause for failing to fulfill that duty. *See*, *e.g.*, *Boeving v. U.S.*, 650 F.2d 493 (8th Cir. 1981); *Lillehei Estate v. Comm'r*, 638 F.2d 65 (8th Cir. 1981); *Kerber Estate v. U.S.*, 717 F.2d 454 (8th Cir. 1983); *Smith v. U.S.*, 702 F.2d 741 (8th Cir. 1983); *Sarto v. U.S.*, 563 F. Supp. 476 (N.D. Cal. 1983). *Quality Homes Inc. v. U.S.*, 2002-1 USTC ¶50,301 (W.D. La. 2002).

Taxpayers cannot be expected to know what is or is not a "substantive matter of tax law" or debatable matter of tax law.

> 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. "Ordinary business care and prudence" do not demand such actions.

Boyle, 469 U.S. at 251.

What has happened since *Boyle* is the adoption of different invariably evolving discussions of delegation or substantive tax law and, more recently, "debatable matter of tax law." These tests do not explain how a taxpayer is expected to differentiate substantive versus nonsubstantive tax law, or identify debatable matters of tax law. The "bright a line as can be drawn" rule of *Boyle* means nothing if its application is inconsistently applied and interpreted by the courts.

Boyle can be consistently applied where a taxpayer relinquishes the responsibility of supervising the filing of returns and payment of tax. A different analysis should be applied where the taxpayer relied on the advice of an advisor in good faith. The appropriate question under these facts and circumstances should be, "Is the taxpayer's reliance on the advice reasonable?" This was the approach adopted by the Tax Court in *La Meres* and partially by the Court of Federal Claims in *Liftin*.

III. The Inconsistency Among the Lower Courts Creates Inconsistency in the Tax Law and Unbalanced Draw on Favorable Jurisdictions

The more favorable interpretation of *Boyle* in the U.S. Tax Court and Court of Federal Claims will result in forum shopping to draw more taxpayers to those jurisdictions that provide a reasonable reliance approach to evaluating reasonable cause abatement based on the reliance of the advice of a tax professional.

The District Court in this case granted summary judgment based largely on two unpublished district court cases (one being *Baccei v. United States*) that purportedly follow the holding of *Boyle*. Based on these authorities, the District Court held that reasonable reliance by a taxpayer must concern "substantive advice on a debatable position," a standard that was not adopted by *Boyle* nor any other court except the U.S. District Court for the Northern District of California in *Baccei*. The requirement that the tax advice be "*debatable*" for purposes of the section 6651(a) penalty is pure invention of the *Baccei* court.

The Ninth Circuit in *Knappe* assumed that the Supreme Court had made a distinction between substantive and nonsubstantive tax advice, which it claimed was also recognized by the Ninth Circuit's opinion in *Baccei v. United States*, 632 F.3d 1140, 1148-49 (9th Cir. 2011): "Reading those cases closely, we conclude that the question of when the estate-tax return was due once an extension had been obtained was a nonsubstantive one." *Knappe*, 713 F.3d at 1171. This is in fact not the case. The *Baccei* court's only comment on the substantive issue is as follows:

> Baccei cites several cases construing the negligence penalty under former 26 U.S.C.

> § 6653(a) for the proposition that "[w]hen 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." [citations omitted]. However, these cases are distinguishable as they involve a taxpayer's reliance on the advice of tax professionals to take aggressive tax deductions or adopt positions that can be classified as "reasonably debatable." **Baccei does not contend that Bagley inaccurately advised him of his liability under the tax code or provided him with substantive advice on a debatable tax position. Rather, Baccei solely claims that he relied on Bagley to request and obtain a payment extension.**

Id. at 1148 n.3 (emphasis added).

As is clear from this note, there was never any allegation of any advice given to the taxpayer in *Baccei*, and rather simple reliance on the tax professional to act on the taxpayer's behalf to obtain the extension. In fact, *Baccei* rejects the "reasonably debatable" standard for the failure to pay penalty under section 6651(a)(2). *Baccei* concludes that it is the duty of a taxpayer to identify the payment deadline and ensure that payment was made prior to that deadline, or confirming that a payment extension had been properly requested and granted. *Id*. at 1149. This conclusion is not consistent with *Boyle*.

IV. The Ninth Circuit Misreads Baccei's Holdings and Incorporates an Impracticable "Debatable" Standard

The Ninth Circuit relies on *Baccei*, which is not a case where any advice was even alleged to have been given, and which rejected the "debatable matter of tax law" standard accepted by the Ninth Circuit's opinion in *Knappe*:

> The question of how long an extension was available was not a "debatable" one. *Baccei*, 632 F.3d at 1148 n.3 (distinguishing cases that involved substantive advice on debatable tax questions).

Knappe, 713 F.3d at 1173.

As noted above, the taxpayer in *Baccei* introduced the "debatable" standard by reference to cases decided under the negligence penalty under former section 6653(a). The negligence penalty today is found under section 6662, which has its own standards for reliance on the advice of tax professionals. 26 C.F.R. § 1.6664-4(c). The Ninth Circuit in *Knappe* is creating a much more stringent, and infinitely less clear, standard by requiring taxpayers and tax professionals alike to evaluate what is debatable or nondebatable.

The Ninth Circuit's new standard creates additional transactional expense by forcing both taxpayers and tax professionals alike to evaluate whether any advice given is a "debatable" or substantive position of tax law, substantive/nonsubstantive, or a delegation. None of these tests further the as " 'bright' a line as can be drawn consistent with the statute and implementing regulations" that this Court sought to establish in *Boyle*.

V. The Ninth Circuit Amplifies *Baccei*'s Incorrect Analysis Concerning Filing Extensions

Baccei concludes that a taxpayer is unreasonable unless the taxpayer identifies the payment deadline and ensures that payment was made prior to that deadline, or confirms that a payment extension had been properly requested and granted. *Baccei*, 632 F.3d at 1149. This standard makes filing an extension request per se unreasonable if done too close to the due date because otherwise the taxpayer cannot verify both that the request had been requested *and granted*. "Ordinary business care and prudence" therefore means an extension is only reasonable if made considerably before the due date, possibly months.

The Ninth Circuit amplifies this fundamental misunderstanding of how extensions are made by applying *Baccei*'s faulty discussion on confirming extension requests to filing extension requests. Requests to extend filing deadlines are generally automatic; whereas requests to extend payment deadlines are granted at the discretion of the Commissioner of Internal Revenue. Payment extension requests generally receive a response from the IRS, but filing extension requests by themselves likely will not receive a response from the IRS because they are automatic and a response is not guaranteed.

Both the IRC and the Treasury Regulations very simply state that "ordinary business care and prudence" is reasonable cause. The courts, including the Ninth Circuit and *Sarto*, have instead imposed impossible standards for taxpayers to meet to remove a penalty for reasonable cause. For example, the Ninth Circuit in *Baccei* holds that it is unreasonable for any taxpayer to file a payment extension request without verifying that it was in fact received and granted by the IRS before the due date. *Baccei v. United States*, 632 F.3d 1140, 1149 (9th Cir. 2011). As a matter of law, taxpayers are permitted to file both a payment extension request and a filing extension request on the due date. The Ninth Circuit's conclusion that such efforts must be verified by the taxpayer fails to recognize that most taxpayers who file extensions do so either on or near the deadline and are automatically deemed unreasonable in the Ninth Circuit under its interpretation of *Boyle* and *Baccei*.

How can taxpayers discern the difference between substantive/nonsubstantive or delegation/nondelegation or "debatable" matter of tax law? It is unreasonable to hold taxpayers to such a heavy burden when substantive tax matters are generally beyond the taxpayer's knowledge. In each case, the taxpayer needs the advice of an expert. Reasonable, good faith reliance on such advice should constitute reasonable cause.

VI. State Taxing Authorities Will Defer to Federal Determination of State Tax Law Analogues

Many states, including California, generally follow federal tax law and accept its laws as authority regarding provisions that are not otherwise modified. *E.g.*, Cal. R&TC § 17024.5. Under state law, filing deadlines can become extremely complicated, and would impose a state-level penalty where one does not exist at the federal level.

As just one example, shareholders of an S corporation agree to sell shares of stock in a purchase agreement to a C corporation. This transaction terminates the S corporation's S status, but it continues to exist as a C corporation. 26 U.S.C. § 1361(b)(1)(B). Ordinarily, if an S corporation's status terminates for less than its entire taxable year, there are two short taxable-year periods: the first, in which the corporation is treated as an S corporation; and the second, in which the corporation is taxed as a C corporation. 26 C.F.R. § 1.1362-3(a). The S short year ends on the day before the effective date of termination of S status, while the C short-year period commences with the date when S status terminated. 26 U.S.C. § 1362(e)(1)(A).

Under these circumstances, the due date of the corporation's final S short-year return is extended to the due date of the C short-year return, including extensions. 26 U.S.C. § 1362(e)(6)(B). In other words, both tax returns are due on the ordinary filing due date. However, if the parties agree to make a deemed asset sale election under section 338(h)(10) more than 4 months after the acquisition date, the former S corporation's tax returns are automatically late. 26 C.F.R. §§ 1.338-10(a)(6)(i); 1.338(h)(10)-1(d)(3), (4).

Under federal law, no S corporation level tax will be due because S corporations are generally not subject to taxation, but under California law the asset sale also triggers the 1.5 percent franchise tax on the sale of assets generating substantially large failure to file penalties.

These shifting due dates for returns are minefields for taxpayers who are charged by the Ninth Circuit with a nondelegable duty to demonstrate "compliance with an unambiguous statute" under its interpretation with *Boyle*: "We conclude that the question of when a return is due – even when an executor has sought an extension – is nonsubstantive." *Knappe*, 713 F.3d at 1173. Taxpayers who justifiably and reasonably rely on their tax advisors must not be punished based on an arbitrary determination of substantive or nonsubstantive. As this Court itself noted in *Boyle*:

> 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. "Ordinary business care and prudence" do not demand such actions.

Boyle, 469 U.S. at 251.

Taxpayers must not be forced to seek a "second opinion" every time a matter of filing a tax return is required because even the most knowledgeable of tax professionals will fail to note an exception of our incredibly complicated tax code that will result in a late filing of a tax return. The Ninth Circuit's Opinion makes any taxpayer automatically unreasonable if the taxpayer relies on any tax advisor's conclusion as to when a tax return is due.

VII. No Evidence Supports the Ninth Circuit's Claim that Reasonable Cause Abatement Would Lead to Collusion

The Ninth Circuit contends that reasonable cause should not be afforded to taxpayers who rely on the advice of their tax advisors with regard to due dates because it "would reward collusion between culpable executors and their agents." *Knappe*, 713 F.3d at 1174. The Ninth Circuit further contends, "In cases like this one, lawyers and accountants would be incentivized to claim that they gave erroneous advice to the executor whether or not they did in fact. The agent who fell on his sword would risk nothing, because the waiver of the penalty would leave the executor without damages." *Id*. The Ninth Circuit took this argument from *Sarto v. U.S.*, 563 F. Supp. 476 (N.D. Ca. 1983), the District Court cited by this Court in *Boyle*.

This argument is unfounded. Nothing prevents taxpayers and their tax professionals from "colluding" to avoid penalties. This determination by the Ninth Circuit would obviate any allowance of reasonable cause abatement based on the advice of a tax professional, even when the issue was a "debatable" matter of substantive tax law. It is unreasonable to assume that this applies in every case or exists as a rationale to deny taxpayers abatement of the penalty, as intended by Congress, based purely on unfounded speculation. Moreover, the Ninth Circuit's theory eliminates the nature of a professional's ethical obligation as well as the fundamental core of our judicial system – truth and justice.

The *Sarto* decision holds that taxpayers have an available remedy in seeking reimbursement from the taxpayer's lawyer or accountant. Although this remedy may work for low amounts, the failure to file penalty for estate tax returns can easily total hundreds of thousands of dollars. Rather than provide prompt and efficient relief as provided under the IRC and Treasury Regulations, such large value penalties would in many cases result in protracted litigation.

Admittedly, the rationale of *Sarto* still holds true, that an advisor should not be advantaged by affirmatively misleading the taxpayer, which would occur if a taxpayer who had been affirmatively misled could escape liability for a penalty, while a taxpayer who was passively negligent could not. However, the statute should not be enforced so as to punish innocent taxpayers from the perceived future fraudulent conduct by the taxpayer's professional advisors, nor should the statute be interpreted as compelling the taxpayer to seek redress solely from administrative or civil complaints against their professional tax advisors.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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713 F.3d 1164
United States Court of Appeals,
Ninth Circuit.

Peter KNAPPE, Executor of the Estate of Ingborg Pattee, deceased, and as Trustee under will of Ingborg Pattee, dated 07/01/1994, Plaintiff-Appellant,
v.
UNITED STATES of America, Defendant-Appellee.

No. 10-56904. | Argued and Submitted May 9, 2012. | Filed April 4, 2013.

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Appeal from the United States District Court for the Central District of California, Dolly M. Gee, District Judge, Presiding. D.C. No. 2:09-cv-07328-DMG-PJW.

Before: KIM McLANE WARDLAW, RICHARD A. PAEZ, and JOHNNIE B. RAWLINSON, Circuit Judges.

OPINION

PAEZ, Circuit Judge:

When can you trust your accountant's advice about when your taxes are due? That is the question we face today. Appellant Peter Knappe, acting as the executor of an estate, asked his accountant to apply for an extension of the deadline to file the estate-tax return from the Internal Revenue Service ("IRS"). The accountant told Knappe that the deadline had been extended one year, when in fact it had been extended only six months. Acting on the bad advice, Knappe filed the tax return several months late, and the IRS assessed significant penalties against the estate. Knappe initiated this action in the Central District of California, seeking a refund of the penalty. The district court granted summary judgment to the Government on the ground that Knappe had not shown "reasonable cause" to excuse the penalty, as that term is used in 26 U.S.C. § 6651(a)(1). We affirm.

I. Background

Ingborg Pattee died on November 30, 2005, leaving behind a substantial estate. Her will named as the executor of the estate Peter Knappe, a longtime friend and successful businessman. Because Knappe had no prior experience serving as the executor of an estate or preparing an estate-tax return, he enlisted the help of Francis Burns, a Certified Public Accountant. Burns had worked as a corporate tax accountant for Knappe's company for many years, and Knappe had always been satisfied with his work. In December 2005, Burns told Knappe that the Pattee estate would need to file a United States Estate Tax Return, IRS Form 706. He also correctly informed Knappe that the deadline to file the return was nine months from the date of Pattee's death: August 30, 2006.

At some point before that deadline, Knappe realized he did not have time to obtain real estate appraisals that he needed to prepare the return accurately. Knappe sought Burns's advice about requesting an extension of the filing deadline from the IRS. Burns told Knappe that he could obtain an extension of both the filing and payment deadlines, and that the same extension was available for both deadlines. Knappe authorized Burns to prepare and file IRS Form 4768, an "Application for Extension of Time To File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Taxes."

Form 4768 gives taxpayers three options: they can seek an extension of the Form 706 filing deadline, seek an extension of the time to pay any estate tax due, or both. The instructions that accompany Form 4768 explain the difference between the two categories of extensions. The instructions for "Part II, Extension of Time to File Form 706" state that an "executor may apply for an automatic 6-month extension of time to file Form 706." An executor who is "out of the country" may apply for an additional extension in excess of the automatic six months; the instructions warn, however, that "[y]ou cannot combine an application for an automatic extension and an additional extension on the same Form 4768." Finally, the instructions explain that an executor who failed timely to apply for the automatic six-month extension may apply for an "extension for cause." "Unless the executor is out of the country," however, extensions for cause are limited to "6 months from the original due date of the Form 706."

The instructions for "Part III, Extension of Time to Pay" explain that such an extension "may not exceed twelve months" and is granted at the discretion of the IRS. In contrast to extensions of the filing deadline, the IRS may grant up to ten consecutive extensions of the payment deadline – parceled out one year at a time – provided the taxpayer can establish "why it is impossible or impractical for the executor to pay the full amount of the estate tax by the estate tax return due date."

The two types of extensions are thus subject to two different sets of rules. Extensions of the filing deadline are granted automatically for six months, and only foreign executors can seek additional time. Extensions of the payment deadline, on the other hand, are purely discretionary, and the IRS may grant multiple extensions, each as long as a year.

Burns filed Form 4786 on August 30, 2006, applying for the six-month automatic filing extension and a one-year discretionary payment extension.

After filing the completed Form 4768 with the IRS, Burns sent a copy to Knappe. Knappe gave the form a cursory review, but did not examine it in detail. Knappe testified that there was no reason he could not have scrutinized the form, but that he mostly noticed the extension date Burns had requested, “8/30/2007,” and Burns’s estimate that the taxes owed would total $1.1 million.

The IRS approved the extension request in writing on January 11, 2007. On the form itself, which the IRS returned to Burns, an IRS agent had handwritten “2/28/07” next to the box Burns had checked to apply for the automatic six-month extension of the filing deadline. A new document, titled “Notice to Applicant,” was attached to the returned application. The Notice to Applicant included two sections: the first relating to the application for an extension of the filing deadline, and the second to the application for an extension of the payment deadline. Three checkboxes appeared in both sections: “Approved,” “Not approved because,” and “Other.” None of the boxes was checked in the first section. In the second section, the IRS agent had checked “Approved” and had typed, “TO 8/30/2007 only.”

At the time Burns prepared Form 4768, he mistakenly believed that it was possible to request a twelve-month extension of the filing deadline, even though he had read the instructions and reviewed the relevant statutes and Treasury regulations. Before Burns filed the form, he advised Knappe explicitly that he could obtain a twelve-month extension of both the filing and payment deadlines. Knappe testified that he believed that the extension application would extend both the filing and payment deadlines for one year – to August 30, 2007. Knappe's understanding of the deadlines rested entirely on Burns's representations; he made no independent effort to assay the rules. When the IRS approved the automatic six-month extension to the filing deadline and the discretionary one-year extension to the payment deadline, neither Burns nor Knappe realized their mistake.

Convinced that the filing deadline had been extended one year, Knappe elected to wait until May 2007 to file the return, in part to accommodate Burns's busy schedule during tax season. Burns and Knappe worked together to complete the return, and on May 18, 2007, Burns sent Knappe the completed Form 706. Burns also prepared a cover letter for Knappe to send to the IRS, which read, "Enclosed for filing is United States Estate Tax Return Form 706 for the above referenced decedent. The extended payment date/due date of this return is August 30, 2007 as shown on the IRS Form 4768 attached to this return." Knappe filed the return and cover letter on behalf of the estate on May 29, 2007. He also enclosed a check for the balance of the estate tax. Knappe later testified that he could have filed the estate-tax return by February 28, 2007 if he had understood that Burns had only obtained a six-month extension.

Sometime in 2008, the IRS observed that Knappe had filed the estate-tax return after the February 28, 2007 deadline. The agency assessed a 20 percent late-filing penalty for a four-month delinquency, excluding interest, in the amount of $196,414.60.[1] Knappe called Burns to ask why the IRS believed the estate-tax return was late. Burns reviewed the regulations and quickly realized he had made an error. Burns admitted that determining the correct deadline "was not an ambiguous question."

Knappe requested an abatement of the penalty. The Internal Revenue Code excuses late-filing executors from penalties if the failure to file was "due to reasonable cause and not due to willful neglect." 26 U.S.C. § 6651(a)(1). Knappe argued that he was entitled to an abatement because his reliance on Burns's erroneous advice was reasonable cause for the late filing. The IRS denied the abatement request. Knappe administratively appealed the IRS's decision, but the IRS denied the appeal. Knappe then paid the full amount due and filed a Claim for Refund with the IRS. When the IRS rejected the claim, Knappe brought this refund action, again alleging that his reliance on Burns constituted reasonable cause.

The Government moved for summary judgment. The district court granted the motion, holding that the existence of reasonable cause under 26 U.S.C. § 6651(a)(1) was an issue of law and that Knappe's

[1] The IRS acknowledged in the district court that it improperly computed the penalty. It should have assessed a 15 percent penalty for a three-month delinquency, rather than the 20 percent penalty it imposed. The district court reduced the penalty by $49,103.65. At issue on appeal is the remaining $185,626.71, including interest.

reliance on Burns's advice was insufficient to establish reasonable cause. Knappe timely appealed.

We have jurisdiction under 28 U.S.C. § 1291, and "we review de novo both the district court's summary judgment and its interpretation of the Internal Revenue Code." *Aloe Vera of Am., Inc. v. United States,* 580 F.3d 867, 870 (9th Cir.2009).

II. Analysis

A.

An estate-tax return, Form 706, must be filed within nine months of the decedent's death. 26 U.S.C. § 6075(a); 26 C.F.R. § 20.6075-1. An executor may apply for an automatic six-month extension of time to file Form 706 by filing Form 4768 on or before the due date of the return and checking the appropriate box. 26 C.F.R. § 20.6081-1(b). While the IRS "may grant a reasonable extension of time for filing any return," "no such extension shall be for more than 6 months" except in the case of taxpayers who are abroad. 26 U.S.C. § 6081(a).

Extensions of the deadline to pay the estate tax operate differently. Treasury Department regulations specify that the IRS may grant an extension of time to pay estate taxes, at the written request of the executor, "for a reasonable period of time, not to exceed 12 months." 26 C.F.R. § 20.6161-1(a)(1).

An executor who fails to file a timely estate-tax return is subject to a penalty. *See* 26 U.S.C.

§ 6651(a)(1). The late-filing penalty is mandatory when a taxpayer fails "to file any return . . . on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect."[2] *Id.* The penalty amount is five percent of the amount of tax that appears on the return for each month or fraction of a month that the return is late, up to a maximum of 25 percent. *Id.*

To establish reasonable cause, a taxpayer must prove that he "exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time." 26 C.F.R. § 301.6651-1(c)(1). Knappe's central argument on appeal is that by relying on his expert accountant's advice about the effect of the extension on the deadline for filing the return, he exercised "ordinary business care and prudence" and so had reasonable cause for filing the return three months late.

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[2] Because the language of § 6651(a)(1) is conjunctive, a late-failing taxpayer must show both "reasonable cause" and an absence of "willful neglect" to avoid paying a penalty. *See United States v. Boyle,* 469 U.S. 241, 245, 105 S.Ct. 687, 83 L.Ed.2d 622 (1985) (explaining that a taxpayer seeking to escape a penalty "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' " (quoting 26 U.S.C. § 6651(a)(1))). The Government does not argue that Knappe's tardiness resulted from willful neglect.

B.

Before we turn to that cardinal issue, we must first address Knappe's argument that the reasonableness of his actions is an issue of disputed fact that cannot be appropriately decided on summary judgment.

The Supreme Court has held that "[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." *United States v. Boyle,* 469 U.S. 241, 249 n. 8, 105 S.Ct. 687, 83 L.Ed.2d 622 (1985). In this case, the parties do not seriously disagree about the material facts. Knappe insists that factual disputes remain regarding whether Knappe had knowledge of the correct filing deadline and whether Burns advised him about it. Viewing the evidence in the light most favorable to Knappe, however, we simply assume that he had no actual or constructive knowledge of the correct filing deadline and that his uncertainty was the product of Burns's bad advice. What remains is the unambiguously legal question of whether Knappe's actions satisfy the minimum elements of reasonable cause. *See id.*

C.

1.

Cases addressing reasonable cause for late filing of tax returns fall into two general categories. In the first category are cases involving 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 leading case in this category is *Boyle,* 469 U.S. 241, 105 S.Ct. 687. There, Boyle, the executor of his mother's estate, retained an attorney who advised him that an estate-tax return was due but did not mention when it was due. *Id.* Boyle contacted the attorney repeatedly to inquire into the progress of the estate proceedings and the preparation of the return, and was repeatedly assured that the return would be filed "in plenty of time." *Id.* at 242-43, 105 S.Ct. 687 (quotation marks omitted). Eventually, the attorney admitted to Boyle that the return was late because a clerical oversight had caused him to overlook the deadline. *Id.* at 243, 105 S.Ct. 687. The return was filed three months late. The IRS assessed the statutory penalty, and Boyle sued to recover it. *Id.* at 244, 105 S.Ct. 687.

The Supreme Court held that Boyle's reliance on his attorney to file the tax return timely was not reasonable cause for the delay. "Congress has placed the burden of prompt filing on the executor," the Court explained, "not on some agent or employee of the executor." *Id.* at 249, 105 S.Ct. 687. The Court described the taxpayer's "fixed and clear" duty as "an obligation to ascertain the statutory deadline and then to meet that deadline, except in a very narrow range of situations." *Id.* at 249-50, 105 S.Ct. 687. Delegating the duty of filing to an agent was not within the "very narrow range of situations" in which failing to meet a statutory filing deadline would be excused, because "Congress has charged the executor with an unambiguous, precisely defined duty to file the return within nine months." *Id.* at 250, 105 S.Ct. 687. That the executor's agent "was expected to attend to the matter does not relieve the principal of his duty to comply with the statute." *Id.* The Court continued:

> Reliance by a lay person on a lawyer is of course common; but that reliance cannot function as a substitute for compliance with an unambiguous statute. . . . It requires no special training or effort to ascertain a deadline and make sure that it is met. 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).

Id. at 251-52, 105 S.Ct. 687; *see also Conklin Bros. of Santa Rosa, Inc. v. United States,* 986 F.2d 315, 316-18 (9th Cir.1993) (holding that reasonable cause did not excuse a corporation's late filing and payment of taxes when the company office manager failed to make timely filings and payments and falsified records to disguise her errors from company management).

In the second category are cases in which a taxpayer relies on an agent's erroneous advice that no return is due. Courts have consistently held that such reliance *does* constitute reasonable cause for delay. Even the *Boyle* court appeared expressly to endorse such a rule:

> When an accountant or attorney *advises* a taxayer 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. "Ordinary business care and prudence" do not demand such actions.

469 U.S. at 250-51, 105 S.Ct. 687 (citations omitted). Cases in this category stand for the principle that the question of whether a return is due is a matter of substantive tax law, and that a taxpayer acts with ordinary business care and prudence when he relies on an expert's answer to that question. *See, e.g., United States v. Kroll,* 547 F.2d 393, 396 (7th Cir.1977) (holding that "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" but noting that "[w]hether or not the taxpayer is liable for taxes is a question of tax law which often only an expert can answer. The taxpayer not only can, but must, rely on the advice of either an accountant or a lawyer. This reliance is clearly an exercise of ordinary business care and prudence.").

This case does not fall squarely into either category. Knappe 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 Burns erroneously had assured him was available.

In *Boyle,* the Supreme Court expressly declined to reach the question posed by this case:

> 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 adviser erroneously told him was available. We need not and do not address ourselves to this issue.

469 U.S. at 251 n. 9, 105 S.Ct. 687 (citations omitted). Our sister circuits have reached contradictory conclusions. *Compare, e.g., Estate of Kerber v. United States,* 717 F.2d 454, 455-56 (8th Cir.1983) (per curiam) (refusing to find reasonable cause where an executrix's attorney "correctly advised her that it would be necessary to file an estate tax return" but "erroneously believed that the return was due one year," rather than nine months, "after the decedent's death"), *with Estate of Bradley v. Comm'r,* 33 T.C.M. (CCH) 70, 72-73 (1974) (holding that it was "consistent with ordinary business care and prudence for [the executor] to consult a member of an accounting firm which regularly prepared tax returns for advice on the due date of the estate tax return and to rely

on the advice he received"), *aff'd,* 511 F.2d 527 (6th Cir.1975).[3]

This case is more like the first category than the second because of the Supreme Court's distinction between substantive and nonsubstantive tax advice, *Boyle,* 469 U.S. at 251-52, 105 S.Ct. 687, which we recently recognized in *Baccei v. United States,* 632 F.3d 1140, 1148-49 (9th Cir.2011). Reading those cases closely, we conclude that the question of when the estate-tax return was due once an extension had been obtained was a nonsubstantive one. For that reason, Knappe did not exercise ordinary business care and prudence when he relied unquestioningly on Burns's advice about the extended deadline, and he unreasonably abdicated his duty to ascertain the filing deadline and comply with it.

[3] The Seventh and Third Circuits have taken intermediate positions in cases with analogous, but not identical, facts. In *Fleming v. United States,* 648 F.2d 1122, 1125-27 (7th Cir.1981), the Seventh Circuit refused to absolve a late-filing taxpayer whose attorney failed to submit an extension application after the taxpayer asked him to do so. In *Sanderling, Inc. v. Commissioner,* 571 F.2d 174, 178-79 (3d Cir.1978), the Third Circuit held that a corporation's reliance on an accountant's misrepresentations about the due date of corporate income tax returns was reasonable when the "due date was not readily determinable" and the IRS itself was uncertain about the correct due date at trial.

2.

Given the vagaries of our famously labyrinthine tax laws, one might assume that hiring a tax expert is the quintessence of "ordinary business care and prudence." On this view, a taxpayer who has solicited the services of a qualified professional and supplied him with the necessary information would be insulated from penalties stemming from the agent's mistakes. After all, one hires a tax expert precisely to avoid having to read even the most straightforward IRS prose.

Taxpayers, however, are not exempt from penalty liability for their agents' mistakes in all cases. In *Boyle,* the Court drew a sharp distinction between substantive advice on tax law, on which executors may reasonably rely, and nonsubstantive advice, on which executors may not rely. *See* 469 U.S. at 251, 105 S.Ct. 687 ("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.") (second emphasis added). The Court also explained that determining the filing date of a tax return is a nonsubstantive matter: "[O]ne 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. . . . It requires no special training or effort to ascertain a deadline and make sure that it is met." *Id.* at 251-52, 105 S.Ct. 687.

The obvious objection is that *Boyle* did not involve a request to extend the default deadline for filing the estate-tax return. It is a simple matter to determine when an estate-tax return is due – the instructions to Form 706 explain the nine-month deadline, under a large heading that reads, helpfully, "When To File." It is harder to work through the rules governing extensions, which distinguish between extensions to the filing deadline and extensions to the payment deadline, as well as between domestic and foreign executors.

Our recent decision in *Baccei* forecloses this objection. That case involved an executor, Baccei, who retained a certified public accountant to prepare and file a federal estate-tax return on behalf of the estate he was administering. 632 F.3d at 1143. The accountant represented to Baccei that he had requested an extension of both the payment and filing deadlines, but in fact had only requested an extension of the filing deadline – he forgot to "check the box indicating that a payment extension was needed" on Form 4768. *Id.* Believing that his accountant had obtained both extensions, Baccei paid the taxes late and incurred a penalty. *Id.*

Seeking relief from the penalty, Baccei cited cases involving former 26 U.S.C. § 6653(a)[4] for the

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[4] Section 6653 imposed penalties for underpayment of taxes "due to negligence or intentional disregard of rules or regulations." *See* 26 U.S.C. § 6653(a) (1982), *repealed by* Pub.L. No. 101-239, Title VII, § 7721, 103 Stat. 2106, 2399-400 (1989).

proposition first stated in *Boyle* that " '[w]hen 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.' " *Id.* at 1148 n. 3 (quoting *Henry v. Comm'r,* 170 F.3d 1217, 1220 (9th Cir.1999)). We distinguished Baccei's cases on the grounds that they "involve[d] a taxpayer's reliance on the advice of tax professionals to take aggressive tax deductions or adopt positions that can be classified as 'reasonably debatable.' " *Id.* (citing *Foster v. Comm'r,* 756 F.2d 1430, 1439 (9th Cir.1985)). Baccei's penalties could not be excused, we explained, because "the executor does not contend that [his accountant] inaccurately advised him of his liability under the tax code or provided him with substantive advice on a debatable tax position." *Id.*

Knappe attempts to distinguish *Baccei* on the grounds that Burns gave him erroneous *advice* about the extension he obtained, whereas the accountant in *Baccei* failed to request an extension at all. The distinction is without a difference. Both Knappe and Baccei instructed their respective agents to obtain extensions of the filing and payment deadlines. Both cases involved expert advice: both agents wrongly informed their principals that the filing and payment deadlines had been extended to a particular date. And both agents erred: Burns, because he misread the instructions and thought that the extension to the filing deadline was twice as long as was actually granted; and the accountant in *Baccei,* because he did not check the appropriate box and was awarded no extension of the payment deadline at all. We see no reason why an executor whose agent misinterpreted Form 4768's instructions should be entitled to a refund, but an executor whose agent filled out Form 4768 improperly should be denied one.

It is undisputed that an executor's reliance on expert advice constitutes reasonable cause in some cases. *See, e.g., Kroll,* 547 F.2d at 396. Taken together, *Boyle* and *Baccei* clarify that an executor's late filing will be excused only if he relied on "substantive" advice about an issue of tax law. *Boyle,* 469 U.S. at 251, 105 S.Ct. 687; *Baccei,* 632 F.3d at 1148 n. 3. All we must ask, then, is whether Knappe's reliance on Burns concerned a substantive tax question.

In arguing that Burns's advice about the extended deadline was substantive, Knappe relies heavily on *Estate of La Meres v. Commissioner,* 98 T.C. 294 (1992). In *La Meres,* the estate's representative understood the correct filing deadline for the estate-tax return, but needed additional time. Her lawyer advised her to apply for a six-month automatic extension of the filing deadline and a one-year extension of the payment deadline. *Id.* at 304-05. When the first extended due date for filing the estate-tax return approached, the representative realized she still needed more time, and again sought her lawyer's advice. The lawyer advised her, wrongly, that a second six-month extension of the filing deadline was available by filing a new extension application. *Id.* The IRS denied this second request for an extension but failed to notify the representative, and the estate eventually incurred late-filing penalties. *Id.* at 306, 313. The *La Meres* court held that the representative had shown reasonable cause because she reasonably relied on her attorney's advice that a second six-month extension was available, explaining that "[a]lthough an extension referred to in [26 U.S.C. §] 6081 is limited to 6 months, the statute does not explicitly state that the Secretary may only grant one extension." *Id.* at 318, 320-21. Thus, the court treated the question of whether multiple filing extensions were available as a substantive one. Knappe argues that his reliance was essentially identical to that of the representative in *La Meres:* like the attorney in *La Meres,* Burns also wrongly advised his client that an additional extension was available.

We disagree that the issue here is substantive. At the time Knappe was preparing the return, the instructions to Form 4768 were unambiguous: they stated that an "automatic 6-month" extension is available, but that "[a]n additional extension is available *only* if you are an executor out of the country" (emphasis added). On the next page, the instructions reiterated the point in equally unambiguous language: "An executor may apply for an automatic 6-month extension of time to file Form 706. . . . Unless you are an executor out of the country (see below), the maximum extension of time to file is 6 months from the original due date of the applicable return."

The relevant section of the Internal Revenue Code is no more ambiguous: "The Secretary may grant a reasonable extension of time for filing any return, declaration, statement, or other document required by this title or by regulations. Except in the case of taxpayers who are abroad, no such extension shall be for more than 6 months." 26 U.S.C. § 6081 (2006). This language may be unclear about whether a taxpayer can request serial extensions, *see La Meres,* 98 T.C. at 320-21, but Knappe only ever requested a single extension.

We conclude that the question of when a return is due – even when an executor has sought an extension – is nonsubstantive. The deadlines here brook no debate. It was clear from the face of Form 4768, from the corresponding instructions, and from the governing statute that the maximum available extension of the filing deadline was six months. Burns himself testified that the deadline was "unambiguous." *See Boyle,* 469 U.S. at 251, 105 S.Ct. 687 ("[R]eliance cannot function as a substitute for compliance with an unambiguous statute."). The question of how long an extension was available was not a "debatable" one. *Baccei,* 632 F.3d at 1148 n. 3 (distinguishing cases that involved substantive advice on debatable tax questions); *cf. Comm'r v. Am. Ass'n of Eng'rs Emp't, Inc.,* 204 F.2d 19, 20-21 (7th Cir.1953) (excusing a company from a tax penalty where the company relied on an attorney's substantive advice about whether the organization was tax-exempt). For that reason, Knappe cannot show reasonable cause to excuse his late filing.

3.

The line between substantive and nonsubstantive advice may not be perfectly bright, but it is surely more luminous than that between "delegation" and "reliance on advice," which many courts have used to distinguish between reasonable and unreasonable taxpayer action. *See, e.g., La Meres,* 98 T.C. at 320. In Knappe's case, classifying his actions as delegation or reliance is simply a matter of framing. On one view, Knappe relied on his accountant's erroneous advice about a deadline. On another view, however, Knappe delegated his duty to obtain an extension to Burns, by allowing Burns to prepare the extension application and assuming Burns had obtained a one-year extension that was never available.

Instead, we treat the distinction between substantive and nonsubstantive matters as coterminous with the distinction between an executor's delegable and nondelegable duties. We have previously held that certain duties of the executor cannot be reasonably delegated to an agent. *See Conklin Bros.,* 986 F.2d at 319 (observing that a taxpayer cannot rely on the negligence of an agent "to escape responsibility for the nonperformance of nondelegable tax duties"). *Boyle* touched on the boundaries of an executor's nondelegable duty: "Congress intended to place upon the taxpayer an obligation to *ascertain* the statutory deadline and then to meet that deadline, except in a very narrow range of situations." 469 U.S. at 249-50, 105 S.Ct. 687 (emphasis added). We went further in *Baccei,* holding that the executor "was responsible for either identifying the payment deadline and ensuring that payment was made prior to that deadline, or confirming that a payment extension had been properly requested and granted." 632 F.3d at 1149. Knappe was derelict in this duty: he did nothing to confirm that Burns had "properly requested" and obtained the one-year extension of the filing deadline that Burns told him the IRS had awarded. In fact, Burns had done neither: he *improperly* requested a one-year extension, and only obtained a six-month extension.

We reaffirm that an executor may only reasonably rely on an agent's advice about substantive tax matters. *Boyle,* 469 U.S. at 250-51, 105 S.Ct. 687. Ascertaining a deadline is within the ambit of the executor's nondelegable duties, because a deadline is a nonsubstantive matter. So too is confirming that a needed extension has been sought or obtained. It follows that ascertaining the length of any extension so obtained is equally nondelegable, because ascertaining an extended deadline is no more a substantive matter than ascertaining a default deadline.

As to deadlines, a responsible executor will not allow himself to be misled. When an attorney or accountant tells an executor, "This is the deadline," the executor bears the risk that the advice is wrong. The rule is the same regardless of whether the payment deadline or the filing deadline is at issue, and regardless of whether the agent's erroneous advice results from his misunderstanding of the relevant rules or his negligence in seeking the appropriate extension. Reliance on erroneous advice about nonsubstantive tax law issues cannot constitute reasonable cause for an executor's failure to file a timely return. *See Baccei,* 632 F.3d at 1148 n. 3.

D.

We acknowledge that the result today imposes a heavy burden on executors, who will affirmatively have to ensure that their agents' interpretations of filing and payment deadlines are accurate if they want to avoid penalties. This burden is justified by the government's substantial interest in ensuring that returns are timely filed. *See Boyle,* 469 U.S. at 249, 105 S.Ct. 687.

Moreover, any other result would reward collusion between culpable executors and their agents. In cases like this one, lawyers and accountants would be incentivized to claim that they gave erroneous advice to the executor whether or not they did in fact. The agent who fell on his sword would risk nothing, because the waiver of the penalty would leave the executor without damages. Even in cases in which executors and their agents did not actively collude to propound a contrived misrepresentation defense, negligent agents would be unilaterally incentivized to persist in giving erroneous advice to their clients, even if they realized their error. *See Sarto v. United States,* 563 F.Supp. 476, 478 (N.D.Cal.1983) ("If a taxpayer who had been affirmatively misled by his attorney regarding the date on which his return was due could escape liability for a penalty while a taxpayer who was passively negligent could not, the ultimate result would be that attorneys who had engaged in active deceit would escape liability while attorneys who were merely guilty of neglect would not. . . . [T]he statute should not be enforced so as to encourage attorneys who are merely guilty of neglect to compound their error and further delay the filing of a required return by engaging in active deceit of their clients.").

E.

It was Knappe's duty to ascertain the correct extended filing deadline. By relying on his accountant's advice about that nonsubstantive matter, he failed to exercise ordinary business care and prudence, and he cannot show reasonable cause to excuse the penalty. We therefore affirm the judgment of the district court.

AFFIRMED.

2010 WL 9463256
United States District Court,
C.D. California.

Peter KNAPPE, as Executor of the Estate of Ingborg Pattee, deceased, and as Trustee under will of Ingborg Pattee, dated 07/01/1994, Plaintiff,
v.
UNITED STATES of America, Defendant.

No. CV 09-07328 DMG (PJWx). | Oct. 22, 2010.

Arthur V Pearson, Janet Lynn Everson, Jason Jay Galek, Murphy Pearson Bradley & Feeney, San Francisco, CA, for Plaintiff.

Andrew Pribe, AUSA-Office of U.S. Attorney, Los Angeles, CA, for Defendant.

Opinion

ORDER RE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

DOLLY M. GEE, District Judge.

This matter is before the Court on Defendant's Motion for Summary Judgment. The Court held a hearing on October 22, 2010. For the reasons set forth below, Defendant's Motion is GRANTED.

I.

PROCEDURAL HISTORY

On October 8, 2009, Plaintiff, in his capacity as executor and trustee of the estate of Ingeborg Pattee,[1] filed a complaint against Defendant, the United States of America, for a tax refund. Defendant filed the Motion for Summary Judgment on September 14, 2010. Plaintiff filed his Opposition on October 1, 2010. On October 8, 2010, Defendant filed its Reply.

II.

FACTUAL BACKGROUND

The parties agree on the material facts.[2] Plaintiff Peter Knappe is the representative and executor of the Estate of Ingeborg Pattee, who died on November 30, 2005. (Def.'s SUF ¶¶ 1-2.)Before the Estate of Pattee, Plaintiff has had no prior experience serving as an executor or filing an estate tax return. (*Id.* ¶¶ 68-69.)

Plaintiff retained Francis Burns, a CPA, to assist the Estate in the preparation of its federal estate tax

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[1] Although the complaint refers to the decedent as "Ingborg" Pattee, Plaintiff later refers to her as "Ingeborg." It appears that the latter spelling is correct.

[2] In setting forth the material facts, the Court draws from the uncontested statements in Defendant's Statement of Uncontroverted Facts ("SUF") and in Plaintiff's "Additional Material Facts," which begin at paragraph 63 in his Statement of Genuine Issues of Material Fact ("SGI").

return. (*Id.*¶ 3.) Burns has been a CPA since 1983 and has known Plaintiff since the mid-1980s. (Pl.'s SGI ¶¶ 63, 65.) Burns has provided tax preparation services to Plaintiff's corporation, TriSep, since its formation around 1987. (*Id.*¶ 64.) Plaintiff does not recall Burns ever previously giving him incorrect advice on a tax matter or missing a filing deadline. (*Id.*¶ 66.)

In early December 2005, Plaintiff learned from Burns that the Estate would need to file a federal estate tax return. (Def.'s SUF ¶ 4.) Plaintiff learned from consulting with Burns that the deadline for filing a federal estate tax return was nine months from the date of death. (*Id.* ¶ 5.) Plaintiff also knew from the fact that the Estate would have to file an estate tax return that the Estate would have to file the return by a particular deadline. (*Id.* ¶ 6.) Because the date of Pattee's death was November 30, 2005, absent an extension, the estate tax return for the Estate was due on August 30, 2006. (*Id.* ¶ 7.)

At the time that Plaintiff was serving as the executor of the Estate, he was also president of TriSep Corporation. (*Id.* ¶ 8.) TriSep is a manufacturing company that has about 50 employees and annual gross receipts of about $10 million. (*Id.* ¶ 9.) As president of TriSep, Plaintiff has responsibility for the operation, profitability, and management of the corporation. (*Id.* ¶ 10.)

On August 30, 2006, Burns filed with the IRS Form 4768, an application for extension of time to file a return and/or pay U.S. estate (and generation-skipping transfer) taxes. (*Id.* ¶ 11.) Burns prepared and filed Form 4768 with Plaintiff's authorization. (Pl.'s SGI ¶ 75.) Before filing this extension application, Burns' standard practice would have been to review the IRS instructions for preparing the form as well as the commentary regarding the form from RIA.[3] (Def.'s SUF ¶ 12.)

The extension application contained four numbered parts: (I) Identification; (II) Extension of Time to File; (III) Extension of Time to Pay; and (IV) Payment to Accompany Request. (*Id.* ¶ 13.) Burns completed Part I by identifying Plaintiff as the executor. (*Id.* ¶ 14.)

Under Part II, which covered a time extension for filing, Burns completed the first portion (Automatic Extension) by checking the box for an automatic *six-month extension* of time to file Form 706, the federal estate tax return. (*Id.* ¶ 15; emphasis added.) In the second portion (Additional Extension), the application states: "If you are an executor out of the country applying for an extension of time to file in excess of 6 months, check here." (*Id.* ¶ 16.) Burns did not check this box. In the space immediately underneath, the form states: "Also you **must** attach a statement

[3] RIA, a service of Thompson Reuters, provides advanced research, practice materials, and compliance tools for tax, accounting, and corporate finance professionals. *See Our Brands,* Thompson Reuters | RIA (Oct. 19, 2010), http://ria.thomsonreuters.com/about/brands.asp.

explaining in detail why it was impossible or impractical to file Form 706 by the due date. *See* instructions." (*Id.* ¶ 17 (emphasis in Form 4768).) Burns did not write a date in the box entitled "extension date requested" although he typed "See Attachment." (*Id.* ¶ 18.)

In Part III, which concerned a time extension to make a payment, Burns checked the box next to the sentence "If this request is for the tax that will be or was due with the filing of Form 706, check here." (*Id.* ¶ 19.) Burns inserted "See Attachment" under the sentence that stated "You **must** attach your written statement to explain in detail why it is impossible or impractical to pay the full amount of the estate . . . tax by the return due date." (*Id.* ¶ 20 (emphasis in Form 4768).) In the box entitled "Extension date requested (not more than 12 months)," Burns wrote "8/30/2007." (*Id.* ¶ 21.)

Part IV of the extension application included three lines. (*Id.* ¶ 22.) On line 1, "Amount of estate . . . taxes estimated to be due," Burns wrote "1,100,000." (*Id.* ¶ 23.) On line 2, "Amount of cash shortage (complete Part III)," Burns wrote "$1,100,000." (*Id.* ¶ 24.) On Line 3, "Balance due (subtract line 2 from line 1)," Burns wrote "0." (*Id.* ¶ 25.)

At the bottom of the extension application, Burns checked the box that indicated he was a "certified public accountant duly qualified to practice in (specify jurisdiction)" and he wrote "CO/CA." (*Id.* ¶ 26.) Burns signed the extension application under penalty of perjury. (*Id.* ¶ 27.) The instructions to the extension application include the following statement: "The due date for Form 706 and Form 706-NA is 9 months after the date of the decedent's death." (*Id.* ¶ 28.) The instructions to the extension application also state: "Automatic extension. An executor may apply for an automatic 6-month extension of time to file Form 706, 706-A, 706-D, 706-NA, or 706-QDT. Unless you are an executor out of the country (see below), the maximum extension of time to file is 6 months from the original due date of the applicable form." (*Id.* ¶ 29.)[4]

On January 11, 2007, the IRS approved the extension request. (*Id.* ¶ 30.) On January 22, 2007, Burns received from the IRS a copy of the extension application with an additional page stating "The application for *extension of time to pay* (Part IV) is [box checked] approved to 8/30/2007 only." (*Id.* ¶ 31; emphasis added.) Other than this form, Burns received no communication from the IRS regarding the Estate's request for extension before the estate tax return was filed. (*Id.* ¶ 32.)

[4] Although Plaintiff does not dispute paragraphs 28 and 29 in Defendant's SUF, Plaintiff raises evidentiary objections on hearsay grounds. Plaintiff's objections are OVERRULED. These statements are not offered "to prove the truth of the matter asserted." Fed.R.Evid. 801(c). Plaintiff's remaining evidentiary objection, to SUF paragraph 44, is OVERRULED as moot because the Court does not rely on it.

Due to the extension application, the Estate had until February 28, 2007, an additional six months, to file the estate tax return. (*Id.* ¶ 33.) The Estate did not file the estate tax return with the IRS until May 29, 2007. (*Id.* ¶ 34.)

At the time that Burns prepared the extension application, he believed that he was requesting a twelve-month extension to file the federal estate tax form for the Estate. (*Id.* ¶ 35.) From the time Burns completed the extension application and sent it to the IRS to the time that the Estate filed the return, he never double-checked the filing deadline. (*Id.* ¶ 36.) From the time Burns completed the extension application and sent it to the IRS to the time that the Estate filed the return, Burns assumed that the Estate had an additional 12 months not only to pay the estate tax but also to file the return. (*Id.* ¶ 37.)

On August 30, 2006, Burns sent Plaintiff a copy of the cover letter along with a copy of the extension application. (*Id.* ¶ 38.) Plaintiff received a copy of the extension application a few days after Burns mailed it to the IRS. (*Id.* ¶ 39.) Plaintiff briefly looked at the extension application a few days after Burns mailed it to the IRS. (*Id.* ¶ 39.) Plaintiff briefly looked at the extension application – sufficient to see the nature of the form and the information about the identity of the requesting taxpayer, *i.e.,* the Estate. Plaintiff does not recollect substantively reviewing the remaining parts of the request except that he may have seen the date "8/30/2007" and the "$1,100,000" on the first page of the form. (*Id.* ¶ 40.) Plaintiff probably did not review

Parts II, III, and IV of the extension application. (*Id.* ¶ 41.)

Plaintiff's understanding was that the Estate could ask for an automatic extension and at the same time request an additional extension both to file the estate tax return and to pay the estate tax. (Pl.'s SGI ¶ 74.) Plaintiff believed that, because the Estate had filed an extension application, both the time to file and the time to pay were extended to August 30, 2007. (Def.'s SUF ¶ 45.) Plaintiff based this belief solely on Burns' representations and not on Plaintiff's review of the extension application. (*Id.* ¶ 46.) Burns advised Plaintiff before filing the extension request that the Estate could obtain a 12-month extension both to file the Form 706 and to pay the estate tax. (Pl.'s SGI ¶ 70.) At all times, Burns advised Plaintiff that the extension would provide the same amount of time both to pay and to file. (*Id.* ¶ 71.)

At the time that Plaintiff first received the extension application from Burns, no impediment existed preventing Plaintiff from reviewing Parts II, III, and IV of the extension application. (Def.'s SUF ¶ 42.) No impediment existed preventing Plaintiff from obtaining and reviewing a copy of the instructions to the extension application. (*Id.* ¶ 43.)

On November 15, 2006, Burns wrote to the IRS enclosing a copy of the extension application and a check in the amount of $800,000. (*Id.* ¶ 47.) Burns sent Plaintiff a copy of the November 15, 2006, letter to the IRS with a copy of the extension application and check. (*Id.* ¶ 48.) At the time, no impediment existed preventing Plaintiff from reviewing the extension request. (*Id.* ¶ 49.)

From the time Burns completed the extension application and sent it to the IRS to the time that the Estate filed the return, Burns has no recollection of Plaintiff questioning him about the extension application. (*Id.* ¶ 50.) Any time the deadline was discussed with Plaintiff after the extension application was sent to the IRS through the time the federal estate tax return was filed with the IRS, Burns would have told Plaintiff that the deadline for filing the federal estate tax return was August 30, 2007. (*Id.* ¶ 51.)

On May 18, 2007, Burns sent Plaintiff the completed federal estate tax return with a proposed cover letter for Plaintiff to send to the IRS. (*Id.* ¶ 52.) After sending the completed federal estate tax return with the proposed cover letter, Burns has no recollection of Plaintiff contacting him regarding the completed estate tax return or the cover letter. (*Id.* ¶ 53.)

Burns first realized that the return was filed late after receiving a call from Plaintiff when Plaintiff received the penalty notice from the IRS. (*Id.* ¶ 54.) After the call from Plaintiff, Burns reread the rules regarding requests for extensions to file. (*Id.* ¶ 55.) Based on this review, Burns quickly realized that he had made a mistake regarding the filing deadline. (*Id.* ¶ 56.) Based on this review, Burns realized that there was no ambiguity about the actual filing deadline. (*Id.* ¶ 57.)

Plaintiff relied on Burns' professional experience and skill in advising what was required under the Internal Revenue Code and Treasury Regulations. (Pl.'s SGI ¶ 87.) Plaintiff was involved in the preparation of the estate tax return by arranging appraisals for the properties and collecting information for inclusion in the estate tax return, as well as reviewing the drafts of the estate tax return prepared by Burns. Plaintiff would discuss with Burns items on the drafts or related issues that he did not understand. (*Id.* ¶ 88.) Although Plaintiff could have filed the estate tax return before February 28, 2007, he waited until May 2007 in part to accommodate Burns' work schedule during tax season. (*Id.* ¶¶ 89-90.)

Because the Estate filed the estate tax return late, the IRS imposed a late-filing penalty. (*Id.* ¶ 59.) The IRS computed the late-filing to be in the amount of $196,414.60 based on a four-month delinquency. (*Id.* ¶ 60.) The IRS erroneously computed the penalty based on a four-month delinquency instead of a three-month delinquency. (*Id.* ¶ 61.) Due to the erroneous computation, the IRS overstated the penalty by $49,103.65. (*Id.* ¶ 62.)

III.

LEGAL STANDARD

Summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c)(2); *accord Mattos v. Agarano,* 590 F.3d 1082, 1085 (9th Cir.2010). Material facts are those that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party has met its initial burden, Rule 56(e) requires the nonmoving party to "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324; *see also Bias v. Moynihan,* 508 F.3d 1212, 1218 (9th Cir.2007). "[T]he inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). However, "an opposing party may not rely merely on allegations or denials in its own pleading." Fed.R.Civ.P. 56(e).

IV.

DISCUSSION

When a taxpayer fails to file a tax return by the due date, the Internal Revenue Code imposes a penalty "unless it is shown that such failure is due to reasonable cause and not due to willful neglect." I.R.C. § 6651(a)(1). Thus, in order to avoid paying a penalty, a late-filing taxpayer must demonstrate *both* reasonable cause *and* the absence of willful neglect. *United States v. Nordbrock,* 38 F.3d 440, 444 (9th Cir.1994) (quoting *United States v. Boyle,* 469 U.S. 241, 245, 105 S.Ct. 687, 83 L.Ed.2d 622 (1985)). Defendant does not address willful neglect in its Motion for Summary Judgment. To establish "reasonable cause," a taxpayer must show that he "exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time." 26 C.F.R. § 301.6651-1(c)(1); *see also Van Camp & Bennion v. United States,* 251 F.3d 862, 866 (9th Cir.2001).

A. *Defendant Is Entitled To Summary Judgment Under Boyle*

In *Boyle,* the Supreme Court established "a rule with as 'bright' a line as can be drawn":

> 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. "Ordinary business care and prudence" do not demand such actions.
>
> 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. In short, tax returns imply deadlines. Reliance by a lay person on a lawyer is of course common; but that reliance cannot function as a substitute for compliance with an unambiguous statute. . . .
>
> It requires no special training or effort to ascertain a deadline and make sure that it is met. 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).

469 U.S. at 248, 251-52 (internal citation omitted; emphasis added).

Plaintiff attempts to distinguish *Boyle* on its facts. There, Plaintiff argues, "[t]he taxpayer failed to monitor when the return was in fact due and *delegated the duty of filing the return* to his attorney." (Opp'n at 6.) Plaintiff thus interprets *Boyle* to treat *delegation* of filing a tax return to an advisor differently from *reliance* on an advisor's *advice* about tax deadlines. Plaintiff points out that *Boyle* expressly refrained from addressing "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 adviser erroneously told him was available." *Boyle,* 469 U.S. at 251 n. 9. As the Supreme Court noted, courts are divided on the answer to this threshold question here. *See id.* (citing cases).

This split of authority, however, is not so stark as might appear at first blush. Whether reliance on an accountant's erroneous advice about a filing deadline excuses an untimely return is a question of reasonableness. If the reliance was reasonable, then the failure to meet the deadline is excused. Some courts have held that it is *per se* unreasonable to rely on professional advice in determining when a return is due. *See, e.g., Estate of Kerber v. United States,* 717 F.2d 454, 455 (8th Cir.1983) (*per curiam*) (holding that "[t]he executor or executrix has a personal and nondelegable duty to file a timely return, and reliance on the mistaken advice of counsel is not sufficient to constitute 'reasonable cause' for failing to fulfill that duty" (quoting *Boeving v. United States,* 650 F.2d 493, 495 (8th Cir.1981) (quotation marks omitted)). A few courts have found situations where calculation of the filing deadline was so complicated that reliance on professional help was reasonable. *See, e.g., Sanderling, Inc. v. Comm'r,* 571 F.2d 174, 178-79 (3d Cir.1978) (holding that corporation "necessarily relied on [its accountant's] professional competence" when corporate circumstances changed the return due date and "[t]he new due date was not readily determinable"). The Ninth Circuit, in *dictum,* has characterized *Boyle* as holding that "a taxpayer's failure to file a timely return, in reliance upon an attorney's advice did not constitute 'reasonable cause' under § 6651(a)(1)." *Church of Scientology of Cal. v. Comm'r,* 823 F.2d 1310, 1322 (9th Cir.1987) (citing *Boyle,* 469 U.S. at 251-52).

Post-*Boyle,* district courts in the Ninth Circuit have either adopted a *per se* rule or have found that reasonable cause does not exist in the quotidian situation where a taxpayer relies on the erroneous advice of an accountant or attorney about a due date. *See Baccei v. United States,* No. C 07-5329 PJH, 2008 WL 2561876, at *11 (N.D.Cal. June 26, 2008) (holding that the plaintiff was responsible for his accountant's error because there was no evidence that the accountant gave the plaintiff "substantive advice on a debatable position"); *Ellis v. United States,* No. CV 91-737 H(M), 1992 WL 199220, at * 1 (S.D.Cal. May 12, 1992) (finding that "the plaintiff's reliance on the attorney to determine the due date was not reasonable"); *United States v. Blumberg,* No. CV-84-2401-CBM, 1985 WL

6353, at *4 (C.D.Cal. July 10, 1985) (holding that reliance on an attorney's erroneous advice about the return filing deadline did not constitute the legal advice contemplated by *Boyle* and thus was not reasonable cause); *Constantino v. United States,* No. C-84-6838 SC, 1985 WL 6399, at *2 (N.D.Cal. Apr.19, 1985) (finding "most persuasive the line of authority holding that a taxpayer does not demonstrate reasonable cause when he or she, on the advice of his [or her] accountant or attorney, files a return after the actual due date but within the time the advisor erroneously told the taxpayer was available").

In this case, the Court need not determine whether a *per se* rule is appropriate because it is clear that the reliance at issue does not constitute reasonable cause. Here, the statute and forms are neither ambiguous nor particularly complex. The two-page application and two-page attachment (Def.'s Evid.App., Ex. 2) plainly indicate that the extension of time to file a return was for six months only and that the 12-month extension was for paying the tax. *See Boyle,* 469 U.S. at 251 ("[R]eliance cannot function as a substitute for compliance with an unambiguous statute."). The extension form is distinctly divided into separate sections for an "Extension of Time To File" and an "Extension of Time To Pay." (Def.'s Evid.App., Ex. 1.) The extension of time to file section, which is checked, states in no uncertain terms that it is for six months. The only possible ambiguity that Plaintiff identifies is a parenthetical reference to "Section 6081," *i.e.,* I.R.C. § 6081, at the end of the "Extension of Time To Pay" heading. This statute, however, does not contradict the information printed on the application itself. Section 6081 simply and straightforwardly explains that a reasonable extension of time for filing any return is available, though not to exceed six months unless the taxpayer is abroad. Thus, contrary to Plaintiff's assertion at oral argument, the application form was clear on its face that the extension of time to file a return was for six months and no additional "research" needed to be done to ascertain that deadline.

In addition, Plaintiff had actual or constructive notice of the proper filing deadline notwithstanding Burns' incorrect statements in that regard. Plaintiff received and briefly looked at a copy of the extension application a few days after Burns sent it to the IRS. The IRS sent Burns a copy of the approved application.[5] The approved copy stated that "[t]he application for *extension of* **time to pay** (Part IV) is: Approved TO 8/30/2007 only." (Def.'s Evid.App., Ex. 2 at 2; emphasis added.) *Cf. Church of Scientology,* 823 F.2d at 1322 (holding that "a taxpayer's failure to file the proper form, in reliance upon an attorney's advice is not 'reasonable cause' where the IRS has expressly instructed the taxpayer to file a tax return"). Finally, there is no evidence that Plaintiff specifically sought advice from Burns about the filing deadline. (*See*

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[5] Burns was serving as Plaintiff's delegated agent insofar as he was performing nonlegal functions such as sending and receiving communications with the IRS.

Def.'s SUF ¶ 50 ("Burns has no recollection of Knappe questioning him about the extension application.").)

Plaintiff takes issue with language in *Baccei,* a case currently on appeal to the Ninth Circuit, that a taxpayer's reliance must concern "substantive advice on a debatable position." 2008 WL 2561876, at * 11. Defendant argues that this language does not reflect the holding in *Boyle.* The phrase "substantive advice" derives from *Boyle* and is significant. *Boyle* establishes two exceptions to a taxpayer's general liability for mistakes concerning a filing deadline. The first, not at issue here, is when the taxpayer's tardiness results from circumstances beyond his or her control, such as when disability renders the taxpayer unable to exercise "ordinary business care and prudence." *Id.* at 248 n. 6.

The second exception is "[w]hen an accountant or attorney advises a taxpayer on a matter of tax law, such as whether a liability exists." *Id.* at 251. The Supreme Court stressed that this exception can only be invoked because "[m]ost taxpayers are not competent to discern error in the *substantive* advice of an accountant or attorney." *Id.* (emphasis added). Therefore, "it is reasonable for the taxpayer to rely on that advice." *Id.* The converse is that it is unreasonable for a taxpayer to rely on the advice of an accountant or attorney where the taxpayer is competent to discern error in the advice. As discussed, *supra,* this case presents precisely this scenario. Plaintiff admits that he would have understood the key sentences on the instructions to the extension form in 2006. (Knappe

Depo. at 72:19-74:25, Ex. 7 at 2.) These sentences explain that an executor may apply for an automatic six-month extension to file a return, which is the maximum extension available unless the executor is out of the country. (*Id.*) It was not reasonable for Plaintiff to rely on Burns' representations to the contrary.[6]

With respect to the language in *Baccei* that the taxpayer's reliance must concern a "debatable position," Defendant is correct that it is not found in *Boyle*. It is unclear whether *Baccei* intended this phrase to incrementally extend *Boyle* or merely to reflect that the advice must concern a matter inscrutable to the ordinary taxpayer. In either case, the Court need not and does not adopt it.

Plaintiff relies heavily on *Estate of La Meres v. Commissioner,* 98 T.C. 294, 1992 WL 54258 (1992). *La Meres* recognized that although courts in general have differed over the issue, "the Tax Court has consistently held that erroneous legal advice with respect to the date on which a return must be filed

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[6] Plaintiff argues that informal publications by the IRS, such as instructions to tax forms, are not authoritative sources of law and are thus irrelevant. (Opp'n at 21-22.) The Court does not point out Plaintiff's ability to understand the two sentences from the instructions on the application form as a suggestion that Plaintiff should have relied on them. Rather, the Court observes that the instructions accurately reflected the law with respect to deadlines and extensions and that Plaintiff had the ability to understand the issues such that he could have questioned his tax advisor's advice.

can constitute reasonable cause for failure to file timely a return if such reliance was reasonable under the circumstances." *Id.* at 318. *La Meres* then found that – under the circumstances of that case – the taxpayer had shown reasonable cause. Under the circumstances of this case, however, Plaintiff has not shown reasonable cause,[7] and the Court need not resolve whether the case-by-case approach applied by *La Meres* is correct.

B. *No Disputed Issues Of Material Fact Preclude Summary Judgment*

At the hearing, Plaintiff cited *Eid v. Alaska Airlines, Inc.,* 621 F.3d 858, 2010 WL 2977727 (9th Cir. July 30, 2010), in arguing that the existence of "reasonable cause" is a factual question for a jury. *See id.* at *7 ("[S]ummary judgment is generally an inappropriate way to decide questions of reasonableness because the jury's unique competence in

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[7] Defendant attempts to distinguish *La Meres* as involving questions of law regarding the availability of a second time extension. (Reply at 8.) It may be that *La Meres* can be explained by a difference in facts. It involved an "extremely complex" estate. 98 T.C. at 304. In addition, it appears that there was no evidence in *La Meres* that the taxpayer could have understood the law regarding time extensions. Regardless of whether *La Meres* is factually distinguishable from the instant case, however, it is not binding precedent. Moreover, to the extent it holds that reliance on advice about a deadline is generally good cause, *La Meres* is at odds with the weight of authority in this Circuit.

applying the reasonable man standard is thought ordinarily to preclude summary judgment." (quoting *Gorman v. Wolpoff & Abramson, LLP,* 584 F.3d 1147, 1157(9th Cir.2009) (quotation marks omitted)). As Plaintiff concedes, the *Eid* case did not arise in a context analogous to this one. In contrast, the Supreme Court's summation in *Boyle* of whether "reasonable cause" constitutes a triable issue of fact is instructive. According to *Boyle,* the view that "reasonable cause" is a question of fact "is not entirely correct." *Boyle,* 469 U.S. at 249 n. 8. "Whether 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." *Id.*

Here, there is no dispute as to the presence of any particular elements (or purported elements) of reasonable cause. This controversy concerns the elements that are necessary to constitute reasonable cause-in particular, whether a taxpayer can rely on an advisor for *any* tax advice, including the determination of a straightforward filing deadline, or whether the taxpayer can only reasonably rely on an advisor for tax advice about *substantive* matters. This Court's conclusion that it is the latter resolves the question of law. Courts routinely decide this issue on summary judgment. *See, e.g., Baccei,* 2008 WL 2561876, at * 11; *Ellis,* 1992 WL 199220, at * 1; *Constantino,* 1985 WL 6399, at *2.

As in any summary judgment motion, Defendant bears the burden of demonstrating that there are no triable issues of material fact-and it has done that here. The Court finds that the extension application form is clear and unambiguous on its face regarding the length of the extension to file a return (*i.e.,* six months) and Plaintiff acknowledged that he understood the words on the application form.

Plaintiff's remaining arguments lack merit or are immaterial. The Court need not decide if Burns was an "advisor" rather than an "agent." Whether advice about a tax deadline qualifies as a "substantive" matter of tax law is not, as Plaintiff contends, a factual question for the jury to decide given the undisputed material facts in this case.

Although Defendant does not address willful neglect, Plaintiff must establish a triable issue of fact as to reasonable cause in order to avoid summary judgment. He has failed to do so. Thus, even assuming that Plaintiff's delayed filing was not willful neglect (an assumption that appears to be supported by the undisputed factual record), Defendant is entitled to summary judgment because it has established that Plaintiff lacked reasonable cause.

V.

CONCLUSION

In light of the foregoing, Defendant's Motion for Summary Judgment is GRANTED. Based on Defendant's admission that the IRS erroneously computed the failure-to-file penalty, Plaintiff is entitled to a judgment in the amount of $49,103.65 plus statutory interest and costs of suit.

IT IS SO ORDERED.

26 U.S.C. § 6651. Failure to file tax return or to pay tax

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

(1) to file any return required under authority of subchapter A of chapter 61 (other than part III thereof), subchapter A of chapter 51 (relating to distilled spirits, wines, and beer), or of subchapter A of chapter 52 (relating to tobacco, cigars, cigarettes, and cigarette papers and tubes), or of subchapter A of chapter 53 (relating to machine guns and certain other firearms), on the date prescribed therefor (determined with regard to any extension of time for filing), 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;

(2) to pay the amount shown as tax on any return specified in paragraph (1) on or before the date prescribed for payment of such tax (determined with regard to any extension of time for payment), 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 shown as tax on such return 0.5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 0.5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate; or

(3) to pay any amount in respect of any tax required to be shown on a return specified in paragraph (1) which is not so shown (including an assessment made pursuant to section 6213(b)) within 21 calendar days from the date of notice and demand therefor (10 business days if the amount for which such notice and demand is made equals or exceeds $100,000), 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 of tax stated in such notice and demand 0.5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 0.5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate.

In the case of a failure to file a return of tax imposed by chapter 1 within 60 days of the date prescribed for filing of such return (determined with regard to any extensions of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, the addition to tax under paragraph (1) shall not be less than the lesser of $135 or 100 percent of the amount required to be shown as tax on such return.

(b) Penalty imposed on net amount due. – For purposes of –

(1) subsection (a)(1), the amount of tax required to be shown on the return shall be reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax and by the amount of any credit against the tax which may be claimed on the return,

(2) subsection (a)(2), the amount of tax shown on the return shall, for purposes of computing the addition for any month, be reduced by the amount of any part of the tax which is paid on or before the beginning of such month and by the amount of any credit against the tax which may be claimed on the return, and

(3) subsection (a)(3), the amount of tax stated in the notice and demand shall, for the purpose of computing the addition for any month, be reduced by the amount of any part of the tax which is paid before the beginning of such month.

(c) Limitations and special rule. –

(1) Additions under more than one paragraph. – With respect to any return, the amount of the addition under paragraph (1) of subsection (a) shall be reduced by the amount of the addition under paragraph (2) of subsection (a) for any month (or fraction thereof) to which an addition to tax applies under both paragraphs (1) and (2). In any case described in the last sentence of subsection (a), the amount of the addition under paragraph (1) of subsection (a) shall not be reduced under the preceding sentence below the amount provided in such last sentence.

(2) Amount of tax shown more than amount required to be shown. – If the amount required to be shown as tax on a return is less than the amount shown as tax on such return, subsections (a)(2) and (b)(2) shall be applied by substituting such lower amount.

(d) Increase in penalty for failure to pay tax in certain cases. –

(1) In general. – In the case of each month (or fraction thereof) beginning after the day described in paragraph (2) of this subsection, paragraphs (2) and (3) of subsection (a) shall be applied by substituting "1 percent" for "0.5 percent" each place it appears.

(2) Description. – For purposes of paragraph (1), the day described in this paragraph is the earlier of –

(A) the day 10 days after the date on which notice is given under section 6331(d), or

(B) the day on which notice and demand for immediate payment is given under the last sentence of section 6331(a).

(e) Exception for estimated tax. – This section shall not apply to any failure to pay any estimated tax required to be paid by section 6654 or 6655.

(f) Increase in penalty for fraudulent failure to file. – If any failure to file any return is fraudulent, paragraph (1) of subsection (a) shall be applied –

(1) by substituting "15 percent" for "5 percent" each place it appears, and

(2) by substituting "75 percent" for "25 percent".

(g) Treatment of returns prepared by Secretary under section 6020(b). – In the case of any return made by the Secretary under section 6020(b) –

(1) such return shall be disregarded for purposes of determining the amount of the addition under paragraph (1) of subsection (a), but

(2) such return shall be treated as the return filed by the taxpayer for purposes of determining the amount of the addition under paragraphs (2) and (3) of subsection (a).

(h) Limitation on penalty on individual's failure to pay for months during period of installment agreement. – In the case of an individual who files a return of tax on or before the due date for the return (including extensions), paragraphs (2) and (3) of subsection (a) shall each be applied by substituting "0.25" for "0.5" each place it appears for purposes of determining the addition to tax for any month during which an installment agreement under section 6159 is in effect for the payment of such tax.

26 C.F.R. § 301.6651-1 Failure to file tax return or to pay tax.

(a) Addition to the tax – (1) Failure to file tax return. In case of failure to file a return required under authority of –

(i) Subchapter A, chapter 61 of the Code, relating to returns and records (other than sections 6015 and 6016, relating to declarations of estimated tax, and part III thereof, relating to information returns);

(ii) Subchapter A, chapter 51 of the Code, relating to distilled spirits, wines, and beer;

(iii) Subchapter A, chapter 52 of the Code, relating to cigars, cigarettes, and cigarette papers and tubes; or

(iv) Subchapter A, chapter 53 of the Code, relating to machine guns, destructive devices, and certain other firearms; and

The regulations thereunder, on or before the date prescribed for filing (determined with regard to any extension of time for such filing), there shall be added to the tax required to be shown on the return the amount specified below unless the failure to file the return within the prescribed time is shown to the satisfaction of the district director or the director of the service center to be due to reasonable cause and not to willful neglect. The amount to be added to the tax is 5 percent thereof if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which the failure continues, but not to exceed 25 percent in the aggregate. The amount of any addition under this subparagraph shall be reduced by the amount of the addition under subparagraph (2) of this paragraph for any month to which an addition to tax applies under both subparagraphs (1) and (2) of this paragraph (a).

(2) Failure to pay tax shown on return. In case of failure to pay the amount shown as tax on any return (required to be filed after December 31, 1969, without regard to any extension of time for filing thereof) specified in subparagraph (1) of this paragraph (a), on or before the date prescribed for payment of such tax (determined with regard to any extension of time for payment), there shall be added to the tax shown on the return the amount specified below unless the failure to pay the tax within the prescribed time is shown to the satisfaction of the district director, or, as provided in paragraph (a) of this section, the Assistant Regional Commissioner (Alcohol, Tobacco and Firearms), the director of the service center, to be due to reasonable cause and not to willful neglect. Except as provided in paragraph (a)(4) of this section, the amount to be added to the tax is 0.5 percent of the amount of tax shown on the return if the failure is for not more than 1 month, with an additional 0.5 percent for each additional month or fraction thereof during which the failure continues, but not to exceed 25 percent in the aggregate.

(3) Failure to pay tax not shown on return. In the case of failure to pay any amount of any tax required to be shown on a return specified in paragraph (a)(1) of this section that is not so shown (including an assessment made pursuant to section 6213(b)) within 21 calendar days from the date of the notice and demand (10 business days if the amount assessed and shown on the notice and demand equals or exceeds $100,000) with respect to any notice and demand made after December 31, 1996, there will be added to the amount stated in the notice and demand the amount specified below unless the failure to pay the tax within the prescribed time is shown to the satisfaction of the district director or the director of the service center to be due to reasonable cause and not to willful neglect. Except as provided in paragraph (a)(4) of this section, the amount to be added to the tax is 0.5 percent of the amount stated in the notice and demand if the failure is for not more than 1 month, with an additional 0.5 percent for each additional month or fraction thereof during which the failure continues, but not to exceed 25 percent in the aggregate. For purposes of this paragraph (a)(3), see § 301.6601-1(f)(5) for the definition of calendar day and business day.

(4) Reduction of failure to pay penalty during the period an installment agreement is in effect – (i) In general. In the case of a return filed by an individual on or before the due date for the return (including extensions) –

(A) The amount added to tax for a month or fraction thereof is determined by using 0.25 percent instead of 0.5 percent under paragraph (a)(2) of this section if at any time during the month an installment agreement under section 6159 is in effect for the payment of such tax; and

(B) The amount added to tax for a month or fraction thereof is determined by using 0.25 percent instead of 0.5 percent under paragraph (a)(3) of this section if at any time during the month an installment agreement under section 6159 is in effect for the payment of such tax.

(ii) Effective date. This paragraph (a)(4) applies for purposes of determining additions to tax for months beginning after December 31, 1999.

(b) Month defined. (1) If the date prescribed for filing the return or paying tax is the last day of a calendar month, each succeeding calendar month or fraction thereof during which the failure to file or pay tax continues shall constitute a month for purposes of section 6651.

(2) If the date prescribed for filing the return or paying tax is a date other than the last day of a calendar month, the period which terminates with the date numerically corresponding thereto in the succeeding calendar month and each such successive period shall constitute a month for purposes of section 6651. If, in the month of February, there is no date corresponding to the date prescribed for filing the return or paying tax, the period from such date in January through the last day of February shall constitute a month for purposes of section 6651. Thus, if a return is due on January 30, the first month shall end on February 28 (or 29 if a leap year), and the succeeding months shall end on March 30, April 30, etc.

(3) If a return is not timely filed or tax is not timely paid, the fact that the date prescribed for filing the return or paying tax, or the corresponding date in any succeeding calendar month, falls on a Saturday, Sunday, or a legal holiday is immaterial in determining the number of months for which the addition to the tax under section 6651 applies.

(c) Showing of reasonable cause. **(1)** Except as provided in subparagraphs (3) and (4) of this paragraph (b),[1] a taxpayer who wishes to avoid the addition to the tax for failure to file a tax return or pay tax must make an affirmative showing of all facts alleged as a reasonable cause for his failure to file such return or pay such tax on time in the form of a written statement containing a declaration that it is made under penalties of perjury. Such statement should be filed with the district director or the director of the service center with whom the return is required to be filed; *Provided,* That where special tax returns of liquor dealers are delivered to an alcohol, tobacco and firearms officer working under the supervision of the Regional Director, Bureau of Alcohol, Tobacco and Firearms, such statement may be delivered with the return. If the district director, the director of the service center, or, where applicable, the

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[1] So in original; probably should read "subparagraphs (3) and (4) of this paragraph (c)".

Regional Director, Bureau of Alcohol, Tobacco and Firearms, determines that the delinquency was due to a reasonable cause and not to willful neglect, the addition to the tax will not be assessed. If the 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. 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. In determining whether the taxpayer was unable to pay the tax in spite of the exercise of ordinary business care and prudence in providing for payment of his tax liability, consideration will be given to all the facts and circumstances of the taxpayer's financial situation, including the amount and nature of the taxpayer's expenditures in light of the income (or other amounts) he could, at the time of such expenditures, reasonably expect to receive prior to the date prescribed for the payment of the tax. Thus, for example, a taxpayer who incurs lavish or extravagant living expenses in an amount such that the remainder of his assets and anticipated income will be insufficient to pay his tax, has not exercised ordinary business care and prudence in providing for the payment of his tax liability. Further, a taxpayer who invests funds in speculative or illiquid assets has not exercised ordinary business care and prudence in providing for the payment of his tax liability unless, at the time of the investment, the remainder of the taxpayer's assets and estimated income will be sufficient to pay his tax or it can be reasonably foreseen that the speculative or illiquid investment made by the taxpayer can be utilized (by sale or as security for a loan) to realize sufficient funds to satisfy the tax liability. A taxpayer will be considered to have exercised ordinary business care and prudence if he made reasonable efforts to conserve sufficient assets in marketable form to satisfy his tax liability and nevertheless was unable to pay all or a portion of the tax when it became due.

(2) In determining if the taxpayer exercised ordinary business care and prudence in providing for the payment of his tax liability, consideration will be given to the nature of the tax which the taxpayer has failed to pay. Thus, for example, facts and circumstances which, because of the taxpayer's efforts to conserve assets in marketable form, may constitute reasonable cause for nonpayment of income taxes may not constitute reasonable cause for failure to pay over taxes described in section 7501 that are collected or withheld from any other person.

(3) If, for a taxable year ending on or after December 31, 1995, an individual taxpayer satisfies the requirement of § 1.6081-4(a) of this chapter (relating to automatic extension of time for filing an individual income tax return), reasonable cause will be presumed, for the period of the extension of time to file, with respect to any underpayment of tax if –

(i) The excess of the amount of tax shown on the individual income tax return over the amount of tax paid on or before the regular due date of the return (by virtue of tax withheld by the employer, estimated tax payments, and any payment with an application for extension of time to file pursuant to § 1.6081-4 of this chapter) is no greater than 10 percent of the amount of tax shown on the individual income tax return; and

(ii) Any balance due shown on the individual income tax return is remitted with the return.

(4) If, for a taxable year ending on or after December 31, 1972, a corporate taxpayer satisfies the requirements of § 1.6081-3(a) (relating to an automatic extension of time for filing a corporation income tax return), reasonable cause shall be presumed, for the period of the extension of time to file, with respect to any underpayment of tax if –

(i) The amount of tax (determined without regard to any prepayment thereof) shown on Form 7004, or the amount of tax paid on or before the regular due date of the return, is at least 90 percent of the amount of tax shown on the taxpayer's Form 1120, and

(ii) Any balance due shown on the Form 1120 is paid on, or before the due date of the return, including any extensions of time for filing.

(d) Penalty imposed on net amount due – (1) Credits against the tax. The amount of tax required to be shown on the return for purposes of section 6651(a)(1) and the amount shown as tax on the return for purposes of section 6651(a)(2) shall be reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax and by the amount of any credit against the tax which may be claimed on the return.

(2) Partial payments. (i) The amount of tax required to be shown on the return for purposes of section 6651(a)(2) shall, for the purpose of computing the addition for any month, be reduced by the amount of any part of the tax which is paid after the date prescribed for payment and on or before the first day of such month.

(ii) The amount of tax stated in the notice and demand for purposes of section 6651(a)(3) shall, for the purpose of computing the addition for any month, be reduced by the amount of any part of the tax which is paid before the first day of such month.

(e) No addition to tax if fraud penalty assessed. No addition to the tax under section 6651 shall be assessed with respect to an underpayment of tax if a 50-percent addition to the tax for fraud is assessed with respect to the same underpayment under section 6653(b). See section 6653(d).

(f) Examples. The provisions of this section may be illustrated by the following examples:

Example 1. (a) Under section 6072(a), income tax returns of individuals on a calendar year basis must be filed on or before the 15th day of April following the close of the calendar year. Assume an individual filed his income tax return for the calendar year 1969 on July 20, 1970, and the failure to file on or before the prescribed date is not due to reasonable cause. The tax shown on the return is $800 and a deficiency of $200 is subsequently assessed, making the tax required to be shown on the return, $1,000. Of this amount, $300 has been paid by withholding from wages and $400 has been paid as estimated tax. The balance due as shown on the return of $100 ($800 shown as tax on the return less $700 previously paid) is paid on August 21, 1970. The failure to pay on or before the prescribed date is not due to reasonable cause. There will be imposed, in addition to interest, an additional amount under section 6651(a)(2) of $2.50, which is 2.5 percent (2% for the 4 months from April 16 through August 15, and 0.5% for the fractional part of the month from August 16 through August 21) of the net amount due as shown on the return of $100 ($800 shown on the return less $700 paid on or before April 15). There will also be imposed an additional amount under section 6651(a)(1) of $58, determined as follows:

20 percent (5% per month for the 3 months from April 16 through July 15 and 5% for the fractional part of the month from July 16 through July 20) of the net amount due of $300 ($1,000 required to be shown on the return less $700 paid on or before April 15)	$60

Reduced by the amount of the addition imposed under section 6651(a)(2) for those months	2
Addition to tax under section 6651(a)(1)	$50

(b) A notice and demand for the $200 deficiency is issued on January 8, 1971, but the taxpayer does not pay the deficiency until December 23, 1971. In addition to interest there will be imposed an additional amount under section 6651(a)(3) of $10, determined as follows:

Addition computed without regard to limitation:	
6 percent (5 1/2% for the 11 months from January 19, 1971, through December 18, 1971, and 0.5% for the fractional part of the month from December 19 through December 23) of the amount stated in the notice and demand ($200)	$12
Limitation on addition:	
25 percent of the amount stated in the notice and demand ($200)	$50
Reduced by the part of the addition under section 6651(a)(1) for failure to file attributable to the $200 deficiency (20% of $200)	$40
Maximum amount of the addition under section 6651(a)(3)	$10

Example 2. An individual files his income tax return for the calendar year 1969 on December 2, 1970,

and such delinquency is not due to reasonable cause. The balance due, as shown on the return, of $500 is paid when the return is filed on December 2, 1970. In addition to interest and the addition for failure to pay under section 6651(a)(2) of $20 (8 months at 0.5% per month, 4%), there will also be imposed an additional amount under section 6651(a)(1) of $112.50, determined as follows:

Penalty at 5 percent for maximum of 5 months, 25 percent of $500	$125.00
Less reduction for the amount of the addition under section 6651(a)(2):	
Amount imposed under section 6651(a)(2) for the months in which there is also an addition for failure to file – 2 ½ percent for the 5 months April 16 through September 15 of the net amount due ($500)	12.50
Addition to tax under section 6651(a)(1)	$112.50

(g) Treatment of returns prepared by the Secretary – (1) In general. A return prepared by the Secretary under section 6020(b) will be disregarded for purposes of determining the amount of the addition to tax for failure to file any return pursuant to paragraph (a)(1) of this section. However, the return prepared by the Secretary will be treated as a return filed by the taxpayer for purposes of determining the amount of the addition to tax for failure to pay the tax shown on any return and for failure to pay the tax required to be shown on a return that is not so shown pursuant to paragraphs (a)(2) and (3) of this section, respectively.

(2) Effective date. This paragraph (g) applies to returns the due date for which (determined without regard to extensions) is after July 30, 1996.