

Notes

Reasonable Cause for the Late Filing of Estate Tax Returns

If a federal estate tax return is required, it must be filed within nine months of the decedent's death.¹ A late return is subject to penalties based on the amount of tax and length of delay.² Fines will be imposed unless the taxpayer establishes that the delinquency was due to reasonable cause, and not to willful neglect.³ Although the executor is technically responsible for filing,⁴ his attorney generally prepares and mails the return.⁵ Thus, a dilatory lawyer may find himself faced with an outraged executor on one hand and penalties that exceed his fees on the other. In order to avoid a possible malpractice suit, the legal representative may decide to assume

¹"Returns made under section 6018(a) . . . shall be filed within 9 months after the date of the decedent's death." I.R.C. § 6075(a). Prior law required that an estate tax return be filed within 15 months after the date of death. Int. Rev. Code of 1954, ch. 61, § 6075(a), 68A Stat. 751.

"In all cases where the gross estate at the death of a resident or citizen exceeds \$175,000, the executor shall make a return with respect to the estate tax . . ." Tax Reform Act of 1976, Pub. L. No. 94-455, § 2001(c)(1)(J), 90 Stat. 1520. The current section relates to decedents dying after December 31, 1976, with transitional requirements of filing an estate tax return if the gross estate exceeds \$120,000, \$134,000, \$147,000, or \$161,000 for decedents dying in 1977, 1978, 1979, and 1980 respectively. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2001(c)(1)(J), 90 Stat. 1520. Prior law required the filing of an estate tax return if the gross estate exceeded \$60,000. Int. Rev. Code of 1954, ch. 61, § 6018(a), 68A Stat. 739. All cases discussed herein involve the prior law because no cases have been reported since the effective date of the current law.

²If a return is delinquent, a penalty of 5% per month (or fraction thereof) may be imposed to a maximum of 25% of the net estate tax. I.R.C. § 6651(a)(1). In *Estate of Krampf v. Commissioner*, 56 T.C. 293 (1971), *aff'd per curiam*, 72-2 U.S. Tax Cas. 86,079 (3d Cir. 1972), the court stated that the penalty should be based on the correct tax liability, rather than on the amount of tax shown on the return (citing *Fisher v. Commissioner*, 50 T.C. 164 (1968)). In *Krampf*, the return was filed 12 days late and the taxpayer introduced no evidence on the issue of reasonable cause.

The failure to file penalty is reduced to 4½% per month if a failure to pay penalty is also in effect for the period. Treas. Reg. § 301.6651-1, T.D. 7133, 1971-2 C.B. 415.

The failure to pay penalty is ½% each month (or fraction thereof) to a maximum of 25% I.R.C. § 6651(a)(2).

³I.R.C. § 6651(a)(1), (2).

⁴See note 1 *supra*. "The term 'executor' . . . means the executor or administrator of the decedent, or, if there is no executor or administrator appointed, qualified, and acting within the United States, then any person in actual or constructive possession of any property of the decedent." I.R.C. § 2203.

⁵See, e.g., *United States v. Kroll*, 547 F.2d 393 (7th Cir. 1977); *Estate of Campbell v. United States*, 77-2 U.S. Tax Cas. 88,665 (D.N.J. Oct. 12, 1977); *Richter v. United States*, 77-2 U.S. Tax Cas. 88,649 (D. Minn. Oct. 3, 1977).

the liability for the penalties himself. Therefore, the methods of eliminating that extra expense are of interest.

Penalties for late filing may be avoided in four ways. First, a complete return can be filed by the original due date.⁶ Second, an extension of time may be obtained and a complete return filed before the expiration thereof.⁷ Third, a return as complete as possible can be filed within the above periods.⁸ Finally, no penalty will be imposed if reasonable cause for late filing is established. This discussion will focus on the circumstances which do or do not constitute sufficient reason for delinquency according to the courts that have examined the issue.⁹

Reasonable cause has been defined as the exercise of ordinary

⁶Estate tax returns that are timely mailed (as indicated by the postmark) are considered filed on the day mailed. See I.R.C. § 7502. If a return is mailed after the due date, however, it is not filed until it is received by the Internal Revenue Service. Rev. Rul. 73-133, 1973-1 C.B. 605. Thus, if a return was due on December 14, was mailed on January 13, and was received on January 15, the return would be treated as over one month late and a 10% penalty would be incurred unless reasonable cause for the delay was shown.

⁷I.R.C. § 6081(a).

⁸If in any case the executor is unable to make a complete return as to any part of the gross estate, he is required to give all of the information he has as to such property, including a full description, and the name of every person holding a legal or beneficial interest in the property.

Treas. Reg. § 20.6018-2 (1958).

⁹This Note will examine all decisions rendered prior to January 1, 1978, involving I.R.C. § 6651 and estate tax returns. The opinions in *Estate of Krampf v. Commissioner*, 56 T.C. 293 (1971), *aff'd per curiam*, 72-2 U.S. Tax Cas. 86,079 (3d Cir. 1972) (see note 2 *supra*), and *Estate of Rackett v. Commissioner*, 35 T.C.M. (CCH) 530 (1976), are the only ones involving I.R.C. § 6651 and estate tax in which reasonable cause was not alleged by the taxpayer. In *Estate of Rackett*, the estate was assessed penalties based upon the amount of tax shown on the return. Such amount was paid by check with a written statement that said check constituted satisfaction of all liability. After an audit, additional tax and penalties on that deficiency were determined and a statutory notice was sent to the taxpayer. The personal representative contended that the Internal Revenue Service could not increase the tax and penalties after the original billing. The court found that the actions taken by the government were permissible.

In addition, the Internal Revenue Service has administratively determined that in certain circumstances no penalties will be imposed if: (1) A return is mailed within the time for filing, but is received by Internal Revenue after the due date; (2) a return is mailed timely to the wrong district; (3) a failure to file is caused by erroneous information from an Internal Revenue Service employee; (4) the failure is due the unavoidable absence of the taxpayer; (5) fire or other casualty destroys the taxpayer's place of business or business records; (6) the taxpayer demonstrates an inability to obtain the necessary forms from Internal Revenue; (7) the taxpayer personally visits an Internal Revenue office and through no fault of his own is unable to meet with an Internal Revenue Service representative; or (8) a failure to file is caused by death or serious illness of the taxpayer or serious illness in his immediate family. INTERNAL REVENUE SERVICE, INTERNAL REVENUE MANUAL § 4562.2 (1976).

business care and prudence.¹⁰ An absence of willful neglect is not adequate.¹¹ Imposition of the penalty is mandatory unless satisfactory reasons for delay are shown.¹² Whether certain circumstances are sufficient is a question of fact,¹³ and the executor has the burden of proof¹⁴ by a preponderance of the evidence.¹⁵

The most often raised question in this context is whether reliance on counsel constitutes reasonable cause. This issue will be

¹⁰Treas. Reg. § 301.6651-1, T.D. 7133, 1971-2 C.B. 415. See also *Northwestern Nat'l Bank v. United States*, 72-2 U.S. Tax Cas. 86,006 (D.S. Dak. 1972); *Pfeiffer v. United States*, 315 F. Supp. 392 (E.D. Cal. 1970); *James v. United States*, 65-1 U.S. Tax Cas. 95,601 (E.D. Va. 1964); *Estate of Duttonhofer v. Commissioner*, 49 T.C. 200 (1967), *aff'd per curiam*, 410 F.2d 302 (6th Cir. 1969); *Estate of Mayer v. Commissioner*, 43 T.C. 403 (1964), *aff'd per curiam*, 351 F.2d 617 (2d Cir. 1965), *cert. denied*, 383 U.S. 935 (1966); *Estate of DeVos v. Commissioner*, 34 T.C.M. (CCH) 933 (1975); *Estate of Klein v. Commissioner*, 34 T.C.M. (CCH) 567 (1975); *Estate of Moesch v. Commissioner*, 33 T.C.M. (CCH) 1271 (1974); *Estate of Crute v. Commissioner*, 33 T.C.M. (CCH) 1073 (1974); *Estate of Geraci v. Commissioner*, 32 T.C.M. 424 (1973), *aff'd per curiam*, 502 F.2d 1148 (6th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975); *Estate of Plotkin v. Commissioner*, 31 T.C.M. (CCH) 1011 (1972); *Estate of Lewis v. Commissioner*, 22 T.C.M. (CCH) 1732 (1963).

¹¹*Estate of Klein v. Commissioner*, 34 T.C.M. (CCH) 567 (1975); *Estate of Moesch v. Commissioner*, 33 T.C.M. (CCH) 1271 (1974); *Estate of Crute v. Commissioner*, 33 T.C.M. (CCH) 1073 (1974); *Estate of Geraci v. Commissioner*, 32 T.C.M. (CCH) 424 (1973), *aff'd per curiam*, 502 F.2d 1148 (6th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975); *Estate of Plotkin v. Commissioner*, 31 T.C.M. (CCH) 1011 (1972); *Estate of Lewis v. Commissioner*, 22 T.C.M. (CCH) 1732 (1963).

¹²*Estate of Hollenbeck v. United States*, 72-2 U.S. Tax Cas. 86,109 (D. Col. 1972); *Estate of Geraci v. Commissioner*, 32 T.C.M. (CCH) 424 (1973); *aff'd per curiam*, 502 F.2d 1148 (6th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975).

¹³*Giesen v. United States*, 369 F. Supp. 33 (W.D. Wis. 1973); *Estate of Duttonhofer v. Commissioner*, 49 T.C. 200 (1967), *aff'd per curiam*, 410 F.2d 302 (6th Cir. 1969); *Estate of Crute v. Commissioner*, 33 T.C.M. (CCH) 1073 (1974); *Estate of Bradley v. Commissioner*, 33 T.C.M. (CCH) 70 (1974), *aff'd*, 511 F.2d 527 (6th Cir. 1975); *Estate of Geraci v. Commissioner*, 32 T.C.M. (CCH) 424 (1973), *aff'd per curiam*, 502 F.2d 1148 (6th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975); *Estate of Plotkin v. Commissioner*, 31 T.C.M. (CCH) 1011 (1972); *Estate of Lewis v. Commissioner*, 22 T.C.M. (CCH) 1732 (1963).

¹⁴*United States v. Mize*, 73-1 U.S. Tax Cas. 81,303 (C.D. Cal. 1972); *Northwestern Nat'l Bank v. United States*, 72-2 U.S. Tax Cas. 86,006 (D.S. Dak. 1972); *Pfeiffer v. United States*, 315 F. Supp. 392 (E.D. Cal. 1970); *James v. United States*, 65-1 U.S. Tax Cas. 95,601 (E.D. Va. 1964); *Estate of Klein v. Commissioner*, 34 T.C.M. (CCH) 567 (1975); *Estate of Crute*, 33 T.C.M. (CCH) 1073 (1974); *Estate of Plotkin v. Commissioner*, 31 T.C.M. (CCH) 1011 (1972); *Estate of Pridmore v. Commissioner*, 20 T.C.M. (CCH) 47 (1961).

¹⁵*United States v. Mize*, 73-1 U.S. Tax Cas. 81,303 (C.D. Cal. 1972); *James v. United States*, 65-1 U.S. Tax Cas. 95,601 (E.D. Va. 1964). The reported decision in *James* is in the form of jury instructions that include the preponderance of the evidence standard and the jury's verdict. Since few facts are indicated, the only conclusion that can be drawn is that the administrator failed to meet the burden of proof required to establish that he acted as an ordinary, prudent business man in filing the return three to four months late.

examined in terms of advice regarding whether a return is required and advice regarding when a return is due.

I. RELIANCE ON COUNSEL—
REGARDING WHETHER A RETURN IS REQUIRED

The opinion rendered in *Estate of Christ v. Commissioner*¹⁶ is the only estate tax decision centering on this issue. Christ died on December 2, 1961, and the return was due on March 2, 1963. The taxpayer contended that he "always relied on his attorney's advice with respect to what tax returns should be filed and when they should be filed. . . . [H]is legal counsel advised that no estate tax return should or need be filed because Daisy's gross estate was less than the specific exemption of \$60,000" ¹⁷ According to the Internal Revenue Service, the several attorneys for the estate should have been on notice that a return would be required. The court found that the attorney in good faith believed that no tax was due¹⁸ and noted that the executor had no reason to doubt the competence of his attorney. The court held that, since his reliance on counsel was reasonable and justified, no penalties should be imposed,¹⁹ citing *Portable Industries v. Commissioner*,²⁰ *Twinam v. Commissioner*,²¹ and *Patino v. Commissioner*.²²

Dependence on an accountant was determined to be reasonable cause for failure to file personal holding company returns in *Haywood Lumber & Mining Co. v. Commissioner*.²³ Although *Haywood* is not an estate tax case, it is significant because of its citation by plaintiffs in estate tax cases.²⁴

¹⁶54 T.C. 493 (1970), *aff'd on other grounds*, 480 F.2d 171 (9th Cir. 1973).

¹⁷*Id.* at 553.

¹⁸"Petitioner's failure to file timely the estate tax return for decedent was due to reasonable cause and not due to willful neglect, where he was advised by his attorney in good faith that no return need be filed because no estate tax was due." *Id.* at 523. Compare *Estate of Plotkin v. Commissioner*, 31 T.C.M. (CCH) 1011 (1972), where the court suggested that, if the gross estate clearly exceeds the amount required for filing, professional advice that no tax is due does not constitute reasonable cause, with *Estate of Christ*.

¹⁹54 T.C. at 554.

²⁰24 T.C. 571 (1955). In *Portable Industries*, the court held that the lawyer's advice that the taxpayer was not a personal holding company was reasonable cause for not filing those returns.

²¹22 T.C. 83 (1954). In *Twinam*, the attorney's advice that alimony payments were not taxable was deemed sufficient reason for petitioner's failure to file income tax returns.

²²13 T.C. 816 (1949), *aff'd on other grounds*, 186 F.2d 962 (4th Cir. 1950). In *Patino* the court held that a lawyer's advice that a taxpayer was a nonresident alien and need not file income tax returns was adequate to avoid penalties.

²³178 F.2d 769 (2d Cir. 1950), *rev'g* 12 T.C. 735 (1949).

²⁴*Giesen v. United States*, 369 F. Supp. 33 (W.D. Wis. 1973); *Estate of Duttonhofer v. Commissioner*, 49 T.C. 200 (1967), *aff'd per curiam*, 410 F.2d 302 (6th Cir. 1969);

In *Haywood*, a corporate officer asked a certified public accountant to prepare "the proper corporate tax returns."²⁵ The accountant knew that the business was a personal holding company, but failed to inform the officer or to file the required returns. The Tax Court held that there was no reasonable cause since the officer had passively awaited the preparer's advice. In reversing that decision, the Second Circuit Court of Appeals stated: "When a corporate taxpayer selects a competent tax expert, supplies him with all necessary information and requests him to prepare the proper tax returns, we think the taxpayer has done all that ordinary business care and prudence can reasonably demand."²⁶ The practitioner in *Haywood* had twenty years of experience and had advised the taxpayer previously. The court refused to impute the negligence of the accountant to the company because the company would have then been held to a standard of care that was higher than that generally required of laymen.²⁷

The court in *Commissioner v. American Association of Engineers Employment*²⁸ quoted the test set forth in *Haywood* in finding that reliance on an attorney was reasonable cause.²⁹ The taxpayer's counsel, who had specialized in taxation for twenty-five years, advised the taxpayer that it was an exempt organization not required to file tax returns. *American Association of Engineers Employment* is of particular interest because of its treatment in subsequent Seventh Circuit cases.³⁰

II. RELIANCE ON COUNSEL—REGARDING WHEN A RETURN IS DUE

The cases discussed below involve situations in which the gross estate clearly exceeds the statutory minimum for filing. The question is whether an executor's dependence on a professional (either attorney or accountant) establishes reasonable cause for failure to file such return within the prescribed time.³¹

Various circuits will be considered separately, since they have developed different positions on the matter. To demonstrate the

Estate of Mayer v. Commissioner, 43 T.C. 403 (1964), *aff'd per curiam*, 351 F.2d 617, (2d Cir. 1965), *cert. denied*, 383 U.S. 935 (1966); Estate of Lewis v. Commissioner, 22 T.C.M. (CCH) 1732 (1963).

²⁵178 F.2d at 770.

²⁶*Id.* at 771.

²⁷*Id.*

²⁸204 F.2d 19 (7th Cir. 1953).

²⁹*Id.* at 21.

³⁰United States v. Kroll, 547 F.2d 393 (7th Cir. 1977); Giesen v. United States, 369 F. Supp. 33 (W.D. Wis. 1973).

³¹The applicable time limit in those cases is 15 months. Int. Rev. Code of 1954, ch.61, § 6075(a), 68A Stat. 751.

historical development of the law, the cases within a circuit will be discussed chronologically. The circuits are arranged in a similar order, starting with the one whose most recent decision is the oldest. The latest opinion will be the final one analyzed.³²

A. Ninth Circuit

The holding in *Ferrando v. United States*³³ was based on the delinquency penalty section of the Internal Revenue Code of 1939.³⁴ *Ferrando* is not the only case decided under the prior section, but is included herein because it was the first case to hold that an executor cannot delegate his duty of timely filing an estate tax return to his attorney. The inexperienced taxpayers (widow and son of the decedent) entrusted the entire administration of the estate to an attorney and made no attempt to ascertain their duties as executors. The preparer said that the late filing was caused by the pressure of his business and an indefinite oral extension of time from a Deputy Collector of the Internal Revenue Service.³⁵ After noting that a personal representative must see to it that his counsel is diligent, the court determined that the taxpayer has a positive obligation to learn the due date of the return.³⁶

A companion case to *Ferrando*, *Ferrari v. United States*,³⁷ involved the same attorney and other executors who were inexperienced with

³²Tax Court decisions are reviewable by the United States Court of Appeals for the district in which the taxpayer has his legal residence. I.R.C. § 7482. Therefore, they are discussed under the heading of the appropriate circuit because the Tax Court will presumably follow the holdings of that circuit.

³³56-2 U.S. Tax Cas. 56,871 (N.D. Cal. 1956), *aff'd*, 245 F.2d 582 (9th Cir. 1957).

³⁴Int. Rev. Code of 1939, ch. 34, § 3612(d), 53 Stat. 438 (now I.R.C. § 6651).

³⁵The attorney testified, "I was then told to bring in the return when I did have time to prepare it and file it. I consider that [quite unilaterally!] an indefinite extension of time to file it." *Ferrando v. United States*, 245 F.2d 582, 585 (9th Cir. 1957), *aff'g* 56-2 U.S. Tax Cas. 56,871 (1956) (bracketed material inserted by the court).

³⁶56-2 U.S. Tax Cas. at 56,872. The court stated:

Of course, laymen who act as executors cannot be expected to become experts in the field of estate administration. Some matters may be so far beyond their own knowledge, that they could not reasonably be charged with the duty even to make inquiry concerning them. *Haywood Lumber & Mining Co. v. Commissioner*

But, in these days when the filing of a variety of tax returns is a commonplace experience, it is not asking too much of an executor, who is aware that an estate tax must be paid, that he ascertain the time when the return and the tax are due. Ordinary prudence demands that he do so, for he must make sure that the necessary information and funds are available for a timely filing of the return and payment of the tax. Plaintiffs' neglect of this responsibility permitted their attorney to push aside the work of preparing and filing the estate tax return in favor of more pressing matters. Attentiveness on the part of plaintiffs would have prompted a timely filing.

³⁷56-2 U.S. Tax Cas. 56,873 (N.D. Cal. 1956), *aff'd sub nom.* *Ferrando v. United States*, 245 F.2d 582 (9th Cir. 1957).

the administration of estates. Here, a needed appraisal had not been completed before the original due date of November 2, 1947. A tentative return that had been signed by the executors on October 31, 1947, was filed on the last day of a thirty-day extension.³⁸ The court held that the signing by an executor of a complete return represented by the preparer to be a proper return might constitute reasonable cause, but that the evidence presented in the instant case did not indicate that those conditions had been satisfied.³⁹

Both of the above cases were appealed together.⁴⁰ The Ninth Circuit Court of Appeals noted that Ferrando's widow had an eighth-grade education and his son did not complete high school, but was able to run a concrete business. Ferrari's sons (the executors) ran a vegetable business. One son graduated from high school; the other did not. Nevertheless, the court held, "[O]ne does not have to be a professional co-executor or a probate lawyer to know that taxes have to be paid when they are due. . . . [T]his duty of vigilance and promptness is not a delegable one, so far as an executor is concerned. It is *personal*."⁴¹ The judge stated that the filing of the tentative return in *Ferrari* was not sufficient because approval of so vague a return would "put a premium upon belated and slipshod filing."⁴²

Apparently, the strong opinions rendered in the above cases were effective in prompting timely filing. The only Ninth Circuit estate tax case reported under current Internal Revenue Code provisions is *Pfeiffer v. United States*.⁴³ In *Pfeiffer*, the decedent died on March 17, 1962. Thus, the return was due on June 7, 1963. It was not filed until three months later. The executrix was the decedent's widow who had attended business college sixty years before his death, worked for an insurance company and lawyer from 1913 to 1918, and had performed minor secretarial chores for her husband. In administering the estate, she depended entirely on the attorney who had done the family's legal work for almost thirty years. She,

³⁸The court stated:

The filing of such a tentative return as he described could not have constituted even substantial compliance with the statutory requirements for the filing of a return. Nor, could he have justifiably relied on such a make-shift return as an adequate return, even if some deputy in the Collector's office had agreed to accept it and permit later alterations.

Id. at 56,874.

³⁹*Id.*

⁴⁰*Ferrando v. United States*, 245 F.2d 582 (9th Cir. 1957).

⁴¹*Id.* at 586 (emphasis in original).

⁴²*Id.* at 588. The court cited *Sanders v. Commissioner*, 225 F.2d 629 (10th Cir. 1955), in which it was held that the filing of a skeletal income tax return did not constitute reasonable cause.

⁴³15 F. Supp. 392 (E.D. Cal. 1970).

however, signed the Estate Tax Preliminary Notice (Form 704),⁴⁴ which was filed with the Internal Revenue Service. The court held that the executrix should have known that taxes had to be paid and that the return had a due date.⁴⁵ The court quoted *Ferrando* in determining that she had a personal, non-delegable duty to file a timely return.⁴⁶

Based on *Ferrando*, *Ferrari*, and *Pfeiffer*, the prevailing legal reasoning in the Ninth Circuit is that if a return is known to be required, reliance on an attorney to file the return is not reasonable cause for delay. Inexperience or lack of education on the part of the executor is also not sufficient. The administrator must determine the due date of the return and has a personal, non-delegable duty to file the return by that date.

B. Second Circuit

The Second Circuit has been the arena for a great deal of litigation. As the cases below indicate, this circuit has developed the position that reliance on a professional is generally not sufficient to avoid penalties.

In the earliest case, *Powers v. United States*,⁴⁷ however, the court instructed the jury that reliance on an attorney could be reasonable cause. The judge said that the executor must have hired competent counsel, and requested him to prepare the proper returns.⁴⁸ During testimony, the taxpayer contended that he had relied on his lawyer, but the attorney stated that he gave no advice regarding the due date of the return. The executor also stated that he had had a mistaken belief concerning the due date of the estate tax return.⁴⁹ The court instructed the jury that a mistaken belief con-

⁴⁴An Estate Tax Preliminary Notice was required to be filed in cases where the gross estate exceeded \$60,000 and the decedent died before January 1, 1971. Treas. Reg. § 20.6036-1(a)(1), T.D. 7238, 1973-1 C.B. 544. The form indicated that the estate tax return was due 15 months after the decedent's death.

⁴⁵315 F. Supp. at 396. The court observed:

[P]laintiff voluntarily assumed the position of executrix and received a commission for fulfilling the concomitant obligations. The position was not an honorary one. The mere acceptance of the job obligated the plaintiff to exercise at least a minimal amount of responsibility in superintending the administration of the estate. This is not to say that plaintiff was mistaken in hiring an experienced attorney and accountant to aid her, but rather that she was under an obligation to at least ascertain what her obligations were and to oversee the activities of Mr. Bybee [her attorney] and his accountant.

Id. at 396 (citing *Estate of Duttonhofer v. Commissioner*, 49 T.C. 200 (1967), *aff'd per curiam*, 410 F.2d 302 (6th Cir. 1969)).

⁴⁶*Id.*

⁴⁷63-2 U.S. Tax Cas. 90,426 (D. Conn. 1963).

⁴⁸*Id.* at 90,427.

⁴⁹Apparently the attorney did not prepare the return.

stituted reasonable cause if the executor had taken reasonable care to learn the correct rule.⁵⁰ The jury determined that the taxpayer had not shown adequate reason for the delay.

In *Estate of Lewis v. Commissioner*,⁵¹ the decedent died on December 25, 1956. His estate tax return was due on March 25, 1958, but was not filed until October 7, 1958. The decedent's son and widow, the co-executors, hired the accountant who had performed the decedent's accounting for almost forty years. The co-executors had notice of the due date since the Estate Tax Preliminary Notice which they filed stated that the return was due fifteen months from the date of death. The accountant had recurring physical problems beginning in March 1956, including two heart attacks. As a result, he spent very little time in his office, where two assistants managed routine work but did not prepare estate tax returns. The co-executors inquired about the progress of the return and were advised that timely filing would depend on the accountant's health.

The court noted that the co-executors were on notice that the accountant might not have been able to file the return within the prescribed time⁵² and observed that the co-executors probably knew the due date because of the preliminary notice. Judge Atkins held that the non-delegable duty of vigilance and promptness obligated them to ascertain the due date, if not known to them, and to file the return by that time.⁵³ Because the representatives knew a return had to be filed, they were not permitted to rely on cases holding that an attorney's advice that a return was not required constituted reasonable cause.⁵⁴

In *Reed v. United States*,⁵⁵ the executor was the decedent's son, an attorney who had not practiced law since becoming president of Wilshire Oil Co. in 1955. The decedent died on June 29, 1959. The return was due on September 29, 1960, and was filed one month later. Since the executor was completely preoccupied with the company, he entrusted the entire administration of the estate to another lawyer.

⁵⁰63-2 U.S. Tax Cas. at 90,428.

⁵¹22 T.C.M. (CCH) 1732 (1963).

⁵²On this basis, the court distinguished *Fisk v. Commissioner*, 203 F.2d 358 (6th Cir. 1953).

⁵³22 T.C.M. (CCH) at 1737 (citing *Ferrando v. United States*, 56-2 U.S. Tax Cas. 56,871 (N.D. Cal. 1956), *aff'd*, 245 F.2d 582 (9th Cir. 1957).

⁵⁴The taxpayers had relied on the decisions in *Hatfried, Inc. v. Commissioner*, 162 F.2d 628 (3d Cir. 1947) (holding an accountant's advice to a taxpayer that it was not a personal holding company was reasonable cause); *Haywood Lumber & Mining Co. v. Commissioner*, 178 F.2d 769 (2d Cir. 1950); *Reliance Factoring Corp. v. Commissioner*, 15 T.C. 604 (1950) (finding that employment of an accountant who decided that personal holding company returns were not required was adequate).

⁵⁵64-2 U.S. Tax Cas. 94,431 (W.D.N.Y. 1964).

The return was filed after the due date because of confusion, lack of alternate values,⁵⁶ and the preparer's heavy schedule. The court determined that the delay was accidental and that revenue laws were not designed to penalize innocent errors. Therefore, it was held that the taxpayer had adequate reason for the late filing of the estate tax return.⁵⁷

At this point, one district court had held that reliance on the specific advice of an attorney as to the due date of the return was reasonable cause. Another district court had stated that an executor could not depend on his lawyer to file the return if the executor knew an estate tax return was required. And yet another district court had provided that an executor could depend entirely on an attorney. In this setting, the Second Circuit Court of Appeals affirmed the Tax Court decision in *Estate of Mayer v. Commissioner*.⁵⁸

In *Estate of Mayer*, the decedent died on October 9, 1958. The estate tax return was required to be filed by January 9, 1960, but was not actually filed until March 7, 1960. The executor, a certified public accountant with limited estate tax experience, hired an attorney who had previously filed eight estate tax returns. The accountant, however, filed the Estate Tax Preliminary Notice.

The executor and the attorney decided to have the New York tax authorities determine the value of certain closely held stock before filing the federal estate tax return. The accountant did not concern himself with the due date and the attorney miscalculated it. As a result, the return was late.

The accountant did not rely on the lawyer to value the stock. Therefore, according to the court, he had no reason to depend on the attorney to file the return.⁵⁹ *Estate of Mayer* did not involve a taxpayer who was unfamiliar with the tax laws and who merely supplied the preparer with necessary information without further participation.

Citing *Ferrando*, the court held that the executor must see that the attorney is diligent.⁶⁰ Since the accountant knew a return was required,⁶¹ was active in the administration of the estate, had a tax

⁵⁶Alternate valuation is a means of valuing the assets of an estate on the date of disposal or six months after the date of death, whichever is earlier, if the change in value is due to economic change. I.R.C. § 2032. The election can only be made on a timely filed return. Treas. Reg. § 20.2032-1(b)(2) (1958).

⁵⁷64-2 U.S. Tax Cas. at 94,432.

⁵⁸43 T.C. 403 (1964), *aff'd per curiam*, 351 F.2d 617 (2d Cir. 1965), *cert. denied*, 383 U.S. 935 (1966).

⁵⁹43 T.C. at 406.

⁶⁰*Id.* (citing *Ferrando v. United States*, 56-2 U.S. Tax Cas. 56,871 (N.D. Cal. 1956), *aff'd*, 245 F.2d 582 (9th Cir. 1957).

⁶¹Thereby the instant case was distinguished from *Haywood Lumber & Mining Co. v. Commissioner*, 178 F.2d 769 (2d Cir. 1950).

background, and knew the due date,⁶² it was determined that he did not have reasonable cause for the delinquent filing.

In *Estate of Lammerts v. Commissioner*,⁶³ the Tax Court imposed penalties because the executors were too passive. The estate tax return was timely filed, but the estate's income tax return was delinquent. The decedent's son, a co-executor, thought only an estate tax return was required. An accountant had prepared all of the family's personal and business income tax returns, but did not have access to the records needed to prepare the fiduciary return.

The taxpayer contended that, because he was inexperienced and ignorant that a return was required, he depended on the attorney who prepared the estate tax return and the accountant. The court held that ignorance of the filing requirement was not reasonable cause.⁶⁴ It observed that the executor has a positive duty to ascertain his responsibilities, and liability is not satisfied by the good faith belief that such obligations have been fulfilled.⁶⁵ The court further determined that the co-executors could not rely on the accountant because the situation was not discussed with him prior to the due date.⁶⁶ Further, they could not depend on the attorney because the matter was not "complicated [or] unusual, justifying such reliance."⁶⁷ Therefore, the late filing was held not due to reasonable cause.

The return in *Estate of Plotkin v. Commissioner*⁶⁸ was due on December 17, 1964, and a tentative return was filed on March 24, 1966. This return had been prepared by September 8, 1965, but was not signed by the executrix until the filing date.

The executrix, the widow of the decedent, was an attorney who had practiced little law before her husband's death. The lawyer she hired to advise her on estate tax said that it appeared no tax would be due, even though the estimated gross estate was \$200,000. Therefore, the widow's attorney indicated that it would not matter if the return were filed late.⁶⁹ The court emphasized that the executrix was a

⁶²Therefore, the decision in *Fisk v. Commissioner*, 203 F.2d 358 (6th Cir. 1953), was held to be inapplicable.

⁶³54 T.C. 420 (1970), *aff'd per curiam*, 456 F.2d 681 (2d Cir. 1972).

⁶⁴*Id.* at 445. The decision in *Haywood Lumber & Mining Co. v. Commissioner*, 178 F.2d 769 (2d Cir. 1950), was distinguished on the ground that the executor had not supplied the accountant with the necessary information and requested him to prepare the proper returns.

⁶⁵54 T.C. at 446. *See, e.g.*, *Fides v. Commissioner*, 137 F.2d 731 (4th Cir. 1943), *cert. denied*, 320 U.S. 797 (1943).

⁶⁶54 T.C. at 447.

⁶⁷*Id.* at 446 (quoting *Bryan v. Commissioner*, 32 T.C. 104 (1959), *aff'd*, 281 F.2d 238 (4th Cir. 1960), *cert. denied*, 364 U.S. 931 (1961)).

⁶⁸31 T.C.M. (CCH) 1011 (1972).

⁶⁹To this statement, the court replied: "The risk involved by following advice similar to [Attorney] Steinhoff's is that a taxable estate may emerge, displaying the foundation on which a penalty may be built." *Id.* 1013.

lawyer who knew the due date and found that her reliance on another attorney was not reasonable cause.

The widow also contended that the mental distress caused by the sudden death of her husband prevented her from filing the estate tax return on time. The court noted that illness could constitute a sufficient reason for late filing;⁷⁰ however, since the executrix continued to carry on normal activities, the court determined that illness did not amount to reasonable cause in this case.⁷¹ Judge Sterrett also observed that the estate's involvement in extensive litigation should have put the executrix on notice that she needed assistance and an extension of time.⁷² Finally, the court held that the executrix's argument that she was too busy was not reasonable cause.⁷³

No estate tax return was ever filed by the executrix in *United States v. Lachman*.⁷⁴ She was the decedent's widow and essentially his sole devisee.⁷⁵ The gross estate was approximately \$600,000. The taxpayer contended that her attorneys had neglected to file the return despite her requests that they do so. The court inferred that the personal representative had been uncooperative from evidence that she hired and fired four lawyers. Failure to file an estate tax return under such circumstances amounted to willful neglect, according to the court.⁷⁶

The most recent decision in the Second Circuit was rendered in *Estate of DeVos v. Commissioner*.⁷⁷ There, the decedent died on January 3, 1968. The return was due on April 3, 1969, and was filed almost one year later. The administrator of the estate, a practicing attorney with no tax experience, hired another attorney. They both knew the due date of the estate tax return. On April 9, 1969, a request for extension of time was denied because no preliminary notice had been filed.

The administrator stated that he originally believed no return would be required. He later⁷⁸ decided that a return would have to be filed, but would result in no tax liability. The attorney for the estate indicated that he thought no return should be filed until a completely accurate one could be prepared. The court found that the ad-

⁷⁰31 T.C.M. (CCH) at 1013 (citing *Williams v. Commissioner*, 16 T.C. 893 (1951)). In *Williams* the court ultimately decided that the taxpayer had not established that his illness was the cause of his failure to file income tax returns.

⁷¹31 T.C.M. (CCH) at 1013-14.

⁷²The executrix had obtained an extension of time to file her 1964 income tax returns.

⁷³31 T.C.M. (CCH) at 1014 (citing *Dustin v. Commissioner*, 53 T.C. 491 (1969)).

⁷⁴73-1 U.S. Tax Cas. 81,210 (S.D.N.Y. 1973).

⁷⁵The only exception was a specific bequest of \$2,500. *Id.* at 81,212.

⁷⁶73-1 U.S. Tax Cas. at 81,214.

⁷⁷34 T.C.M. (CCH) 933 (1975).

⁷⁸The administrator's decision was made in November, 1968. *Id.* at 936.

ministrator could have determined the assets of the estate with sufficient accuracy to have filed the return by the due date or shortly after the extension was denied.⁷⁹

The court held that an executor, particularly if he is an attorney,⁸⁰ "cannot avoid his obligation to file a timely return by delegating to another the responsibility for preparing and filing his return."⁸¹ The court noted that the administrator did not receive definite advice that the return could be filed late without incurring any penalties.⁸² *Haywood* was distinguished because the administrator had not supplied all necessary information to the attorney and had not requested that the return be prepared.⁸³ The decision in *Fisk v. Commissioner*⁸⁴ was distinguished on the length of the delay in filing.⁸⁵

As a result of the case law in the Second Circuit, an executor must ascertain his responsibilities and the due date of the return. He may not delegate his duty to file a timely estate tax return to the attorney.⁸⁶ In addition, the mistaken belief of an executor is reasonable cause only if he took reasonable care to learn the correct rule. Illness of the preparer is not adequate reason if the personal representative is aware of the disability. If the executor continues his normal activities, his physical condition will not excuse delinquency. Simple ignorance of a filing requirement or a belief that no tax is due is not sufficient.⁸⁷ And finally, difficulty in determining the assets of the estate is not reasonable cause for late filing.

⁷⁹34 T.C.M. (CCH) at 940.

⁸⁰*Id.* at 941 (citing *Estate of Mayer v. Commissioner*, 43 T.C. 403 (1964), *aff'd per curiam*, 351 F.2d 617, *cert. denied*, 383 U.S. 935 (1966)).

⁸¹34 T.C.M. (CCH) at 941 (citing *Maudlin v. Commissioner*, 60 T.C. 749 (1973)). In *Maudlin*, it was found that reliance on an accountant to file an income tax return was not reasonable cause.

⁸²The holding in *Bryan v. Commissioner*, 32 T.C. 104 (1959), *aff'd*, 281 F.2d 238 (4th Cir. 1960), *cert. denied*, 364 U.S. 931 (1961), was distinguished because declarations of estimated tax were not filed timely due to the accountant's indication that one declaration would satisfy the requirement.

⁸³34 T.C.M. (CCH) at 941.

⁸⁴203 F.2d 358 (6th Cir. 1953). The court determined that, if the delay was only one day, reliance on an attorney was reasonable cause.

⁸⁵34 T.C.M. (CCH) at 941.

⁸⁶In *Estate of Lewis v. Commissioner*, 22 T.C.M. (CCH) 1732 (1963), the court distinguished *Haywood Lumber & Mining Co. v. Commissioner*, 178 F.2d 769 (2d Cir. 1950), on the ground that it held that a taxpayer could rely on legal advice only if it related to whether a return was due. All other cases referring to *Haywood* distinguished the decision on the basis of the facts presented, rather than on the legal principles involved.

⁸⁷*Contra*, *Estate of Christ v. Commissioner*, 54 T.C. 493 (1970), *aff'd on other grounds*, 480 F.2d 171 (6th Cir. 1973).

C. Tenth Circuit

There is little relevant case law available in the Tenth Circuit. The court of appeals has not ruled on the issue of reasonable cause in an estate tax context. Nevertheless, since this discussion is intended to be comprehensive, the single reported opinion is included.

In *Estate of Klein v. Commissioner*,⁸⁸ the decedent died intestate on October 22, 1968, leaving no heirs who were residents of his domicile. The lawyer who was retained recommended that an employee of his firm be administrator and the employee was appointed.⁸⁹ Although the personal representative knew an estate tax return was due, he failed to file one. After the attorney discovered that the return had not been filed, he prepared and submitted it as soon as was possible, nearly four months late.

The court noted, "A good faith reliance on professional advice may sometime excuse a failure to file [in a] timely [manner]."⁹⁰ The excuse is only applicable, however, when a taxpayer who is unfamiliar with tax law receives advice that no return need be filed.⁹¹ Since those conditions were not met, there was no reasonable cause for the late filing. The court stated that it had no jurisdiction to waive the penalties on the ground that the heirs were blameless.⁹² Thus, the current law in the Tenth Circuit can be ascertained only in terms of a 1975 Tax Court memorandum decision holding that a personal representative may avoid penalties only by relying on professional advice that no return need be filed.

⁸⁸34 T.C.M. (CCH) 567 (1975).

⁸⁹The employee was a former attorney who had been suspended from the bar.

⁹⁰34 T.C.M. (CCH) at 569 (citing *Paula Constr. Co. v. Commissioner*, 58 T.C. 1055 (1972); *West Coast Ice Co. v. Commissioner*, 49 T.C. 345 (1968); *Estate of Collino v. Commissioner*, 25 T.C. 1026 (1956); *Burruss Land & Lumber Co. v. United States*, 349 F. Supp. 188 (W.D. Va. 1972)).

In *Paula Construction Co.*, the court held that reliance on counsel was reasonable cause if the professional advice related to a complex question. The dependence on an accountant to file a Subchapter S corporate income tax return which the taxpayer knew was due was not adequate.

No penalties were imposed in *West Coast Ice Co.* The accountant did not prepare personal holding company returns because he thought the taxpayer did not meet that status.

An attorney's advice that the gross estate was less than the statutory exemption and that, therefore, no return was required, was found to constitute reasonable cause for the late filing of an estate tax return in *Estate of Collino*.

In *Burruss Land & Lumber Co.*, the court determined that reliance on house counsel that no excise tax return was required was sufficient cause.

⁹¹*Estate of Lammerts v. Commissioner*, 54 T.C. 420 (1970), *aff'd per curiam*, 456 F.2d 681 (2d Cir. 1972); *Estate of Duttonhofer v. Commissioner*, 49 T.C. 200 (1967), *aff'd per curiam*, 410 F.2d 302 (6th Cir. 1969).

⁹²"The heirs remedy lies in another forum." 34 T.C.M. (CCH) at 570.

D. Sixth Circuit

The Sixth Circuit has essentially developed in the same manner as the Second Circuit and has concluded that reliance on counsel is not reasonable cause. Like *Ferrando v. United States*,⁹³ *Fisk v. Commissioner*,⁹⁴ is based on the Internal Revenue Code of 1939. *Fisk* is discussed because, although the holding is very narrow, it is often cited.⁹⁵ In *Fisk* the return was due on July 21, 1947, was mailed on that date, and was received on July 22, 1947. At that time, the return had to be received within the period for filing.⁹⁶

The court of appeals found that reliance on counsel for the preparation and filing of returns permitted the avoidance of delinquency penalties.⁹⁷ It refused to impute the acts of the attorney to the taxpayer stating that to do so would hold the executrix to a higher standard of care than that generally required of laymen.⁹⁸ Therefore, the court determined that reliance upon an attorney as reasonable cause applied "to the filing of tax returns as well as to reliance upon technical advice in complicated legal matters."⁹⁹ Judge Allen stated that the ruling was in accordance with the principle

⁹³56-2 U.S. Tax Cas. 56,871 (N.D. Cal. 1956), *aff'd*, 245 F.2d 582 (9th Cir. 1957).

⁹⁴203 F.2d 358 (6th Cir. 1953).

⁹⁵*Fisk* has been distinguished in *Estate of Duttonhofer v. Commissioner*, 49 T.C. 200 (1967), *aff'd per curiam*, 410 F.2d 302 (6th Cir. 1969); *Estate of Mayer v. Commissioner*, 43 T.C. 403 (1964), *aff'd per curiam*, 351 F.2d 617 (2d Cir. 1965), *cert. denied*, 383 U.S. 935 (1966); *Estate of DeVos v. Commissioner*, 34 T.C.M. (CCH) 933 (1975); *Estate of Geraci v. Commissioner*, 32 T.C.M. (CCH) 424 (1973), *aff'd per curiam*, 502 F.2d 1148 (6th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975); *Estate of Rose v. Commissioner*, 32 T.C.M. (CCH) 461 (1973); *Estate of Lewis v. Commissioner*, 22 T.C.M. (CCH) 1732 (1963).

⁹⁶Timely mailed is now timely filed. I.R.C. § 7502.

⁹⁷*Cf. Dayton Bronze Bearing Co. v. Gilligan*, 281 F. 709 (6th Cir.), *cert. denied sub nom. Dayton Brass Castings Co. v. Gilligan*, 258 U.S. 619 (1922) (attorney advised the company it was not subject to munitions tax); *Haywood Lumber & Mining Co. v. Commissioner*, 178 F.2d 769 (2d Cir. 1950); *Orient Inv. & Fin. Co. v. Commissioner*, 166 F.2d 601 (D.C. Cir. 1948) (the accountant decided that the taxpayer was not a personal holding company); *C.F. Lindback Found'n v. Commissioner*, 4 T.C. 652 (1945) (lawyer informed the foundation that it was not required to file income tax returns because it was an exempt organization); *Brooklyn & Richmond Ferry Co. v. Commissioner*, 9 T.C. 865 (1947), *aff'd*, 171 F.2d 616 (2d Cir. 1948), *cert. denied*, 336 U.S. 968 (1949) (accountant advised the taxpayer that it was not required to file an excess profits tax return); *Safety Tube Corp. v. Commissioner*, 8 T.C. 757 (1947), *aff'd*, 168 F.2d 787 (6th Cir. 1948) (attorney indicated to the business that it was not a personal holding company); *Houk v. Commissioner*, 6 T.C.M. (CCH) 761 (1947) (attorney told the taxpayer that income from a trust was not taxable).

⁹⁸*Fisk v. Commissioner*, 203 F.2d at 359 (citing *Haywood Lumber & Mining Co. v. Commissioner*, 178 F.2d 769 (2d Cir. 1950)).

⁹⁹203 F.2d at 360.

that penalties were to be imposed upon conduct which was voluntary, rather than accidental or resulting from innocent errors.¹⁰⁰

In *Estate of Duttenhofer v. Commissioner*,¹⁰¹ the decedent died on February 22, 1963. The estate tax return was due on May 22, 1964, and was filed on October 27, 1964. One of the co-executors was the brother of the decedent, who was seventy-seven, had four years of formal education, and was a factory employee. The other co-executor was the president of a corporation, a high school graduate, and thirty-eight years old.

They hired an attorney, who had twenty years experience, with whom they had had only minimal contact before the decedent's death. An Estate Tax Preliminary Notice was filed. The attorney controlled the administration of the estate. On September 16, 1964, he requested an extension of time in which to file the estate tax return, but the request was denied.¹⁰²

The court found that the co-executors made no effort to determine their duties and completely abdicated their responsibilities to the attorney. It stated that a personal representative who knows a return is required must determine the due date and see to it that the attorney is diligent.¹⁰³ The co-executors contended that reliance on an attorney to prepare and file a return was reasonable cause, citing several cases.¹⁰⁴ The court stated:

We think reliance upon these cases is misplaced. In the situations involved in those cases the taxpayers, *without knowledge* that certain tax returns were required, were found to have reasonably relied upon their tax advisers to determine whether a return should be filed and if so to prepare the necessary returns for filing.¹⁰⁵

¹⁰⁰*Id.* (citing *Spies v. United States*, 317 U.S. 492 (1943); *United States v. Murdock*, 290 U.S. 389 (1933)). Both *Murdock* and *Spies* related to the imposition of criminal sanctions for willful evasion of income tax.

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

¹⁰²The extension was denied because it had not been requested before the due date of the return and it was not signed by the taxpayer or his authorized representative. 49 T.C. at 203.

¹⁰³*Id.* at 205 (citing *Ferrando v. United States*, 56-2 U.S. Tax Cas. 56,871 (N.D. Cal. 1956), *aff'd*, 245 F.2d 582 (9th Cir. 1957)).

¹⁰⁴The taxpayers cited *Orient Inv. & Fin. Co. v. Commissioner*, 166 F.2d 601 (D.C. Cir. 1948) (*see note 97 supra*); *Haywood Lumber & Mining Co. v. Commissioner*, 178 F.2d 769 (2d Cir. 1950) (*see notes 23-27 supra* and accompanying text); *Brooklyn & Richmond Ferry Co. v. Commissioner*, 9 T.C. 865 (1947), *aff'd*, 171 F.2d 616 (2d Cir. 1948), *cert. denied*, 336 U.S. 968 (1949) (*see note 97 supra*); *Hatfried, Inc. v. Commissioner*, 162 F.2d 628 (3d Cir. 1947) (accountant advised the taxpayer that it was not a personal holding company); *Safety Tube Corp. v. Commissioner*, 8 T.C. 757 (1947), *aff'd*, 168 F.2d 787 (6th Cir. 1948) (*see note 97 supra*).

¹⁰⁵49 T.C. at 205 (emphasis in original).

The court distinguished *Fisk* on the ground that the facts in *Fisk* did not show that the executrix failed to act prudently or that she knew a return was required.¹⁰⁶

The taxpayer also contended that litigation prevented timely filing. It was noted that the co-executors could have requested an extension in the proper fashion or could have filed a timely return based on the information then available.

In affirming the trial court, the court of appeals stated that *Fisk* was not a comparable case because of the lengths of delay in the two cases.¹⁰⁷ Thus, the court did not reverse *Fisk*, but did limit its scope to situations involving a very minimal delay.¹⁰⁸

The decision in *Estate of Rose v. Commissioner*¹⁰⁹ followed *Estate of Duttenhofer*. In *Estate of Rose*, the decedent died on March 4, 1967. The return was due on June 4, 1968, and was filed more than five months later. The executor (the decedent's son) hired an attorney with forty-five years of experience, but who did not consider himself a tax expert. The taxpayer did not request that a return be filed or request to know the due date of the return.

The court stated that the executor has a positive duty to ascertain his responsibilities; simple passivity does not constitute reasonable cause.¹¹⁰ The court distinguished *Fisk* on the basis of the length of the delay, and the other cases relied upon by the executor¹¹¹ on the ground that those opinions related to advice from an attorney that no return was required.¹¹²

In *Estate of Geraci v. Commissioner*,¹¹³ the decedent died on March 27, 1967. The estate tax return was due on June 27, 1968, and was filed on August 28, 1968, two months and one day late. The executrix, the decedent's widow, hired an attorney, who was ill for several weeks during late May or early June, 1968. The executrix contended that there was reasonable cause for the delay in that she had relied on the attorney to file the return. The attorney mistakenly thought the return was due fifteen months from the appointment

¹⁰⁶*Id.* at 206.

¹⁰⁷The delinquency in *Fisk* was one day. In *Estate of Duttenhofer*, it was over five months.

¹⁰⁸410 F.2d 302.

¹⁰⁹32 T.C.M. (CCH) 461 (1973).

¹¹⁰*Id.* at 464 (citing *Estate of Lammerts, v. Commissioner*, 54 T.C. 420 (1970), *aff'd in part per curiam*, 456 F.2d 681 (2d Cir. 1972)).

¹¹¹*McColgan v. Commissioner*, 10 B.T.A. 958 (1928); *Estate of Collino v. Commissioner*, 25 T.C. 1026 (1956); *Estate of Christ v. Commissioner*, 54 T.C. 493 (1970), *aff'd on other grounds*, 480 F.2d 171 (9th Cir. 1973). In those cases an attorney advised the taxpayer that an estate tax return was not required.

¹¹²32 T.C.M. (CCH) at 464.

¹¹³32 T.C.M. (CCH) 424 (1973), *aff'd per curiam*, 502 F.2d 1148 (6th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975).

of the executrix, which would have made the due date August 1, 1968.

The court stated that the key to its decision was the passive role of the executrix.¹¹⁴ It held that reliance on the attorney was not reasonable cause and that, therefore, reliance on his mistake as to the due date was not adequate.¹¹⁵ The personal representative was required to ascertain the due date and to file timely.¹¹⁶ The attorney's illness was not a sufficient excuse for late filing because there was no evidence that the executrix was unaware of the disability. Further, it appeared that other members of the attorney's firm could have filed the return.¹¹⁷

The court of appeals affirmed the decision of the Tax Court, but indicated that it was unenthusiastic about the determination. The appellate opinion stated that the attorney had orally requested an extension, and an Internal Revenue employee had told him that the statute was seldom enforced if the return was filed within a reasonable time and if there was some reason for the delay.¹¹⁸ Further, the court of appeals disagreed with the lower court's characterization of the executrix as passive, suggesting that she was as active as could reasonably be expected.¹¹⁹

In *Estate of Bradley v. Commissioner*,¹²⁰ the scope of the other decisions in the Sixth Circuit was somewhat narrowed. There, the decedent's son-in-law, a practicing attorney with no tax work, was one of the co-executors. He asked an accountant, employed by an accounting firm upon which he had previously relied, the due date of the estate tax return. The accountant thought the attorney wanted to know the due date for the state inheritance tax return and indicated that it was eighteen months after the decedent's death.

The decedent had died on January 30, 1969. Thus, the estate tax return was actually due on April 30, 1970. It was prepared by the

¹¹⁴32 T.C.M. (CCH) at 426 (citing *Estate of Lammerts v. Commissioner*, 54 T.C. 420 (1970), *aff'd in part per curiam*, 456 F.2d 681 (2d Cir. 1972)).

¹¹⁵32 T.C.M. (CCH) at 426.

¹¹⁶32 T.C.M. (CCH) at 425-26 (citing *Ferrando v. United States*, 56-2 U.S. Tax. Cas. 56,871 (N.D. Cal. 1956), *aff'd*, 245 F.2d 582 (9th Cir. 1957); *Pfeiffer v. United States*, 315 F. Supp. 392 (E.D. Cal. 1970); *Estate of Duttonhofer v. Commissioner*, 49 T.C. 200 (1967), *aff'd per curiam*, 410 F.2d 302 (6th Cir. 1969)).

¹¹⁷*Robinson's Dairy, Inc. v. Commissioner*, 302 F.2d 42 (10th Cir. 1962). Illness of the taxpayer's accountant was not reasonable cause because the taxpayer was aware of it.

¹¹⁸There was no written request for an extension and the conversation was unverified. Therefore, the Tax Court must have chosen not to believe the attorney's testimony on the matter.

¹¹⁹It was stipulated that the executrix relied entirely on the attorney to file the return. 32 T.C.M. (CCH) at 425.

¹²⁰33 T.C.M. (CCH) 70 (1974), *aff'd*, 511 F.2d 527 (6th Cir. 1975).

accountant and given to the co-executor on May 28, 1970. The return was received by the Internal Revenue Service on June 1, 1970.

The government contended that the co-executor had a personal, non-delegable duty to file the return timely. It further contended that the co-executor was charged with knowledge of the due date by virtue of his profession as an attorney. The court refused to impute knowledge of the due date to the personal representative because his practice did not include tax work.¹²¹ The court stated:

To sustain respondent's argument would require a holding that an executor may rely upon the advice of an expert on substantive tax law questions but, as a matter of law, may not do so with respect to the requirements of the law as to the due date of tax returns—that he must research that question for himself. We decline to so hold. We fail to see a significant distinction between the reasonableness of a failure to file at all and the reasonableness of a failure to file on time, where in both circumstances the taxpayer has relied on the advice of competent counsel.¹²²

Apparently, the Sixth Circuit will consider the advice of a professional to be adequate reason for delay if the professional is specifically requested to state the estate tax return due date and misinforms the taxpayer. Otherwise, an attorney's mistake regarding the due date is not sufficient cause. The executor cannot be passive and be successful in asserting reasonable cause as a defense to the imposition of penalties. The administrator must at least make sure that the attorney for the estate is diligent. Illness of the preparer is no excuse if the executor is aware of the disability or if other firm members could file the return.

E. Seventh Circuit

Analysis of the Seventh Circuit demonstrates that the courts are becoming ever more narrow in defining reasonable cause. The earliest pertinent case, *Giesen v. United States*,¹²³ however, used the broader concept enunciated in *Haywood Lumber & Mining Co. v. Commissioner*.¹²⁴ In *Giesen*, the decedent died on August 30, 1964. The estate tax return was due November 30, 1965, and was filed June 18, 1968, accompanied by the executor's check dated February 10, 1968.

¹²¹*Id.* at 72. Compare *Estate of Mayer v. Commissioner*, 43 T.C. 403 (1964), *aff'd per curiam*, 351 F.2d 617 (2d Cir. 1965) *cert. denied*, 383 U.S. 935 (1966).

¹²²33 T.C.M. (CCH) at 73.

¹²³369 F. Supp. 33 (W.D. Wis. 1973).

¹²⁴178 F.2d 769 (2d Cir. 1950), *rev'g* 12 T.C. 735 (1949).

The personal representative, the decedent's son, was a doctor with no knowledge of business practices. He hired the attorney who had represented the estate of the executor's father. The lawyer, with thirty-four years of experience, was reputed to be an expert in probate law and taxation. The counselor controlled the administration of the estate. The executor had inquired about the progress of the estate, and the attorney had assured him that the matter was being handled in accordance with the law.

The court stated that it was adopting the majority view in holding that an administrator may establish reasonable cause by relying on a professional if certain conditions are met.¹²⁵ The taxpayer must be unfamiliar with tax law and make full disclosure to the attorney. He also has to exercise ordinary business care and prudence by selecting an expert, supplying him with the relevant information, and requesting him to prepare the necessary returns.¹²⁶ The court said that this rule had been adopted in many cases.¹²⁷ It further held that the position had been adopted by the Seventh Circuit.¹²⁸

In *Estate of Crute v. Commissioner*,¹²⁹ the decedent's will was admitted to probate in Indiana, and a bank president was appointed executor.¹³⁰ Later, Connecticut authorities asserted that the decedent

¹²⁵369 F. Supp. at 35.

¹²⁶*Id.* at 36. The court stated that the holding in *Ferrando v. United States*, 56-2 U.S. Tax Cas. 56,871 (N.D. Cal. 1956), *aff'd*, 245 F.2d 582 (9th Cir. 1957), represented the minority position followed only by the Ninth Circuit.

¹²⁷*Id.* (citing *Educational Fund of Electrical Indus. v. United States*, 424 F.2d 1053 (2d Cir. 1970) (reliance on an attorney's advice that the taxpayer was not subject to withholding tax was not sufficient because the organization had received a contrary ruling of the Internal Revenue Service); *Rubber Research, Inc. v. Commissioner*, 422 F.2d 1402 (8th Cir. 1970) (taxpayer did not establish it received expert advice regarding whether any tax was due); *Estate of Mayer v. Commissioner*, 43 T.C. 403 (1964), *aff'd per curiam*, 351 F.2d 617 (2d Cir. 1965), *cert. denied*, 383 U.S. 935 (1966) (*see note 58 supra* and accompanying text); *Fisk v. Commissioner*, 203 F.2d 358 (6th Cir. 1963); *Mayflower Inv. Co. v. Commissioner*, 239 F.2d 624 (5th Cir. 1956) (advice of corporate officer inadequate because the taxpayer had not taken care to learn the correct rule); *Burton Swartz Land Corp. v. Commissioner*, 198 F.2d 558 (5th Cir. 1952) (accountant advised the taxpayer that it was not a personal holding company); *Haywood Lumber & Mining Co. v. Commissioner*, 178 F.2d 769 (2d Cir. 1950) (*see note 23 supra* and accompanying text); *Davis v. Commissioner*, 184 F.2d 86 (10th Cir. 1950) (fraud penalty was not imposed because the taxpayer had furnished all information to a certified public accountant and requested that he prepare the return); *Hatfried Inc. v. Commissioner*, 162 F.2d 628 (3d Cir. 1947) (*see note 104 supra*); *Orient Inv. & Fin. Co. v. Commissioner*, 166 F.2d 601 (D.C. Cir. 1948) (*see note 97 supra*); *Burruss Land & Lumber Co. v. United States*, 349 F. Supp. 188 (W.D. Va. 1972) (*see note 90 supra*); *Dexter v. United States*, 306 F. Supp. 415 (N.D. Miss. 1969)).

¹²⁸*Id.* (citing *Commissioner v. American Ass'n of Eng'rs Employment*, 204 F.2d 19 (7th Cir. 1953)).

¹²⁹33 T.C.M. (CCH) 1073 (1974).

¹³⁰He had previously served as an executor in his own individual capacity and as president of the bank.

might have been a domiciliary of that state. The accountant, hired by the personal representative, advised the executor that he did not have standing to file an estate tax return until the issue of the decedent's domicile was resolved. Although he relied on the accountant's advice, the representative was active in the administration of the estate.

The court found that because the bank president was aware of his responsibilities¹³¹ and because he was active in the administration of the estate,¹³² he had exercised ordinary business care and prudence in relying upon the accountant's advice.¹³³

In *Fisher v. United States*,¹³⁴ the executrix was a housewife who hired her husband, an attorney, to represent the estate. The court held that the executrix had met the conditions set forth in *Giesen* and determined that she had adequate reason for the late filing of the return. The judge stated that Congress should impose delinquency penalties only on the person actually responsible for the delay.¹³⁵ He noted that in this case, as in many others, the attorney did not have sufficient reason for failing to file the return within the prescribed time.

In *Clum v. United States*,¹³⁶ the executor was the decedent's brother, a sixty-year-old farmer with a high school education. He depended entirely on the attorney who had written the decedent's will to manage the affairs of the estate. The court found that the executor met the requirements listed in *Giesen* and held that his reliance excused the late filing.¹³⁷

The Seventh Circuit trend begun with *Giesen* was halted with the decision in *United States v. Kroll*,¹³⁸ the first estate tax delinquency penalty case to be heard by the Seventh Circuit Court of Appeals. In *Kroll*, the decedent died on July 13, 1967. The estate tax return was due on October 13, 1968, and was filed one year later. The executor, the husband of the sole heir, was a college graduate with one year of law school and had worked for a large industrial company and a brokerage firm. He hired an attorney to prepare the estate tax return. On January 1, 1969, the Internal Revenue Service notified the personal representative that no return had been filed.

¹³¹But see *Estate of Lammerts v. Commissioner*, 54 T.C. 420 (1970), *aff'd in part per curiam*, 456 F.2d 681 (2d Cir. 1972).

¹³²Compare *Estate of Duttonhofer v. Commissioner*, 49 T.C. 200 (1967), *aff'd per curiam*, 410 F.2d 302 (6th Cir. 1969).

¹³³33 T.C.M. (CCH) at 1075.

¹³⁴75-2 U.S. Tax Cas. 88,819 (W.D. Wis. 1975).

¹³⁵*Id.* at 88,820.

¹³⁶76-2 U.S. Tax Cas. 85,685 (S.D. Ohio 1976).

¹³⁷*Id.* at 85,686 (citing *Fisk v. Commissioner*, 203 F.2d 358 (6th Cir. 1953)).

¹³⁸547 F.2d 393 (7th Cir. 1977).

In a decision written by Leonard P. Moore, Senior Judge for the Second Circuit, sitting by designation, the court held that a taxpayer has reasonable cause for late filing if he depends on an attorney to determine whether a return is required.¹³⁹ Since the executor in *Kroll* knew a return was required, it was immaterial that he was not experienced and had made full disclosure to the lawyer. The court found that a person with minimal business experience knows returns have deadlines and that he must sign and return before it is filed.¹⁴⁰ In this case, the executor has notice of the exact due date. Judge Moore held that when there is no question that a return is required, the taxpayer has a personal, non-delegable duty to file the return when it is due.¹⁴¹

The holding in *Kroll* was extended in *Ruel v. United States*.¹⁴² In *Ruel*, the executor contended that the taxpayer in *Kroll* was more educated and had received notice from the Internal Revenue Service that the estate tax return was due. In response the district court stated, "The factual distinctions urged by the plaintiffs do not exempt them from the impact of the broad language of *Kroll*."¹⁴³

Thus, the current position in the Seventh Circuit is that when an executor knows a return is required, he has a personal, non-delegable duty to file in a timely manner. If an executor is active and aware of his duties, he may rely on professional advice that he has no need to file an estate tax return.

F. Eighth Circuit

In *Northwestern National Bank v. United States*,¹⁴⁴ the decedent died on August 28, 1966, and the return was due on November 28, 1967. It was not filed until May 11, 1970. The decedent's will was

¹³⁹*Id.* at 396 (citing *Commissioner v. American Ass'n of Eng'rs Employment*, 204 F.2d 19 (7th Cir. 1953); *Burton Swartz Land Corp. v. Commissioner*, 198 F.2d 558 (5th Cir. 1952); *Orient Inv. & Fin. Co. v. Commissioner*, 166 F.2d 601 (1946); *Hatfried, Inc. v. Commissioner*, 162 F.2d 628 (3d Cir. 1947).

¹⁴⁰547 F.2d at 396.

¹⁴¹*Id.* See *Commissioner v. American Ass'n of Eng'rs Employment*, 204 F.2d 19 (7th Cir. 1953); *Cedarburg Canning Co. v. Commissioner*, 149 F.2d 526 (7th Cir. 1945) (taxpayer's belief that it was not a personal holding company was not sufficient); cf. *Rubber Research, Inc. v. Commissioner*, 422 F.2d 1402 (8th Cir. 1970) (see note 145 *infra*); *Estate of Duttenhofer v. Commissioner*, 49 T.C. 200 (1967), *aff'd per curiam*, 410 F.2d 302 (6th Cir. 1969) (see note 101 *supra* and accompanying text); *Coates v. Commissioner*, 234 F.2d 459 (8th Cir. 1956) (taxpayer did not request specific advice regarding estimated tax and penalties were imposed). *But see* *Consolidated-Hammer Dry Plate & Film Co. v. Commissioner*, 317 F.2d 829 (7th Cir. 1963) (a taxpayer's beliefs that an extension had been obtained was not reasonable cause).

¹⁴²77-1 U.S. Tax Cas. 87,260 (E.D. Wis. 1977).

¹⁴³*Id.*

¹⁴⁴72-2 U.S. Tax Cas. 86,006 (D. S. Dak. 1972).

held to be invalid, and a bank was appointed special administrator on January 29, 1968. The state supreme court reversed the trial court's decision concerning the appointment on March 24, 1970, and the same financial institution then became the executor of the estate.

The bank did not file the return earlier for two reasons: (1) It was uncertain of its status and the costs of litigation, and (2) its attorney advised it not to file until the final determination. The lawyer testified that an accurate return could not be made until the supreme court decision. Reliance on counsel was the exercise of ordinary business care and prudence according to the district court.¹⁴⁵ Therefore, the court held that the executor had reasonable cause for the late filing of the return.

In *Jacobson v. United States*¹⁴⁶ the jury rendered a verdict in favor of the administratrix.¹⁴⁷ Only the instructions and the verdict were reported. The court indicated that the jury could consider whether the administratrix had relied upon her attorney, but did not state the legal effect of such reliance.

In *Richter v. United States*¹⁴⁸ the decedent died on May 23, 1971, and the return was due nine months later. Although the administrator of the estate, the decedent's son, filed Form 704 which stated that the return was due fifteen months from the date of death,¹⁴⁹ the return was not filed until January 22, 1974.

The administrator hired the law firm that had represented him when he was administrator of his uncle's estate. Despite the taxpayer's lack of business and tax law experience, his filing of Form 704 and his increasingly frequent trips to the attorney's office to inquire about the progress of the estate indicated his awareness of the necessity to file the return. At no time did he ask the due date of the return or was he advised that no return need be filed.

Because the attorney did not tell the administrator to delay filing, the court distinguished *Northwestern National Bank*.¹⁵⁰ Relying on *Kroll, Ferrando and Pfeiffer*,¹⁵¹ the court held that the represen-

¹⁴⁵72-2 U.S. Tax Cas. at 86,007 (citing *Rubber Research v. Commissioner*, 442 F.2d 1402 (8th Cir. 1970)). *Rubber Research* held that the taxpayer's belief that no tax was due was not reasonable cause since the taxpayers did not establish that it relied on legal advice to that effect. The court in *Northwestern Nat'l Bank* inferred from *Rubber Research* that, if a taxpayer relied on an attorney, he would have reasonable cause.

¹⁴⁶3 FED. EST. & GIFT TAX REP. (CCH) (78-1 U.S. Tax Cas.) ¶ 13,231 (D.N.D. Sept. 24, 1977).

¹⁴⁷*Id.*

¹⁴⁸77-2 U.S. Tax Cas. 88,649 (D. Minn. Oct. 3, 1977).

¹⁴⁹The return was actually due nine months after the date of death. See note 1 *supra*.

¹⁵⁰77-2 U.S. Tax Cas. at 88,650.

¹⁵¹*Id.* at 88,651.

tatives of the estate had not established reasonable cause for the late filing of the return. Apparently, the Eighth Circuit has limited *Northwestern National Bank* to its facts and will follow the majority position when applicable.

G. Third Circuit

In *Estate of Campbell v. United States*¹⁵² the co-executors contended that their reliance on an attorney to file the estate tax return was reasonable cause. The co-executors were unfamiliar with estate tax laws, but the operation of a printing business by one was sufficient experience for the court to infer that he knew that tax returns had due dates. The taxpayers introduced no evidence as to whether they asked about the due date or were given advice about the same. The court held that *Kroll* controlled and that the penalties were properly imposed.¹⁵³

H. Summary

A comparison of the holdings of the various circuits¹⁵⁴ indicates that the majority have determined that the executor has a personal, non-delegable duty to ascertain his responsibilities and to see that they are fulfilled in timely fashion. The personal representative cannot be passive and his inexperience or lack of education are irrelevant. Ignorance of the requirement to file a return, a belief that no tax is due, and difficulty in determining the assets of an estate are not defenses to the imposition of penalties. An executor, however, may rely on professional advice regarding the due date or his standing to file a return if the advice is specifically requested.

Illness of the preparer is not adequate reason for delay if the executor is aware of the infirmity or there are other members of the firm able to file the return. The personal representative's physical condition is not reasonable cause if he continues his normal activities.

III. OTHER ASSERTIONS OF REASONABLE CAUSE

As noted in *Klein*,¹⁵⁵ the fact that the beneficiaries are not at fault is no defense. This issue was also raised in *Estate of Hollenbeck v. United States*¹⁵⁶ and in *United States v. Mize*.¹⁵⁷

¹⁵²77-2 U.S. Tax Cas. 88,665 (D.N.J. Oct. 12, 1977).

¹⁵³*Id.* at 88,669.

¹⁵⁴The absence of litigation in other circuits may mean that the Internal Revenue Service or the taxpayers have not chosen to litigate the issue or that estate tax returns are timely filed in those jurisdictions.

¹⁵⁵34 T.C.M. (CCH) 567 (1975).

¹⁵⁶77-2 U.S. Tax Cas. 86,109 (D. Col. 1972).

¹⁵⁷73-1 U.S. Tax Cas. 81,303 (C.D. Cal. 1972).

In *Estate of Hollenbeck*, the decedent died on October 29, 1965. The estate tax return was due on January 29, 1967, and was filed on October 30, 1968. The attorney, who was named executor in the decedent's will, had substantial probate experience and was familiar with inheritance tax, but had never filed an estate tax return. He had access to all necessary information. The court stated that since the estate, not the beneficiaries, was the taxpayer, the inexcusable neglect of the executor caused imposition of penalties.¹⁵⁸

The concept of blamelessness is present in *Mize*, although no reason for late filing was stated in the facts. The decedent died on April 11, 1953, and the return was due on July 11, 1954. It was not filed until April 28, 1965. The administrator was not appointed until 1971. The decedent's daughter (who was not the personal representative) filed the return. The facts of the case do not indicate who was responsible for filing as of the due date. The administrator, even though he was not serving when the return was due, was held liable for the penalties.¹⁵⁹

In *Estate of Pridmore v. Commissioner*,¹⁶⁰ the executor contended that litigation involving the estate required a delay in filing. The court noted that the taxpayer was an attorney who was familiar with the requirements of estate tax returns. The court held that since he could have obtained an extension and did not request one there was no reasonable cause for failing to file the return on time.¹⁶¹ The decisions in *Estate of Duttenhofer v. Commissioner*¹⁶² and *Estate of Plotkin v. Commissioner*¹⁶³ also held that a lawsuit affecting the taxability of the estate was not sufficient reason for delinquency. The court in *Northwestern National Bank v. United States*¹⁶⁴ held that litigation could excuse late filing. That suit, however, concerned the legal status of the executor.

In *Estate of Moesch v. Commissioner*,¹⁶⁵ the court held that lack of funds needed to pay the tax did not constitute reasonable cause. The decedent died on January 4, 1966, and the administrator was appointed on February 2, 1966. The return was due April 4, 1967, and was filed January 7, 1970. During the course of certain discovery proceedings on May 13, 1966, the administrator found that the decedent had transferred \$20,000 to her attorney during her lifetime, but within three years of her death. The only reason for not filing given

¹⁵⁸77-2 U.S. Tax Cas. at 86,109.

¹⁵⁹73-1 U.S. Tax Cas. at 81,304.

¹⁶⁰20 T.C.M. (CCH) 47 (1961).

¹⁶¹*Id.* at 55.

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

¹⁶³31 T.C.M. (CCH) 1011 (1972).

¹⁶⁴72-2 U.S. Tax Cas. 86,006 (D.S. Dak. 1972).

¹⁶⁵33 T.C.M. (CCH) 1271 (1974).

by the executor was his lack of funds.¹⁶⁶ The court found the administrator liable.

IV. CONCLUSION

In conclusion, an executor can rely on the advice of a professional as to whether a return is required, but not as to when a return is due (unless that advice is specifically sought). The personal representative is responsible, in most jurisdictions, for the timeliness of the return, regardless of his experience or knowledge of the law. Although courts have indicated that illness could be adequate reason for delay, they have not yet permitted a taxpayer to avoid penalties on that account. The blamelessness of the beneficiaries of the estate will not excuse an executor's delinquency, and neither litigation nor lack of funds constitutes reasonable cause.

It is expected that in many instances the administrative burden of preparing and filing the estate tax return will fall on the attorney for the estate, even though the executor is legally liable. Thus, it is in the best interest of the legal profession and the individual lawyer that an estate tax return receive proper priority.

DIANE HUBBARD KENNEDY

¹⁶⁶Although the administrator did not have control of the funds given by the decedent during her lifetime, he must have controlled at least \$40,000 or the estate would not have generated any tax liability.