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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:PSI:BR4
PLR-123215-09
Date: OCTOBER 26, 2009

RE:

Legend:
Decedent =
Date 1 =
Date 2 =
Date 3 =
Date 4 =
Year 1 =
Year 2 =
Year 6 =
Year 7 =
Attorney =
Tax Professional =
a =
x =

Dear :

This responds to a letter dated April 21, 2009, submitted by your authorized representative, requesting rulings under §§ 2032A, 2057, 6166, and 6651 of the Internal Revenue Code on behalf of the Decedent's estate.

FACTS

Decedent died intestate on Date 1, in Year 1. The personal representative of Decedent's estate hired Attorney and Tax Professional to commence probate proceedings, provide legal advice regarding the estate, and prepare and file the Form 706 United States Estate (and Generation-Skipping Transfer) Tax Return. Based on asset valuation information provided by Attorney, Tax Professional advised the personal

representative that the estate was eligible for a § 2032A special use valuation, a § 2057 QFOBI deduction, and a deferral of payments under § 6166. Tax Professional timely filed a Form 4768, Application for Extension of Time to File a Return, with the Internal Revenue Service. The Service granted the extension request and set a new filing deadline of Date 2. Prior to the new due date, Tax Professional informed Attorney that he would submit an additional extension of time to file the estate tax return.

Subsequently, the personal representative met with Tax Professional on a regular basis from Years 2-6 as Tax Professional prepared Form 1041 for the estate for each of those years. At each of these meetings, Tax Professional advised the personal representative that the Form 706 was being handled and that there were no pending deadlines by which to file Form 706.

On Date 3, in Year 7, Attorney contacted Tax Professional regarding payment of the additional tax in accordance with the deferral under § 6166. During this conversation, Attorney requested copies of the extensions and elections filed by Tax Professional and Tax Professional admitted that he had not kept current in requests for extensions. When the Attorney reviewed Tax Professional's file, Attorney learned that Tax Professional had not filed Form 706, had not filed any requests for an extension since the initial Form 4768 had been filed, and had not taken any action to make the election under § 6166.

The personal representative retained a new tax professional, and, on Date 4, the personal representative filed Decedent's Form 706 and made elections under §§ 2032A, 2057, and 6166.

You have requested the following rulings:

1. The estate is entitled to elect special use valuation for the farm property under § 2032A on the Form 706 filed on Date 4.

2. The estate is entitled to elect to have its farm property treated as Qualified Family Owned Business Interest under § 2057 on the Form 706 filed on Date 4.

3. The estate may elect, under § 6166, to defer payment of the estate tax and pay the estate tax in installments where the Form 706 is not timely filed.

4. The estate is not liable for an addition to tax under § 6651(a)(1).

LAW AND ANALYSIS ISSUES 1 AND 2

Section 2001(a) imposes a tax on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.

Section 2032A(a)(1) provides, generally, that if the decedent was (at the time of his death) a citizen or resident of the United States, and the executor elects the application of this section and files the agreement referred to in § 2032A(d)(2), then, for purposes of chapter 11, the value of qualified real property shall be its value for the use under which it qualifies, under § 2032A(b), as qualified real property.

Section 2032A(d)1) provides that the election under § 2032A shall be made on the return of tax imposed by § 2001. Such election shall be made in such manner as the Secretary shall by regulations prescribe. Such an election, once made, shall be irrevocable.

Section 22.0(b) of the Temporary Estate Tax Regulations provides that the election shall be valid even if the estate tax return is not timely filed.

Page 7 of the instructions to the Year 1 Form 706 provides that an election under § 2032A may be made on a late return as long as it is the first return filed.

Section 2057(a)(1) provides that for purposes of the tax imposed by § 2001, in the case of an estate of a decedent to which § 2057 applies, the value of the taxable estate shall be determined by deducting from the value of the gross estate the adjusted value of the qualified family-owned business interests of the decedent.

Section 2057(a)(2) provides that the deduction allowed by § 2057 shall not exceed $ 675,000.

Section 2057(b)(1) provides, generally, that § 2057 shall apply to an estate if: (A) the decedent was (at the date of the decedent's death) a citizen or resident of the United States; (B) the executor elects the application of this section and files the agreement referred to in § 2057(h); (C) the sum of the adjusted value of the qualified family-owned business interests described in § 2057(b)(2), plus the amount of the gifts of such interests determined under § 2057(b)(3), exceeds 50 percent of the adjusted gross estate; and (D) during the 8-year period ending on the date of the decedent's death there have been periods aggregating 5 years or more during which such interests were owned by the decedent or a member of the decedent's family, and there was material participation (within the meaning of § 2032A(e)(6)) by the decedent or a member of the decedent's family in the operation of the business to which such interests relate.

Section 2057(b)(2) provides that for purposes of § 2057 qualified family-owned business interests are interests which are included in determining the value of the gross estate, and are acquired by any qualified heir from, or passed to any qualified heir from the decedent (within the meaning of § 2032A(e)(9)).

Section 2057(e)(1) provides, generally, that for purposes of § 2057, the term “qualified

family-owned business interest" means an interest as a proprietor in a trade or business carried on as a proprietorship, or an interest in an entity carrying on a trade or business,

if: (1) at least 50 percent of such entity is owned (directly or indirectly) by the decedent and members of the decedent's family; (2) at least 70 percent of such entity is so owned by members of 2 families and at least 30 percent of such entity is so owned by the decedent and members of the decedent's family; or (3) at least 90 percent of such entity is so owned by members of 3 families, and, at least 30 percent of such entity is so owned by the decedent and members of the decedent's family.

Section 2057(j)(3)(H) provides that, for purposes of making the election and filing the agreement under § 2057(b)(1)(B), rules similar to the rules under § 2032A(d)(1) and (3) (regarding the election of special use valuation of farm and other qualified real property) shall apply.

Section 2057(j) provides that § 2057 will not apply to estates of decedent's dying after December 31, 2003.

Based upon the information provided and the representations made, we rule that the estate is entitled to elect special use valuation for the farm property under § 2032A on the Form 706 filed on Date 4. In addition, we rule that the estate is entitled to elect to have its farm property treated as Qualified Family Owned Business Interest under § 2057.

LAW AND ANALYSIS ISSUE 3

Section 6166 states that if the value of an interest in a closely held business, which is included in determining the gross estate of a decedent who was a citizen or resident of the United States exceeds 35 percent of the adjusted gross estate, the executor may elect to pay part or all of the tax imposed under § 2001 in 2 or more (but not exceeding 10) equal installments. I.R.C. § 6166(a)(1). Section 6166(d) states that this election "shall be made not later than the time prescribed by section 6075(a)" for filing the estate tax return. Section 6075(a) states that such returns shall be filed within nine months after the decedent's death. The regulations describe this deadline by stating that the election under § 6166 is made by attaching a notice of election to a timely filed estate tax return. Treas. Reg. § 20.6166-1(b). In this case, the Form 706 was not timely filed. In fact, the Form 706 was filed over x years after it was due. Therefore, the estate may not make an election under § 6166.

In the ruling request submission, the estate requested relief, under Treas. Reg. § 301.9100-3, from the deadline imposed by § 6166. However, relief under this regulation is not available in this case. Treas. Reg. § 301.9100-3 allows the Service to extend the time of regulatory elections where a taxpayer establishes that he acted

reasonably and in good faith and where granting relief will not prejudice the interests of the government. Treas. Reg. § 301.9100-3(a). A regulatory election is defined as "an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin." Treas. Reg. § 301.9100-1(b). A statutory election is defined as "an election whose due date is prescribed by statute." In this case, the election under § 6166 is a statutory, not regulatory, election because the deadline is prescribed by statute, specifically §§ 6166(d) and 6075(a). The mere fact that regulations under § 6166 parrot the deadline set forth in the statute itself does not transform the election from a statutory election into a regulatory election. Therefore, relief under Treas. Reg. § 301.9100-3 is not available to the estate in this case.[1]

LAW AND ANALYSIS ISSUE 4

An estate return due under § 6018 which is not timely filed is subject to an addition to tax under § 6651(a)(1) unless the failure is due to reasonable cause and not to willful neglect. In United States v. Boyle, 469 U.S. 241 (1985), the taxpayer relied on his attorney to file an estate tax return. The return was filed late, and the Supreme Court established a bright-line rule that the timely filing of a tax return is not excused by the taxpayer's reliance on an agent:

> [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. 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).

Boyle, supra, at 251-52. Boyle thus established that reasonable cause could be found where the reliance was premised upon a question of law, because such reliance could constitute the "ordinary business care and prudence" required by Treas. Reg. § 301.6651-1(c)(1). Boyle clearly distinguished such questions of law from the clearly-defined, ministerial duty of filing. Subsequent cases have held that a taxpayer's reliance on an attorney is not sufficient to relieve the taxpayer from the late-filing penalty. See, e.g., McMahan v. Commissioner, 114 F.3d 366 (2d Cir. 1997) (no relief where attorney told taxpayer that estate return would be filed and it wasn't); Fleming v. United States, 648 F.2d 1122, 1125 (7th Cir. 1981) (no relief where taxpayer relied on

[1] Treas. Reg. § 301.9100-2 does allow for an automatic six month extension for statutory elections in certain circumstances. Though this section allows for extensions of statutory elections, it is inapplicable in this case because, even if the estate qualified for relief under this section, this section allows only a six month extension. In this case, the estate missed the deadline to make the election under § 6166 by over x years.

attorney's statement that application for extension had been filed); Smith v. United States, 702 F.2d 741, 743 (8th Cir. 1983) (executor had nondelegable duty to file a timely return, and reliance on the mistaken advice of a tax advisor as to the due date is not sufficient to constitute "reasonable cause" for failing to fulfill that duty); Carmean v. United States, 4 Cl. Ct. 181 (Ct. Cl. 1983) (plaintiff instructed attorney to file estate tax return and inquired periodically about return's status; court relies on "long list of cases" that taxpayer has personal, non-delegable duty to file return).

Estate of La Meres v. Commissioner, 98 T.C. 294 (1992) added a subtle twist to what seemed a settled area of law. In La Meres, the taxpayer relied on his attorney's advice that he could obtain a second extension of time in which to file the estate tax return, although such a second extension was not available under Treas. Reg. § 20.6081-1(a). The Tax Court viewed this as a question of law, which under Boyle could satisfy the "ordinary business care and prudence" required by Treas. Reg. § 301.6651- 1(c)(1). See also Sanderling, Inc., v. Commissioner, 571 F.2d 174, 178-79 (3d Cir. 1978) (corporation reasonably relied on professional to determine due date of tax, however, court noted that the case was unusual in that even the Service was confused as to the actual due date). The court noted that the situation in La Meres did not involve a taxpayer who relied on an expert to perform the nondelegable duty of filing a return. The court also emphasized that the Service did not notify petitioner that the request for extension was denied, nor did it refuse to cash petitioner's check.

By contrast, the Tax Court found in Estate of Hinz v. Commissioner, T.C. Memo. 2000-6, that petitioner's reliance on his attorney was not reasonable. In Hinz, the petitioner engaged an attorney to handle his mother's estate. The attorney filed for an extension, which was granted, but misread the extended due date. The court held that because petitioner had delegated the duty of filing to his attorney, he was subject to the Boyle standard and so the failure to file was not due to reasonable cause.

In Estate of Maltaman v. Commissioner, T.C. Memo. 1997-110, the court faced a factual situation very similar to La Meres, save in one respect – the Service notified the petitioner's attorney that the second request for extension had been denied. The court found that reliance on the attorney's advice that it was possible to obtain a second extension of the due date for filing the estate tax return was neither reasonable nor in good faith. See also Estate of Young v. Commissioner, 110 T.C. 297 (1998).

Under § 6651(a)(2), an addition to tax is imposed upon the failure to pay the amount shown as tax on any return on or before the filing date, unless such failure to pay is due to reasonable cause and not willful neglect. Treas. Reg. § 301.6651-1(c) provides that a failure to pay will be considered due to reasonable cause to the extent the taxpayer exercised ordinary business care and prudence in providing for payment, or would suffer undue hardship (as described in Treas. Reg. § 1.6161-1(b)). Most of the cases discussing this provision deal with nonpayment of employment taxes, where financial hardship is the key issue. See, e.g., Estate of Sowell v. United States, 198 F.3d 169

(5th Cir. 1999). Here, there has been no submission of evidence to demonstrate hardship. The primary estate asset is farmland valued at approximately a per the appraisal dated Date1.

In East Wind Industries, Inc., v. United States, 196 F.3d 499, 504 (3rd Cir. 1999), the court applied the analysis from Boyle to § 6651(a)(2), reasoning that the language concerning the standard for failure to file a return is identical to the language for failure to pay. See also Fran Corp. v. United States, 164 F.3d 814, 816 (2d Cir. 1999); Valen Mfg. Co. v. United States, 90 F.3d 1190, 1193 (6th Cir. 1996). Just as the act of filing is non-delegable, so too is the act of payment. The estate cannot escape liability under § 6651(a)(2) by arguing that Tax Professional should have paid the taxes or made the election. Estate of Hinz v. Commissioner, T.C. Memo. 2000-6, is the exception that proves the rule. In Hinz, the court found in favor of the taxpayer solely because the Service tentatively allowed the § 6166 election. Although the Service later determined the election invalid, the court found it reasonable for the estate to rely on the Service's first ruling (as it held in La Meres). Cf. Bank of the West v. Commissioner, 93 T.C. 462, 472 (1989) (taxpayer did not get approval from Service for § 6166 election or § 2032A special use valuation; therefore no reasonable cause).

An individual's duty to file tax returns or pay taxes under § 6651(a) cannot be delegated, and reliance on a third party, even a CPA, is not a reasonable cause for late filing. Boyle, 469 U.S. at 250; see also McMahan v. Commissioner, 114 F.3d 366 (2d Cir.1997); Estate of Fleming v. Commissioner, 974 F.2d 894 (7th Cir.1992); Denenburg v. United States, 920 F.2d 301 (5th Cir.1991). If a taxpayer were allowed to delegate his duty to file a tax return, this would seriously impede the Government's ability to collect taxes fairly and efficiently. Boyle, 469 U.S. at 249. Even an unsophisticated taxpayer is capable of determining when taxes are due. It was the estate's responsibility to ascertain the due date, and to make certain that a proper request for late payment had been made, and that permission to file late had been granted. Accordingly, under Boyle, a taxpayer cannot delegate the task of filing and paying taxes to a third party and escape the penalty consequences when that third party fails to follow through. The estate has not shown reasonable cause under § 6651(a).

The rulings contained in this letter are based upon information and representations submitted by the estate and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination

Except as specifically ruled herein, we express no opinion on the federal tax consequences of the transaction under the cited provisions or under any other provisions of the Code.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely,

Curt G. Wilson
Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosure
Copy for § 6110 purposes
Copy of this letter