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#6**Failure to File Penalty Under IRC § 6651(a)(1), Failure to Pay an Amount Shown As Tax on Return Under IRC § 6651(a)(2), and Failure to Pay Estimated Tax Penalty Under IRC § 6654****SUMMARY**

We reviewed 45 decisions issued by federal courts from June 1, 2015, to May 31, 2016, regarding the additions to tax for:

- Failure to file a tax return by the due date under Internal Revenue Code (IRC) § 6651(a)(1);
- Failure to pay an amount shown on a tax return under IRC § 6651(a)(2);
- Failure to pay an amount shown on a tax return within 21 days of the issuance of a notice and demand under IRC § 6651(a)(3);
- Failure to pay installments of the estimated tax under IRC § 6654; or
- Some combination of the four.¹

The phrase “addition to tax” is commonly referred to as a penalty, so we will refer to these additions to tax as the failure to file penalty, the failure to pay penalty, and the estimated tax penalty. Eight cases involved the imposition of the estimated tax penalty in conjunction with the failure to file and failure to pay penalties; four cases involved the estimated tax penalty and either the failure to file penalty or the failure to pay penalty under IRC §§ 6651(a)(2) or (a)(3); 32 involved the failure to file or failure to pay penalties; one case involved only the estimated tax penalty.

The IRS imposes the failure to file and failure to pay penalties unless the taxpayer can demonstrate the failure is due to reasonable cause and not willful neglect.² The estimated tax penalty is imposed unless the taxpayer can meet one of the statutory exceptions.³ Taxpayers were unable to avoid a penalty in 41 of the 45 cases.

TAXPAYER RIGHTS IMPACTED⁴

- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to a Fair and Just Tax System*

1 For the first time in the Most Litigated Issue on the failure to file, failure to pay, and failure to pay installments of estimated tax, we have included cases where a decision was made on penalties imposed under Internal Revenue Code (IRC) § 6651(a)(3) failure to pay amount due within 21 days of the issuance of a notice and demand.

2 IRC §§ 6651(a)(1), (a)(2).

3 IRC § 6654(e).

4 See Taxpayer Bill of Rights (TBOR), <https://taxpayeradvocate.irs.gov/taxpayer-rights>. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a), 129 Stat. 2242, 3117 (2015) (codified at IRC § 7803(a)(3)).

PRESENT LAW

Under IRC § 6651(a)(1), a taxpayer who fails to file a return on or before the due date (including extensions) will be subject to a failure to file penalty of five percent of the tax due (minus any credit the taxpayer is entitled to receive and payments made by the due date) for each month or partial month the return is late. This penalty will accrue up to a maximum of 25 percent, unless the failure is due to reasonable cause and not willful neglect.⁵ To establish reasonable cause, the taxpayer must show the exercise of ordinary business care and prudence but the taxpayer was still unable to file by the due date.⁶ The failure to file penalty applies to income, estate, gift, employment, self-employment, and certain excise tax returns.⁷

The failure to pay penalties, IRC §§ 6651(a)(2) and (a)(3), apply to a taxpayer who fails to pay an amount shown as tax on the return. The penalty accrues at a rate of 0.5 percent per month on the unpaid balance for as long as it remains unpaid, up to a maximum of 25 percent of the amount due.⁸ When IRS imposes both the failure to file and failure to pay penalties for the same month, it reduces the failure to file penalty by the amount of the failure to pay penalty (0.5 percent for each month).⁹

The failure to pay penalty applies to income, estate, gift, employment, self-employment, and certain excise tax returns.¹⁰ The taxpayer will not be held liable if the taxpayer can establish reasonable cause, *i.e.*, the taxpayer must show the exercise of ordinary business care and prudence but was still unable to pay by the due date, or that payment on that date would have caused undue hardship.¹¹ Courts will consider “all the facts and circumstances of the taxpayer’s financial situation” to determine whether the taxpayer exercised ordinary business care and prudence.¹² In addition, “consideration will be given to the nature of the tax which the taxpayer has failed to pay.”¹³ Failure to pay a deficiency within 21 calendar days from the date a notice and demand is issued (or ten business days if the amount exceeds \$100,000) may result in a penalty under IRC § 6651(a)(3). In general, the addition to tax is 0.5 percent of the tax not paid, for each month or part of a month that the tax remains unpaid, up to a maximum of 25 percent.¹⁴ As in IRC §§ 6651(a)(1) and (a)(2) discussed above, the taxpayer will not be liable for the penalty if failure to pay is due to reasonable cause and not to willful neglect.¹⁵

IRC § 6654 imposes a penalty on any underpayment of estimated tax by an individual or by certain estates or trusts.¹⁶ The law requires four installments per tax year, each generally 25 percent of the

5 IRC §§ 6651(a)(1), (b)(1). The penalty increases to 15 percent per month up to a maximum of 75 percent if the failure to file is fraudulent. IRC § 6651(f).

6 Treas. Reg. § 301.6651-1(c)(1).

7 IRC § 6651(a)(1).

8 IRC § 6651(a)(2). Note that if the taxpayer timely files the tax return (including extensions) but an installment agreement is in place, the penalty will continue accruing at the lower rate of 0.25 percent rather than 0.5 percent of the tax shown. IRC § 6651(h).

9 IRC § 6651(c)(1). When both the failure to file and failure to pay penalties are accruing simultaneously, the failure to file will max out at 22.5 percent and the failure to pay will max out at 2.5 percent, thereby abiding by the 25 percent maximum limitation.

10 IRC § 6651(a)(2).

11 Treas. Reg. § 301.6651-1(c)(1). Even when a taxpayer shows undue hardship, the regulations require proof of the exercise of ordinary business care and prudence.

12 Treas. Reg. § 301.6651-1(c)(1). See, *e.g.*, *East Wind Indus., Inc. v. U.S.*, 196 F.3d 499, 507 (3d Cir. 1999).

13 Treas. Reg. § 301.6651-1(c)(2).

14 IRC § 6651(a)(3).

15 IRC § 6651(a)(3).

16 IRC § 6654(a), (l).

required annual payment.¹⁷ The required annual payment is generally the lesser of 90 percent of the tax shown on the return for the current tax year or 100 percent of the tax for the previous tax year.¹⁸ The IRS will determine the amount of the penalty by applying the underpayment rate, according to IRC § 6621, to the amount of the underpayment for the applicable period.¹⁹

To avoid the penalty, the taxpayer has the burden of proving that one of the following exceptions applies:

- The tax due (after taking into account any federal income tax withheld) is less than \$1,000;²⁰
- The preceding tax year was a full 12 months, the taxpayer had no liability for the preceding tax year, and the taxpayer was a U.S. citizen or resident throughout the preceding tax year;²¹
- The IRS determines that because of casualty, disaster, or other unusual circumstances, the imposition of the penalty would be against equity and good conscience;²² or
- The taxpayer retired after reaching age 62, or became disabled, in the tax year for which estimated payments were required, or in the tax year preceding that year, and the underpayment was due to reasonable cause and not willful neglect.²³

In any court proceeding, the IRS has the burden of producing sufficient evidence that it imposed the failure to file, failure to pay, or estimated tax penalties appropriately.²⁴

ANALYSIS OF LITIGATED CASES

We analyzed 45 opinions issued between June 1, 2015, and May 31, 2016, where the failure to file penalty, failure to pay penalty, or estimated tax penalty was in dispute. All but eight of these cases were litigated in the United States Tax Court. A detailed list appears in Table 6 in Appendix 3. Twenty-eight cases involved individual taxpayers and 17 involved businesses (including individuals engaged in self-employment or partnerships).

Of the 28 cases in which taxpayers appeared *pro se* (without counsel), taxpayers did not fully prevail in any, and only two cases resulted in split decisions. Of the 17 cases in which taxpayers had representation, taxpayers prevailed in full in one case, and in part in two cases.

Failure to File Penalty

In most of the cases reviewed, taxpayers could not successfully establish that the failures to file were due to reasonable cause. Circumstances suggesting reasonable cause are typically outside the taxpayer's control.²⁵ Frequent reasonable cause claims included medical illness and reliance on an agent. In 38 cases reviewed where the failure to file penalty was at issue, the taxpayers could not successfully establish that the failures to file were due to reasonable cause in 32 cases.

17 IRC §§ 6654(c)(1), (d)(1)(A).

18 IRC § 6654(d)(1)(B).

19 IRC § 6654(a).

20 IRC § 6654(e)(1).

21 IRC § 6654(e)(2).

22 IRC § 6654(e)(3)(A).

23 IRC § 6654(e)(3)(B).

24 *Higbee v. Comm'r*, 116 T.C. 438, 446 (2001) (applying IRC § 7491(c)). An exception to this rule relieves the IRS of this burden where the taxpayer's petition fails to state a claim for relief from the penalty (and therefore is deemed to concede the penalty). *Funk v. Comm'r*, 123 T.C. 213, 218 (2004).

25 *McMahan v. Comm'r*, 114 F.3d 366, 369 (2d Cir. 1997) (citation omitted), *aff'g* T.C. Memo.1995-547.

Medical Illness

Depending on the facts and circumstances, a medical illness may establish reasonable cause for failure to file, if the taxpayer can show incapacitation to such a degree that he or she could not file a tax return on time. When considering whether the severity of the illness suffices to establish reasonable cause, the court will analyze a taxpayer's management of his or her business affairs during the illness.

In *Poppe v. Commissioner*, the taxpayer argued that failure to file his 2007 tax return was due to reasonable cause because he suffered from an autistic spectrum disorder (ASD)²⁶ previously known as Asperger's Syndrome, which prevented him from filing his tax return timely for tax year (TY) 2007.²⁷ During the trial, the taxpayer offered the testimony of a licensed psychologist who explained that ASD can impede an individual's executive functions and social cognition and create a high dependency on routines. However, the Tax Court gave this testimony little weight because the individual who offered the testimony was a licensed psychologist and not a medical physician.²⁸ Further, the licensed psychologist did not treat the taxpayer during the time in which he claimed he was impaired from filing a tax return. In addition, the taxpayer was unable to show how ASD impaired his life in other ways. For instance, the taxpayer was a teacher from 2001 through 2006 and did not provide any documentation showing that he ever requested any accommodation while teaching. While a teacher, the taxpayer was also day-trading two hours per school day. In 2007, he began trading on a full-time basis. When conducting these trades on a full-time basis, the taxpayer had six monitors in his workstation that showed the status of his trades. Further, the taxpayer was able to collect and analyze information on which to base his trades. Despite the taxpayer's ability to function in these situations, he claims that he was unable to file his tax return for TY 2007 because he was distraught over losses he suffered for that year. Although the Tax Court was "sympathetic to [taxpayer's] plight," it was unable to find that the taxpayer's mental condition prevented him from conducting his business affairs.²⁹ Therefore, the taxpayer's failure to file the 2007 tax return timely was not due to reasonable cause.³⁰

26 Centers for Disease Control and Prevention (CDC), *Facts about ASD* (Mar. 2016), <http://www.cdc.gov/ncbddd/autism/facts.html>. ASD is a developmental disability that can cause significant social, communication, and behavioral challenges. Individuals with ASD might not point at objects to show interest, have trouble relating to others or not have an interest in other people at all, avoid eye contact and want to be alone, have trouble understanding other people's feelings or talking about their own feelings, appear to be unaware when people talk to them but respond to other sounds, have trouble expressing their needs using typical words or motions, repeat actions over and over again, have trouble adapting when a routine changes, lose skills they once had (for example, stop saying words they were using), etc.

27 *Poppe v. Comm'r*, T.C. Memo. 2015-205.

28 National Taxpayer Advocate 2013 Annual Report to Congress 302; National Taxpayer Advocate 2015 Annual Report to Congress 368. The National Taxpayer Advocate has previously recommended that the IRS consider letters from other health professionals such as clinical psychologists or social workers, when determining if a taxpayer was unable to file a refund claim required under IRC § 6511(a) due to a mental disability that rendered him or her unable to manage his or her financial affairs, thereby meeting the definition of disability under IRC § 6511(h).

29 The court relied on *Hardin v. Comm'r*, T.C. Memo. 2012-162, even though the taxpayer suffered from attention deficit hyperactivity disorder, posttraumatic stress syndrome, and bipolar disorder; his mental condition did not prevent him from engaging in activities that required a high degree of concentration and ability to analyze and organize information.

30 Due to the resolution of the issues raised in the notice of deficiency, the taxpayer had no tax liability. Consequently, when the stipulated decision was entered, there was no failure to file penalty due from the taxpayer.

Reliance on Agent

The U.S. Supreme Court, in *United States v. Boyle*, held that taxpayers have a non-delegable duty to file a tax return on time.³¹ The Court noted that “[i]t requires no special training or effort to ascertain a deadline and make sure that it is met.”³² Therefore, a taxpayer’s reliance on an agent to file a tax return does not excuse any failure to comply with a known filing requirement.

In *Redstone v. Commissioner*, the taxpayer conducted a transaction where he transferred stock into trusts that were being held for his children.³³ The taxpayer did not file a gift tax return for these transactions, and the IRS therefore imposed a failure to file penalty. The taxpayer argued that he was not liable for the failure to file penalty because he reasonably relied on the advice of a tax professional. In fact, the tax advisors offered the taxpayer advice about his gift tax filing requirements on 34 occasions beginning in 1970. Further, the evidence showed that the taxpayer relied on a written memorandum that stated no gift tax return was required to be filed because the taxpayer had not made a taxable gift and that the taxpayer relied on this advice in good faith. Therefore, the Tax Court concluded that the taxpayer was not liable for an addition to tax for failure to file a gift tax return.

In *West v. Commissioner*, the estate (hereafter referred to as the taxpayer) failed to file a timely estate tax return.³⁴ The taxpayer argued that it reasonably relied on the advice of a tax professional. After the death of June West, the executors of her estate, her children — Peter, Lesley, and John, began working with their mother’s attorney, John Rodgers, to settle the estate. On January 3, 2010, Peter West emailed Mr. Rodgers seeking guidance as to “what legal followups are needed in the short term.”³⁵ Mr. Rodgers responded via email the following day informing Peter West that the estate would need to pay any outstanding bills, possibly file a federal estate tax return, and file her final Form 1040, *U.S. Individual Income Tax Return*, and a trust income tax return. Mr. Rodgers went on to say in his email, “[t]his all takes as short as a few months or (if an estate tax return is required) as long as [two] years.”³⁶

The following day, Peter West, again via email, responded that he was “sure there will be tax due” on the estate and that he “assume[d]” that John Renner, the accountant hired to do June West’s 2009 taxes, “would also take care of preparing estate taxes.”

On or about February 1, 2010, the executors of the estate met with Mr. Rodgers in person to discuss issues relating to the estate. During this meeting, the executors of the estate did not inquire about the filing and payment deadlines for the estate tax, nor did Mr. Rodgers volunteer that information. In fact, as Peter West later testified at his deposition, “[Rodgers] only gave the executors of the estate, both in the prior email and during the meeting, a general timeframe of two years for the taxes.” Following this February meeting, the executors of the estate had no further contact with Rodgers until November 2010, at which time the filing deadline for the estate tax return had already passed.

In November 2010, Peter West met with his siblings and thereafter emailed Mr. Rodgers inquiring as to what needed to be done to start work on the estate taxes. Mr. Rodgers interpreted this question as Peter West’s hiring him to prepare the estate tax return, and Mr. Rodgers began work preparing the estate tax return in December 2010. Mr. Rodgers was not concerned that the deadline for filing had already

31 *U.S. v. Boyle*, 469 U.S. 241 (1985).

32 *Id.* at 252.

33 *Redstone v. Comm’r*, T.C. Memo. 2015-237.

34 *West v. Comm’r*, 141 F.Supp. 3d 498 (E.D. Va. 2015).

35 *Id.* at 499.

36 *Id.*

passed, and he never mentioned this fact to the executors, as he mistakenly assumed that Mr. Renner, the accountant, had obtained the appropriate extension, as Peter West had earlier advised Mr. Rodgers that Mr. Renner would “take care of preparing estate taxes.”

In March 2011, Lesley West filed the tax return and paid the associated taxes. Shortly after filing the tax return, Lesley received a notice indicating the taxpayer owed the failure to file penalty. In June 2011, Mr. Rodgers filed a request with the IRS to abate these penalties on the basis of reasonable cause. The request was denied, and the taxpayer paid the penalties. Mr. Rodgers subsequently filed a claim for refund on behalf of the estate.

The taxpayer subsequently filed a refund suit, claiming that the failure to file penalty should be abated on the basis of reasonable cause for reliance on Mr. Rodgers’s legal advice, and that the penalty paid by the taxpayer should thereby be refunded.

The taxpayer argued that it had reasonable cause for failing to file the tax return because it had reasonably relied on Mr. Rodgers’ statement that “[t]his all takes as short as a few months or ... as long as [two] years.” The taxpayer interpreted this statement as saying it had up to two years to file the tax return. However, the court determined that this email from Mr. Rodgers was not legal advice as to the estate tax return filing deadline. The court then concluded that no reasonable person exercising ordinary business care and prudence would rely on the email for that purpose; rather, a reasonable person would have sought clarification, which the executors might have done during the face-to-face meeting with Mr. Rodgers in February. Furthermore, the court pointed out that the executors had ample opportunity to seek clarity as to the deadline but chose instead to construe vague language as specifying a “two-year” filing deadline. The court concluded that Rodgers never offered any legal advice as to the filing deadline and thus held that the taxpayer’s claim of reasonable cause based on reliance on the erroneous advice of counsel fails because the taxpayer never actually received advice from Mr. Rodgers as to an estate tax return filing deadline.³⁷

Failure to Pay an Amount Shown Penalty

A taxpayer can file a tax return by the due date and still be liable for a penalty under IRC § 6651(a)(2) if the amount shown on the tax return is not timely paid. Further, under IRC § 6651(a)(3), a penalty may apply if a taxpayer fails to pay a deficiency within 21 calendar days from the date a notice and demand is issued (or ten business days if the amount exceeds \$100,000). As described above, to assert a reasonable cause defense for purposes of the failure to pay penalty, the taxpayer must show that he or she exercised ordinary business care and prudence in providing for payment of tax liabilities but nevertheless was either unable to timely pay the tax or would suffer undue hardship if the payment was made on time.³⁸ In cases where individual taxpayers disputed that they were subject to the failure to pay penalty, many of their arguments for reasonable cause were similar to those used for the failure to file penalty under IRC § 6651(a)(1). The taxpayers often unsuccessfully argued medical illness or reliance on an agent or failed to make a separate and distinct argument relevant to the failure to pay.³⁹

However, a taxpayer can prevail on the failure to pay penalty when the IRS cannot meet its burden of production under IRC § 7491(c). Specifically, the IRC §§ 6651(a)(2) or (a)(3) penalties apply only when

³⁷ West, 141 F.Supp.3d at 503. See also Treas. Reg. § 301.6651-1(c)(1).

³⁸ See Treas. Reg. § 301.6651-1(c)(1).

³⁹ See, e.g., *Akey v. Comm’r*, T.C. Memo. 2015-227 (illness and break-in did not establish reasonable cause); *Poppe*, T.C. Memo. 2015-205 (mental condition did not establish reasonable cause); and West, 141 F. Supp. 3d at 498 (reliance on tax professional did not establish reasonable cause).

the taxpayer's *filed* tax return shows an amount due.⁴⁰ If the taxpayer did not file a tax return, the IRS can only assess the penalties if it has introduced a Substitute for Return (SFR) that satisfies the requirements of IRC § 6020(b). If the IRS cannot produce the SFR, it fails to meet its burden of production under IRC § 7491.⁴¹

In *Nutrition Formulators, Inc. v. Commissioner*, the taxpayer petitioned the Tax Court to reconsider the IRS Settlement Officer's determination in a Collection Due Process hearing that the failure to pay penalty for unpaid employment taxes for tax periods ending June 30, September 30, and December 31, 2011, and March 31, 2012, should not be abated for reasonable cause.⁴² The taxpayer argued that the company was a victim of embezzlement perpetrated by their former accountant and that the embezzlement exceeded the amount its former Certified Public Accountant was to pay in restitution. In addition, the taxpayer argued that it was impaired from paying its taxes due to the expenses it incurred for relocating its manufacturing operations to comply with Food and Drug Administration (FDA) regulations. However, the taxpayer was unable to show that the embezzlement impaired its ability to pay its taxes. Further, it could not show that the FDA regulations required its manufacturing operation to relocate, or that the debt incurred as a result of this relocation impaired its ability to timely pay taxes. Therefore, the Tax Court held that the taxpayer did not have reasonable cause for failure to timely pay its taxes.

In *Ibarra v. Commissioner*, the taxpayer was assessed a failure to pay penalty for TY 2010.⁴³ The taxpayer argued that he was unable to pay his tax liability due to the fact that he lost his job earlier in the year and incurred large expenses for treatment of his wife's pancreatic cancer. The taxpayer's insurance did not cover all the expenses associated with his wife's round-the-clock care, and in fact, he eventually had to rely on charitable organizations to help pay for oncologists and other caretakers. However, paying the tax liability due after withholdings were considered would have caused the taxpayer to suffer undue hardship. The Tax Court held that the taxpayer had reasonable cause for failing to pay his 2010 tax liability. Although this case has no precedential value,⁴⁴ it illustrates that courts do consider the unique circumstances of a taxpayer's case and can reach a just result.

Estimated Tax Penalty

Courts routinely found taxpayers liable for the IRC § 6654 estimated tax penalty when the IRS proved the taxpayer:

- Had a tax liability;
- Had no withholding credits;
- Made no estimated tax payments for that year; and
- Offered no evidence to refute the IRS.

The IRS has the burden under IRC § 7491(c) to produce evidence that IRC § 6654(d)(1)(B) requires an annual payment from the taxpayer.

40 IRC §§ 6651(a)(2), (g)(2).

41 See *Wheeler v. Comm'r*, 127 T.C. 200, 210 (2006), *aff'd*, 521 F.3d 1289 (10th Cir. 2008).

42 *Nutrition Formulators, Inc. v. Comm'r*, T.C. Memo. 2016-60.

43 *Ibarra v. Comm'r*, T.C. Summ. Op. 2015-70.

44 See IRC § 7463(b).

In *Evans v. Commissioner*, the IRS determined that the taxpayer was liable for an IRC § 6654(a) addition to tax of \$8,840 for TY 2009.⁴⁵ To meet its burden of production under IRC § 7491(c), the IRS had to show that the taxpayer had a “required annual payment” as defined in IRC § 6654(d)(1)(B). This burden requires the IRS to produce evidence that allows the court to determine the amount of the required annual payment. To determine the amount of the taxpayer’s required annual payment for 2009, the court needed to know whether the taxpayer filed a return for the preceding tax year and if so, the amount of the “tax shown” on that return. Therefore, it was required that the IRS produce evidence that the taxpayer filed a tax return for 2008, and if so, the amount of “tax shown” on that return. In this case, the IRS was unable to meet its burden of production. The IRS’s opening brief contained no findings of fact regarding whether the taxpayer filed a tax return for TY 2008, and if so, the amount shown on that return. The only evidence that the IRS produced regarding the filing of a 2008 tax return was a transcript of account for TY 2008. The court reviewed the transcript and found it “inscrutable” in regards to whether or not a tax return was filed in 2008 or if the IRS later issued a Statutory Notice of Deficiency (SNOD) for that tax year.

The taxpayer provided a copy of his 2008 tax return. For the purpose of the required annual payment, the taxpayer must have sent it prior to the issuance of a SNOD. Because the Tax Court was unable to tell from the transcript when, if ever, the IRS had issued a SNOD for TY 2008, the Tax Court held that the tax return was filed prior to the issuance of a SNOD. The Tax Court determined that the 2008 tax return the taxpayer mailed qualifies as a tax return for the purpose of IRC § 6654. Because the amount shown on the 2008 tax return was zero, the estimated payment due for 2009 was also zero. Therefore, the taxpayer was not liable for the IRC § 6654(a) addition to tax.

CONCLUSION

Taxpayers prevailed in full in only one of 45 (or two percent) of the failure to file, failure to pay, and estimated tax penalty cases analyzed in this report. Four taxpayers prevailed in part (about nine percent) of the failure to file, failure to pay, and estimated tax penalty cases. Considering the limited resources most taxpayers have when litigating a case against the IRS, and the immense resources possessed by the IRS, a rather low, eleven percent, taxpayer success rate does not seem surprising. Additionally, this is about a six percent decline from the prior year’s success rate (17 percent).⁴⁶

It is critical that IRS employees look closely and thoroughly at the case facts when assessing reasonable cause claims rather than solely relying on the Reasonable Cause Assistant (RCA) software,⁴⁷ which is designed to help IRS employees make fair and consistent abatement determinations.⁴⁸ The RCA program allows IRS employees to override the results in certain circumstances, but employees must understand the definition of reasonable cause to apply the override.⁴⁹ Thus, a close review by an employee is essential to

45 *Evans v. Comm’r*, T.C. Memo. 2016-7.

46 National Taxpayer Advocate 2015 Annual Report to Congress 499.

47 The Reasonable Cause Assistant (RCA) can only consider failure to file or failure to pay penalties for certain individual tax returns.

48 National Taxpayer Advocate 2010 Annual Report to Congress 198 (Most Serious Problem: *The IRS’s Over-Reliance on Its “Reasonable Cause Assistant” Leads to Inaccurate Penalty Abatement Determinations*). See also IRS, *Reasonable Cause Assistant (RCA) Usability Test Final Report Summary* 4 (May 28, 2010). The test showed that employees using the RCA determined penalty abatement requests correctly in only 45 percent of the cases. An even more disturbing finding was that all of the employees in the study believed they were making correct legal determinations based on reasonable cause.

49 Internal Revenue Manual (IRM) 20.1.1.3.6.10(3) (Nov. 25, 2011) (“[F]air and consistent application of penalties requires employees to make a final penalty relief determination consistent with the RCA conclusion ... [U]nderstanding that the individual facts and circumstances vary for each case and that there may be unique facts and circumstances in certain cases that RCA cannot consider, an ‘override (abort)’ function is available in RCA.”)

ensure that the failure to file penalty or the failure to pay penalty is imposed appropriately. Additionally, as previously recommended by the National Taxpayer Advocate, Congress should amend IRC § 6404 to authorize the Secretary of the Treasury to grant a one-time abatement of the failure to file penalty (IRC § 6651(a)(1)) and failure to pay penalty (IRC § 6651(a)(2)) for first time filers and taxpayers with a consistent history of compliance, where no countervailing factors are present.⁵⁰ To promote voluntary compliance and to uphold a taxpayer's *right to a fair and just tax system* and *the right to pay no more than the correct amount of tax*, the facts of taxpayers' individual cases must be carefully considered.

⁵⁰ National Taxpayer Advocate 2001 Annual Report to Congress 188.