

**Office of Chief Counsel
Internal Revenue Service
memorandum**

Number: **201637012**

Release Date: 9/9/2016

CC:PA:01: GSemasek

POSTN-108804-16

UILC: 6651.03-07

date: May 20, 2016

to: Skyler K. Bradbury
Attorney
(Small Business/Self-Employed)

from: Blaise G. Dusenberry
Senior Technician Reviewer
(Procedure & Administration)

subject: FTF Penalty for POA Filing Late

This Chief Counsel Advice responds to your request for assistance dated March 14, 2016. This advice may not be used or cited as precedent.

ISSUES

1. Whether the Service should abate the additions to tax for late filing and failure to timely pay income tax assessed against (taxpayer) for her taxable year because she was allegedly mentally incapable of handling her financial affairs.

2. Whether the Service should alternatively deny the request for abatement of the additions to tax because (POA), the individual whom taxpayer designated as her power of attorney during , failed to fulfill her obligation to timely file income tax returns on behalf of taxpayer and ensure that the tax was timely paid.

CONCLUSIONS

1. We recommend that the Service first consider whether taxpayer qualifies for an abatement of the failure to file and failure to pay penalties under the First Time Abatement rules, as prescribed in IRM 20.1.1.3.6.1. If she does not, the additions to tax could be abated for reasonable cause if the Service determines that taxpayer suffered

from dementia during the time period when the tax return was required to be prepared and filed and the accompanying tax liability paid and that such illness caused the delinquencies.

2. The fact that taxpayer appointed POA as her power of attorney before the relevant time period is not relevant to that consideration because the taxpayer, not POA, had a duty to timely file and pay her taxes.

FACTS

During taxpayer appointed POA as her durable power of attorney. Among other powers the taxpayer granted to POA in the durable power of attorney, paragraph 8 authorized POA to prepare, file and sign tax income tax returns, make estimated tax payments, and to make and file gift tax returns respecting any gifts made by the taxpayer for any year. Paragraph 8 of the durable power of attorney also authorized POA to sign and file any claim for refund of any taxes.

Paragraph 21 of the durable power of attorney reads, in part, "This General Power of Attorney shall not be affected by my disability or incapacity. It is my intent that this Power of Attorney shall be effective even if I later become disabled, or incapacitated, or incompetent."

Based on the information furnished to our office, taxpayer was age during calendar year when her Form 1040 was required to be filed. The taxpayer filed an untimely income tax return for taxable year on . The late filed return reported tax due totaling \$. Because of the late filing, the Service assessed an addition to tax in the amount of \$ pursuant to section 6651(a)(1). Similarly, because the tax due for the year was not timely paid, the Service assessed the failure to timely pay addition to tax under section 6651(a)(2) in the amount of \$.

During , POA petitioned a state court in for the appointment of an Emergency Guardian and Conservator for the taxpayer. After considering the reports and evaluations of a court-appointed physician, a social worker, guardian ad litem, the testimony of the taxpayer herself and other evidence, the state court appointed POA and as full co-guardians of the taxpayer. The state court's order of characterizes taxpayer as an "incapacitated person."

According to your request, the taxpayer's attorney has cited Treas. Reg. section 301.6651-1(c)(1) in support of the argument that the Service should abate the additions to tax for taxable year because of the taxpayer's mental incapacity.

You requested our views on whether the Service should abate the additions to tax assessed against taxpayer for year because her alleged lack of mental capacity

during the relevant time period supports a finding of reasonable cause. You also asked if the correct course of action will be to alternatively advise the Service to refuse to abate these additions, based on POA's responsibilities under the durable power of attorney.

LAW AND ANALYSIS

Issue 1

First, we recommend Appeals consider whether taxpayer qualifies for First Time Abatement under IRM 20.1.1.3.6.1.

If taxpayer does not qualify for First Time Abatement, the Service should determine whether the taxpayer had reasonable cause and did not willfully neglect to timely file a return and pay the tax due. In relation to the additions to tax under section 6651(a) for failure to timely file a return and pay tax, the implementing regulation provides:

. . . If the taxpayer exercises ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time, then the delay is due to a reasonable cause. A failure to pay will be considered to be due to reasonable cause to the extent that the taxpayer has made a satisfactory showing that he exercised ordinary business care and prudence in providing for the payment of his tax liability and was nevertheless either unable to pay the tax or would suffer an undue hardship (as described in § 1.6161-1(b) of this chapter) if he paid on the due date. . . .

Treas. Reg. § 301.6651-1(c)(1).

If the taxpayer is able to demonstrate to the Service that she was suffering from dementia during early and was therefore unable to handle her own financial affairs, this could support a finding of reasonable cause for failure to timely file her return. United States v. Isaac, 91-2 U.S. Tax Cas. (CCH) P 50314 (E.D. Ky. 1991), *aff'd.*, 968 F.2d 1216 (6th Cir. 1992) (taxpayer who suffered from chronic progressive illness which resulted in paralysis of arms and legs and was therefore unable to attend to his affairs demonstrated reasonable cause as defense to the addition to tax for late filing); and see Jones v. Commissioner, T.C. Memo. 2006-176 (“[w]here a taxpayer’s disability is raised as part of a reasonable cause defense . . . significant psychiatric disorder and * * * [mental incapacitation] during the period under consideration . . . may provide reasonable cause.”). Although these cases address only whether a taxpayer’s physical or mental disability supports reasonable cause for failure to timely file a return, the same analysis should apply to the addition to tax for failure to timely pay under section 6651(a)(2), in the limited situation of an individual’s mental incapacity causing him to neglect to timely pay taxes when due.

The determination of whether taxpayer suffered from dementia during the early part of _____ and was at that time not able to manage her own affairs is inherently a factual issue. Consequently, Appeals will have to determine the validity of the facts as presented by taxpayer's representative.

Issue 2

A power of attorney is an instrument under which an individual authorizes another to act as his agent or attorney. *Black's Law Dictionary* 1055 (5th ed. 1979); Treas. Reg. § 601.501, et seq. (standards for representation of taxpayers before IRS under authority of power of attorney). Under the relevant _____ statute, a durable power of attorney means that the authority conferred by the individual on another is exercisable notwithstanding the individual's subsequent disability, incapacity or the lapse of time. _____. A power of attorney creates an agency relationship between the individual and the person authorized to act on his behalf, and agency principles are applicable in determining the authority and duties of the attorney-in-fact.

Here, although after _____, POA was authorized to prepare, file and sign tax returns for the taxpayer, the durable power of attorney created under _____ law did not impose an affirmative legal duty on POA to prepare and timely file federal and state tax returns on the taxpayer's behalf. Following the taxpayer's execution of the durable power of attorney in _____, POA became the taxpayer's agent.

In United States v. Boyle, 469 U.S. 241 (1985), the Supreme Court opined that Congress placed the burden of prompt filing of tax returns on the taxpayer, not on some agent or employee of the taxpayer. The Court rejected the argument of an estate's executor that the estate should be excused from the addition to tax for late filing under section 6651(a)(1) because it relied in good faith on an attorney to timely file the return. The Court held that "[t]he failure to make a timely filing of a tax return is not excused by the taxpayer's reliance on an agent, and such reliance is not "reasonable cause" for a late filing under § 6651(a)(1)." 469 U.S. at 252.

As such, the fact that taxpayer had a durable power of attorney for the year at issue neither establishes nor results in a finding of reasonable cause for taxpayer because POA did not have a legal duty to file the return and pay the tax due on taxpayer's behalf. For an example of when a guardian has a legal duty to file on behalf of a taxpayer, see Bassett v. Commissioner, 67 F.3d 29 (2d Cir. 1995). The relevant question here concerns whether the facts known by the Service support a determination that the taxpayer had established reasonable cause and lacked willful neglect for the failure to timely file her _____ return and pay her _____ taxes due to her mental incapacity. The applicable return filing and payment deadlines for _____ occurred before taxpayer was adjudicated incompetent. Appeals would need facts indicating that

taxpayer was incompetent when the tax return was due to be filed and the tax was due to be paid in order to determine that taxpayer had reasonable cause for her failure to timely file and pay due to her mental incapacity. That POA was authorized to act for taxpayer under the durable power of attorney respecting tax return filing is not relevant for the year at issue.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

None identified.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call (202) 317-6845 if you have any further questions.