



Sorry, but No Dice-Reliance Upon Tax Professional Co-Administrator
Podcast of November 4, 2006



Feed address for Podcast subscription:
<http://feeds.feedburner.com/EdZollarsTaxUpdate>
Home page for Podcast: <http://ezollars.libsyn.com>
©2006 Edward K. Zollars, CPA

The TaxUpdate podcast is intended for tax professionals and is not designed for those not skilled in independent tax research. All readers and listeners are expected to do their own research to confirm items raised in this presentation before relying upon the positions presented.

The Podcast and this document may be reproduced freely so long as no fee is charged for the use of this document. Such prohibited use would include using this podcast or document as part of a CPE presentation for which a fee is charged.

This podcast is sponsored by Leimberg Information Services, located on the web at <http://www.leimbergservices.com>. Leimberg Information Services offers email newsletters on tax related matters, as well as access to a library of useful information to tax practitioners that subscribe to their services.

Failure to File Returns

In the case of *Estate of Landers*, TC Memo 2006-230, the Tax Court looked at whether a co-administrator could claim a reasonable cause exception to the late filing of an estate tax return where the co-administrator claimed he had relied upon the other administrator of the estate, who was an enrolled agent, to insure that estate tax returns would be timely filed and the tax paid. The case serves as a reminder that, generally, reliance upon a tax professional for timely filing will not be deemed reasonable cause by the courts.

Margaret Landers' Estate and A Tale of Two Administrators

In January of 2000, Margaret Landers died. Her will provided two co-administrators, Dale Seltzer (the individual claiming a right to reasonable cause relief and principal beneficiary of the estate of the estate) and Mark Gershon, EA. Mr. Seltzer was a nephew

of Mrs. Landers. Mrs. Landers' husband had died in 1993, and most of her property was held in a revocable trust of which Mr. Seltzer and Mr. Gershon were the co-trustees.

Mr. Gershon was an enrolled agent who performed tax and accounting services for rental properties that were owned in various forms by the Landers. He also prepared Mrs. Landers' estate tax return and the 2000 income tax return for the trust.

Mr. Gershon had a number of health issues following Mrs. Landers' death. Just over a year after Mrs. Landers' death, Mr. Gershon slipped and fractured his hip. The court reported that he remained active after his injury. However, Mr. Gershon died on December 13, 2003.

Somehow, Mrs. Landers' estate tax return was not filed by the extended due date. While the return's extended due date was April 21, 2001, the return was not actually filed until February 4, 2002. This turned out to be a significant problem, since the return showed a tax due of \$3,911,424 of which \$2.4 million had been paid with the extension request. The return was accompanied by a check for \$600,000. The IRS issued assessments under §6651(a)(1) for \$340,070.40 for late filing and under §6651(a)(2) for \$130,028.16 for late payment of tax.

But I Relied Upon the Tax Professional

The court noted that Mr. Seltzer knew there was a deadline to file the estate tax return, and that Mr. Gershon had obtained an extension of time to file the return. Seltzer did not independently determine the due dates, but rather relied upon Mr. Gershon to inform him of when the return was due. The court noted that Mr. Seltzer normally paid obligations as soon as they were due—which implies the court believes that had Mr. Gershon informed Seltzer of the due date the return would have been timely filed and the obligation paid. Similarly the court would seem to believe that Mr. Gershon failed to either get the return filed or inform Mr. Seltzer.

The facts of the case don't make it clear how the return managed to fall between the cracks or what later caused the estate to realize that a return needed to be filed. However, from the dates it is clear that the return was filed before Mr. Gershon died, and the timing suggests that the oversight may have been noted when someone began preparing income tax returns for the following year.

The estate argued two different excuses for its administrators failure to file the return on a timely basis. It argued that Mr. Gershon's hip injury caused the untimely filing. Remember that Mr. Gershon's hip fracture occurred about two months before the extended due date of the estate tax return, and it would appear the estate wanted the court to decide that this would be disruptive enough to excuse Mr. Gershon's inability to get the return filed in a timely fashion.

However, the Court found this was not the case. In what might be a disconcerting warning in cases dealing with extended returns, the Court first noted that there was no information provided why Mr. Gershon had waited to complete the return so it was still

not ready to file by the date he had fractured his hip, which was about two months before the extended due date.

The Court also noted that Mr. Gershon continued to work after fracturing his hip, and took special note of the fact that the trust return was filed on time for 2000, which was approximately the same time as the estate tax return was due. As such, the Court decided, it did not appear that Mr. Gershon's injury was one that prevented him from completing tax returns, and therefore the injury did not excuse the late filing. The Court noted that it wasn't until nearly a year after Mr. Gershon's hip fracture that the estate tax return was finally filed.

The estate argued that Mr. Seltzer had acted reasonably because he had relied upon Mr. Gershon, a tax professional, to take care of filing the returns. Mr. Seltzer pointed to California Probate Code sec. 16012 to show he was allowed to delegate the filing of the estate tax return to his co-administrator, despite the fact that generally fiduciaries of the estate are responsible for ascertaining the due date of the estate tax return.

California Probate Code sec. 16012 provided in part:

SEC. 16012. Delegation of duties; prohibitions; exceptions

(a) The trustee has a duty not to delegate to others the performance of acts that the trustee can reasonably be required personally to perform * * *.

(b) In a case where a trustee has properly delegated a matter to an agent, cotrustee, or other person, the trustee has a duty to exercise general supervision over the person performing the delegated matter.

The Tax Court indicated that, to it, that provision did not help Mr. Seltzer. It held that Mr. Seltzer could "reasonably be required to perform" his duty to insure an estate tax return was filed. The fact that Mr. Seltzer did not determine what the due date of the return was, or make an effort to determine if a return had been filed was a problem.

The Court noted that Mr. Seltzer himself did not appear to be operating under any personal disability that would have limited his ability to discharge this obligation—and that, in fact, he had made sure that the bills due for other entities whose business he managed were paid timely during that period. The Court referred to Mr. Seltzer's *selective inability* to meet tax obligations when combined with his ability to meet other business obligations did not support a finding of reasonable cause for late filing.

The estate tried a slightly different theory to attempt to get out of the late payment penalty. Again the estate pointed to Mr. Gershon's hip fracture to excuse the fact that he had prepared the estate tax return, and then argued that because Mr. Seltzer did not have a completed estate tax return, he could not know the proper tax to pay—and thus should be excused from the late payment.

The Court felt that even if Mr. Seltzer believed his preparer was working under a disability and was unable to complete his duties, he should have taken a different action:

We add that we believe that an ordinary and reasonable person in Seltzer's position would have consulted another individual as to the estate tax return had he or she known that the return was on extension and believed that the current preparer was suffering from a disability.

Lessons From This Case

For tax professionals, this case serves as a reminder that on the issue of a timely filing, the taxpayer won't necessarily be able to get out of a late filing penalty if the preparer simply fouls up and doesn't catch the due date and inform the client of that date. Preparers likely should consider their systems for insuring that due dates are noted well in advance and their import communicated to clients on timely basis.

That's especially true for those professionals that normally do annual recurring returns who are handling an estate tax return, which will have a unique due date based on the date of death of the decedent. It's easy for such an unusual due date to "slip through the cracks" and be missed if a professional is only looking for returns with a 15th or end of the month due date in his/her due date scanning.

The problem is that while the IRS and Tax Court may not excuse late filing due to reliance on a professional, it's not necessarily true that a local court would not find the preparer liable to reimburse the client for the penalty in a case like this. In other areas of tax law where reliance on a professional is a valid reasonable cause, the preparer may receive a "get out of jail free" card from a liability standpoint if he/she "falls on his sword" and admits error, since the client ends up with no penalty.

As well, since the issue of the due date is of special concern, it is likely important to communicate the due date to the client for the return, as well as establish dates by which the client must provide all required information for the return to be able to be completed on time. Absent such information, a client may figure it's OK to bring in the information at the last minute, leaving the professional with the poor choice of either rushing through a return that may contain errors due to its rushed status, or missing a filing deadline when the client will claim the professional had the information before the due date. The latter may be the only option when a professional has a number of clients that decide to bring information in just before a filing deadline.

Preparers should consider options that can be implemented if they become disabled temporarily. This step is especially important for individuals in solo practice, since there's no obvious individual to step in. While the court did not find Mr. Gerston's injuries to be sufficient to excuse the late filing, it does seem likely that the hip injury would have disrupted his practice—and that it's not a coincidence that this return was overlooked shortly after Mr. Gerston's injury.

It is also important to note that in cases like this, the court will look at things like the time period before the error was corrected in evaluating an excuse. In this case, the fact that the return was finally filed many months later made it difficult for the court to accept that

Reliance Upon Tax Professional Co-Administrator *Podcast of November 4, 2006*
<http://www.edzollars.com> [Feed http://feeds.feedburner.com/EdZollarsTaxUpdate](http://feeds.feedburner.com/EdZollarsTaxUpdate)

Mr. Gerston's injury was the sole cause of the late filing—rather, it looked a lot more like simple negligence on the part of both co-administrators.