# MLI #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 56 decisions issued by federal courts from June 1, 2013 to May 31, 2014, 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 as tax on a return under IRC § 6651(a)(2);
- Failure to pay estimated tax under IRC § 6654; or
- Some combination of the three.[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. Thirteen cases involved the imposition of the estimated tax penalty in conjunction with the failure to file and failure to pay penalties; four involved both the failure to file and failure to pay penalties; one case involved only the estimated tax penalty; three cases involved only the failure to pay penalty; and 30 cases involved only the failure to file penalty.[2]

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.[3] The estimated tax penalty is imposed unless the taxpayer can meet one of the statutory exceptions.[4] Taxpayers were unable to avoid a penalty in 49 of the 56 cases.

## PRESENT LAW

Under IRC § 6651(a)(1), a taxpayer who fails to file a return on or before its due date (including extensions) will be subject to a 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, 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 that he or she exercised ordinary business care and prudence but was still unable to file by the due date.[6] The failure to file penalty applies to income, estate, gift, employment and self-employment, and certain excise tax returns.[7]

1 Internal Revenue Code (IRC) § 6651(a)(3) imposes an addition to tax for failure to pay a tax liability not shown on a return. However, because only a small number of cases involved this penalty, we did not include it in our analysis.

2 There were two additional categories of combined case issues: four involved the estimated tax penalty with just the failure to file penalty, and one case involved the estimated tax penalty with just the failure to pay penalty.

3 IRC § 6651(a)(1), (a)(2).

4 IRC § 6654(e).

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).

The failure to pay penalty applies to a taxpayer who fails to pay an amount shown as tax on his or her 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 both the failure to file and failure to pay penalties are imposed for the same month, the amount of the failure to pay penalty reduces the amount of the failure to file penalty by 0.5 percent for each month.[9]

The failure to pay penalty applies to income, estate, gift, employment and self-employment, and certain excise tax returns.[10] The taxpayer will not be held liable if he or she can establish reasonable cause, *i.e.*, the taxpayer must show that he or she exercised ordinary business care and prudence but still could not 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]

IRC § 6654 imposes a penalty on any underpayment of estimated tax by an individual or by certain estates or trusts.[14] The law requires four installments per taxable year, each generally 25 percent of the required annual payment.[15] The required annual payment is generally the lesser of 90 percent of the tax shown on the return for the current taxable year or 100 percent of the tax for the previous year.[16] 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.[17]

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;[18]
- The preceding taxable year was a full 12 months, the taxpayer had no liability for the preceding taxable year, and the taxpayer was a U.S. citizen or resident throughout the preceding taxable year;[19]
- The IRS determines that because of casualty, disaster, or other unusual circumstances, the imposition of the penalty would be against equity and good conscience;[20] or

8 IRC § 6651(a)(2). Note that if the taxpayer timely files the 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 limitation.

10 IRC § 6651(a)(2).

11 Treas. Reg. § 301.6651-1(c)(1). Even when a taxpayer shows undue hardship, the regulations require him or her to prove reasonable cause.

12 *Id. 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 § 6654(a), (l).

15 IRC § 6654(c)(1), (d)(1)(A).

16 IRC § 6654(d)(1)(B).

17 IRC § 6654(a).

18 IRC § 6654(e)(1).

19 IRC § 6654(e)(2).

20 IRC § 6654(e)(3)(A).

- The taxpayer retired after reaching age 62 or became disabled in the taxable year for which estimated payments were required, or in the taxable year preceding that year, and the underpayment was due to reasonable cause and not willful neglect.[21]

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.[22]

## ANALYSIS OF LITIGATED CASES

We analyzed 56 opinions issued between June 1, 2013 and May 31, 2014, where the failure to file penalty, failure to pay penalty, or estimated tax penalty was in dispute. All but five of these cases were litigated in the United States Tax Court. A detailed list appears in Table 6 in Appendix III. Thirty-six cases involved individual taxpayers and 20 involved businesses (including individuals engaged in self-employment or partnerships).

Of the 41 cases in which taxpayers appeared *pro se* (without counsel), taxpayers prevailed in full in one case, and three resulted in split decisions. Of the 15 cases in which taxpayers had representation, taxpayers prevailed in full in three cases, and none were split decisions.

### Failure to File Penalty

To be held liable for the failure to file penalty, the taxpayer must have a filing requirement. In *Ungvar v. Commissioner*,[23] a tax-exempt religious corporation petitioned the U.S. Tax Court for redetermination of an employment tax deficiency and additions to tax after the reclassification of an individual as the taxpayer's employee.[24] The IRS issued a notice of determination of worker classification and a notice of deficiency for employment tax deficiencies that arose from this reclassification.[25] The deficiency included a penalty under IRC § 6651(a)(1) for failing to file federal employment tax returns. However, the Tax Court held the taxpayer was not required to file these returns or make any required deposits for the taxable periods at issue, because it was determined the taxpayer did not have any employees at that time. Accordingly, the court held the taxpayer was not liable for the failure to file penalty.[26]

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21 IRC § 6654(e)(3)(B).

22 *Higbee v. Comm'r*, 116 T.C. 438, 446 (2001) (quoting 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), such as where the taxpayer only makes frivolous arguments. *Funk v. Comm'r*, 123 T.C. 213 (2004).

23 *Ungvar v. Comm'r*, T.C. Memo. 2013-161.

24 IRC § 7436 grants the Tax Court jurisdiction to determine whether the IRS's determination of worker classification is correct and whether the employment taxes, including additions to tax, associated with the worker classification are the proper amount. Originally IRC § 7436 only granted jurisdiction to the Tax Court to review and determine worker classification status and not the proper amount of employment tax associated with the classification. In 2000, Congress amended IRC § 7436 and clarified that the Tax Court does have jurisdiction to determine the proper amount of employment tax under the determination of worker status. *See* The Community Renewal Tax Relief Act of 2000, Pub. L. No. 106-554, § 314(f) and (g), 114 Stat. 2763A-587, 2763A-643 (Dec. 21, 2000).

25 The IRS assessed amounts due as a result of the taxpayer's failure to withhold and deposit payments from its employee's wages. Specifically, the taxpayer did not remit amounts required under the Federal Insurance Contributions Act (FICA) and amounts required for income tax withholding (ITW) for the last three quarters of 2004 and all quarters of taxable years 2005, 2006, and 2007. Under IRC §§ 3401 through 3405, employers are required to withhold from employees' wages an amount for payment of tax, such as income tax and employment tax, and are required to remit these withholdings to the IRS.

26 T.C. Memo. 2013-161. The court also held that because the taxpayer did not have any employees during the time period at issue, the taxpayer did not fail to make employment tax deposits and was therefore, not liable for the penalties assessed under IRC § 6656.

More commonly, taxpayers raised reasonable cause arguments in defense to the failure to file penalty. However, in most cases reviewed, taxpayers could not successfully establish that the failures to file were due to reasonable cause. Frequent reasonable cause claims included the following issues.

### *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 return on time.[27] 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.[28] In *Wolfington v. Commissioner*,[29] the taxpayers (husband and wife) failed to file their 2005 and 2006 federal income tax returns after seeking and receiving filing extensions.[30] In addition to raising other arguments, which the court found unconvincing and misguided, the taxpayers argued that Mrs. Wolfington's illness was "one of the distractions whose cumulative effect prevented [them] from timely filing their return."[31] However, the taxpayers did not provide any evidence, aside from Mr. Wolfington's testimony, that his wife's illness, alone or cumulatively, had a direct impact on their ability to file a return. As the taxpayers' arguments cumulatively did not establish reasonable cause, the Tax Court upheld the penalty as properly assessed. This case highlights the importance of providing additional documentation to establish illness as a reasonable cause.

In *Stevens Tech., Inc. v. Commissioner*,[32] the taxpayer was assessed additions to tax for failure to file quarterly employment tax returns (Forms 941, *Employer's Quarterly Federal Tax Return*) for a number of quarters between 2005 and 2008.[33] After the assessment, the IRS filed a Notice of Federal Tax Lien and sent the taxpayer a *Notice of Federal Tax Lien Filing and Your Right to a Hearing under IRC § 6320*. The taxpayer then requested a Collection Due Process (CDP) hearing requesting abatement of the failure to file penalties on the basis of reasonable cause. After the CDP hearing, and considering the taxpayer's request, the Appeals Officer issued a notice of determination stating that abatement of the failure to file penalties was unwarranted. After receiving this determination, the taxpayer petitioned the U.S. Tax Court under IRC § 6320(a), which grants the Tax Court judicial review of the IRS Appeals Office's CDP determinations.[34] During the trial, the taxpayer argued that its failure to file timely was due to reasonable cause, because one of its officers had significant health and family problems. Despite those difficulties, "the company was able to continue its operations, market its services to clients and potential clients,

27 *Williams v. Comm'r*, 16 T.C. 893, 905-06 (1951) (interpreting § 291 of the 1939 Code, a predecessor to IRC § 6651), *acq.*, 1951-2 C.B. 1. *See*, *e.g.*, *Harbour v. Comm'r*, T.C. Memo. 1991-532 (finding reasonable cause for failing to timely file because the taxpayer was in a coma the month before the due date of his tax return).

28 *Judge v. Comm'r*, 88 T.C. 1175, 1189–91 (1987).

29 T.C. Memo. 2014-45.

30 The taxpayers filed returns only after the IRS issued a statutory notice of deficiency in 2011.

31 T.C. Memo. 2014-45 at 8. The taxpayers also stated they believed it was unnecessary to timely filing the 2005 return because they were not expecting to owe tax, and were unable to timely file the 2006 return because they were still gathering necessary information.

32 T.C. Memo. 2014-13.

33 *Id*. The term "employment taxes," as used in this case, included: (1) employer's share of Federal Insurance Contributions Act (FICA), (2) employee's FICA withholding, and (3) employee's income tax withholding. The term also includes withholding under the Federal Unemployment Tax Act. *See generally*, IRC §§ 3101, 3102, 3111-3113, and 3121-3128 (Federal Insurance Contributions Act); IRC §§ 3201, 3202, 3211, 3221, 3231-3233 and 3241 (Railroad Retirement Tax Act); IRC §§ 3301-3311 (Federal Unemployment Tax Act); IRC §§ 3401-3407 (collection of income at source on wages).

34 Where the validity of the underlying tax liability is properly at issue, the court will review the amount of the tax liability on a *de novo* basis. The legislative history of RRA '98 addresses the standard of review courts should apply in reviewing Appeals' CDP determinations. H.R. Rep. No. 105-599, at 266 (1998) (Conf. Rep.). The term *de novo* means anew. *Black's Law Dictionary*, 447 (7th Ed. 1999).

increase its workforce, and hire an accounting firm to prepare its Forms 941."[35] As a result, the Tax Court held the officer's health and family problems could not be reasonable cause because the failure to file was the result of the company's deliberate choice to focus on business matters rather than on tax compliance.[36]

### *Reliance on Agent*

The U.S. Supreme Court, in *United States v. Boyle*,[37] held taxpayers have a nondelegable duty to file a return on time and a taxpayer's reliance on an agent to file the return does not excuse a failure to comply with a known filing requirement. In *Lamb v. Commissioner*,[38] the taxpayers relied on their attorney to prepare and file their 2008 tax return, but the IRS never received it. The court held, even if the taxpayers' testimony regarding their relationship and interactions with their attorney were credible, their reliance did not excuse their failure to timely file their return.

A taxpayer may establish reasonable cause for a failure to file if he or she can prove reasonable reliance on a professional tax advisor's advice or that the taxpayer made a good-faith effort to ascertain return filing requirements.[39] In order to reasonably rely on the advice of a tax professional, the taxpayer must present evidence of the professional's expertise and show he or she provided the professional with all necessary and accurate information.[40]

In *Sean McAlary Ltd., Inc. v. Commissioner*,[41] the taxpayer relied on a preparer to compute and remit employment taxes and file required employment tax returns for tax year 2006 (Form 941, *Employer's Quarterly Federal Tax Return* and 940, *Employer's Annual Federal Unemployment 'FUTA' Tax Return*).[42] However, the returns were not filed and the IRS imposed a failure to file penalty under IRC § 6651(a)(1). The taxpayer argued he was not liable for the penalty, because reliance on advice from the tax professional established reasonable cause. However, the court held reasonable cause did not exist because the taxpayer

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35 *Stevens Tech., Inc. v. Comm'r*, T.C. Memo. 2014-13.

36 *Id*. The court also upheld the imposition of the failure to pay penalty under IRC § 6651(a)(2) and failure to make tax deposits under IRC § 6656.

37 469 U.S. 241, 252 (1985).

38 T.C. Memo. 2013-155.

39 *Estate of La Meres v. Comm'r*, 98 T.C. 294, 315-17 (1992) (citations omitted).

40 *Id*. In her Annual Reports to Congress, the National Taxpayer Advocate has emphasized the need for minimum competency standards for paid unenrolled return preparers. *See* National Taxpayer Advocate 2013 Annual Report to Congress 61-74; National Taxpayer Advocate 2009 Annual Report to Congress 41-69; National Taxpayer Advocate 2008 Annual Report to Congress 503-512. In June of 2014, the IRS announced that it would be offering a new voluntary program designed to encourage education and filing season readiness for such preparers. The program will allow unenrolled return preparers to obtain a record of completion when they voluntarily complete a required amount of continuing education, including a course in basic tax filing issues and updates, ethics and other federal tax law courses. Tax return preparers who elect to participate in the program and receive a record of completion from the IRS will be included in a database on IRS.gov that will be available by January 2015 to help taxpayers determine return preparer qualifications. *See* IRS Press Release, *New IRS Filing Season Program Unveiled for Tax Return Preparers*, IR-2014-75 (June 26, 2014). The American Institute of CPAs filed suit, in the District Court for the District of Columbia, alleging that the IRS lacks the authority to implement the voluntary program. The government subsequently filed a motion to dismiss. On October 27, 2014, the District Court for the District of Columbia granted the IRS's motion to dismiss. *AICPA v. IRS*, 2014 WL 5585334 (D.D.C. 2014).

41 T.C. Summ. Op. 2013-62. This is a summary opinion small tax case and pursuant to IRC § 7463(b) cannot be cited as precedent. Normally we do not discuss Tax Court cases that are designated as a "Small Case" under IRC § 7463(b) but we have elected to discuss this case here because it best illustrates the point that reliance on a tax professional is not an absolute defense, but merely a factor to be considered. *See e.g.*, *Freytag v. Comm'r*, 89 T.C. 849, 888 (1987).

42 IRC § 7436(a) vests the Tax Court with jurisdiction to review certain determinations made by the Commissioner regarding employment status (worker classification) and to determine the proper amount of employment tax arising from such determination. In this case, the parties agreed the IRS classification of employee was correct and the remaining issues were the amounts of employment tax and additions to tax.

never investigated the preparer's background or qualifications, or otherwise confirmed that he was a competent professional who had sufficient knowledge and expertise to warrant reliance on his advice.[43]

### *"Zero Return" Filers and Other Frivolous Arguments*

Under the longstanding four-part test articulated in *Beard v. Commissioner*,[44] a valid return must:

1. Contain sufficient data to calculate the tax liability;
2. Purport to be a return;
3. Represent an honest and reasonable attempt to satisfy the requirements of the tax laws; and
4. Be signed under penalties of perjury.

Each year, some taxpayers claim they have no obligation to pay taxes by filing returns reporting zero income when they have earned substantial wages accurately reported on a Form W-2.[45] A "zero" return does not constitute a tax return under the *Beard* test because it is devoid of financial data and lacks sufficient information to calculate the tax liability.[46] Thus, when the taxpayer in *Hill v. Commissioner* filed returns containing zeros for taxable income, the court upheld the failure to file penalty.[47]

## Failure to Pay an Amount Shown Penalty

A taxpayer can file a return by the due date and still be liable for a penalty if he or she does not pay the amount shown on the return. In cases where individual taxpayers disputed that they were subject to the failure to pay penalty, many of their justifications were similar to those used for the failure to file penalty under IRC § 6651(a)(1), as the taxpayers often unsuccessfully argued medical illness or reliance on an agent.[48]

However, a taxpayer succeeded in disputing the penalty when the IRS could not meet its burden of production under IRC § 7491(c). Specifically, the IRC § 6651(a)(2) penalty applies only when the return filed by the taxpayer shows the amount due.[49] If the taxpayer did not file a return, the IRS can only assess the penalty if it has prepared a Substitute for Return (SFR) that satisfies the requirements of IRC § 6020(b). If the IRS cannot produce the SFR, it falls short of satisfying its burden of production under IRC § 7491.[50]

For example, in *Close v. Commissioner*,[51] the IRS stated it prepared a valid SFR for the taxpayers for each year in issue. However, no SFRs were introduced into evidence, and the parties did not stipulate that valid SFRs were prepared. Instead, the IRS relied upon certified Forms 4340, *Certificate of Assessments, Payments, and Other Specified Matters*, that purported to show the IRS filed SFRs for the taxpayers. Still,

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43 T.C. Summ. Op. 2013-62.

44 82 T.C. 766, 777 (1984), *aff'd per curiam*, 793 F.2d 139 (6th Cir. 1986).

45 *See, e.g., Hill v. Comm'r*, T.C. Memo. 2013-265 (concluding there was no evidence of reasonable cause presented when the taxpayer reported all "zeros" on his return and offered only frivolous arguments).

46 *See Turner v. Comm'r*, T.C. Memo. 2004-251, and the numerous cases cited therein.

47 *Hill v. Comm'r*, T.C. Memo. 2013-265.

48 *See, e.g., U.S. v. Meehan*, 530 F. App'x 155 (3d Cir. 2013), *aff'g* 108 A.F.T.R.2d (RIA) 5619 (illness); *Alexander v. Comm'r*, T.C. Memo. 2013-203 (reliance on agent).

49 IRC § 6651(a)(2), (g)(2).

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

51 T.C. Memo. 2014-25.

the court held the IRS did not meet its burden of production under IRC § 7491(c), because the forms did not adequately prove the SFRs had been created.

### 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.[52]

The IRS has the burden of production under IRC § 7491(c) to produce evidence that a taxpayer was required to make an annual payment under IRC § 6654(d)(1)(B). In *Winterroth v. Commissioner*,[53] the IRS did not produce any evidence the taxpayer had a tax liability for 2007. Without the 2007 return, and without knowing if the taxpayers had a liability for that year, the court was unable to calculate the taxpayers' estimated annual payment for 2008, if any. However, the IRS established that the taxpayer was obligated to file a return for 2008 but did not do so and did not make the requisite 2009 payments. Therefore, the IRS did not meet its burden of production of information showing that the taxpayers had a required payment under IRC § 6654 for 2008, but did show that the taxpayer was required to make a payment for 2009.

### Penalty for Raising Frivolous Arguments

In four cases where the IRS had asserted either the failure to file penalty, failure to pay penalty, estimated tax penalty, or some combination, the courts also imposed the IRC § 6673 penalty for making frivolous arguments.[54] In one of these cases, the taxpayer failed to file a return because he believed neither compensation nor dividends were taxable income.[55] The Tax Court held the taxpayer liable for fraudulent failure to file, failure to pay tax, and failure to pay estimated income tax, and imposed a $50,000 penalty under IRC § 6673 ($25,000 in each consolidated case).[56]

## CONCLUSION

The IRS did not prevail in full in seven of 56 (or 13 percent) of the failure to file penalty, failure to pay penalty, and the estimated tax penalty cases analyzed in this report. This is similar to the prior year, when the IRS did not prevail in 17 percent of cases.[57] Despite a rather high IRS success rate, the litigation represents a significant impact on IRS resources and a burden on taxpayers.

In an effort to reduce the burden on taxpayers and save resources, it is important the IRS clearly explain to taxpayers the requirements of reasonable cause. In a number of cases, it appeared that taxpayers did

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52 *See, e.g.*, *Duggan v. Comm'r*, T.C. Memo. 2014-17, *appeal docketed*, No. 14-71645 (9th Cir. June 16, 2014).

53 T.C. Memo. 2014-28.

54 *See* Most Litigated Issue: *Frivolous Issues Penalty Under IRC § 6673 and Related Appellate-Level Sanctions*, *infra*.

55 *Jones v. Comm'r*, T.C. Memo. 2014-101.

56 *Id*.

57 National Taxpayer Advocate 2013 Annual Report to Congress at 384.

not fully understand what type of situations would establish reasonable cause.[58] This disconnect may result in unnecessary litigation, putting the taxpayer at risk for sanctions under IRC § 6673.

Additionally, 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,[59] which is designed to help IRS employees make fair and consistent abatement determinations.[60] The RCA program allows IRS employees to override the result in certain circumstances, but employees must understand the definition of reasonable cause in order to apply the override.[61] Thus, a close review by an employee is essential to ensure the penalty is imposed appropriately. To promote voluntary compliance, taxpayers must believe the facts of their individual cases have been carefully considered.

The National Taxpayer Advocate reiterates her recommendation that Congress implement a one-time abatement of the failure to file penalty for taxpayers who comply with their filing obligations, but in an untimely manner.[62] She also continues to recommend a repeal of the failure to pay penalty, which could be replaced by a market rate of interest equal to the rate on an unsecured loan.[63]

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58 *See*, *e.g.*, *Wolfington v. Comm'r*, T.C. Memo. 2014-45.

59 The Reasonable Cause Assistant can only consider Failure to File or Failure to Pay penalties on certain individual tax returns, and the Failure to Deposit penalty only on certain business returns.

60 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.

61 IRM 20.1.1.3.6.10(3) (Nov. 25, 2011) ("Fair and consistent application of penalties requires employees to make a final penalty relief determination consistent with the RCA conclusion. Because 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.").

62 IRM 20.1.1.3.6 (Nov. 25, 2011). The Reasonable Cause Assistant (RCA) will be used when considering penalty relief due to reasonable cause. RCA is to be used after normal case research has been performed, (*i.e.*, applying missing deposits/payments, adjusting tax, researching for missing extensions of time to file, etc.). *See* National Taxpayer Advocate 2001 Annual Report to Congress 188. A provision to waive the failure to file penalty for first-time, unintentional, minor errors was included in the House-passed Taxpayer Protection and IRS Accountability Act of 2003. *See* H.R. 1528, 108th Cong. § 106 (2003). Although the IRS has provided for a one-time administrative waiver of the failure to file penalty in IRM 20.1.1.3.6.1 (Nov. 25, 2011), the National Taxpayer Advocate continues to recommend a statutory waiver similar to IRC § 6656(c).

63 *See* National Taxpayer Advocate 2001 Annual Report to Congress 182.