

Current Federal Tax Developments

Week of July 11, 2022

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CURRENT FEDERAL TAX DEVELOPMENTS
WEEK OF JULY 11, 2022
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Published in 2022 by Kaplan Financial Education.

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IRS EXTENDS LATE PORTABILITY ELECTION AUTOMATIC RELIEF FROM TWO TO FIVE YEARS AND PROVIDES ADDITIONAL GUIDANCE

Revenue Procedure 2022-32, 7/8/22

The IRS has issued a revised Revenue Procedure providing for a late portability election available to qualifying estates in Revenue Procedure 2022-32.¹ The procedure supersedes Revenue Procedure 2017-34 and becomes the only method by which a late election may be made for any estate that qualifies to use this procedure.

Portability Election

The portability election was added to IRC §2010 by the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (Pub. L. 111-312, referred to in this article as the “2010 Act”), providing a method to prevent any applicable exclusion not used by a decedent with a surviving spouse from being lost. If an estate makes the portability election, any unused exclusion at this first death is made available to be used by the surviving spouse and/or his/her estate for subsequent transfers (subject to certain restrictions).

At the death of an individual, the IRC provides a tax credit equal to the federal transfer tax on an exclusion amount that can be used to offset the estate tax. Similarly, no transfer taxes are due on any amounts transferred to the decedent’s surviving spouse.

For many couples, they would prefer for all assets to be transferred to the surviving spouse’s control at the passing of the first spouse, with assets not passing to their children or other descendants until the passing of the second spouse. But that “wasted” the exclusion that was available to the first spouse to die in terms of eventually transferring assets to succeeding generations at the death of the second spouse.

The standard method of “saving” that exclusion prior to 2010 was to transfer assets up to the exclusion in place at the death of the first spouse to die to a trust that provided income from the assets would be paid to the surviving spouse for his/her life with the principal of the trust passing to the succeeding generation(s) at the death of the surviving spouse. This structure is referred to as a bypass trust.

The bypass trust, as the name suggests, allows the assets inside the trust to bypass inclusion in the surviving spouse’s estate. At the survivor’s death, the assets in the bypass trust should pass transfer tax free to the couple’s descendants (or whatever other parties they have chosen to pass their wealth to). That is true regardless of the value of

¹ Revenue Procedure 2022-32, July 8, 2022, <https://www.irs.gov/pub/irs-drop/rp-22-32.pdf> (retrieved July 8, 2022)

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the assets in this trust at the date of death—so in addition to preserving the use of the decedent’s exclusion, it also removes all appreciation of those assets from being subject to transfer taxes at the surviving spouse’s passing.

But the bypass trust does have some negative features. The key one is that the surviving spouse loses direct access to assets that used to be available to the couple to do with as they wished prior to the first death. While the bypass trusts almost always provide a method to distribute trust principal to the surviving spouse in certain situations to maintain his/her standard of living, the spouse often is, at best, annoyed by this loss of full control.

As well, the trust incurs certain ongoing costs, such as having annual accountings prepared to determine what is trust accounting income (which is not the same as taxable income) and to make proper distributions, along with the preparation of an annual fiduciary income tax return. And we can’t forget that the actual trust document itself must be drafted and kept updated, incurring both initial and continuing costs.

While a bypass trust still works under the current law, the portability option provides a different method to preserve the decedent’s exclusion at the death of the first spouse. In this case, the unused portion of the decedent’s exclusion can, if a proper election is filed, be used to increase the exclusion available at the death of the surviving spouse, allowing both spouses’ exclusion amounts to be used in full.

But the need to make an election to use this option creates a deadline that can be easily missed if the estate and/or surviving spouse does not receive timely advice. Generally, this election is made on a Form 706 that is originally due 9 months after the date of death of the decedent, though that can be extended to 15 months if a timely extension is requested.

Original IRS Relief

In 2017 the IRS published the first version of this relief. Congress provided in IRC §2010(c)(5)(A) that the portability had to be made on the estate tax return that is filed within the time prescribed by law for filing the estate tax return. Since estates with reportable assets below the exclusion amounts are not required to file an estate tax return, the IRS had to come up with a due date for those returns in the regulations for the portability provision:

For estates that are not required to file an estate tax return under § 6018(a) of the Code (as determined based on the value of the gross estate and adjusted taxable gifts), § 20.2010-2(a)(1) of the Estate Tax Regulations clarifies that the due date of an estate tax return required to elect portability is nine months after the decedent’s date of death or

the last day of the period covered by an extension (if an extension of time for filing has been obtained).²

While the IRS's position is that the agency is not authorized to extend the time to make an election whose due date is prescribed by Congress, the agency's position is that it can provide relief for a due date set by the agency via regulations:

Section 20.2010-2(a)(1) further provides that an extension of time under § 301.9100-3 to elect portability may be available to an estate that is not required to file an estate tax return under § 6018(a).³

Normally, taxpayers must make a private letter ruling request (and pay the associated fee) to obtain late election relief under IRC §301.9100-3. However, after the IRS began to get hit with a large number of private letter ruling requests for late portability election relief, the agency released its first automatic late portability election ruling in Revenue Procedure 2017-34:

On June 26, 2017, the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) published Rev. Proc. 2017-34, which provides a method for obtaining an extension of time under § 301.9100-3 to make a portability election under § 2010(c)(5)(A) that is available to the estates of decedents dying after December 31, 2010, if that estate was not required by § 6018(a) to file an estate tax return and if such a decedent was survived by a spouse. Under Rev. Proc. 2017-34, this method is a simplified method that is to be used in lieu of the letter ruling process and is available for a period extending to the second anniversary of the decedent's date of death.⁴

IRS Decision to Modify Late Election Relief

While the ruling provided relief for those estates that realized they wanted to make a portability election within 2 years of the date of death for the decedent, the IRS discovered that they were still receiving a number of requests for those who failed to meet the 2-year deadline.

Since the publication of Rev. Proc. 2017-34, the IRS has continued to issue numerous letter rulings under § 301.9100-3 granting an extension of time to elect portability under § 2010(c)(5)(A) in situations in which the decedent's estate was not required by § 6018(a) to file an estate tax return and the time for obtaining relief under the simplified method had expired. The IRS has observed that a significant

² Revenue Procedure 2022-32, July 8, 2022

³ Revenue Procedure 2022-32, July 8, 2022

⁴ Revenue Procedure 2022-32, July 8, 2022

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percentage of these ruling requests have been from estates of decedents who died within five years preceding the date of the request. The number of these requests continues to place a significant burden on the available resources of the IRS.⁵

The IRS has decided to extend this relief to five years and make certain other changes in order to attempt to reduce the number of PLR requests the agency receives in this area:

The Treasury Department and the IRS have determined that the considerable number of ruling requests for an extension of time to elect portability received since the publication of Rev. Proc. 2017-34 indicates a need for continuing relief for the estates of decedents having no filing requirement under § 6018(a). Accordingly, this revenue procedure supersedes Rev. Proc. 2017-34 and updates the procedures set forth therein by extending the period within which the estate of a decedent may make the portability election under that simplified method to on or before the fifth anniversary of the decedent's date of death.⁶

Revised Relief – What Estates Qualify?

Section 3 of the Revenue Procedure outlines the scope of this relief. The relief is available to the executor of a qualified estate or, if no executor has been appointed, a “non-appointed executor” as provided for in the regulations at Treasury Reg. §20.2010-2(a)(6). Such “non-appointed executors” are defined by the regulation as “any person in actual or constructive possession of any property of the decedent.”⁷

Such an election may be made if the following conditions are met:

- The decedent
 - was survived by a spouse;
 - died after December 31, 2010; and
 - was a citizen or resident of the United States on the date of death
- The executor was not required to file a federal estate tax return based on the value of the gross estate and adjusted taxable gifts and without regard to the need to file for portability purposes,
- The executor did not file an estate tax return within the time required by § 20.2010-2(a)(1) for filing an estate tax return; and

⁵ Revenue Procedure 2022-32, July 8, 2022

⁶ Revenue Procedure 2022-32, July 8, 2022

⁷ Treasury Reg. §20.2010-2(a)(6)

- The executor files Form 706 under the procedures outlined in this Revenue Procedure to make a late portability election.⁸

The steps the executor must take to file this special Form 706 is outlined by the procedure as follows:

- A person permitted to make the election on behalf of the estate of a decedent-- that is, an executor or non-appointed executor described earlier--must file a complete and properly prepared Form 706, *United States Estate (and Generation-Skipping Transfer) Tax Return*, on or before the fifth annual anniversary of the decedent's date of death. The Form 706 will be considered complete and properly prepared if it is prepared in accordance with § 20.2010-2(a)(7) (including the simplified filing procedures for returns filed solely to elect portability if applicable).
- The authorized party filing the Form 706 on behalf of the decedent's estate must state at the top of the Form 706 that the return is "FILED PURSUANT TO REV. PROC. 2022- 32 TO ELECT PORTABILITY UNDER § 2010(c)(5)(A)."

The relief provided if these steps are followed are described in the procedure as follows:

Satisfaction of the requirements for relief provided in section 4.01 of this revenue procedure, by an executor for whom the relief is available pursuant to section 3.01 of this revenue procedure, is deemed to satisfy the requirements for relief under § 301.9100-3 and upon that satisfaction, relief is granted under the provisions of § 301.9100-3 to extend the time to elect portability under § 2010(c)(5)(A). Accordingly, for purposes of electing portability, the Form 706 of that decedent's estate will be considered to have been filed timely in accordance with § 20.2010-2(a)(1).⁹

Or, to put it more succinctly, the portability election will be treated as properly made by estate and, subject to the standard rules related to use of the deceased spouse unused exclusion amount (DSUE), the DSUE is available to the surviving spouse and/or his/her estate.

This procedure is not available if either of the following are true:

- *A Timely Estate Tax Return Was Filed by the Estate.* The ruling provides:

The simplified method of this revenue procedure is not available to the estate of a decedent whose executor filed an estate tax return within the time prescribed by § 20.2010-2(a)(1). Such an executor either will have elected portability of the DSUE amount by timely filing that

⁸ Revenue Procedure 2022-32, July 8, 2022

⁹ Revenue Procedure 2022-32, July 8, 2022

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estate tax return or will have affirmatively opted out of portability in accordance with § 20.2010-2(a)(3)(i).¹⁰

- *Estates That Were Otherwise Required to File a Form 706.* The procedure states:

As set forth in § 20.2010-2(a)(1), an extension of time to elect portability under § 301.9100-3, including through the simplified method of this revenue procedure, is not available to an estate that is required to file an estate tax return under § 6018(a) (as determined based on the value of the gross estate and adjusted taxable gifts) because, in that case, the due date of the election is prescribed by statute and not by regulation.¹¹

The late election is also treated as void if it is later determined the estate did have an estate tax return filing requirement independent of making the portability election:

If, subsequent to the grant of relief pursuant to this revenue procedure, it is determined that, based on the value of the gross estate and taking into account any taxable gifts, the executor was required to file an estate tax return under § 6018(a), the grant of an extension as provided in section 4.02 of this revenue procedure is deemed null and void *ab initio*.¹²

As the burden of showing that the estate qualified for this election will remain with the estate and the surviving spouse or the surviving spouse's estate when the DSUE is used to reduce the transfer tax due, the surviving spouse and his/her estate should be sure to maintain records documenting that the estate of the first spouse to die was not of such a size to require the filing of an estate tax return. It will *not* be sufficient to merely have a copy of the Form 706 to document this fact, so other supporting documents will need to be maintained as well.

The expanded five-year relief is effective as of July 8, 2022. Thus, relief would be available now for estates that had missed their two-year late election date under Revenue Procedure 2017-34 but who file the Form 706 to make the late portability election within five years of the date of death of the decedent.

If an estate is not eligible for this relief solely because the executor failed to file the required Form 706 within the five-year period, the procedure provides:

The executor of an estate not within the scope described in section 3.01 of this revenue procedure only because the executor does not satisfy the requirements of section 4.01 of this revenue procedure may

¹⁰ Revenue Procedure 2022-32, July 8, 2022

¹¹ Revenue Procedure 2022-32, July 8, 2022

¹² Revenue Procedure 2022-32, July 8, 2022

request an extension of time to make the portability election under § 2010(c)(5)(A) by requesting a letter ruling under the provisions of § 301.9100-3. The requirements for requesting a letter ruling are described in Rev. Proc. 2022-1 (or any successor revenue procedure).¹³

Impact on the Surviving Spouse

The procedure provides the following general description of the impact of the late election on the surviving spouse:

If the decedent's estate is granted relief under this revenue procedure so that the estate tax return is considered to have been timely filed for purposes of electing portability, the DSUE amount of that decedent is available to the decedent's surviving spouse or the estate of the surviving spouse for application to the surviving spouse's transfers made on or after the decedent's date of death in accordance with the rules prescribed under § 20.2010-3 of the Estate Tax Regulations and § 25.2505-2 of the Gift Tax Regulations.¹⁴

But what if the surviving spouse had made taxable gifts prior to the estate taking advantage of this relief and paid gift tax on that transfer? Or, perhaps, estate tax had been paid on the estate tax return of the surviving spouse?

The procedure provides that, *if the statute of limitations for filing a claim for refund of the gift or estate tax has not expired*, the surviving spouse may file a claim for refund of the gift tax that would have been offset by the DSUE or the surviving spouse's estate could file a similar claim for excess estate taxes paid. But any taxes paid at a time that is now beyond the statute for filing a claim will not be available for refund:

However, if the increase in the surviving spouse's applicable exclusion amount attributable to the addition of the decedent's DSUE amount as of the decedent's date of death results in an overpayment of gift or estate tax by the surviving spouse or his or her estate, no claim for credit or refund may be made if the period of limitations under § 6511(a) of the Code for filing a claim for credit or refund of an overpayment of tax with respect to such transfer has expired. That is, an extension of time to elect portability granted under this revenue procedure does not extend the period during which the surviving spouse or the surviving spouse's estate may make a claim for credit or refund under § 6511(a).¹⁵

¹³ Revenue Procedure 2022-32, July 8, 2022

¹⁴ Revenue Procedure 2022-32, July 8, 2022

¹⁵ Revenue Procedure 2022-32, July 8, 2022

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The procedure also provides that if a surviving spouse files a claim for refund prior to the actual filing of the Form 706 under this Revenue Procedure, that filing will be treated as a protective claim for refund:

Because a surviving spouse has no DSUE amount from a deceased spouse to apply to such surviving spouse's transfers until the portability election has been made by the deceased spouse's executor (see §§ 20.2010-3(a)(2) and 25.2505-2(a)(2)), a claim for credit or refund of tax filed within the time prescribed in § 6511(a) by the surviving spouse or the estate of the surviving spouse in anticipation of a Form 706 being filed to elect portability pursuant to this revenue procedure, and otherwise meeting applicable legal requirements, will be considered a protective claim for credit or refund of tax.¹⁶

A surviving spouse (or the spouse's estate) would likely consider taking this step if the statute on claiming a refund of gift or estate tax was about to expire and there did not remain sufficient time to insure the Form 706 would be completed before the statute on the claim for refund of the gift or estate tax expired.

Note that such a protective claim would not extend the five-year period to make use of the automatic relief found in this Revenue Procedure. But the protective claim should still allow for a refund if the estate applied for and obtained a private letter ruling to make the late election after the five year period for the automatic relief had expired.

The procedure provides examples of applying these claim for refund rules.

EXAMPLE 1, REVENUE PROCEDURE 2022-32

Predeceasing Spouse (S1) dies on January 1, 2018, survived by Surviving Spouse (S2). The assets includible in S1's gross estate consist of cash on deposit in bank accounts held jointly with S2 with rights of survivorship in the amount of \$4,500,000. S1 made no taxable gifts during life. S1's executor is not required to file an estate tax return under § 6018(a) and does not file such a return.

S2 dies on January 29, 2021. S2's taxable estate is \$17,000,000 and S2 made no taxable gifts during life. S2's executor files a Form 706 on behalf of S2's estate on October 29, 2021, claiming an applicable exclusion amount of \$11,700,000. S2's executor includes payment of the estate tax with the Form 706.

Pursuant to this revenue procedure, S1's executor files a complete and properly prepared Form 706 on behalf of S1's estate on December 1, 2022, reporting a DSUE amount of \$11,180,000. The executor includes at the top of the Form 706 the statement required by section 4.01(2) of this revenue procedure. The filing of the return satisfies the requirements for a grant of relief under this revenue procedure and S1's estate is deemed to have made a valid portability election. The IRS accepts the return of S1's estate with no changes.

To recover the estate tax paid, S2's executor must file a claim for credit or refund of tax by October 29, 2024 (the end of the period of limitations prescribed in § 6511(a)), even though a

¹⁶ Revenue Procedure 2022-32, July 8, 2022

Form 706 to elect portability was not filed on behalf of S1's estate at the time S2's estate filed its Form 706. Such a claim filed on Form 843, Claim for Refund and Request for Abatement, in anticipation of the filing of the Form 706 by S1's executor will be considered a protective claim for credit or refund of tax. Accordingly, as long as the Form 843 is filed on or before October 29, 2024, the IRS can consider and process that claim for credit or refund of tax once S1's estate is deemed to have made a valid portability election and S2's estate notifies the IRS that the claim for credit or refund is ready for consideration.

EXAMPLE 2, REVENUE PROCEDURE 2022-32

The facts relating to S1 and S1's estate are the same as in Example 1. S2 makes a gift to Child of \$13,000,000 on December 1, 2020. S2 has made no prior taxable gifts. On April 15, 2021, S2's executor files a Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return, claiming an applicable exclusion amount of \$11,580,000. S2's executor tenders payment of the gift tax with the Form 709.

To recover the gift tax paid, S2's executor must file a claim for credit or refund of tax (protective or otherwise) within the time prescribed in § 6511(a) for filing a claim for credit or refund; in this case, April 15, 2024.

EXAMPLE 3, REVENUE PROCEDURE 2022-32

The facts are the same as in Example 2 except that S2's Form 709 claims an applicable exclusion amount of \$22,760,000, including a DSUE amount of \$11,180,000 from S1's estate. As a result, the Form 709 reports no tax due and S2's executor tenders no gift tax.

Although the portability election, once made, makes S1's DSUE amount available to S2 retroactively to S1's date of death, that DSUE amount is not available until the election is made. Because S2's executor files the Form 709 before S1's estate makes the portability election, the claimed application of the DSUE amount will be denied and gift tax on the transfer will be assessed. S2's executor pays the gift tax assessed. To recover that gift tax once the portability election has been made by S1's estate, S2's executor must file a claim for credit or refund of tax (protective or otherwise) within the time prescribed in § 6511(a) for filing a claim for credit or refund.

As Example 3 makes clear, an original Form 709 or 706 filed before the portability election is made will *not* be treated as a protective claim. Rather, the tax must be paid with such an original Form 709 or 706 if the due date for filing the form arrives before the late portability election is made by the prior decedent's estate or by obtaining a private letter ruling if the prior decedent's estate did not qualify for the automatic relief.

In such a case, the surviving spouse or executor may wish to follow up the original Form 709 or 706 with a protective claim for refund pending the later processing of the late portability election.

No Letter Rulings to Be Issued If an Estate Qualifies for This Relief

The IRS has also clarified that if an estate qualifies for relief under this Revenue Procedure, the IRS will not issue a private letter ruling even if the estate pays the user fee and asks for such a ruling.

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The procedure provides:

On or before the fifth anniversary of a decedent's date of death, the exclusive procedure for obtaining an extension of time under § 301.9100-3 to make a portability election under § 2010(c)(5)(A) for the estate of a decedent, if the decedent and executor meet the requirements of section 3.01(1) through (3) of this revenue procedure, is the procedure described in section 4.01 of this revenue procedure.¹⁷

The IRS will return the user fees and close the file on any letter ruling requests pending as of the date of this procedure that fall within that five-year time period:

If an executor of such an estate has filed a request for a letter ruling seeking an extension of time under § 301.9100-3 to make a portability election under § 2010(c)(5)(A) and that letter ruling is pending in the National Office on July 8, 2022, the Office of the Associate Chief Counsel (Passthroughs & Special Industries) will close its file on the ruling request and refund the user fee, and the estate may obtain the relief granted by this revenue procedure only by complying with section 4.01 of this revenue procedure.¹⁸

FEDERAL TAX LIEN CAN ATTACH TO AGREEMENT BY BUSINESS BUYER TO MAKE PAYMENTS TO SELLER'S FORMER SPOUSE FOR ALIMONY OBLIGATION

Email Chief Counsel Advice 202226010, 7/1/22

In Email Chief Counsel Advice 202226010¹⁹ IRS counsel gave its conclusion on whether a federal tax lien (FTL) could be attached to payments made by the purchaser of a business to the seller's former spouse to cover an alimony obligation of the seller who now faced a collection action related to a federal tax liability. This payment structure was entered as part of the taxpayer's divorce action and was in effect prior to when the federal tax lien arose.

IRC §6231 provides the following regarding a lien for federal taxes:

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may

¹⁷ Revenue Procedure 2022-32, July 8, 2022

¹⁸ Revenue Procedure 2022-32, July 8, 2022

¹⁹ Email Chief Counsel Advice 202226010, July 1, 2022, <https://www.taxnotes.com/research/federal/irs-private-rulings/e-mail-chief-counsel-advice/tax-lien-attaches-to-alimony-paid-by-business-purchaser/7dm5l> (retrieved July 10, 2022)

accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

The email describes the question posed and the history of the arrangement as follows:

You have asked us about the priority of the federal tax lien (FTL), in a situation where the taxpayer was ordered to pay monthly alimony payments to his ex-wife as a part of the taxpayer's divorce and such order was issued prior to the FTL arising. In short, following the taxpayer's divorce, the taxpayer sold his interest in three businesses to a purchaser in exchange for multiple forms of compensation provided by the contract terms. One of the contract terms provides that the purchaser will cause one of the business entities to pay the taxpayer's monthly alimony obligations to the taxpayer's ex-wife.²⁰

The email notes that the author was not made aware of whether any such payments are still being made and the assumption made for the answer given in this emailed advice:

Currently, we are not aware of the history of alimony payments since the execution of the contract. For purposes of this advice, we are assuming that the monthly payments have occurred and continue to occur as provided for by the contract.²¹

The email concludes that an FTL can attach to these payments:

The contract term that the purchaser will cause the business entity to pay the taxpayer's monthly alimony obligation provides a contractual right to payment that is subject to attachment of an FTL. *Corwin Consultants, Inc. v. Interpublic Group of Companies, Inc.*, 512 F.2d 605 (2d Cir. 1975) (FTL attached to fund comprised of periodic payments owed to taxpayer under severance agreement); *Mantovani v. Fast Fuel Corp.*, 494 F.Supp. 72, 77 (S.D.N.Y. 1980) (FTL attached to taxpayer's contractual right to proceeds); Rev. Rul. 55-210 ("Where a taxpayer has an unqualified fixed right, under a trust or a contract, or through a chose in action, to receive periodic payments or distributions of property, a Federal lien for unpaid tax attaches to the taxpayer's entire right . . .").

²⁰ Email Chief Counsel Advice 202226010, July 1, 2022

²¹ Email Chief Counsel Advice 202226010, July 1, 2022

The opinion outlines the facts related to the returns and taxes in question as follows:

Petitioner, a physician, resided in Iowa when she timely filed her petition. During 2017 she worked as an independent contractor for AB Staffing Solutions. She received income that was documented by third-party reports.

Petitioner filed an extension for time to file her 2017 return on April 15, 2018; however, she failed to file her 2017 income tax return. Respondent prepared a substitute for return for 2017 and executed Form 13496, IRC section 6020(b) Certification on February 18, 2020.

Petitioner failed to make payments of estimated tax for her 2017 income tax liability and failed to pay her tax liability.²⁸

The issue was whether the taxpayer had reasonable cause for her failure to file the returns in question, as well as failing to pay the taxes involved.

The taxpayer argued that the following circumstances justified her late filing and failure to make timely payments of her federal taxes for the years in question:

Petitioner testified that she worked fewer hours in 2018 and 2019.... She further testified that she thought she would have a refund from prior years that could be used towards her 2017 tax liability.²⁹

The opinion outlines the standard necessary to show reasonable cause for failure to file a federal tax return:

Section 6651(a)(1) imposes an addition to tax if the taxpayer failed to file an income tax return by the required due date, including an extension of time for filing. Whether “reasonable cause” and lack of “willful neglect” exist is a question of fact, and the burden of establishing these facts is on the taxpayer. *United States v. Boyle*, 469 U.S. 241 (1985). To prove reasonable cause for a failure to timely file, the taxpayer must show that he or she exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time. *Crocker v. Commissioner*, 92 T.C. 899, 913, (1989); Treas. Reg. § 301.6651-1(c)(1).

A taxpayer may have reasonable cause for failure to timely file a return where the taxpayer experiences an illness or incapacity that prevents the taxpayer from filing the return. *Boyle*, 469 U.S. at 248 n. 6; *Jordan v. Commissioner*, T.C. Memo. 2005-266. A taxpayer’s illness or

²⁸ *Bennett v. Commissioner*, Case No. 7885-21, Bench Opinion, July 5, 2022

²⁹ *Bennett v. Commissioner*, Case No. 7885-21, Bench Opinion, July 5, 2022

incapacity generally does not prevent the taxpayer from filing returns where he or she is able to continue business affairs despite the illness or incapacity. *Jordan*, T.C. Memo. 2005-266.³⁰

Unfortunately for this taxpayer, the opinion notes that, despite working fewer hours, “she was still able to function as a physician.”³¹ As such, the opinion holds:

Petitioner did not show reasonable cause and is liable for the addition to tax pursuant to section 6651(a)(1) for the year in issue.³²

The Court was no more impressed with her request to find she had reasonable cause for her failure to timely pay the taxes due.

Section 6651(a)(2) imposes an addition to tax for failure to timely pay the amount of tax shown on a return, unless it is shown that such failure is due to reasonable cause and not due to willful neglect. This addition to tax applies only when an amount of tax is shown on a return. §§ 6651(a)(2), (g)(2). When a taxpayer has not filed a valid return, the section 6651(a)(2) addition to tax may not be imposed unless the Secretary has prepared a substitute for return. See *Wheeler v. Commissioner*, 127 T.C. 200, 210 (2006), *aff'd*, 521 F.3d 1289 (10th Cir. 2008). Respondent introduced into evidence a document that qualifies under section 6020(b) as a substitute for return for 2017. See *Cabirac v. Commissioner*, 120 T.C. 163, 170-72 (2003), *aff'd without published opinion*, 94 A.F.T.R. 2d (RIA) 2004-5490 (3d Cir. 2004).

Respondent has shown that petitioner has failed to pay her federal income tax obligation for 2017.

Petitioner has not shown reasonable cause and is liable for the addition to tax pursuant to section 6651(a)(2).³³

As well, the Court found no reason to grant relief on the estimated tax penalties, noting that there is no general relief for this penalty based on reasonable cause provided for in the law:

Section 6654(a) imposes an addition to tax on underpayment of estimated tax unless an exemption applies. Respondent’s burden of production under section 7491(c) with respect to the section 6654(a) tax has been met since petitioner had income tax liability for 2017 and made no estimated tax payments for that year. Generally, no

³⁰ *Bennett v. Commissioner*, Case No. 7885-21, Bench Opinion, July 5, 2022

³¹ *Bennett v. Commissioner*, Case No. 7885-21, Bench Opinion, July 5, 2022

³² *Bennett v. Commissioner*, Case No. 7885-21, Bench Opinion, July 5, 2022

³³ *Bennett v. Commissioner*, Case No. 7885-21, Bench Opinion, July 5, 2022

reasonable cause exception exists for the section 6654(a) addition to tax. Treas. Reg. § 1.6654-1(a)(1).

Petitioner does not meet any of the statutory exceptions under section 6654(e). Therefore, petitioner is liable for the addition to tax pursuant to section 6654(a).³⁴

³⁴ *Bennett v. Commissioner*, Case No. 7885-21, Bench Opinion, July 5, 2022