

Current Federal Tax Developments

Week of September 12, 2022

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CURRENT FEDERAL TAX DEVELOPMENTS
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Current Federal Tax Developments

Table of Contents

IRS Inadvertently Made Certain Non 501(c)(3) Organizer Form 990-T Data Available for Download..... 1

No Reasonable Cause Demonstrated for Failure to Pay Taxes and Timely File Tax Returns ..4

IRS INADVERTENTLY MADE CERTAIN NON 501(C)(3) ORGANIZER FORM 990-T DATA AVAILABLE FOR DOWNLOAD

Letter from Anna Canfield Roth, Acting Assistant Secretary for Management, Department of the Treasury to Rep. Bennie G. Thompson, D-Miss, Chair, House Homeland Security Committee, 9/2/22

The IRS, via a letter to Rep. Bennie G. Thompson, D-Miss, Chair, House Homeland Security Committee, reported that the agency had inadvertently made available for bulk download certain XML Form 990-T data that should not have been disclosed.¹

The letter describes the inadvertent release of data as follows:

This notification follows the IRS discovery that some machine-readable (XML) Form 990-T data made available for bulk download section on the Tax Exempt Organization Search (TEOS) should not have been made public. This section is primarily used by those with the ability to use machine-readable data; other more widely used sections of TEOS are unaffected.²

The website contains full XML files of Form 990 information filed electronically with the IRS by §510(c)(3) organizations which is subject to public disclosure. The information is “kind of” readable but is designed to be used with software that interprets the XML schema to bring the data into a database that would be queried for data or produce a more “human friendly” version of the data to be read.

¹ Letter from Anna Canfield Roth, Acting Assistant Secretary for Management, Department of the Treasury to Rep. Bennie G. Thompson, D-Miss, Chair, House Homeland Security Committee, September 2, 2022, <https://www.taxnotes.com/tax-notes-today-federal/exempt-organizations/treasury-informs-congress-inadvertent-form-990-t-disclosures/2022/09/06/7f1v0> (subscription required, retrieved September 10, 2022)

² Letter from Anna Canfield Roth, Acting Assistant Secretary for Management, Department of the Treasury to Rep. Bennie G. Thompson, D-Miss, Chair, House Homeland Security Committee, September 2, 2022

2 Current Federal Tax Developments

The page³ looks like this:

The screenshot shows the IRS website page for Charities and Nonprofits Form 990 Series Downloads. The page has a blue header with the IRS logo and navigation links for Help, News, English, Charities & Nonprofits, and Tax Pros. Below the header is a search bar and a breadcrumb trail: Home / File / Charities and Nonprofits / Search for Charities / Form 990 Series Downloads. The main heading is "Form 990 Series Downloads". On the left is a sidebar menu with categories: Individuals, Businesses and Self-Employed, Charities and Nonprofits (selected), International Taxpayers, and Governmental Liaisons. Under Charities and Nonprofits, there are sub-links: Exempt Organization Types, Lifecycle of an Exempt Organization, Annual Filing and Forms, Charitable Contributions, Search for Charities (highlighted), Education Sessions, and International Taxpayers. The main content area has a heading "Form 990 Series (e-file) XML format" and a note: "The 2021 and 2022 XML data links are currently unavailable." Below this is a section for "2020" with a sub-heading "Index file for 2020 (CSV)" and a list of 8 links to ZIP files: https://apps.irs.gov/pub/epostcard/990/xml/2020/download990xml_2020_1.zip, https://apps.irs.gov/pub/epostcard/990/xml/2020/download990xml_2020_2.zip, https://apps.irs.gov/pub/epostcard/990/xml/2020/download990xml_2020_3.zip, https://apps.irs.gov/pub/epostcard/990/xml/2020/download990xml_2020_4.zip, https://apps.irs.gov/pub/epostcard/990/xml/2020/download990xml_2020_5.zip, https://apps.irs.gov/pub/epostcard/990/xml/2020/download990xml_2020_6.zip, https://apps.irs.gov/pub/epostcard/990/xml/2020/download990xml_2020_7.zip, and https://apps.irs.gov/pub/epostcard/990/xml/2020/download990xml_2020_8.zip. Below the 2020 section is a section for "2019".

If you download the CSV file you get a file that can be read with most spreadsheet software (including Excel) that lists all organizations whose data is found in the following 8 ZIP files, along with their EIN and return ID. Each of the ZIP files contains a large number of individual XML files with the data in XML format from individual organizations.

However, the IRS managed to inadvertently add Forms 990-T from certain organizations that weren't §501(c)(3) organizations and whose data is not subject to public disclosure. The letter describes the data and the issue with the disclosure of some Forms 999-T not subject to disclosure:

Form 990-T is the business tax return used by tax-exempt entities, including tax-exempt organizations, government entities and retirement accounts, to report and pay income tax on income that is generated from certain investments or income unrelated to their exempt purpose. The IRS is required to publicly disclose this information for 501(c)(3) organizations; however, similar information was inadvertently published for a subset of non-501(c)(3)s, which are not subject to public disclosure.⁴

³ <https://www.irs.gov/charities-non-profits/form-990-series-downloads>

⁴ Letter from Anna Canfield Roth, Acting Assistant Secretary for Management, Department of the Treasury to Rep. Bennie G. Thompson, D-Miss, Chair, House Homeland Security Committee, September 2, 2022

The letter describes the steps the IRS has now taken, as well the fact that the IRS will contact all impacted entities in the coming weeks:

The IRS took immediate steps to address this issue. The agency removed the errant files from IRS.gov, and the IRS will replace them with updated files in next few weeks. The IRS also will be working with groups that routinely use the files to update remove the erroneous files and replace them with the correct versions as they become available. The IRS will contact all impacted filers in the coming weeks.⁵

A *Tax Notes Today Federal* article regarding the leak contained the following information about the nature of the items made available:

The mistakenly released data don't include Social Security numbers, detailed account holder information, or Forms 1040, according to the IRS. However, in some cases the data include individual names or business contact information, the agency said.⁶

Any entity that has filed Form 990-T and is not a §501(c)(3) organization may have had data that was exposed to the public in this case. That would include individual retirement accounts with reportable amounts of unrelated business taxable income. Advisers may want to prepare such clients for the fact that they may receive notice that data was made available to the public and review what was reported on the Forms 990-T involved to see if any of the disclosed data may require action to be taken to protect the taxpayer from identity theft or similar risks.

⁵ Letter from Anna Canfield Roth, Acting Assistant Secretary for Management, Department of the Treasury to Rep. Bennie G. Thompson, D-Miss, Chair, House Homeland Security Committee, September 2, 2022

⁶ Fred Stokeld, "IRS Inadvertently Disclosed Taxpayer Data From Exempt Org Forms," *Tax Notes Today Federal*, September 6, 2022, <https://www.taxnotes.com/tax-notes-today-federal/unrelated-trade-or-business/irs-inadvertently-disclosed-taxpayer-data-exempt-org-forms/2022/09/06/7f1ts> (subscription required, retrieved September 10, 2022)

NO REASONABLE CAUSE DEMONSTRATED FOR FAILURE TO PAY TAXES AND TIMELY FILE TAX RETURNS

United States v Koncurat, USDC MD, Case No. 1:21-cv-00676, 9/7/22

In the case of *United States v Koncurat*,⁷ the Court rejected the taxpayers' argument that they should not be subject to penalties for failure to file their tax returns timely under IRC §6651(a)(1) and failure to timely pay taxes due under IRC §6651(a)(2).

Reasonable Cause for Late Filing and Late Payment

The relevant provisions provide:

(a) Addition to the tax

In case of failure—

(1) to file any return required under authority of subchapter A of chapter 61 (other than part III thereof), subchapter A of chapter 51 (relating to distilled spirits, wines, and beer), or of subchapter A of chapter 52 (relating to tobacco, cigars, cigarettes, and cigarette papers and tubes), or of subchapter A of chapter 53 (relating to machine guns and certain other firearms), on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate;

(2) to pay the amount shown as tax on any return specified in paragraph (1) on or before the date prescribed for payment of such tax (determined with regard to any extension of time for payment), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount shown as tax on such return 0.5 percent of the amount of such tax if the failure is for not more than 1

⁷ *United States v Koncurat*, USDC MD, Case No. 1:21-cv-00676, September 7, 2022, <https://www.taxnotes.com/tax-notes-today-federal/individual-income-taxation/government-granted-judgment-couples-unpaid-taxes/2022/09/09/7f24z> (subscription required, retrieved September 10, 2022)

month, with an additional 0.5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate;

Each subsection contains the potential for a taxpayer to obtain relief from the penalty if the taxpayer can show the failure is:

- Due to reasonable cause and
- Not due to willful neglect.

Note that a taxpayer must be able to show the cause of the failure, so even if a potential reasonable cause exists, the taxpayer must both show the failure is due to that actual reasonable cause and that it was not due to willful neglect on the part of the taxpayer.

The Court notes that the US Supreme Court has held “[a] ‘heavy burden’ falls on the taxpayer to establish that they qualify for a reasonable cause abatement. *United States v. Boyle*, 469 U.S. 241, 245 (1985).”⁸

The opinion goes on to summarize the IRS regulations on the issue:

The Internal Revenue Code does not define “reasonable cause,” but the applicable Treasury Regulation requires that the taxpayer demonstrate either that they exercised “ordinary business care and prudence” but nevertheless were “unable to file the return” or pay tax owed on time, or that they “would [have] suffered] an undue hardship” if they had paid on time. 26 C.F.R. § 301.6651-1(c)(1). “Undue hardship,” according to the Treasury Regulation, “means more than an inconvenience to the taxpayer.” 26 C.F.R. § 1.6161-1(b). The IRS has articulated eight examples of reasons that, in its view, satisfy the “reasonable cause” standard. These include

unavoidable postal delays, the taxpayer’s timely filing of a return with the wrong IRS office, the taxpayer’s reliance on the erroneous advice of an IRS officer or employee, the death or serious illness of the taxpayer or a member of his immediate family, the taxpayer’s unavoidable absence, destruction by casualty of the taxpayer’s records or place of business, failure of the IRS to furnish the taxpayer with the necessary forms in a timely fashion, and the inability of an IRS representative to meet with the taxpayer when the taxpayer makes a timely visit

⁸ *United States v Koncurat*, USDC MD, Case No. 1:21-cv-00676, September 7, 2022

to an IRS office in an attempt to secure information or aid in the preparation of a return.

Boyle, 469 U.S. at 243 n. 1 (citing Internal Revenue Manual § 4350, (24) ¶ 22.2(2) (Mar. 20, 1980)).⁹

The opinion goes on to summarize additional guidance in this area:

The Supreme Court in *Boyle* found this list instructive to its conclusion that the “reasonable cause” exception is limited to a “very narrow range of situations,” and this Court will be guided by it as well. *Id.* at 249-50. With respect to financial hardships, courts have held that “[e]vidence of financial trouble, without more, is not enough[]” to constitute reasonable cause. *Synergy Staffing, Inc. v. United States Internal Revenue Service*, 323 F.3d 1157, 1160 (9th Cir. 2003) (citing *Fran Corp. v. United States*, 164 F.3d 814, 816 (2d Cir. 1999)). “Willful neglect,” by contrast, “may be read as meaning a conscious, intentional failure or reckless indifference.” *Id.* at 245, The Internal Revenue Manual provides that reasonable cause “determinations must be based on the individual facts and circumstances of each case,” but specifies that “[c]ontinued failure to file or pay (beyond the effect of the ‘reasonable cause’) may be evidence that the underlying reason for the failure to file or pay is willful neglect and not the ‘reasonable cause’ claimed by the taxpayer.” Internal Revenue Manual § 20.1.2.2.4.1(2)(a), (c) (2016).¹⁰

Facts of This Case

The opinion summarizes the information the IRS presented in the case about the taxpayers’ failures to pay their taxes when due, as well as their failure in certain cases to timely file returns for the years involved in this case:

In support of its Motion for Summary Judgment, the Government submitted for each tax year at issue both a certified Account Transcript and a “Certificate of Assessments, Payments and Other Specified Matters” (a “Certificate of Assessments” or “Certificate”), also known as a Form 4340, all prepared by the United States Internal Revenue Service (“IRS”).¹ (Mot. Summ. J. Ex. A-R, ECF No. 23-4-23-21.) These IRS records indicate that, for all tax years at issue (i.e., 2005, 2006, and 2010 through 2016), the Koncurats failed to pay the full balance of taxes due on filing. (Decl. of Revenue Officer Christina Beyer ¶¶ 7-8, Mot. Summ. J. Ex. 2, ECF-No. 23-3.) The records further show that, for tax years 2005, 2006, and 2014, the Koncurats

⁹ *United States v Koncurat*, USDC MD, Case No. 1:21-cv-00676, September 7, 2022

¹⁰ *United States v Koncurat*, USDC MD, Case No. 1:21-cv-00676, September 7, 2022

filed their joint federal income tax returns late. (Id.) The records for the nine tax years at issue reflect that, as of November 1, 2021, the Koncurats owed the Government a combined total of \$669,151.03 in outstanding tax liabilities, interest, and penalties for late filing and late payment. (Mot. Summ. J. Mem. Supp. ¶ 6, ECF No. 23-1.) Because these liabilities continue to accrue interest and penalties until they are paid in full, the balance owed by the Koncurats today may be larger. (Id. at ¶ 7); 26 U.S.C.A. § 6601(a); 26 U.S.C.A. § 6651(a).¹¹

The taxpayers did not contest the IRS's computation of the unpaid taxes, nor that they had failed to pay the taxes when due, file certain returns timely, or the IRS's computation of the penalties and interest that would be due if such penalties applied. As the opinion notes:

Although the Koncurats do not dispute the IRS's calculation of penalties assessed against them for late filing and late payment, they contend that they should not be required to pay those penalties at all because they qualify for a penalty abatement for "reasonable cause." (See generally Opp'n to Mot. Summ. J. Mem. Supp., ECF No. 24-1.)

...

In support of their claim for a reasonable cause abatement, the Koncurats assert that "circumstances beyond their control" made them unable to timely file their returns and pay their taxes in the years at issue. (Opp'n to Mot. Summ. J. Mem. Supp. 6, ECF No. 24-1.) They point to "financial hardship, such as the fluctuating business conditions Mr. Koncurat experienced" around 2010, the foreclosure of several of their rental properties in Baltimore around 2007 or 2008, and the unspecified period during which Stephen Koncurat's father made the Koncurats' mortgage payments. (Id.) They also assert that Stephen Koncurat's significant medical challenges — including a broken back in 2014 or 2015 and diagnoses of cancer and a blocked artery in 2018 — contributed to their inability to meet their tax obligations "even after exercising ordinary care and prudence." (Id.)¹²

Failure to Demonstrate Reasonable Cause and Lack of Willfulness

As was noted earlier, merely having had various unfortunate circumstances take place is not enough to obtain relief unless it can be established that those circumstances are the cause of the failures in question and that the cause was not willful neglect—burdens

¹¹ *United States v Koncurat*, USDC MD, Case No. 1:21-cv-00676, September 7, 2022

¹² *United States v Koncurat*, USDC MD, Case No. 1:21-cv-00676, September 7, 2022

8 Current Federal Tax Developments

that are placed on the taxpayer under the law. Remember, the law requires the taxpayers *show* that these are the facts in their case.

The Court found the taxpayers failed to show their circumstances were the true cause of their failure to pay their taxes when due or file returns timely.

Even assuming that the Koncurats exercised reasonable business care and prudence, their general allegations of financial and personal difficulties over the course of years do not amount to “reasonable cause” for their failures to file and pay taxes in the specific years at issue. They have alleged no details sufficient to support a finding that any of the hardships they experienced actually presented unavoidable obstacles of the sort enumerated by the IRS and recognized by the *Boyle* Court, either to their timely filing or payment in any given year or to their ability to settle their outstanding tax balance to date. (See generally Opp’n to Mot. Summ. J. Mem. Supp., ECF No. 24-1.)¹³

In a footnote, the opinion notes that it’s not certain that the taxpayers had truly exercised reasonable business care and prudence in meeting their tax obligations:

As the Government points out, there is evidence on the record that calls into question whether Stephen Koncurat exercised “ordinary business care and prudence,” a necessary component of the “reasonable cause” defense. (Reply Mot. Summ. J. Mem. Supp. 7, ECF No. 25-1; see Stephen Koncurat Depo. at 21-22 (“I was using [the money] for business expenses and didn’t realize how much was owed until it was finally filed. . . . I didn’t have the money set aside for tax.”)) However, because the Koncurats have failed to allege reasonable cause, the Court declines to address the issue of ordinary business care and prudence.¹⁴

While the Court did not address the issue of ordinary business care and prudence because reasonable cause was never shown, advisers have to remember that the facts the footnote discussed would be ones that could present major hurdles if our clients are trying to get reasonable cause relief.

The Court also took time to point out that common “financial difficulties” do not lead to being eligible for reasonable cause relief:

Further, the Koncurats have not alleged, beyond general statements by Stephen Koncurat that they “didn’t have [the money]” or “couldn’t afford to keep [the installment plan] going” in any given year, that they suffered more than the kind of common “financial difficulties” that other courts have rejected as reasonable cause. (Stephen Koncurat

¹³ *United States v Koncurat*, USDC MD, Case No. 1:21-cv-00676, September 7, 2022

¹⁴ *United States v Koncurat*, USDC MD, Case No. 1:21-cv-00676, September 7, 2022

Depo. at 35-36); see *Fran Corp.*, 164 F.3d at 819-20 (finding no reasonable cause where a company continued to pay rent and fund other business endeavors while delinquent on tax obligations), *ABL & Associates Plumbing, LLC v. United States*, Civ. No. 16-918-D, 2019 WL 2221588, at *5 (E.D.N.C. May 21, 2019) (finding no reasonable cause where company “fail[ed] to present evidence that its continued viability as a business would have been threatened had [it] paid its federal employment taxes”).¹⁵

As noted, taxpayers would need to show clear evidence that paying their tax liabilities rather than other expenses they did pay during the years in question would have resulted in a total business failure.¹⁶

The Court pointed out that the taxpayers continued to pay other expenses, including ones where a failure to pay them would not have posed any risk to business viability:

While the family’s financial troubles were significant at times, the record reflects that they have had consistent access to financial resources throughout the years at issue. For instance, they were paying “business expenses” for Stephen Koncurat’s insurance company; contributing tuition, housing, and wedding expenses to children; and donating up to “ten percent” of income “after expenses” to charity each year. (Stephen Koncurat Depo. at 22, 52-53, 55.)¹⁷

The taxpayers also failed to show that paying the taxes would have created undue hardship for the taxpayers:

Nor does the record indicate that the timely payment of their federal taxes would have been an “undue hardship” rather than an “inconvenience” to the Koncurats. 26 C.F.R. § 1.6161-1(b). Although the family’s Adjusted Gross Income decreased from \$462,455 in 2010 to \$95,974 in 2011, Stephen Koncurat earned income in each of the tax years at issue despite employment changes, was able to “work[] in between” his medical challenges, and earned more than one million dollars in income in 2019 and 2021. (Stephen Koncurat Depo. at 26, 43-14; Mot. Summ. J. Ex. A-I, ECF No. 23-4-23-12.)¹⁸

¹⁵ *United States v Koncurat*, USDC MD, Case No. 1:21-cv-00676, September 7, 2022

¹⁶ Advisers should also remember that for trust fund taxes, the responsible person penalties would apply against responsible parties even if it could be shown that paying over the trust fund taxes would have led to the failure of the business. The taxes and penalties in question here related solely to the taxpayers’ own personal income taxes.

¹⁷ *United States v Koncurat*, USDC MD, Case No. 1:21-cv-00676, September 7, 2022

¹⁸ *United States v Koncurat*, USDC MD, Case No. 1:21-cv-00676, September 7, 2022

10 Current Federal Tax Developments

Finally, the opinion notes that the issues the taxpayers presented to argue for reasonable cause relief had all occurred many years in the past, while the failures continued during the years after the resolution of those issues:

Finally, the Koncurats have pointed only to hardships that occurred four or more years ago and, as evidenced by Stephen Koncurat's recent income, have since been resolved; when viewed as a whole, the record implicates the kind of "continued failure" that IRS guidance warns may evidence willful neglect. Internal Revenue Manual § 20.1.2.2.4.1(2)(c) (2016).¹⁹

The Court noted that "Stephen Koncurat earned more than one million dollars in income in 2019, and again in 2021. (Stephen Koncurat Depo. at 43-44.)"²⁰ That fact and the failure to take action to resolve this problem once the taxpayers had gotten rid of their financial difficulties led the Court to conclude that willful neglect of the responsibility was the true reason why the taxes remained unpaid.²¹

Ultimately the opinion held:

The Koncurats have failed to identify specific facts sufficient to place the issue of reasonable cause in genuine dispute, and, as such, they cannot avail themselves of the defense of reasonable cause with respect to the penalties assessed against them under 26 U.S.C. § 6651(a).²²

¹⁹ *United States v Koncurat*, USDC MD, Case No. 1:21-cv-00676, September 7, 2022

²⁰ *United States v Koncurat*, USDC MD, Case No. 1:21-cv-00676, September 7, 2022

²¹ *United States v Koncurat*, USDC MD, Case No. 1:21-cv-00676, September 7, 2022

²² *United States v Koncurat*, USDC MD, Case No. 1:21-cv-00676, September 7, 2022