

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1266

TITLE UNITED STATES, Petitioner v. ROBERT W. BOYLE,
EXECUTOR OF THE ESTATE OF MYRA W. BOYLE, DECEASED

PLACE Washington, D. C.

DATE October 10, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES :

Petitioner :

v. : No. 83-1266

ROBERT W. BOYLE, EXECUTOR OF THE :

ESTATE OF MYRA W. BOYLE, :

DECEASED :

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Washington, D.C.

Wednesday, October 10, 1984

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 2:06 c'clock p.m.

APPEARANCES:

ALBERT G. LAUBER, JR., ESQ., Assistant to the
Sclicitor General, Department of Justice,
Washington, D. C.; on behalf of Petitioner.

THCMAS E. DAVIES, ESQ., Pekin, Illinois, on behalf
of the Respondent.

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C C N T E N T S

ORAL ARGUMENT OF

PAGE

ALBERT G. LAUBER, JR., ESQ.

On behalf of the Petitioner

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THOMAS E. DAVIES, ESQ.

On behalf of the Respondent

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ALBERT G. LAUBER, JR., ESQ.

On behalf of the Petitioner -- Rebuttal

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: Mr. Lauber, I think you
3 may proceed whenever you are ready.

4 ORAL ARGUMENT OF ALBERT G. LAUBER, JR., ESQ.

5 ON BEHALF OF THE PETITIONER

6 MR. LAUBER: Mr. Chief Justice, may it please
7 the Court:

8 This case presents a question about the
9 addition to the tax often referred to colloquially as a
10 penalty for failure to file a tax return on time.

11 Section 6651(a)-1 of the Internal Revenue Code provides
12 that in case of failure to file any return on the date
13 prescribed therefor, there shall be added to the tax an
14 amount up to a total of 25 percent of the total tax due
15 unless it is shown that such failure is due to
16 reasonable cause and is not due to willful neglect.

17 The question here is whether a taxpayer can
18 demonstrate reasonable cause for a late filed return
19 even though that return's late filing is in fact
20 attributable to negligent by citing the fact that he
21 relied on his attorney or other agent to prepare the
22 return for him.

23 The facts were not in dispute below and are
24 not very complicated. The taxpayer here is the executor
25 of an estate. Among the duties of an executor, imposed

1 both by relevant state law and by the Revenue Code, is
2 the duty to file a federal estate tax return.

3 QUESTION: Well, would it be any different in
4 your view if it was for a personal return and he was
5 involved in filing the return, a delinquent return as an
6 individual?

7 MR. LAUBER: No, it would not, Your Honor. We
8 think the same reasoning would apply to an income tax
9 return, a gift tax return, almost any kind of return.

10 Here the executor hired a lawyer to take care
11 of administering most of the estate's affairs. The
12 executor met with the lawyer; he was told that the
13 estate would in fact be required to file a federal
14 estate tax return. The executor was also told that
15 there existed a specific deadline by which the return
16 would have to be filed

17 The lawyer in fact knew what that correct
18 deadline was, namely, a date nine months after the date
19 of death, but the lawyer did not recall having informed
20 the executor of the exact due date, only that there was
21 a due date.

22 As it turned out, the lawyer, through
23 carelessness, forgot all about the return until well
24 after the filing period had elapsed. As a result, the
25 return was filed three months late. The Commissioner

1 determined that the executor's late filing was not due
2 to reasonable cause, and accordingly, asserted an
3 addition to the estate tax in the appropriate amount.

4 The Court of Appeals expunged the penalty. It
5 recognized that under longstanding Treasury regulations,
6 the determination of reasonable cause is governed by an
7 objective test, that is, whether the taxpayer exercised
8 ordinary business care and prudence and was nevertheless
9 unable to file the return within the prescribed time.
10 But the Court of Appeals held that here the executor's
11 late filing was due to reasonable cause.

12 It relied primarily on two facts, the fact
13 that the executor lacked personal knowledge of the
14 filing date, and that he relied on his attorney to
15 prepare the return for him. The Court of Appeals
16 acknowledged that three other circuits had ruled as a
17 matter of law that reliance on counsel standing alone is
18 not a defense to the late filing penalty in this kind of
19 a case.

20 We think the Court of Appeals was wrong both
21 for reasons of technical tax law and also for reasons of
22 common sense. We start from the premise that where, as
23 here, it is clear that a tax return is required to be
24 filed, the taxpayer has a personal and nondelegable duty
25 to file that return on time. This premise we think

1 follows from a variety of code provisions that state
2 that the taxpayer shall make a return, he shall sign the
3 return under penalties of perjury, and that he shall
4 file it by a specified date.

5 The personal and nondelegable nature of his
6 timely filing obligation has been recognized by almost
7 every lower federal court to address the question, and
8 we think from this premise two conclusions inevitably
9 follow.

10 First of all, because the taxpayer's duty to
11 file on time is personal, he has a concomitant duty
12 personally to find out what the filing date is, and that
13 we think is just a matter of common sense. If a person
14 knows he has a duty to perform and knows it must be
15 performed by a deadline, ordinary business care and
16 prudence require him, plainly require him to find out
17 what that date is.

18 QUESTION: Are you able to tell us, Mr.
19 Lauber, if you know whether -- what is the policy of
20 IRS? Do they dispense mercy very often in this area?

21 MR. LAUBER: Well, we -- the IRS tries to be
22 reasonable, but I don't think they would be inclined to
23 be particularly clement in a case like this, and I will
24 try and explain why it would be --

25 QUESTION: Well, I don't mean as to this

1 case.

2 Are there many dispensations granted in a
3 given year, if you know?

4 Do they forgive late filings with very many
5 people?

6 MR. LAUBER: I really don't know the answer to
7 that, to that question.

8 And secondly, because the taxpayer's duty to
9 file on time is nondelegable, he cannot escape liability
10 for a late filing simply by having somebody else prepare
11 the return for him; rather, if the taxpayer is going to
12 show ordinary business care and prudence, he has got to
13 supervise his agent and make sure the agent gets about
14 the business of preparing the return.

15 Moreover, if the agent is negligent himself,
16 that negligence, we think, under agency doctrine, must
17 be imputed to the taxpayer as the principal.

18 And we think if the Court agrees with us about
19 these general rules in the area, reversal of the Court
20 of Appeals decision is required. Here, the executor
21 knew that he had to file a return; he knew he had to
22 file it by a certain date; but he simply failed to find
23 out what that date was. He also failed to use the kind
24 of care that an ordinarily prudent businessman who faced
25 a liability would use in making sure that his agent was

1 prompt in preparing the return.

2 I think in both those respects the taxpayer
3 was negligent.

4 Moreover, the attorney was plainly negligent
5 because he forgot about the return altogether, and that
6 negligence must be imputed to the taxpayer. And since
7 both of them were negligent, we think that there was no
8 reasonable cause and the penalty was properly assessed.

9 This result, we think, is not only dictated by
10 well-settled tax principles, but makes perfect sense.
11 And here it is helpful to recall the words of the
12 statute. It says that where a return is filed late, an
13 addition to the tax shall be imposed unless it is shown
14 that the failure to file was due to reasonable cause.

15 Here, if one looks at all the acts and
16 omissions committed by the executor and the lawyer that
17 in fact caused the return to be filed late --

18 QUESTION: Well, somewhere in the archives of
19 IRS, in the law department, there must be a sort of
20 code, guidelines as to when this dispensation should be
21 granted?

22 MR. LAUBER: Well, the regulations set out --

23 QUESTION: I mean apart from the regulations.

24 MR. LAUBER: And the prior --

25 QUESTION: There must be some explanatory

1 material about the regulations themselves.

2 MR. LAUBER: Well, the only thing I know of is
3 the Internal Revenue manual lists eight examples of
4 cases where the penalty will not be assessed, and they
5 are listed in a footnote in our brief. I don't know of
6 any other secret law on the subject.

7 But the IRS would not assess the penalty if it
8 looks like there is a reasonable basis for a late
9 filing, and it is only when there is no reasonable basis
10 that they will go after the taxpayer.

11 But I think if you look at all the acts and
12 omissions that actually caused the late filing here, it
13 could not be shown that that late filing had a
14 reasonable cause. Indeed, the cause of the late filing
15 was failure of oversight by the executor and
16 carelessness by the lawyer. And plainly, if one person,
17 the taxpayer, had committed all those acts and been
18 guilty of all those omissions, he couldn't possibly
19 escape the late filing penalty.

20 QUESTION: But the Court of Appeals thought
21 that the taxpayer should be able to rely on the doctrine
22 of advice of counsel since it really was the lawyer's
23 failings that prevented the thing from being filed on
24 time.

25 MR. LAUBER: Well, that's right, Justice

1 Rehnquist, and that would bring me to defining of proper
2 scope of the reliance on counsel defense which I was
3 going to get to shortly.

4 QUESTION: Well, just before that, and along
5 the same line, if the lawyer misled or negligently
6 advised the executor and the executor was penalized for
7 it, couldn't the executor get that money back from the
8 lawyer --

9 MR. LAUBER: He certainly could, Justice
10 Marshall.

11 QUESTION: -- in any court in the world?

12 MR. LAUBER: I would think so. I would be
13 very surprised if he couldn't.

14 But let me address Justice Rehnquist's --

15 QUESTION: May I ask this before you move on?
16 Is the standard that CA-11 purports to follow
17 substantially identical with the standard prescribed by
18 the regulations, reasonable care?

19 MR. LAUBER: Well, that's hard to say, Justice
20 Powell, because --

21 QUESTION: Don't they use the same words,
22 essentially?

23 MR. LAUBER: They use the same words, but they
24 really did not apply an objective test because -- they
25 quoted the regulations and they trotted them out, but

1 when they performed their analysis, they didn't use an
2 objective test. They looked at a personal knowledge of
3 that particular executor. He didn't know --

4 QUESTION: Are you advocating the rule of CA-5
5 and a couple of other circuits, that the duty is
6 nondelegable in all circumstances?

7 MR. LAUBER: That is our position.

8 QUESTION: You are?

9 MR. LAUBER: Yes.

10 QUESTION: That's not what the regulation
11 says.

12 MR. LAUBER: The regulations about reasonable
13 cause you mean.

14 QUESTION: Yes.

15 MR. LAUBER: The regulations about reasonable
16 cause say that the executor must exercise ordinary
17 business care and prudence.

18 QUESTION: Yes.

19 MR. LAUBER: And our position is that ordinary
20 business care and prudence per se require the executor,
21 A, to find out the due date, and B, to make sure his
22 agent, if he has an agent, is prompt in performing his
23 agency activity. So we think that is a -- that is per
24 se inherent in the notion of ordinary business care and
25 prudence.

1 QUESTION: With respect to a filing date,
2 perhaps you are right, but there are so many
3 complications in preparing some tax returns, you are not
4 arguing, I suppose, that a layman, for example, has to
5 assume nondelegable obligations with respect to things
6 of which he knows no --

7 MR. LAUBER: Oh, exactly right.

8 Well, perhaps I should get to the reliance on
9 counsel defense point.

10 QUESTION: Do you think there is any analogy
11 between filing dates of this kind and filing dates for
12 petition for writ of certiorari in this Court?

13 MR. LAUBER: It simply is jurisdictional,
14 period. One has to -- well, I think that is a good
15 analogy. The sanction is a little different. It is a
16 monetary sanction rather than not being able to get into
17 court, but I think it must be policed rigorously.
18 Otherwise, the whole system just will crumble.

19 Here, the Court of Appeals did reach their
20 result by finding that reliance on counsel defense
21 should be available to the executor here. Now, we of
22 course, agree that reliance on counsel in appropriate
23 conditions is, may be a defense to various tax
24 penalties, including the addition to the tax for late
25 filing. But we think those conditions are not present

1 here.

2 The law is fairly clear in the lower courts
3 that reliance on counsel defense is available where
4 basically four conditions are met: the taxpayer must
5 consult a competent attorney, he must make a full
6 disclosure of all the facts, the attorney must opine on
7 the question presented, and the taxpayer must rely in
8 good faith on the advice given. And if those conditions
9 are met, it is normally not relevant whether the lawyer
10 was wrong.

11 But here we think this doctrine has no
12 application. The attorney -- the executor did not
13 request any legal advice from the attorney, and the
14 attorney gave him no legal advice, whether erroneous or
15 not. It was clear to both the executor and the lawyer
16 that a tax return had to be filed. It was clear to both
17 of them that the filing date, the specific deadline for
18 filing the return, the lawyer knew what the deadline was
19 and did not advise his client about it. So the whole
20 predicate for invoking a reliance on counsel defense,
21 the giving of a reliance on legal advice, simply is not
22 present here.

23 And for that reason, we think that the
24 personal nondelegable duty doctrine governs the case,
25 and the result then would be a perfectly sensible

1 result, we think, for all concerned, because we think it
2 is clear here that if the taxpayer himself had committed
3 all the steps that caused late filing, he would clearly
4 be liable for the penalty.

5 What the Court of Appeals basically said is
6 that if two people, the taxpayer and his agent, commit
7 all the acts and omissions, the penalty is not
8 collectable, that it kind of falls between the two
9 stools. The IRS can't collect from the taxpayer because
10 he can rely on his agent as a defense. The Commissioner
11 can't --

12 QUESTION: But you don't go any farther than
13 the filing date and the fact of filing, do you, for a
14 per se rule?

15 MR. LAUBER: No. As far as -- even as far as
16 obligation --

17 QUESTION: As far as the accuracy of the
18 return or the intent or the legal problems involved in
19 it?

20 MR. LAUBER: No, we would not go that far in
21 our position. Our position is really confined to the
22 timely filing of the return.

23 QUESTION: Right.

24 MR. LAUBER: As to --

25 QUESTION: Mr. Lauber, would you apply that

1 strict per se approach to someone such as a mentally
2 retarded person who inherits property and has to file a
3 return and relies on someone like a lawyer to help him?
4 Would you really want to stick to that standard under
5 any and circumstances in every case?

6 MR. LAUBER: Well, hard cases make bad law.

7 QUESTION: Yes.

8 MR. LAUBER: But I think I would have to say
9 yes, we would stick to our standard there. If you had
10 an incompetent who had a fiduciary appointed to take
11 care of his or her affairs, I think the fiduciary is an
12 alter ego of the incompetent, and they are stuck.

13 QUESTION: Well, you've added something, a
14 fiduciary appointed, and that was not part of my
15 inquiry.

16 QUESTION: Would you agree that generally
17 speaking these heavy penalties don't fall on people who
18 are indigent?

19 MR. LAUBER: Well, they generally don't
20 because the penalty is one quarter, maximum, one quarter
21 of the tax due. If there is no tax due, generally
22 speaking, there is no penalty in the estate tax area at
23 least.

24 QUESTION: Even though the executor or trustee
25 may be not as affluent as his -- the beneficiaries of

1 the trust or of the estate, nevertheless, the penalty is
2 deliberately aimed by Congress to fit the size of the
3 problem, isn't it?

4 MR. LAUBER: It is 5 percent per month for
5 every month up to 25 percent that the return is late.

6 But I think what the case boils down to is a
7 fairly, as Justice Marshall said, a fairly common sense
8 proposition. Here, what the Court of Appeals held is
9 that the IRS cannot collect from the taxpayer because he
10 relies on the agent. It can't collect from the agent
11 because the agent, not being a taxpayer, can't be liable
12 for the addition to the tax, and the result is the IRS
13 can collect from no one, even though it is plain in that
14 precisely what Congress spoke of in the penalty
15 provision, a filing not due to reasonable cause, it is
16 late, has happened.

17 And we think this outcome just makes no sense,
18 as a matter of statutory construction or tax policy or
19 common sense or even fairness to the parties involved.
20 Congress designed the late filing addition to the tax as
21 an incentive to timely payment of taxes. It is designed
22 to protect the revenue.

23 Now, the effect of this incentive will be
24 destroyed if a taxpayer can escape liability for a
25 negligent late filing merely by having somebody else

1 prepare his return. Indeed, the harmful effect of that
2 kind of holding is clear because literally tens of
3 millions of American citizens now have income tax
4 returns prepared by professional return preparers.

5 We think the sensible approach in this kind of
6 situation where the negligence is somehow shared in an
7 unclear way between the taxpayer and his agent, is to
8 let the IRS collect the penalty that it is entitled to
9 collect under the statute, let the taxpayer and his
10 agent sort out among themselves who will bear the cost
11 of the penalty.

12 QUESTION: How about an approach like that
13 suggested by Judge Posner in his dissent?

14 MR. LAUBER: I think that's exactly what we
15 would advocate. Justice Marshall's --

16 QUESTION: Well, it isn't -- I think it's not
17 quite as --

18 MR. LAUBER: Simple.

19 QUESTION: -- black and white and arbitrary as
20 you've described yours, as I read it, anyway.

21 MR. LAUBER: Well, he did have that final
22 sentence that let us --

23 QUESTION: He did qualify it.

24 MR. LAUBER: -- by all means have an escape
25 clause for the truly inexperienced. We think that is

1 wrong. We think his good old Chicago school free market
2 approach is the correct approach, you simply let the
3 people who are at fault fight it out among themselves by
4 a malpractice action for breach of fiduciary duty, and
5 let the cost fall on negligent people. But the IRS
6 should not be forced to bear the cost. They have done
7 nothing wrong. They are entitled to their penalty.

8 QUESTION: But even if he was right, it
9 wouldn't reach this case.

10 MR. LAUBER: No, because here, he didn't --

11 QUESTION: I mean, if you had the -- even if
12 you had that, that final sentence wouldn't save the
13 taxpayer in this case.

14 MR. LAUBER: No.

15 QUESTION: Do you think he and Judge Swygert
16 take the same position on this issue?

17 MR. LAUBER: Swygert, he was the one who
18 wanted to have the malpractice action brought.

19 QUESTION: He dissented in the earlier Seventh
20 Circuit case.

21 MR. LAUBER: I think they are quite similar
22 because Judge Posner --

23 QUESTION: They are not both from the Chicago
24 school, you know.

25 MR. LAUBER: And we think that makes a very

1 sensible approach in which a taxpayer, in answer to
2 Justice O'Connor's question, the poor incompetent person
3 is -- have to pay up, he would surely have a claim
4 against the lawyer --

5 QUESTION: Well, Judge Posner would have
6 reserved a situation for that person, I suggest.

7 MR. LAUBER: But I think his reservation
8 doesn't fit with his basic theory that if it is true
9 that the pocr, wronged taxpayer has an action over, or
10 for reimbursement against a lawyer, why make an
11 exception that only operates to hurt the IRS when it is
12 clearly entitled to a penalty because the return has in
13 fact been filed late and negligently.

14 And as long as a taxpayer is made whole for
15 whatever errors his agent committed, the taxpayer is not
16 going to be out any money, and the IRS will get what
17 Congress wished it to get when taxes, returns are filed
18 late.

19 And what we think really makes no sense at all
20 is to deprive the IRS of the penalty, let the taxpayer
21 in effect borrow money from the government at will and
22 let the negligent lawyer get off completely free.

23 I would like to address briefly the --

24 QUESTION: You would require, I suppose, that
25 the taxpayer have a solvent tax preparer. He should be

1 sure --

2 MR. LAUBER: Well, if he doesn't, it's his
3 fault for not picking a very good tax return preparer.
4 I think most of them must be bonded, I believe. But in
5 any event, the IRS shouldn't be stuck with that, left
6 holding the bag there.

7 I would like to address briefly the analysis
8 of a statute that the Respondent has put forward in his
9 brief. Respondent nowhere argues that the executor's
10 conduct here amounted to ordinary business care and
11 prudence within the meaning of the regulations. He
12 contends for the first time in this Court that the
13 regulation is invalid and that the penalty should be
14 imposed only where the taxpayer is guilty of willful
15 conduct.

16 And that interpretation we think simply won't
17 wash under the terms of the statute Congress drafted.
18 The statute says that the penalty is collectable unless
19 it is shown that the failure to file on time is due to
20 reasonable cause and not due to willful neglect.

21 Since the burden of proof is on the taxpayer,
22 and since the terms reasonable cause and willful neglect
23 are used conjunctively, the Commissioner has an option
24 of proving either the absence of reasonable cause or the
25 presence of willful neglect. He can prove either one.

1 Now, of course, the practice, because the
2 absence of reasonable cause is basically negligence, it
3 is easier to prove that than to prove willful activity
4 with the subjective content. But the fact that one
5 option is easier than the other for the Commissioner
6 doesn't mean that one is redundant.

7 QUESTION: Well, is there a kind of a lacuna
8 between reasonable cause and willful neglect?

9 MR. LAUBER: Well, I think that -- I don't
10 think the statute is incongruous, but I agree that they
11 are not literally opposites. But that is not uncommon
12 in the Revenue Code. In fact, the penalty for
13 negligence in Section 6653(a) says that a penalty is
14 applicable if the understatement of tax is due either to
15 negligence or to intentional disregard of rules and
16 regulations.

17 QUESTION: If you prove reasonable cause, you
18 would surely prove that the failure to file was not from
19 willful neglect, I assume.

20 MR. LAUBER: I think that's almost certainly
21 true.

22 QUESTION: Except what is willful neglect?
23 That in itself is a contradiction in terms. Neglect
24 suggests unconsciousness or carelessness of what you are
25 doing. willful suggests and intent.

1 MR. LAUBER: Well --

2 QUESTION: Is it very much different from
3 willful negligence as against ordinary negligence?

4 MR. LAUBER: I guess that's an accurate -- an
5 example of willful neglect might be, you know, a tax
6 protester.

7 QUESTION: Well, the courts frequently refer
8 to willful negligence, do they not?

9 MR. LAUBER: They do. It is a heightened form
10 of negligence.

11 QUESTION: Do you think that is a very
12 artistic way of speaking about negligence, to speak of
13 willful negligence?

14 MR. LAUBER: Well, no, I didn't draft the
15 statute. This goes -- this language goes back a long
16 way, and I think one often finds in these old
17 provisions -- this goes back to 1916 -- a certain funny
18 way of drafting them. But it makes perfect sense. What
19 the statute really says is that the penalty is
20 applicable unless the taxpayer proves both that he acted
21 reasonably in an objective sense and in a subjective
22 sense.

23 Now, I agree with you that almost invariably,
24 if the Commissioner proves that -- if a taxpayer proves
25 that he did not act negligently, he could not have acted

1 with willful negligence either.

2 But still, the statute does on its face give
3 the Commissioner an option. The taxpayer must prove
4 both the absence of reasonable cause -- both the
5 presence of reasonable cause and the absence of willful
6 neglect, and it is plainly up -- the Commissioner is
7 plainly able to assess the penalty, therefore, by
8 proving that reasonable cause did not exist for the late
9 filing.

10 CHIEF JUSTICE BURGER: Mr. Davies?

11 ORAL ARGUMENT OF THOMAS E. DAVIES, ESQ.

12 ON BEHALF OF RESPONDENT

13 MR. DAVIES: Mr. Chief Justice, and may it
14 please the Court:

15 In response to a question a few moments ago,
16 Mr. Lauber in effect admitted that perhaps the statute
17 wasn't drafted very adequately. He actually used the
18 term funny.

19 Well, we couldn't agree more, and I think
20 that's --

21 QUESTION: Well, do you have any difficulty
22 understanding the statute?

23 MR. DAVIES: Yes, sir, I have a great deal of
24 difficulty understanding the statute, and I think as
25 Judge Posner pointed out, the -- it sets up two

1 conditions which I believe are almost the opposite of
2 one another.

3 Our contention is that by adding those
4 additional words, that something was intended beyond
5 mere negligence for reasonable cause before a penalty is
6 invoked.

7 QUESTION: Does either the -- Mr. Boyle or
8 your firm claim that they looked at the statute and
9 didn't understand it, and that that's accounted for the
10 delay?

11 MR. DAVIES: No -- for the delay in filing the
12 return?

13 I think the answer to the reason for the delay
14 was that there was a mistake, it was not posted on the
15 calendar, and was simply forgotten. There is no other
16 explanation, sir. It was a mistake. Clearly there was
17 no intent or any reason to try to buy an extra three
18 months' time to become embroiled in a case like this.

19 QUESTION: Do you think the case is any
20 different if the executor, Boyle himself, and the
21 lawyer, was handling his own affairs and made the same
22 mistake?

23 MR. DAVIES: Yes, I think it would be a big
24 difference in that case. I think you're --

25 QUESTION: In what respect?

1 MR. DAVIES: I think you're looking at a
2 situation where you have the average layman, he comes
3 in, he hires an expert, a person he is relying on and
4 trusting.

5 QUESTION: Well, doesn't counsel and Mr. Boyle
6 merge into one entity so far as this is concerned?

7 MR. DAVIES: I don't think so, Your Honor,
8 because I don't think that's what the statute directs
9 its attention, and the cases heretofore have always said
10 the standard involved is one placed on the taxpayer, and
11 I think we are getting a little bit off the boat, so to
12 speak, by focusing our attention on the attorney.

13 It may well be that there ought to be a law
14 that says, okay, if you file a return late, or you cause
15 it, then you pay the penalty.

16 QUESTION: Who? Who do you mean by you?

17 MR. DAVIES: The attorney or the accountant?
18 That may be --

19 QUESTION: Don't you think the malpractice
20 cases take care of that?

21 MR. DAVIES: They should. In most cases, I
22 believe they should.

23 QUESTION: I don't see how you say that we put
24 the weight on the lawyer. I don't consider the lawyer
25 in this case at all.

1 MR. DAVIES: Well, I don't either, Your
2 Honor.

3 QUESTION: Well, then, I don't understand your
4 argument.

5 MR. DAVIES: Well --

6 QUESTION: The man -- what is the difference
7 between that and filing the certiorary petition on time
8 in this Court?

9 MR. DAVIES: Well --

10 QUESTION: What happens if you don't do it?

11 MR. DAVIES: You're -- I think it's
12 jurisdictional. You lose out.

13 QUESTION: Yes, but what happens to the
14 lawyer? He either -- at least, he might lose a client,
15 and beyond that he might lose a good deal more, is that
16 not so?

17 MR. DAVIES: I think he's at fault. There is
18 no question about that. We are not --

19 QUESTION: Well, isn't that the same case
20 here? Because of the lawyer, the only -- the IRS could
21 not penalize the lawyer, right?

22 MR. DAVIES: Under the existing law, that's
23 correct.

24 QUESTION: Under any law.

25 MR. DAVIES: That is correct

1 QUESTION: So they have been done in. So they
2 have to collect from somebody. So who do they collect
3 from?

4 MR. DAVIES: Well, in this particular case,
5 and I would hope in most cases, the lawyer would admit
6 his mistake, as we did, and paid it.

7 QUESTION: The lawyer paid it?

8 MR. DAVIES: Yes, sir.

9 QUESTION: Well, what, what -- what are we
10 doing with the case?

11 MR. DAVIES: Well, I think the question is, in
12 looking --

13 QUESTION: What are we doing with the case?

14 MR. DAVIES: Well, when the case started
15 out --

16 QUESTION: Are you trying to get your money
17 back?

18 MR. DAVIES: Well, that would happen is --

19 QUESTION: That would help, wouldn't it?

20 MR. DAVIES: If the Seventh Circuit was
21 affirmed, but I would respectfully point it out -- point
22 out when this case started that if we had been in
23 perhaps any other circuit, there probably would not have
24 been a case. However, in the Seventh Circuit, it seemed
25 to us, under the Rohrabach case there was clear

1 authority which at least up until this point has been
2 agreed upon that this case did fall under that narrow
3 exception.

4 Now, I think that -- and trying to get back to
5 what the Chief Justice's question is, well, what is the
6 difference, I think you have to also realize that we are
7 talking about the average layman.

8 Now, let's assume hypothetically that person
9 comes into the attorney's office -- it is after the
10 death, we will say, of a loved one -- someone who has
11 never handled anything before, or had very little.
12 We've even had people that probably never even wrote a
13 check; they are a 65 year old widow, suddenly they
14 don't -- they don't know what to do. They come in, they
15 see their attorney.

16 Now, I'm suggesting to you that it's not
17 unreasonable for that person to rely on their attorney
18 to do something. The facts in this particular case, I
19 believe, suggest that Mr. Boyle did everything that the
20 average person could reasonably be expected to do. He
21 kept --

22 QUESTION: Speaking for your own firm --

23 MR. DAVIES: Yes, sir.

24 QUESTION: If we affirm this judgment, can we
25 assume that you'll never make that mistake again?

1 MR. DAVIES: I certainly hope so, sir.
2 QUESTION: Well, is there any other way we can
3 do it?
4 MR. DAVIES: Pardon?
5 QUESTION: Is there any other way we can do it
6 other than affirming?
7 MR. DAVIES: Well, I believe not, not if the
8 government's position is accepted.
9 QUESTION: Well, there's nothing in this
10 record to bear on something that you suggested, and I
11 feel bound to ask you, are you representing to the Court
12 that your firm has reimbursed Mr. Boyle, that you have
13 paid the penalty?
14 MR. DAVIES: The question was asked. We have,
15 yes, sir.
16 QUESTION: Well, then, is there possible
17 mootness to this case? Mr. Boyle has suffered no loss.
18 MR. DAVIES: I guess you could technically say
19 that. I am just answering the question honestly. When
20 the bill came, you know, it was our fault, we paid it.
21 There's --
22 QUESTION: Well, what if, what if you win this
23 case? Are you going to get it back?
24 MR. DAVIES: Yes, we would.
25 QUESTION: So the case isn't moot then.

1 QUESTION: Assuming there is something riding
2 on the outcome of the case.

3 MR. DAVIES: Yes, sir, I believe there is, and
4 I believe there's also the overall question that -- of
5 the per se rule, which I believe, and it is probably my
6 understanding is why this case was granted by this
7 Court.

8 QUESTION: Well, I know, but it still has --
9 there still has to be a case with controversy.

10 MR. DAVIES: Yes.

11 QUESTION: Between your client and the
12 government.

13 MR. DAVIES: Yes. Well, there would also be
14 the question of interest.

15 QUESTION: In other words, you are saying,
16 conceding that your private arrangements with your
17 client are irrelevant to the issues of this case.

18 MR. DAVIES: Yes, sir.

19 I think it's necessary to look at the statute
20 in question, and that is really the key, in my opinion,
21 of how this should be decided.

22 Congress did not provide for an absolute
23 penalty that could be invoked in all circumstances. I
24 would certainly agree that that is certainly their
25 prerogative. But I am suggesting to this Court by the

1 insertion of the words reasonable cause and not due to
2 willful neglect, suggests that Congress recognizes --
3 recognized that it may in fact be inequitable or unfair
4 under certain circumstances to unilaterally provide for
5 an absolute penalty or absolute rule.

6 Now, that is certainly within their
7 prerogative to do that, but I'm suggesting that they
8 have not chosen to do that. As Judge Posner indicated,
9 that the addition of the words willful neglect would
10 seem to modify the ordinary meaning of the word
11 reasonable. The only sense that we can infer that that
12 means is that Congress, by using the words willful and
13 neglect, intended that the penalty be imposed only in
14 those circumstances where the person -- the failure to
15 file was due to more than mere inadvertence.

16 The government suggests there is a two-part
17 test. Well, as we raised in our brief -- and I have yet
18 to be able to figure out how it would happen -- is how a
19 person could pass the reasonable -- pass the willful
20 neglect portion of the test and otherwise fail the
21 reasonable cause test. I don't think that can be done.

22 QUESTION: Well, it is a two-part test that is
23 phrased in the conjunction, I guess, because they use
24 the word and. The taxpayer, in order to avoid the
25 penalty, has to show that the failure is, first, due to

1 reasonable cause and not due to willful neglect. Now,
2 if he fails the first hurdle, if he can't show that it
3 is not due to reasonable cause, you never get to the
4 willful neglect.

5 MR. DAVIES: That is correct, Your Honor.

6 QUESTION: Well, then, I think that argument
7 cuts in favor of the government, not you.

8 Do I misunderstand you?

9 MR. DAVIES: Well, I'm saying the additional
10 words seem to me, because what they say is reasonable
11 cause as an ordinary man standard, or shall we say,
12 negligence, which normally does not connote a willful
13 action. I'm saying those additional words were either
14 put there for emphasis or for -- to indicate that
15 something beyond the so-called reasonable man standard
16 would apply.

17 QUESTION: You say that perhaps reasonable
18 cause should be read as mere negligence, or not due to
19 mere --

20 MR. DAVIES: I think more than mere
21 negligence. I think first you look at what the person
22 did, whether that was reasonable, and secondly, whether
23 those actions were willful, and why did he fail to file
24 the return?

25 QUESTION: Well, what if a judge were to find

1 in this case that the preparer's actions were negligent
2 but they were not due to willful neglect? Now, do you
3 think on those findings you ought to win?

4 MR. DAVIES: Yes. I think under the way the
5 law is written, there was certainly no intentional or
6 willful desire to avoid filing the return on time.

7 QUESTION: But does the absence of willful
8 neglect by itself prove that there was reasonable
9 cause? That's a twisting of the language.

10 MR. DAVIES: Not necessarily. I don't think
11 it would necessarily, just because they didn't say under
12 traditional view willfully decide not to file it, they
13 could have otherwise acted unreasonably.

14 Say, for instance, in this case, Mr. Boyle --
15 and I think this is -- there's a difference in this case
16 as to many of the others -- he kept in constant contact
17 with the attorney. He called the office. He said, you
18 know, is there something I should be doing? When's the
19 return going to be filed? He was told don't worry about
20 it.

21 I think that's a far different situation than
22 the executors you have seen in some of the other cases
23 who does not do anything and in fact abandons ship, so
24 to speak, and takes no active part in the administration
25 of the estate.

1 I would further say that I believe Congress
2 intended something more than the reasonable man
3 standard, because if you look at what does the statute
4 provide for, we are suggesting -- and it seems to us it
5 is a penalty. Now, the government in their reply brief
6 and in their argument didn't really want to use that
7 term, but they certainly did in their original brief,
8 and it seems to us by any stretch of the imagination
9 that if you file a return one day late and are assessed
10 5 percent interest, that that computes out to be a
11 pretty harsh and pretty severe punishment.

12 QUESTION: But if you are one day late in
13 filing a document in the courts, under court rules or
14 statutes, you are out of court. That's pretty rough,
15 isn't it?

16 MR. DAVIES: That's correct, sir, and I
17 doubt --

18 QUESTION: Unless there's some -- unless it is
19 demonstrable that the United States mails are
20 responsible for it, as often happens.

21 MR. DAVIES: Right.

22 I am not saying that there shouldn't be
23 certainty in many things. However, I am suggesting
24 under this statute Congress did not suggest that.

25 They could very easily write a statute that

1 says, okay, you file it on time or pay a penalty, and be
2 done with it.

3 QUESTION: Well, have you any suggestion how
4 much willful neglect loss is reasonable cause?

5 MR. DAVIES: Well, I think you have to look
6 not only at what they did up to the time that they
7 learned whether the return was late, and then what did
8 they do when they learned of it? I think in a lot of
9 these other cases the taxpayer said so what and waited
10 nine months.

11 QUESTION: That doesn't tell me what you think
12 is the standard then.

13 MR. DAVIES: I think the standard would be
14 probably, if you are putting it on a scale of
15 negligence, gross negligence. I think when you use the
16 word willful, I think you are into gross negligence.

17 QUESTION: Or reckless disregard, something
18 like that?

19 MR. DAVIES: Yes, I think, years.

20 QUESTION: How would three months figure on
21 this? It was three months in this case.

22 MR. DAVIES: Yes, three months and a day.

23 QUESTION: Wouldn't that be close to willful?

24 MR. DAVIES: Well, except for the fact that
25 what the -- what was the reason. I think it's a --

1 again, looking at what the executor did, it's easy now
2 to say, well, sure, I guess he should have known the
3 exact date, but looking at what the executor did --

4 QUESTION: Well, the executor is the only one
5 covered by the law.

6 MR. DAVIES: Right.

7 QUESTION: The government can't reach anybody
8 but the executor.

9 MR. DAVIES: That is correct, but I am saying
10 in looking at the --

11 QUESTION: The executor didn't have to get a
12 lawyer.

13 MR. DAVIES: Right.

14 QUESTION: But he did.

15 MR. DAVIES: That is correct.

16 QUESTION: And it's whose responsibility?
17 His, and nobody else's, is that right?

18 MR. DAVIES: That is correct.

19 But I'm suggesting that looking at what the
20 executor did, there's nothing in the statute that says
21 what the attorney should or shouldn't do. The standard
22 as courts have looked at before said, now, what did the
23 executor do.

24 I'm suggesting, if we all think about it, or
25 think about Mrs. Rohrabach or, say, someone who for

1 some unfortunate reason doesn't have all their mental
2 facilities or whatever, if they hire an attorney and
3 they call them and they are told that everything is
4 going to be taken care of, I don't think that's so
5 unreasonable for that person to assume that it's going
6 to be taken care of.

7 QUESTION: Mr. Davies, can I ask you a
8 question?

9 What does the government do with the problem
10 that all lawyers are -- I wish they were, but they're
11 not all as honorable as the members of your firm, and
12 you do have the possibility, I suppose, of a dishonest
13 taxpayer who had an accountant or a lawyer who is
14 willing to say I forgot about it for two months and
15 then -- how can the government disprove that sort of
16 thing?

17 MR. DAVIES: Well, I agree that's probably a
18 problem or a question of fact that has to be
19 determined. I can't give you a good answer as to how
20 easily that could be done, but questions of fact are
21 determined in life and death cases and other cases. I
22 can't say that --

23 QUESTION: Congress could settle that.

24 MR. DAVIES: Well, I believe they could,
25 but --

1 QUESTION: They could just change the statute
2 a little. If you are right about the present
3 construction, your view of the statute, it could be
4 changed.

5 MR. DAVIES: That is correct

6 QUESTION: To agree with the present
7 government's regulation.

8 MR. DAVIES: I believe it could. I believe
9 there's innumerable better ways to handle this
10 situation, and I don't think this court should have to
11 sit here and try and figure out what they are. That's
12 not your job.

13 You've been stuck with this case. I think you
14 can look at it one of two ways. Sure, you can make a
15 decision and make this whole thing better, or I think
16 what needs to be done is to say, well, that is what the
17 statute says. You didn't write it. If they want
18 something clearer or something more absolute, all they
19 have to do is change it.

20 Now, the second part, even assuming that my
21 construction or our construction of this statute is all
22 wrong, or that it is something you can't accept -- and
23 there's certainly arguments for not accepting it, but
24 then, let's look at the second part of it is whether or
25 not the per se rule as advocated by the government

1 should be adopted.

2 We suggest that that should not be because it
3 is not in conformity with what the statute sets out to
4 do. That would in effect be an absolute rule which
5 would mean in all cass -- now, this is only an estate
6 tax case, but presumably in all cases, then, that it
7 would be, or reliance on counsel or another tax preparer
8 would not be any defense.

9 Now, the government in their reply brief
10 brought up the Willis case which was recently decided in
11 the Fourth Circuit. Now, there's a situation where a
12 taxpayer comes in, signs the return, leaves it with his
13 acccountant.

14 Is that unreasonable? Let's say that's --
15 that case was eighteen days before the deadline, leaves
16 it with his preparer. I don't think it's unreasonable
17 for him to presume that it will be mailed.

18 QUESTION: What if he gives it to his
19 chauffeur and says take this down and mail it or take it
20 and deliver it by hand, and the chauffeur gets drunk and
21 forgets all about it?

22 MR. DAVIES: Well, I think -- I think that's
23 why the statute is written that says reasonable cause.

24 QUESTION: Well, is that reasonable cause in
25 your view? Test out your standard.

1 MR. DAVIES: Giving it to your chauffeur?

2 QUESTION: An employee, he's agent of the
3 taxpayer.

4 MR. DAVIES: I would say that as a practical
5 matter, I think that's done. Would I personally --

6 QUESTION: Well, if you were the Internal
7 Revenue, do you think Internal Revenue should impose a
8 penalty then, or should they forget it?

9 MR. DAVIES: Do I? Not under the way the
10 statute is written, no, I don't, and that's why I'm
11 suggesting that they had an exception.

12 QUESTION: Did you say earlier, Mr. Davies,
13 that the executor actually before the filing date had
14 called to ask whether or not the return had been
15 prepared and filed?

16 MR. DAVIES: The executor had called on
17 numerous occasions wondering --

18 QUESTION: Before the filing date?

19 MR. DAVIES: Yes, sir.

20 QUESTION: Wondering what? Asking what?

21 MR. DAVIES: Wondering when the return would
22 be due, or thinking, you know, I know we have to file a
23 return because I was told that. I mean, there's no
24 question, and I deeply resent the inferences of the
25 government that there's any dishonesty here, the

1 attorney said -- if he was going to make up a story, he
2 could have made up a lot better one -- the record says,
3 well, sure, I told Mr. Boyle that there was a federal
4 estate tax return due, and so all Mr. Boyle said, well,
5 he didn't know when it was, he knew there was one due,
6 and that's why he had his wife keep calling.

7 QUESTION: What do you mean by keep calling?

8 MR. DAVIES: Well, on several -- the record
9 does not say the exact number other than he called on
10 numerous occasions saying --

11 QUESTION: And the subject was always when is
12 the return going to be filed?

13 MR. DAVIES: I can't say that it was always
14 that. I think more than once. I can't say exactly. I
15 can say as late as April when they sold some farmland
16 that they asked, and that there is no question about it,
17 that they should have remembered at that time because
18 the June filing date was coming on.

19 And they continued, and then finally in
20 September they thought, well, gee, this sure seems like
21 a long time, and then suddenly the light went on.

22 So it's not like they just turned the file
23 over to the attorney and walked away and said, well, let
24 me know how it works out. I think that is a big
25 difference.

1 However, under the per se rule as advocated by
2 the government, it wouldn't make any difference what he
3 did. Mr. Boyle would be treated the same as other
4 taxpayers who never checked up or never did anything.
5 Mr. Boyle or Mrs. Rohrabach, for that matter, what
6 difference would it have made? It seems to me there's a
7 clear difference between the fact that somebody knows,
8 is made aware of the fact they made a mistake, they
9 should file their return.

10 Now, in this case Mr. Boyle did that in a
11 week. Okay, now, granted that held the penalty down to
12 20 percent instead of 25, all he could have lost was
13 another 5 percent. However, he would be treated the
14 same as somebody who is told, let's say, in September
15 this, that hey, your return is late. He says, ah, I'm
16 not going to worry about it. Two years later, well,
17 we'll file it.

18 Now, there are several cases like that.

19 If you talk about incentives, I think under
20 the -- there's a big difference between the two parties
21 there.

22 I would further just like to touch on a couple
23 of the policy and common sense arguments that the
24 government says make this so clear. They suggest, well,
25 it would be easier to collect. Sure it might be, but

1 tell Congress that. Don't tell this Court that. That's
2 not a decision that you have to make. Or maybe we would
3 have a better scheme.

4 Well, this Court has pointed out before, let
5 Congress come up with that scheme. If in fact there is
6 such a serious revenue drain because of this narrow
7 little exception, don't you think Congress would change
8 the law, not ask this Court --

9 QUESTION: Well, don't you have to convince us
10 that the Treasury regulation is invalid, under the
11 statute, that it is inconsistent with the statute?

12 MR. DAVIES: As an alternative argument, yes.

13 QUESTION: Well, alternative. Let's suppose
14 the -- suppose the regulation is completely valid.

15 MR. DAVIES: Okay.

16 QUESTION: And that it means what it says.

17 MR. DAVIES: Okay.

18 QUESTION: Would you lose?

19 MR. DAVIES: Not necessarily.

20 QUESTION: Why not? Why not?

21 MR. DAVIES: I, what I -- okay, what I'm
22 saying is I don't think it's necessarily unreasonable for
23 Mr. Boyle or Mrs. Widow or we could think of a lot of
24 sad cases --

25 QUESTION: So you think he used reasonable

1 care.

2 MR. DAVIES: Yes, I think so. I am --

3 QUESTION: Well, do you agree that it should
4 be judged on an objective basis under the regulations?
5 Suppose the regulation applies.

6 MR. DAVIES: Yes, I do believe it should be.

7 QUESTION: So it would be the objective test,
8 and then you would just -- you and the government would
9 just disagree on how it is to be applied in this case.

10 MR. DAVIES: That's one way to look at this
11 case, yes, sir.

12 QUESTION: Well, that isn't -- wasn't the
13 approach of the Court of Appeals, was it?

14 MR. DAVIES: Well, I think it was on their
15 holding. They said that, the Seventh Circuit holding
16 said, okay, we find these facts to be present, and
17 therefore we find that in this case it was reasonable
18 for Mr. Boyle to rely on his attorney.

19 QUESTION: So you think they applied the
20 objective test.

21 MR. DAVIES: Yes, I do.

22 The main bone of contention, as I see it, was
23 that Judge Posner thought that Mr. Boyle was more
24 experienced than Mrs. Rohrabach.

25 QUESTION: But on one of your arguments, your

1 primary argument, or the argument you made first, would
2 require us to hold the regulation invalid.

3 MR. DAVIES: Yes.

4 QUESTION: Yes, okay.

5 MR. DAVIES: On that argument.

6 QUESTION: What amount of -- what's the rate
7 of interest on the delinquent payment, not the penalty,
8 the rate of interest.

9 MR. DAVIES: At this time it was 6 percent.
10 Now, I believe that's raised to a floating rate now.

11 QUESTION: So the government pays about 11
12 percent to borrow money, and they are only charging, if
13 you're correct, they would only be charging 6 percent.

14 MR. DAVIES: At this time.

15 Now, I think that -- I believe that's foolish,
16 Your Honor, and I think they've changed it, but that's
17 not our fault. I believe there can be proper incentives
18 by charging an appropriate rate of interest.

19 QUESTION: Well, didn't -- isn't it possible
20 that Congress put this penalty that you regard as so
21 drastic in order to keep the interest at a more moderate
22 rate?

23 MR. DAVIES: It's possible. I don't know the
24 legislative history on that. I believe they have raised
25 the 6 percent, like if you file your income tax return

1 late or you don't pay the money, I should say, you would
2 pay 11 or 12 percent, say, and that's adjustable. At
3 this particular time it was 6 percent.

4 Now, one other thing I would point out is that
5 on the per se rule, what about the widow or the person
6 who can't collect from the attorney? Does that person
7 really get a fair shake, and did Congress really intend
8 to penalize that person?

9 I suggest that Congress did not and they
10 allowed a narrow exception which the courts have made in
11 this particular case and I think in the Willis case. I
12 don't think it's that the Seventh Circuit is necessarily
13 out there all alone.

14 Thank you.

15 CHIEF JUSTICE BURGER: Do you have anything
16 further, counsel?

17 CRAL ARGUMENT OF ALBERT G. LAUBER, JR., ESQ.

18 ON BEHALF OF PETITIONER -- REBUTTAL

19 MR. LAUBER: I have two points.

20 First, on the question of mootness, the case
21 is definitely not moot. What happened here is the
22 estate paid the penalty and filed a suit for a refund,
23 for \$17,000, about. If this Court affirms the decision
24 below, the IRS must pay \$17,000 to the estate. If it
25 reverses, the IRS pays nothing.

1 And the arrangements that the estate and the
2 lawyer made among themselves on how they divvy up the
3 money is simply not relevant to this Court's
4 jurisdiction.

5 Now, on the question of statutory
6 construction, I should point out that since 1916 there
7 have been literally thousands of cases construing the
8 late filing addition to the tax decided by the federal
9 courts. No court has ever adopted or even suggested the
10 interpretation that Respondent advocates here, i.e.,
11 that only willful neglect causes the penalty to be
12 assessed. They have uniformly addressed the question in
13 terms of whether or not there was reasonable cause.

14 The regulation that implements what we think
15 is the correct scheme of the statute has been in effect
16 since 1918, and this Court's cases have often
17 acknowledged when you have a regulation, particularly a
18 tax regulation, in effect that long, Congress is deemed
19 to have approved it.

20 QUESTION: Well, do you, assuming that the
21 regulation is valid, as you say, do you think the Court
22 of Appeals did not proceed on an objective basis?

23 MR. LAUBER: I think they did not because they
24 focused on whether or not this particular executor
25 actually knew himself the due date, and whether or not

1 he had particular executor. The question --

2 QUESTION: You don't think they concluded that
3 he acted reasonably?

4 MR. LAUBER: Well, they thought -- they looked
5 whether he acted reasonably given his particular past
6 experience. For us the question is whether or not a
7 reasonable man would have remained ignorant of the
8 filing date.

9 QUESTION: All right. Assuming, assuming that
10 you are right and that the Court of Appeals applied the
11 wrong standard, shouldn't we remand?

12 MR. LAUBER: I think there's no need for a
13 remand because the Court of Appeals acknowledged that
14 negligence was committed.

15 QUESTION: Well, it requires an assessment of
16 the facts under a reasonable man standard which you say
17 they didn't apply.

18 MR. LAUBER: Well, they acted like they
19 applied it, but because they erroneously employed the
20 reliance on counsel defense, which was not available as
21 a matter of law, if the statute is correctly construed,
22 that was what led them to their incorrect result, and
23 that was a legal error, not a factual error.

24 Finally, I would like to point out that if the
25 Court were to construe the statute as making the penalty

1 applicable only where there is willful neglect, it would
2 be an impossible enforcement burden on the government.
3 Thousands of returns are filed late every year, and if
4 we had to prove on a case by case basis whether or not
5 the taxpayer or his agent acted willfully, it would be a
6 nightmare for the courts and for the IRS.

7 It's much better from an enforcement
8 standpoint as well as being correct under the statute.

9 QUESTION: In other words, a bright line.

10 MR. LAUBER: A bright line test. And what the
11 Revenue Service has done in implementing the reasonable
12 man standard is to define a number of categories of
13 cases which per se will be reasonable cause, and as I
14 mentioned to you before, the manual, the revenue manual,
15 lists eight different categories of cases, for example,
16 where there's an unavoidable postal delay, where there
17 is a death or serious illness of the taxpayer or a
18 member of his family, where the taxpayer is unavoidably
19 absent from the country, where the Service gives the
20 taxpayer erroneous legal advice, where there's a
21 destruction or a casualty to the taxpayer and his
22 property, all those situations amount to per se
23 reasonable cause, and that let's the government dispense
24 of many of these cases without litigation.

25 CHIEF JUSTICE BURGER: Thank you, gentlemen.

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The case is submitted.

(Whereupon, at 3:06 c'clock p.m., the case in
the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#83-1266 - UNITED STATES, Petitioner v. ROBERT W. BOYLE, EXECUTOR OF THE ESTATE

OF MYRA W. BOYLE, DECEASED

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)

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