DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
TE/GE: EO Examination
1100 Commerce Street
Dallas, Texas 75242

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

Release Number: **201547007**
Release Date: 11/20/2015
Date: September 5, 2014
UIL Code: 4962-00-00

Taxpayer Identification Number:

Form:

Tax year Ended:

Person to Contact/ID Number:

Contact Numbers:

Manager Name/ID Number:

Contact Numbers:

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Dear:

We are enclosing a technical advice memorandum (TAM) that we requested from EO Rulings and Agreements in Washington D.C. Generally we request TAMs for issues that cannot be resolved in the basis of law, regulations, or other published precedent.

Please take time to follow the instructions in the attached 438, Notice of Intention to Disclose (Technical Advice). Your sanitized TAM is subject to public inspection in the IRS Electronic Reading Room by section 6110 and we want to be sure you have another opportunity to identify additional content you believe requires lawful deletion from public inspection.

Your examination will be concluded on the basis of the TAM's conclusions. You will receive a closing letter when your examination is complete.

If you have any questions, you can call me at the number indicated at the heading of this letter.

Thank you for your cooperation.

Sincerely yours,

Barbara L. Harris
Acting Director, EO Examinations

Enclosures:
Technical Advice Memorandum
Technical Advice Memorandum (sanitized copy)
Notice 438
Publication 892

INTERNAL REVENUE SERVICE

NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

E.O. Exams Programs and Review
Internal Revenue Service
Attn: EO Mandatory Review
MC 4920 DAL
1100 Commerce Street
Dallas, TX 75242

September 24, 2014

Taxpayer's Name:

Taxpayer's Address:

Taxpayer's Identification Number:

Tax Years Involved:

Date of Conference:

LEGEND:

Trust	=
Year	=
Grantor	=
Company	=
Foundation	=
Partnership	=
Year1	=
Year2	=
Date	=

ISSUE:

Should the first-tier excise taxes under I.R.C. § 4945 on Trust's failure to distribute income for the years at issue be abated in accordance with § 4962?

FACTS:

Trust is a § 501(c)(3) organization established in Year and classified as a private foundation as described in § 509(a). Trust began as a grantor trust, payments from which were payable only to Grantor and then after Grantor's death Trust became an irrevocable trust. Trust was funded with corporate stock of the Company. Under the trust agreement Trust will liquidate the stock and distribute the proceeds to Foundation.

Foundation is exempt from income tax under § 501(c)(3) and is classified as a private foundation within the meaning of §509(a). Foundation's purpose is to make grants to 501(c)(3) organizations.

Trust has provided grants to Foundation every year since Year. Upon the completion of the series of distributions from Partnership, then to Foundation, Trust will terminate. Trust has two trustees. Neither trustee has experience, knowledge, or understanding of the federal tax applicable to private foundations. Both trustees are also members of the board of directors of Foundation. Trust engaged a law firm, which assists Trust in other legal matters, to prepare its application for exemption and to assist with the preparation of its Form 990-PF for Year. In the years immediately following Year Trust engaged a certified public accountant to prepare its annual tax returns and advise it on other tax matters, particularly those concerning its tax exempt and private foundation status and reporting requirements. The trustees relied upon these professionals to inform them of all filing and administrative requirements. According to the filed abatement request, both the law firm and the CPA were aware of all relevant facts and circumstances giving rise to the expenditure responsibility requirements. Trust did not enter into a formal written agreement with Foundation concerning the grant payments. Trust represents that the requirement to enter such a written agreement or to otherwise exercise expenditure responsibility with respect to the grants to Foundation was never brought to the attention of the trustees by either the law firm or the CPA.

In Year2, Trust engaged a second CPA at a different firm to assist it with its tax compliance responsibilities, beginning with its Form 990-PF filing for Year1. During the preparation of this Form 990-PF the second CPA discovered the error. Specifically, a written agreement containing the terms of the grant and express requirements that any portion of the investment not used for the specific purpose of the grant be repaid was not signed by Foundation, and Foundation did not provide an annual report stating that it has complied with the terms of the grant. Trust states that during the years in question, however, no portion of the funds granted were used for purposes other than those intended by the grant, and Foundation has complied with the terms of the grant. Also, while no written reports were made, the trustees' positions as members of the board of Foundation provided them with the knowledge that the funds were being used in the intended manner. Trust also failed to include an annual report from Foundation in its Form 990-PF filings for the years in questions since none were provided by Foundation.

Once the second CPA informed Trust that it had failed to exercise the technical requirements of expenditure responsibility during the preparation of the Year1 returns in early Year2, Trust immediately took corrective action, gathering the appropriate information from Foundation and filing Form 4720, Return of Certain Excise Taxes under Chapter 41 and 42, to voluntarily report its noncompliance. Trust also implemented controls to ensure that it complies with the expenditure responsibility requirements for all future grants. Trust took the following corrective steps:

Trust entered into a written Grant Agreement with Foundation, effective as of the start of Year. The Grant Agreement contains all of the terms required in order to meet the expenditure responsibility requirements of § 4945(h), as set forth in § 53.4945-5(b)(3).

Trust on Date obtained reports from Foundation covering the years in question containing the required statements that Foundation has complied with the terms of the grant.

Trust on its timely filed Year1 return included the required reports with respect to the grant payments made to Foundation for the years in question on its timely filed Form 990-PF for Year1.

LAW:

I.R.C. § 4945(a)(1) imposes a tax equal to 20 percent on each taxable expenditure, to be paid by the private foundation.

I.R.C. § 4945(a)(2) provides that, "there is hereby imposed on the agreement of any foundation manager to the making of an expenditure, knowing that it is a taxable expenditure, a tax equal to 5 percent of the amount thereof, unless such agreement is not willful and is due to reasonable cause. The tax imposed by this paragraph shall be paid by any foundation manager who agreed to the making of the expenditure."

I.R.C. § 4945(b) provides that there shall be "additional taxes.--on the foundation--In any case in which an initial tax is imposed by subsection (a)(1) on a taxable expenditure and such expenditure is not corrected within the taxable period, there is hereby imposed a tax equal to 100 percent of the amount of the expenditure. The tax imposed by this paragraph shall be paid by the private foundation."

I.R.C. § 4945(d)(4) defines taxable expenditure as an amount paid by a private foundation as a grant to an organization unless such organization is described in §§ 509(a)(1), (2), or (3) or it is an exempt operating foundation, or the private foundation exercises expenditure responsibility with respect to such grant in accordance with subsection (h).

I.R.C. § 4945(h) provides that expenditure responsibility referred to in § 4945(d)(4) means that the private foundation will assert all reasonable efforts and establish adequate procedures to see that the grant is spent solely for the purpose for which it was made, to obtain full and complete reports from the grantee on how the funds are spent, and to make full and detailed reports with respect to such expenditures to the Secretary.

I.R.C. § 4963(a) provides that, "If any taxable event is corrected during the correction period for such event, then any second tier tax imposed with respect to such event (including interest, additions to the tax, and additional amounts) shall not be assessed, and if assessed the assessment shall be abated, and if collected shall be credited or refunded as an overpayment."

I.R.C. § 4962(a) provides that if it is established to the satisfaction of the Secretary that:

1. a taxable event was due to reasonable cause and not to willful neglect, and
2. such event was corrected within the correction period for such event, then any qualified first tier tax imposed with respect to such event (including interest) shall not be assessed and, if assessed, the assessment shall be abated and, if collected, shall be credited or refunded as an overpayment.

I.R.C. § 4963(e)(1) defines "correction period" as "the period beginning on the date on which such event occurs and ending 90 days after the date of mailing under section 6212 of a notice of deficiency."

I.R.C. § 6651(a)(1) provides that in "Addition to the tax.--In case of failure--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."

I.R.C. § 6656 provides that, "in the case of any failure by any person to deposit (as required by this title or by regulations of the Secretary under this title) on the date prescribed therefor any amount of tax imposed by this title in such government depository as is authorized under § 6302(c) to receive such deposit, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be imposed upon such person a penalty equal to the applicable percentage of the amount of the underpayment."

Treas. Reg. § 53.4945-1(d)(2) provides that, "If the expenditure is taxable only because of a failure to obtain a full and complete report as required by section 4945(h)(2) or because of a failure to make a full and detailed report as required by section 4945(h)(3), correction may be accomplished by obtaining or making the report in question. In addition, if the expenditure is taxable only because of a failure to obtain a full and complete report as required by section 4945(h)(2) and an investigation indicates that no grant funds have been diverted to any use not in furtherance of a purpose specified in the grant, correction may be accomplished by exerting all reasonable efforts to obtain the report in question and reporting the failure to the Internal Revenue Service, even though the report is not finally obtained."

Treas. Reg. § 53.4945-5(b)(3) provides that in order to meet the expenditure responsibility requirements of § 4945(h), a private foundation must require that each grant to an organization be made subject to a written commitment signed by an appropriate officer, director, or trustee of the grantee organization. Such commitment must include an agreement by the grantee: to repay any portion of the amount granted which is not used for the purposes of the grant, to submit full and complete annual reports on the manner in which the funds are spent and the progress made in accomplishing the purposes of the grant, to maintain records of receipts and expenditures and to make its books and records available to the grantor at reasonable times, and not to use any of the funds for any activity for any purpose other than one specified in § 170(c)(2)(B).

Treas. Reg. § 53.4945-5(c)(1) stipulates that the granting private foundation shall require reports on the use of the funds, compliance with the terms of the grant, and the progress made by the grantee toward achieving the purposes for which the grant or any portion thereof is received an all such subsequent periods until the grant funds are expended in full or the grant is otherwise terminated.

Treas. Reg. § 53.4945-5(d)(1) provides that to satisfy the report making requirements of § 4945(h)(3), a granting foundation must provide the required information on its annual information return for each taxable year which is subject to the expenditure responsibility requirements of § 4945(h).

Treas. Reg. § 53.4955-1(b)(7) provides that the act of agreeing to a political expenditure by a foundation manager will be considered to be due to reasonable cause if that manager receives a reasoned written legal opinion. An opinion will be considered reasoned if it addresses the facts and applicable law. The opinion is will not be considered reasoned if it does nothing more than recite the facts and express a conclusion.

Treas. Reg. § 53.4963-1(a) defines "first tier tax" as any tax imposed by subsection (a) of §§ 4941-45, 51, 52, 55, 58, 66, 67, 71, or 75. A "first tier tax" may also be referred to as an "initial

tax."

Treas. Reg. § 53.4963-1(b) defines "second tier tax" as any tax imposed by subsection (b) of §§ 4941-45, 51, 52, 55, 58, 71, or 75. A "second tier tax" may also be referred to as an "additional tax."

Treas. Reg. § 53.4963-1(e) provides that the correction period with respect to any taxable event shall begin with the date on which the taxable event occurs and shall end 90 days after the date of mailing of a notice of deficiency under § 6212 with respect to the second tier tax imposed with respect to the taxable event. Subparagraph (3) provides that the correction period may be extended by any period which the Commissioner determines is reasonable and necessary to bring about correction of the taxable event.

In United States v. Boyle, 469 U.S. 241 n.3 (1985), the Supreme Court described "willful neglect" "as meaning a conscious, intentional failure or reckless indifference." To show reasonable cause, the taxpayer must "demonstrate that he exercised 'ordinary business care and prudence.'" Boyle, 469 U.S. at 246 (quoting Treas. Reg. § 301.6651-1(c)(1). Additionally, the court stated, "This case is not one in which a taxpayer has relied on the erroneous advice of counsel concerning a question of law. Courts have frequently held that "reasonable cause" is established when a taxpayer shows that he reasonably relied on the advice of an accountant or attorney that it was unnecessary to file a return, even when such advice turned out to have been mistaken." Citing United States v. Kroll, 547 F.2d 393, 395-396 (CA7 1977); Commissioner v. American Assn. of Engineers Employment, Inc., 204 F.2d 19, 21 (CA7 1953); Burton Swartz Land Corp. v. Commissioner, 198 F.2d 558, 560 (CA5 1952); Haywood Lumber & Mining Co. v. Commissioner, 178 F.2d, at 771; Orient Investment & Finance Co. v. Commissioner, 83 U.S.App.D.C., at 75, 166 F.2d, at 603; Hatfried, Inc. v. Commissioner, 162 F.2d, at 633-635; Girard Investment Co. v. Commissioner, 122 F.2d, at 848; Dayton Bronze Bearing Co. v. Gilligan, 281 Fed. 709, 712 (CA6 1922). This Court also has implied that, in such a situation, reliance on the opinion of a tax adviser may constitute reasonable cause for failure to file a return. Citing Commissioner v. Lane-Wells Co., 321 U.S. 219, 64 S.Ct. 511, 88 L.Ed. 684 (1944). The court goes on to state, "When an accountant or attorney *advises* a taxpayer on a matter of tax law, such as whether a liability exists, it is reasonable for the taxpayer to rely on that advice. Most taxpayers are not competent to discern error in the substantive advice of an accountant or attorney. To require the taxpayer to challenge the attorney, to seek a "second opinion," or to try to monitor counsel on the provisions of the Code himself would nullify the very purpose of seeking the advice of a presumed expert in the first place."

Haywood Lumber & Mineral Co. v. Commissioner, 178 F.2d 769 (2nd Cir. 1950), holds that a corporation's failure to file a personal holding surtax return did not incur a 25 percent penalty since it had reasonable cause to not file by relying on a competent certified accountant to prepare the proper returns. The accountant did not inform the taxpayer of its need to file these returns despite being hired to prepare the taxpayer's returns and being fully informed of all the information necessary to know you needed to file the forms.

Hatfried, Inc. v. Commissioner, 162 F.2d 628 (3rd Cir. 1947), provides that there will be no penalty for failing to file the personal holding company return when the taxpayer made full disclosure of all relevant facts that would establish it as a personal holding company to its outside tax return preparer who then did not file the return.

Orient Inv. & Finance Co. v. Commissioner, 166 F.2d 601 (D.C. Cir. 1948), provides that there was reasonable cause for failure to file personal holding company returns when advisors had all

information necessary to make the determination as to whether or not the returns were required.

L.D. Caulk Co. v. U.S., 116 F. Supp. 835 (D. Del. 1953), provides that the failure to file a withholding tax return was do to "reasonable cause" where the taxpayer's outside advisor advised that no withholding tax was due.

Burruss Land & Lumber Co., Inc. v. U.S., 349 F. Supp. 188 (W.D. Va. 1972), primarily discussed the reasonableness of relying upon in-house counsel, rather than outside counsel, when determining reasonable cause in relying on such advice for purposes of §§ 6651 and 6656. The court determined that reliance on in-house counsel constitutes reliance on counsel and not an act of the organization itself therefore reasonable cause existed and no penalty should be assessed. The court also noted the distinction between penalty and the initial tax when determining the assessment of a tax.

Burton Swartz Land Corp. v. Commissioner, 198 F.2d 558 (5th Cir. 1952), states that the delinquency penalty did not apply for the late filing of returns where the corporation had initially received advice that no returns were due but later found out that this advice was incorrect and filed delinquent returns.

In Woodsum v. Commissioner, 136 T.C. 585 (2011), the court determined that there was no reasonable cause for the failure to report $3.4 million in income when the taxpayer had provided its tax preparer with all of the information for it to know that the taxpayer had earned that income. The court noted that the tax preparers failure to report the income on the return does not constitute professional advice on which the taxpayer could rely for not reporting the income.

Hans Mannheimer Charitable Trust v. Commissioner, 93 T.C. 35 (1989), involved the imposition of taxes under § 4945 for failure to exercise the expenditure responsibilities found under 4945(h). In this case the taxpayer shared a founder with the organizations to which it made grants and was fully aware of the activities and expenditures of those organizations throughout the time period in question. The taxpayer in the case did not make the grants conditional upon a written agreement nor did they require annual reports or submit any annual reports as part of their Form 990-PF flings. The taxpayer noted that the spirit of the regulations was followed and that the errors were only "technical" in nature. The court disagreed stating that, "The initial tax is a spur designed to remind the foundation that it has been remiss. Subsequent compliance with the rules enables the foundation to avoid the real whip of § 4945(b)(1), but cannot undo the punishment for its initial infraction." The court determined that even if no expenditures were used inappropriately the failure to comply with the regulations and file the appropriate paperwork warranted imposition of the first-tier tax under § 4945.

In Rembusch v. Commissioner, 38 T.C.M. (CCH) 310 (1979), the court held that the taxpayer has the burden of showing that a failure to file timely returns was due to reasonable cause and not willful neglect. A mere showing that the delinquency in filing the returns was not due to willful neglect is not sufficient and that there must also be reasonable cause.

In de Belaieff v. Commissioner, 15 T.C.M. (CCH) 1426 (1956), the court held that ignorance of the law does not constitute reasonable cause. The taxpayer had shown that failure to file returns was not due to willful neglect, but was instead due to ignorance of the law. The taxpayer received advice from her attorneys regarding the tax treatment of income items, which at the time of the advice, was correct. Subsequently, for the years at issue, there was a change in the law and taxpayer continued to treat the items as nontaxable, even though they were now taxable. The court found that even though taxpayer had legal representation, the failure by the

attorneys to provide advice and the failure by the taxpayer to seek advice, did not constitute reasonable cause.

H.R. Rep. No. 432 (Pt. 2), 98th Cong., 2d Sess. 1472 (1984), and S. Rep. No. 169 (Vol. 1), 98th Cong., 2d Sess. 591 (1984), provide that where the foundation or foundation manager can establish that there was reasonable cause for such a violation and that there was no willful neglect of the rules, the Internal Revenue Service is to have discretionary authority to relieve the foundation or manager from the first-tier penalty tax, provided that the violation is corrected in the manner required in order to avoid liability for second-tier taxes. A violation which was merely due to ignorance of the law cannot qualify for such abatement.

Delegation Order No. 7-11 (11-08-2007) delegates authority to abate substantial first-tier excise taxes to the Director, Exempt Organizations. "Substantial qualified first-tier tax amount" is described as a sum exceeding $200,000 for all such tax payments or deficiencies (excluding interest, other taxes, and penalties) involving all related parties and transactions arising from chapter 42 taxable events within the statute of limitations as determined by the key district office involved. See IRM 1.2.46.12(2), (3).

Analysis

For first tier taxes to be abated under § 4962, the tax assessed must be from a taxable event due to reasonable cause and not due to willful neglect, and the taxable event must be corrected within the correction period for such event. Here, Trust's four transfers of funds to Foundation are taxable expenditures within the meaning of § 4945(d) and do not satisfy the requirement of § 4945(d)(4).

Trust, through the counsel of its new CPA, recognized that it had failed to meet the technical requirements for expenditure responsibility on these grants. Trust's failure occurred despite the use of prior counsel that failed to advise Trust of its obligations while being fully aware of the circumstances of the grants. Trust then corrected the failure to exercise expenditure responsibility for the years in question as defined in § 4963 without prior notice from the Service, thus within the applicable period for correction. Section 53.4963-1(e). Trust then promptly filed these reports with its timely filed Form 990-PF for the final year in question. Trust also filed a Form 4720 seeking abatement of the taxes on taxable expenditures under § 4962.

Abatement of taxes under § 4962 requires that the failure to comply with the tax law was due to (1) reasonable cause and (2) not from willful neglect, and that Trust (3) correct its non-compliance within the applicable correction period. There is no contention that Trust's failure was due to willful neglect or that Trust has not corrected within the applicable correction period. It is not enough to show that the mistake was merely not due to willful neglect, Trust must also show that it was due to reasonable cause. Rembusch, 38 T.C.M. (CCH) 310. Reasonable cause is not defined in § 4962. The Supreme Court, however, noted that to show reasonable cause Trust must demonstrate that it acted with "ordinary business care and prudence." Boyle, 469 U.S. at 246. The Supreme Court goes on to state that, "When an accountant or attorney advises a taxpayer on a matter of tax law, such as whether a liability exists, it is reasonable for the taxpayer to rely on that advice." Boyle, 469 U.S. at 251. The technical requirements underlying expenditure responsibility constitute four pages of regulations and are a matter of tax law akin to whether a liability exists.

While Trust's trustees lacked the knowledge or the expectation that such written products would be needed given their lack of knowledge and experience as well as their close relationship with

Foundation, ignorance of the law does not justify abatement. Trust also cannot be said to have relied upon the written advice of an attorney or accountant that no expenditure responsibilities were required. Trust contends that it provided full information to its counsel and the lack of advice to make the appropriate written agreements and reports was reliance on the advice of counsel that such reports were not required. This argument contradicts the outcome in Woodsum, 136 T.C. 585, however. That case stated that even though the taxpayer gave the tax preparer all the appropriate information the fact that the preparer failed to include the amount in the income of the taxpayer does not constitute advice from counsel that such an inclusion is not necessary. Trust cannot rely on the lack of advice to perform certain acts as advice that such acts are not necessary.

This result is consistent with that found in Mannheim Charitable Trust, 93 T.C. 35, where the court states that "the initial tax is a spur designed to remind the foundation that it has been remiss. Subsequent compliance with the rules enables the foundation to avoid the real whip of § 4945(b)(1), but cannot undo the punishment for its initial infraction." Trust's subsequent correction and informing of the Service removes it from liability for any second-tier taxes that are the true teeth of the excise tax, but such correction is not enough to absolve it of the need for the much smaller first tier tax they seek to abate.

Trust asserts that the incorrect completion of the Form 990-PF by a qualified tax preparer who has all of the necessary information constitutes advice of counsel that may be relied upon when determining that reasonable cause exists for not completing a requirement of Chapter 42. Trust points to several cases interpreting the phrase "reasonable cause" in the context of penalties in the tax code as evidence to how such term should be construed for § 4962 purposes since no further definition is provided for such term under § 4962, within the regulations or elsewhere. Trust's argument is unpersuasive, however, since its argument relies entirely on case law for tax penalties and "additional taxes" rather than the imposition of an initial tax.

The earliest of the cases cited by Trust include Haywood Lumber, 178 F.2d 769, and Hatfried, Inc., 162 F.2d 628, both of which establish that the taxpayer provided all of the relevant information to its professional tax preparer, having the necessary competencies to prepare the taxpayer's taxes, and when that tax preparer failed to file a specific holding company return the taxpayers were deemed to have exercised reasonable care in determining whether that return was necessary. The cases provide that relying on a fully informed, competent tax preparer to file the appropriate returns is ordinary business care and prudence thus constituting a reasonable cause for not filing the appropriate return. Trust cites to several other cases maintaining this same holding. E.g., Orient Inv. & Fin. Co., 166 F.2d 601; and L.D. Caulk Co., 116 F. Supp. 835.

Trust also cites to cases interpreting "reasonable cause" under the penalties for failure to file and underpayment found in §§ 6651 and 6656. In Burruss Land & Lumber, 349 F. Supp. 188, the court determined that when assessing the penalties found in §§ 6651 and 6656 "reasonable cause" is shown when in-house counsel incorrectly determines the proper returns and amounts owed to the Service causing a delinquent filing or underpayment. The court noted that a company may rely on in-house counsel the same as it may rely on the advice of outside counsel as to hold otherwise would put an undue burden on smaller companies that cannot afford outside counsel or in-house counsel dedicated solely to legal questions. The fact that it was prepared by in-house counsel does not remove the fact that the taxpayer received advice, upon which it relied. The court in Burton Swartz, 198 F.2d 558, also held that when incorrect outside advice created a delinquent return the receiving of advice from fully informed, competent counsel constitutes "reasonable cause."

Trust's protest is unpersuasive, however, because all of the authority upon which it relies regards the imposition of an additional penalty beyond the initial tax rather than the assessment of the initial tax itself as we have in this situation. In all of the cases cited by Trust the taxpayer in those cases paid the initial tax and associated interest. The court in Hatfried, Inc., 162 F.2d at 632, emphasized that the case at hand dealt with a penalty for an act that is personal and intentional. Here, the tax imposed on Trust requires no such personal or intentional failure to act in order to be imposed. In fact, Hans Mannheimer, 93 T.C. 35, provides that the expenditure responsibilities under § 4945(h) is to be strictly maintained and that the fact that no negative outcome, intentional or not, occurred does not remove the requirement and excise tax thereon. Additionally, the court in Burruss Land & Lumber, 349 F. Supp. at 190, cites Spies v. U.S., 317 U.S. 492, 496 (1943) stating, "It is not the purpose of the law to *penalize*...innocent errors made despite the exercise of reasonable care. Such errors are corrected by the assessment of the deficiency of tax and its collection with interest for the delay" (emphasis added). The tax in question is not the penalty in this case, but instead it is the assessment of the deficiency of the tax by the foundation for failing to follow the required expenditure responsibilities. Thus, even the cases cited by Trust suggest that the tax owed here would not be abated. The court in Hans Mannheimer again comments that "The initial tax is a spur designed to remind the foundation that it has been remiss. Subsequent compliance with the rules enables the foundation to avoid the real whip of [the tax], but cannot undo the punishment for its initial infraction." The "real whip of [the tax]" referred to in Hans Mannheimer is the second tier taxes found in Chapter 42 such as the one hundred percent tax on foundations for failing to correct a taxable expenditure. See § 4945(b) and 53.4963-1(b). These cases, cited by Trust, then provide that a distinction exists as between an initial tax and a penalty incurred as an additional tax. The Service is not attempting to impose an additional tax on Trust, either under § 4945(b) or on a manager under § 4945(a)(2).

The distinction between the penalties discussed in the cases cited above and the initial tax imposed here is further emphasized when evaluating the statutory language provided in the various code sections from which the Trust draws. Sections 6651 and 6656 state within the section itself that the penalty is to be imposed "unless it is shown that such failure is due to reasonable cause and not due to willful neglect." No such language can be found within § 4945(a)(1). This tax is meant to be applied strictly upon the occurrence of such an event. See Hans Mannheimer, 93 T.C. 35. Looking at § 4945(a)(2) further illustrates that Congress had the ability to add language similar to that found in §§ 6651 and 6656 had it chosen to make imposition of such tax dependent upon the taxpayer's reasonable cause, or lack thereof. Section 4945(a)(2) imposes a tax on the foundation manager who agrees to a taxable expenditure, "unless such agreement is not willful and is due to reasonable cause." Having such conditional language in §§ 6651, 6656, and 4945(a)(2) and not in § 4945(a)(1) demonstrates Congress' intent to apply a different standard for the initial imposition of the tax on the foundation and the imposition of any penalties or tax on foundation managers. Furthermore, the added language for foundation managers must be a lower standard than that found in § 4962 or there would be no imposition of a tax on a foundation when there was no tax on the foundation manager. If Congress had intended this consequence it would not have used different language in the initial standard for the foundation and the foundation managers as it has done.

Also, despite Trust's contention that "reasonable cause" should be interpreted consistently throughout, it fails to address the interpretation of reasonable cause under the foundation manager code excise taxes in Chapter 42, even going so far as to dismiss these interpretations without stating proper cause. See Trust's letter dated November 25, 2013, Fn 1, pg. 5. While

the foundation manager taxes differ from the taxes imposed on the foundations, as discussed above, they are first tier taxes within Chapter 42 that were contemplated at the same time as the first tier taxes imposed on the foundation. Given this proximity to the tax in question the understanding of reasonable cause in these sections is arguably more relevant. Section 53.4955-1(b)(7) provides that the advice of counsel must be a written legal opinion that addresses the facts and the law and not a recitation of facts with a conclusion. In Trust's case, it is arguing that the preparation of the return constitutes the legal advice of counsel. The check box on the return that Trust points to as the advice of counsel is merely the stating of a conclusion with no reasoned analysis. Trust cannot argue for drawing from other parts of the Code to determine the meaning of § 4962 and omit the most relevant references to reasonable cause in its analysis. The advice of counsel, in order to constitute reasonable cause, must be more than the checking of a box in the preparation of a return.

Trust contends that the preparing of the Form 990-PF in a manner indicating that no such expenditure responsibilities are necessary constitutes advice from counsel. While it may be sufficient to note that a professional tax preparer with full knowledge of the relevant facts improperly completed a tax return in order to avoid the imposition of a penalty, that standard cannot hold true for the imposition of the initial tax. In Woodsum, 136 T.C. 585, the court considered the argument that not declaring certain money as income for tax purposes on an individual tax return cannot be said to be the advice of counsel despite the preparation of the return by a fully informed professional tax preparer. The court noted that the individual knew that he had gained such money and that the individual was put on notice by knowing of the income. Additionally, the court said that in order to constitute advice of counsel the advice needed to include analysis and a conclusion that would provide substantive advice and that the preparation of a return does not rise to this level. Here, Trust was aware of the payments to the private foundation and was aware that the organization was a private foundation and not a public charity. Furthermore, the preparation of Trust's return no more constituted an analysis and conclusion providing substantive advice than does an individual's return.

Based on the foregoing facts, we find that:

The § 4945 taxes on taxable expenditures due to failing to meet the technical requirements for expenditure responsibility are not abated under § 4962 since Trust did not have reasonable cause for such failure.

A copy of this memorandum is to be given to Trust. Section 6110(k)(3) of the Internal Revenue Code provides that it may not be used or cited as precedent.

-END-