
State of South Carolina
Department of Revenue
301 Gervais Street, P. O. Box 125, Columbia, South Carolina 29214

SC Revenue Procedure #95-2

SUBJECT: Penalty Waiver
(All Taxes)

EFFECTIVE DATE: Applies to all periods open under the statute.

SUPERSEDES: SC Revenue Procedure #93-1

REFERENCE: S.C. Code Ann. Section 12-54-160 (Supp. 1993)

AUTHORITY: S.C. Code Ann. Section 12-4-320 (Supp. 1993)
SC Revenue Procedure #94-1

SCOPE: A Revenue Procedure is a statement which provides information of a procedural nature. It is valid and remains in effect until superseded by a change in the statute or regulations or a subsequent court decision or Revenue Procedure.

I. PENALTY WAIVER

Code Section 12-54-160 provides that "[t]he [Department], unless otherwise prohibited within a specific section, may waive, dismiss, or reduce penalties provided for in this chapter..."

The Department, therefore, has authority to waive a penalty as determined by the facts and circumstances of each case. For purposes of this ruling, the term "waive" means to completely or partially adjust a penalty.

II. GENERAL RULE

General standards for penalty waivers are necessary in order to encourage voluntary tax compliance and to ensure consistent treatment among taxpayers. In accordance with Department policy, the appropriate treatment of a penalty is a question of fact to be considered on a case by case basis.

A complete penalty waiver is appropriate when lack of performance required by a taxpayer is due to reasonable cause. The general standard for determining whether reasonable cause exists is whether the taxpayer exercised ordinary business care and prudence and was nevertheless unable to perform the act required. This question is one of fact and the burden of proof that the failure to perform is due to reasonable cause is on the taxpayer.

A partial penalty waiver may be appropriate when reasonable cause required by the taxpayer does not exist, but significant mitigating factors are present. The general standard for determining whether significant mitigating factors are present is based upon the Department's review of the taxpayer's filing and payment history and the complexity, amount, frequency and materiality of the error or understatement.

If reasonable cause or significant mitigating factors do not exist, the originally proposed or assessed penalty should be imposed.

III. PROCEDURE TO FOLLOW IN WAIVING PENALTIES

Department employees authorized to waive penalties should follow the procedures set forth below when waiving a penalty:

- A. The Department employee will request the taxpayer or a representative of the taxpayer submit a signed, written explanation of the facts and circumstances that caused the failure to comply. Prior to receipt of the written explanation, employees are not authorized to waive the penalty. Upon receipt, the taxpayer's written explanation should be retained in the appropriate file.
- B. After the written explanation is reviewed, the authorized employee will determine whether the facts and circumstances justify waiving the penalty. Section IV of this document provides guidance in making this decision. The examples provided in Section IV are not designed to be all-inclusive. When an employee is uncertain whether a penalty adjustment should be made, the employee should consult his supervisor.
- C. In addition to determining that reasonable cause exists or significant mitigating factors exist to waive a penalty, it must be determined who has authority to waive a particular penalty. The Department has decided to determine an employee's authority to waive a penalty based upon the following factors:
 - (1) the employee's level of authority established in Section VI of this document; and,
 - (2) the type of tax or taxes (as described below) upon which the penalties are imposed.

Section VI of this document sets forth a list of authorized personnel that may waive penalties and the "authorized amount" the employee may waive. The term "authorized amount", excluding property tax assessments otherwise described, means the aggregate penalties within a "tax type" that is initially proposed or assessed at the time of an audit, inspection, violation, etc., including property tax penalties on private carline companies and airline companies. For adjustments to property tax assessments, the term "authorized amount" means any penalty amount added by the Department to the assessed value of the property before certification to the county.

In general, audits and assessments are grouped by tax type. Therefore, the Department decided to group penalties by the type of tax or taxes used to group audits and assessments for the purpose of determining who may waive penalties. For this purpose, the Department has established the following "tax types". All taxes listed under a single number are considered one tax type.

1. Abandoned Property
2. Admissions Tax
3. Alcoholic Liquor Tax
4. Bank Tax
Bank Tax Declaration of Estimated Tax
5. Beer Excise Tax
Wine Excise Tax
6. Bingo Tax
7. Cigarettes - Business License Tax
Tobacco Products - Business License Tax
8. Coin Operated Device License Tax
9. Commercial Nuclear Waste Revenue
10. Corporate License Fee (Domestic & Foreign)
Corporate Income Tax
Corporate Declaration of Estimated Tax
Unrelated Business Income Tax of Tax Exempt Entities
11. Documentary Tax
12. Electric Power Tax
13. Estate Tax
Gift Tax
Generation Skipping Tax
14. Fiduciary Income Tax
15. Forest Renewal Revenue
16. Gasoline Tax
17. Highway Use Tax
18. Individual Income Tax
Individual Declaration of Estimated Tax
19. Property Tax
20. Sales Tax
Use Tax
Casual Excise Tax
Local Option Tax
Accommodations Tax
Retail License Tax
21. Savings and Loan Tax
Savings and Loan Declaration of Estimated Tax
22. Soft Drink Tax
23. Special Fuels Tax
24. Withholding Tax
25. Other Taxes Not Listed

The following examples provide guidance in determining whether an employee has the authority to waive a penalty:

Example 1: A sales and use tax audit of a taxpayer results in the assessment of aggregate penalties totaling \$5,500.00 - a \$3,500.00 failure to file penalty and a \$2,000.00 failure to pay penalty. Under the guidelines established in this document, the sales and use taxes are

considered one tax type in determining who may waive the penalties assessed under this audit. According to Section VI, one or both of these penalties may be waived by personnel authorized to waive aggregate penalty amounts of \$5,000.01 to \$10,000.00 and above, providing the waiver guidelines set forth in this document are met.

Example 2: A sales and use tax audit and an admissions tax audit are conducted on a taxpayer for a three year period. The sales and use tax audit results in the assessment of \$5,500.00 in aggregate penalties and the admissions tax audit results is the assessment of \$2,500.00 in aggregate penalties. Under the guidelines established in this document, the sales and use taxes are considered one tax type in determining who may waive these penalties and the admissions tax is considered a separate tax type. In other words, the \$5,500.00 penalties imposed as a result of the sales and use tax audit may be waived by personnel authorized to waive amounts of \$5,000.01 to \$10,000.00 and above. The \$2,500.00 penalties imposed from the admissions tax audit may be waived by personnel authorized to waive amounts of \$0.01 to \$5,000.00 and above.

Example 3: An inspection of a bingo operation results in the detection of 55 violations during a single session for which penalties totaling \$5,600.00 are imposed. The violations and penalties are as follows: (1) 5 major violations totaling \$5,000.00 in penalties, (2) 25 occurrences of intermediate violations totaling \$500.00 in penalties, and (3) 30 occurrences of minor violations totaling \$100.00. Under the guidelines established under this document, the bingo tax violations in this example are considered one type of tax violation in determining who may waive these penalties. According to Section VI, any one or all of these penalties may be waived by personnel authorized to waive amounts of \$5,000.01 to \$10,000.00 and above.

NOTE: Even though the aggregate penalty is used to determine who may waive a penalty, each individual penalty, (e.g. failure to file, failure to pay) is considered separately when determining and documenting the existence of reasonable cause or significant mitigating factors.

- D. A standardized "Penalty Log" must be maintained by each employee who is authorized to make penalty adjustments in the receivables system. Employees retaining a penalty log on a computer must also maintain the required standardized log on paper.

A sample page of the standardized log is provided in this document. The employee actually making the adjustment to the computer system must fully complete the log for every proposed or assessed penalty that has been approved to be waived by authorized employees listed in Section VI of this document. If a penalty is not adjusted on the computer system, the employee actually making the adjustment must fully complete the log.

A specific reason(s) and dollar amount must be documented for waiving each individual penalty. For example, in the case of negligence and failure to file penalties imposed upon an individual income taxpayer, the authorized employee adjusting the penalty must document the reason(s) for waiving the negligence penalty and the amount waived. Additionally, the reason(s) for waiving the failure to file penalty and the amount waived must also be documented. However, if the reason for waiving all penalties assessed to a taxpayer is the same, then it is not necessary for the

authorized employee to provide a separate explanation for waiving each individual penalty. When completing the log, it is acceptable for the reason to be the letter(s) assigned to the list of examples provided in Sections IV, if applicable. For example, a penalty waived because of the death of the taxpayer, as discussed on page 6 of this document, may be documented in the log as reason: "RP #95-2, Section IV. B."

Penalty logs must be retained for five years and may be destroyed after such time at the discretion of the assistant administrator. Each employee is responsible for retaining his own penalty log, unless the division assistant administrator directs otherwise.

In addition, all documentation must be retained in the appropriate file. This documentation should include the taxpayer's request for penalty waiver as well as the authorized employee's written approval to waiving the penalty.

- E. In order to ensure consistent treatment among taxpayers and maintain adherence to the general standard, employees should carefully consider the facts and circumstances of each case when waiving penalties for reasons not listed in this document.
- F. Once it has been determined a penalty will be waived, the adjustment should be properly reflected in the receivables system pursuant to currently established procedures.
- G. When the facts and circumstances do not justify the waiver of a penalty, the department employee should communicate with the taxpayer why the penalty was not waived and the appeal rights available.
- H. Special rules apply for civil fraud penalties. When a Revenue Agents Report (RAR) indicates the Internal Revenue Service has imposed civil fraud penalties, civil fraud penalties may also be imposed by the Department. The auditing division, however, must consult with the Criminal Investigations Department of the Policy and Special Procedures Division (CID) if they think criminal penalties may be appropriate. Civil fraud penalties may also be appropriate when an RAR is not received from the Internal Revenue Service, however, an employee must consult CID prior to imposing the civil fraud penalty which does not result from an RAR.

IV. PENALTY WAIVER

Complete Waiver: The following list provides examples that may indicate the existence of reasonable cause and may justify the complete waiver of a penalty. While other reasons for waiving penalties exist, it is important that employees adhere to the general standard of reasonable cause discussed in Section II in determining whether to waive penalties. Furthermore, even if a taxpayer's reason for waiver is the same as one of the examples listed below, the penalty should not be waived if other factors indicate that the penalty should be imposed.

- A. The delay was caused by an unexpected and unavoidable absence of the taxpayer from South Carolina, such as being called to active military duty. In the case of a corporation, estate or trust the absence must have been of an individual having primary authority to execute the return, make the deposit, or pay the tax.

- B. The delay was caused by death or serious, incapacitating illness of the taxpayer, taxpayer's immediate family, or taxpayer's tax return preparer. In the case of a corporation, estate or trust, the death or serious illness must have been of an individual having primary authority to execute the return, make the deposit, or pay the tax.
- C. The tax return or the request for an extension of time was filed on time and accompanied by the appropriate amount of tax due, but was inadvertently filed with another state or with the Internal Revenue Service.
- D. The delinquency was caused by the unavailability of the taxpayer's records, over which the taxpayer had no control, provided that the records directly relate to the return and the unavailability of such records make it impractical to comply with the tax laws. For example, the required records were destroyed by fire or flood. It does not, however, include delinquencies caused by excessive time and business pressures or employee turnover or negligence.
- E. The taxpayer, in good faith, was unable, for reasons beyond his control, to obtain the records or information necessary to comply with a tax requirement. In the case of an estate, this situation may include difficulty in acquiring appraisals, inability to identify or locate assets, litigation concerning the will or property, subsequent discovery of additional assets, or the existence of a nonresident decedent's property in this State. It does not, however, include the failure of an executor or personal representative to ascertain the nature of his responsibilities.
- F. The delay or failure was caused by ignorance of the law in conjunction with other facts and circumstances such as limited education of the taxpayer or the lack of previous tax and penalty experience. For example, the taxpayer may have reasonable cause for noncompliance where difficult and complex issues are involved when reasonable persons differ as to the appropriate tax treatment of the issue and there is no Department guidance with respect to the issue. Also, the taxpayer may have reasonable cause if the failure was a result of a recent change in law or form revision and the taxpayer could not reasonably be expected to be aware of the recent change. However, this reason does not include ignorance of the law in situations where the taxpayer in the exercise of ordinary business care should have been aware of his tax obligations or consulted a tax advisor.
- G. The taxpayer provides written documentation that incorrect advice, such as the filing of a return was not required or the taxpayer was not liable for the tax, was received from a competent tax advisor such as a tax attorney, certified public accountant or enrolled agent. This may constitute reasonable cause if the taxpayer contacted a tax advisor who is competent on the specific tax matter and the taxpayer supplied the advisor with all necessary information, provided the taxpayer exercises ordinary business care and prudence in determining whether to secure further advice, based on his own information and knowledge.
- H. The taxpayer establishes that ordinary business care was used but due to circumstances beyond the taxpayer's control, the taxpayer's check was not honored. For example, the penalty was the result of a bank or Department error.

- I. The taxpayer demonstrates good faith reliance on substantial, official written authority, such as case law, Department policy documents and instructions to South Carolina tax forms.
- J. The delay or failure was caused by reliance on erroneous written or oral advice given by a Department employee to the taxpayer, if accurate and complete facts were given to the employee, there is no change in law, and the taxpayer provides supporting documentation, such as a copy of the taxpayer's question to the employee and the advice provided by the employee. A penalty will not be waived if the advice was oral, unless the employee verifies that all the facts were provided and that he gave the advice.
- K. The taxpayer made timely, reasonable, and documented attempts to obtain assistance or tax forms from Department offices but was unable to secure the necessary tax forms or assistance in sufficient time to file on the due date.
- L. The Director or Administrator determines it is in the best interest of the State. This determination may not be made by other employees.

Partial Waiver: The existence of significant mitigating factors may warrant the partial waiver of a penalty. The taxpayer's tax filing and payment history, the nature, frequency and materiality of the error, and the relationship of the penalty to the tax due must all be considered in making this determination.

V. REMEDIES NOT CONSIDERED WAIVERS

The provisions of this Revenue Procedure apply only to penalty waivers. The following adjustments are not penalty waivers as defined in Section I of this document, and therefore, are not subject to the guidelines set forth in this Revenue Procedure. These adjustments and reasons for them, however, should be noted in the appropriate file.

- 1. A penalty is imposed. Upon further review, it is discovered that a mathematical error was made in calculating the penalty and it is recalculated.
- 2. An estimated assessment is issued based upon arbitrary figures. An adjustment to tax, penalty and interest amounts is made when the taxpayer later submits actual information.
- 3. The taxpayer timely pays an assessment. The Department's computer system, however, does not reflect the payment and additional penalties accrue or an additional assessment is issued. An adjustment to the system is made to reflect the amount timely paid.
- 4. An assessment is issued to the taxpayer. Based upon the facts and circumstances, the Department revises the amount of tax due. An adjustment is made to the penalty since it was based upon a percentage of the tax due on the initial assessment.

VI. PERSONNEL AUTHORIZED TO WAIVE PENALTIES

A list of Department employees authorized to waive penalties and the dollar amounts such employees are authorized to waive is set forth below. Only the Director, however, is authorized to waive penalties imposed upon Department employees.

When employees are approved by the assistant administrator or director to waive penalties, such approval must be in writing.

A. All Penalties, Except As Otherwise Provided:

<u>Authorized Amount</u>	<u>Authorized Personnel</u>
\$0.01 - \$ 5,000	Division managers, supervisors or employees approved by the assistant administrator
5,000.01 - 10,000	Assistant administrator or managers approved by the assistant administrator
10,000.01 - 25,000	Assistant administrator or managers approved by the assistant administrator. The administrator must be advised in writing of the penalty waiver or reduction.
25,000.01 - 50,000	Administrator
50,000.01 - above	Director

B. Property Tax Penalties Which Increase Assessed Values, Excluding Penalties Imposed on Airline and Private Carlin Companies:

<u>Authorized Penalty Increase in Assessed Values</u>	<u>Authorized Personnel</u>
0.01 - 5,000	Property Division managers, supervisors or employees approved by the property assistant administrator
5,000.01 - 50,000	Property Division assistant administrator or managers approved by the property assistant administrator

50,000.01 - 125,000

Property Division assistant administrator or managers approved by the property division assistant administrator. The Director and administrator must be advised in writing of the penalty waiver or reduction.

125,000.01 - 250,000

Administrator

250,000.01 - above

Director

C. Civil Fraud Penalties:

Authorized Amount

Authorized Personnel

\$ 0.01 - above

Director

South Carolina Department of Revenue

s/Burnet R. Maybank III

Burnet R. Maybank, III, Director

Columbia, South Carolina
June 6 _____, 1995