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SC TECHNICAL ADVICE MEMORANDUM #89-5

TO: Mr. Marvin N. Davant, Director
Field Services Division

FROM: John Swearingen, Manager
Tax Policy and Procedures Department

DATE: February 15, 1989

SUBJECT: Penalties - Failure to Pay

REFERENCE: S.C. Code Ann. Section 12-54-40(b)(2)(a)&(b)
(Law. Co-Op. Supp. 1988)

AUTHORITY: S.C. Code Ann. Section 12-3-170 (1986)
SC Revenue Procedure #87-3

SCOPE: A Technical Advice Memorandum is a temporary document issued to an individual within the Commission, upon request, and it applies only to the specific facts or circumstances related in the request. Technical Advice Memoranda have no precedential value and are not intended for general distribution.

Question:

Whether the 1988 amendments to the failure to pay penalty in Section 12-54-40 apply to assessments issued after January 1, 1989 as a result of a proposed assessment issued prior to January 1, 1989?

Facts:

Section 12-54-40(b)(2)(a) prior to amendment provided a 1/2% per month penalty for failure to pay any tax as follows:

- (2) (a) In case of failure to pay any tax on or before the date prescribed by law (determined with regard to any extension of time for paying), there must be added to the tax due a penalty of one-half of one percent of the amount of the tax if the failure is for not more than one month, with an additional one-half of one percent for each additional month or fraction thereof, during which the failure continues, not exceeding twenty-five percent in the aggregate.

Section 12-54-40(b)(2)(a) and (b) were amended to conform the failure to pay penalty more closely to the federal failure to pay penalty as follows:

- (2) (a) In case of failure to pay the amount shown as tax on any return on or before the date prescribed by law (determined with regard to any extension of time for paying), there must be added to the tax due a penalty of one-half of one percent of the amount of the tax if the failure is for not more than one month, with an additional one-half of one percent for each additional month or fraction of the month, during which the failure continues, not exceeding twenty-five percent in the aggregate.
- (b) In case of failure to pay any amount in respect of any tax required to be shown on a return which is not so shown (including an assessment) within ten days of the date of the notice and demand for payment, there must be added to the amount of tax stated in the notice and demand one-half of one percent of the amount of the tax if the failure is for not more than one month, with an additional one-half of one percent for each additional month or fraction of a month during which the failure continues, not exceeding twenty-five percent in the aggregate.

Discussion:

The failure to pay penalty was amended to more closely conform the penalty to the Federal failure to pay penalty in I.R.C. Section 6651. Prior to amendment the penalty was applied to any failure to pay, whether the failure was to pay the tax shown on a return or additional tax as a result of an audit. The amended penalty provisions impose the penalty on failure to pay the tax shown on the return but allows 10 days from date of notice and demand for additional tax as a result of audit.

The effective date of the amendments to 12-54-40(b)(2)(a) & (b) is as follows:

This act, upon approval by the Governor, is effective for all assessment issued after January 1, 1989. 1988 S.C. Acts 660, Section 7

Generally when an audit is completed, the taxpayer is sent a proposed assessment stating the additional tax, penalty and interest due. If the taxpayer does not file a protest or a protest is filed and the differences later resolved, an assessment is issued. The assessment states the total amount due and places the taxpayer on notice that the taxpayer has 10 days to pay before collection procedures will begin. It is after the expiration of the 10 days to pay on the assessment that the amended failure to pay penalty will apply to additional taxes due as a result of audit. The plain wording of the language relating to the effective date of the amendments states that the amendments are effective for all assessments issued after January 1, 1989. Thus, where a proposed assessment is issued prior to January 1, 1989 and the assessment allowing 10 days to pay is issued after January 1, 1989, the amended penalty provisions will apply.

If the failure to pay penalty had been applied to the proposed assessment following the law prior to amendment, this penalty should be deleted from the assessment when the assessment is issued after January 1, 1989.

Conclusion:

The 1988 amendments to the failure to pay penalty apply to assessments issued after January 1, 1989 as a result of a proposed assessment issued prior to January 1, 1989.