

NEW JERSEY ADMINISTRATIVE CODE
TITLE 18. TREASURY -- TAXATION
CHAPTER 2. GENERAL POLICIES AND PROCEDURES
SUBCHAPTER 2. PENALTIES AND INTEREST

N.J.A.C. 18:2-2.7 (2017)

§ 18:2-2.7 Abatement of penalty and interest calculated on such penalty

(a) The Director may waive the payment of the whole, or any part, of any penalty, except post-amnesty penalties (such as those assessed under N.J.S.A.54:53-16 to 19), and any interest accruing from such penalty, if the failure to pay any tax when due or the failure to file any return is explained to the satisfaction of the Director.

(b) An abatement will be granted if the taxpayer can show reasonable cause for failure to file any return or pay any tax when due. All of the facts alleged as a basis for reasonable cause for failure to timely file a return or for failure to timely pay or pay over any tax due must be affirmatively shown in a written statement, containing a declaration that it is made under penalties of perjury, made by the taxpayer or other person against whom the penalty or penalties have been assessed or are assessable. Where the taxpayer or other person is unable to provide such statement or does not have a personal knowledge of such facts, a showing of reasonable cause may be made on behalf of the taxpayer or other person by an individual with a personal knowledge of such facts. In determining whether reasonable cause exists, in addition to an evaluation of such facts, the taxpayer's previous compliance record with respect to all of the taxes imposed may be taken into account.

(c) The following are examples of reasonable cause, when clearly established by or on behalf of the taxpayer or other person.

1. The death or serious illness of the taxpayer or a partner, officer, director, shareholder, employee, or other representative of the taxpayer or such individual's unavoidable absence from the usual place of business, which precluded timely compliance, may constitute reasonable cause provided that:

i. In the case of the failure to file any return, the applicable return is filed; or

ii. In the case of the failure to pay or pay over any tax, such amount is paid or paid over unless a taxpayer can demonstrate reasonable cause as required under (d) below, within a justifiable period of time after the death, illness, or absence. A justifiable period of time is that period which is substantiated by or on behalf of the taxpayer or such other person liable for penalty, as a reasonable period of time for filing the return and/or for paying any tax based on the facts and circumstances in each case. Substantiation may be required by the submission of third-party verification in the form of, for example, doctor's reports and hospital insurance carrier reports.

Example: It was established that illness incapacitated the owner of a small business during the period of delinquency. The taxpayer further established that no other person had access to sufficient information which would enable such person to timely file the delinquent return and pay over the tax due. The return was filed and the tax due was paid over within a justifiable period of time after the owner returned to work. This constitutes reasonable cause for failure to file the return and for failure to pay the tax due.

2. The destruction of the taxpayer's or the taxpayer's representative's place of business or business records

by a fire or other documented casualty, which precluded timely compliance, may constitute reasonable cause provided that:

- i. In the case of the failure to file any return, the return is filed; or
- ii. In the case of the failure to pay or pay over any tax, such amount is paid or paid over unless taxpayer can demonstrate reasonable cause as required under (d) below, within a justifiable period of time after the casualty has taken place. A justifiable period of time is that period which is substantiated by or on behalf of the taxpayer or such other person liable for penalty, as a reasonable period of time for filing the return and/or for paying any tax based on the facts and circumstances in each case. Substantiation may be required by the submission of third-party verification in the form of, for example, police accident reports and insurance claims and settlements.

Example 1: The place of business, together with the business records and the tax return, of a corporate taxpayer were destroyed by a documented casualty immediately prior to the date prescribed for filing the return and paying over the tax due. Within a justifiable period of time after the casualty took place the records of the taxpayer were reconstructed, a return was filed and the tax due was paid over. This constitutes reasonable cause for failure to file the return and for failure to pay the tax due.

Example 2: The same facts as Example 1 above, but the full tax was not paid at the time the return was filed as a result of a dispute with taxpayer's insurance company for the valuation of all business assets on the claim. The taxpayer provides documented proof of the dispute and enters into a payment plan with the Division. This constitutes reasonable cause for failure to pay the tax due.

3. The inability, for reasons beyond the taxpayer's control, to timely obtain and assemble essential information required for the preparation of a complete return, despite the exercise of reasonable efforts, may constitute reasonable cause provided a return is timely filed and the tax is timely paid or paid over on that portion of the tax liability which can be ascertained. The relevant facts affecting that portion of the tax liability which cannot be ascertained must be fully disclosed with the timely filed return and when such liability is ascertained, and where applicable collected, an amended return must be immediately filed together with any additional tax due.

Example: A limited partnership fails to issue K-1 forms in time for a limited partner to include the information on the partner's return. The partner, in good faith, estimates the partner's share of income earned by the partnership. The partner attaches a rider that explains in detail why the proper tax liability could not be determined prior to the due date. Subsequently, the K-1 form is issued, the partner immediately files an amended return and the additional tax due is paid. This constitutes reasonable cause for failure to pay the tax due.

4. A pending conference with the Division of Taxation, or a pending action or proceeding for judicial determination, which involves a question or issue affecting whether or not the individual or entity is required to file a return and/or pay tax, may constitute reasonable cause, provided that:

- i. The return or returns that are due are for a tax period or periods subsequent to the commencement of the conference or proceeding;
- ii. The action or proceeding is not based on a position which is frivolous; and
- iii. The facts and circumstances for such taxable period or periods are identical or virtually identical to

those of the taxable period or periods covered by the action or proceeding.

Example: An individual is awaiting a determination of the Tax Court of New Jersey regarding whether or not such individual was required to file a return and collect and remit tax in a prior taxable period. The petition on the matter to the Tax Court was filed prior to the due date for the return for the current taxable period. The facts and circumstances for the current taxable period are identical to those of the period covered by the petition. The individual's position is arguable and has merit based on case law or other recognized legal authority. This constitutes reasonable cause for failure to file a return and for failure to pay the tax due for the current period.

5. Any other cause for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly indicates an absence of willful neglect may be determined to be reasonable cause. Ignorance of the law is not a basis for reasonable cause.

Example 1: A manufacturer with production facilities throughout New Jersey has established an accrual accounting system to record purchases subject to use tax. The manufacturer, as the result of its first sales and use tax audit, owes additional use tax because of occasional misclassification of office supplies and equipment. After a review of a written statement submitted by the manufacturer, containing all of the facts alleged as a basis for reasonable cause, it was determined that the manufacturer had made reasonable efforts to account for its use tax liabilities, that the understatement of tax was unintentional, and that the manufacturer had otherwise substantially complied with the law. The audit findings established that willful neglect did not occur and reasonable cause existed. Therefore, penalty and interest calculated on such penalty will be waived.

Example 2: A vendor who operates a large restaurant business has an accounting system which is devised in such a way that the tax to be remitted each quarter is based on the accumulated taxable sales. An over collection test was performed on the guest checks which disclosed occasional miscalculation of tax by vendor's staff which resulted in an understatement of the tax due and paid. The vendor submitted a written statement containing all of the facts alleged as a basis for reasonable cause. The understatement of the tax due was not considered substantial, taking into account the size of the operation, volume of sales, and an otherwise sound accounting system. The audit findings established that willful neglect did not occur and that reasonable cause existed. Therefore, the penalty and interest calculated on such penalty will be waived.

(d) A failure to pay will be considered to be due to reasonable cause to the extent that the taxpayer has made a satisfactory showing that the taxpayer has exercised ordinary business care and prudence in providing for payment of the tax liability and was nevertheless either unable to pay the tax or would suffer an undue hardship if paid on the due date. In determining whether the taxpayer was unable to pay the tax in spite of the exercise of ordinary business care and prudence in providing for payment of the tax liability, consideration will be given to all the facts and circumstances of the taxpayer's financial situation, including the amount and nature of the taxpayer's expenditures in light of income (or other amounts) the taxpayer could, at the time of such expenditures, reasonably expect to receive prior to the date prescribed for the payment of the tax. For example, a taxpayer who incurs lavish or extravagant living expenses in an amount such that the remainder of the taxpayer's assets and anticipated income will be insufficient to pay the tax, has not exercised ordinary business care and prudence in providing for the payment of the tax liability. Further, a taxpayer who invests funds in speculative or illiquid assets has not exercised ordinary business care and prudence in providing for the payment of the tax liability unless, at the time of the investment, the remainder of the taxpayer's assets and estimated income will be sufficient to pay the tax or it can be reasonably foreseen that the speculative or illiquid investment made by the taxpayer can be

utilized (by sale or as security for a loan) to realize sufficient funds to satisfy the tax liability. A taxpayer will be considered to have exercised ordinary business care and prudence if the taxpayer made reasonable efforts to conserve sufficient assets in marketable form to satisfy the tax liability and nevertheless was unable to pay all or a portion of the tax when it became due.

1. In determining whether reasonable cause and good faith exist, the most important factor to be considered is the extent of the taxpayer's effort to ascertain the proper tax liability. In addition to any relevant grounds for reasonable cause as exemplified in (c) above, circumstances that indicate reasonable cause and good faith with respect to the substantial understatement or omission of tax, where clearly established by or on behalf of the taxpayer, may include the following:

i. An honest misunderstanding of fact or law that is reasonable in light of the experience, knowledge and education of the taxpayer;

ii. A computational or transcriptional error;

iii. Pursuant to N.J.S.A. 54:49-11.b, the reasonable reliance by the taxpayer on erroneous written advice furnished by an officer or employee of the Division of Taxation acting in the officer's or employee's official capacity entitling that taxpayer to appropriate penalty and interest waivers permitted by law, provided that the penalty or interest did not result from a failure of the taxpayer to provide adequate or accurate information to the officer or employee, and provided such reliance was reasonable and the taxpayer had no knowledge of circumstances which, upon inquiry, would have made the taxpayer aware as to whether such facts were erroneous. For purposes of this subparagraph, no officer or employee of the Division of Taxation is authorized to provide written advice which is binding on the Division of Taxation in the absence of a written request from a taxpayer; or

iv. The filing of an amended return which shows an additional amount of taxes due or which adequately discloses the tax treatment of an item which should have been adequately disclosed with the original return, provided the amended return is filed prior to the time the taxpayer is first contacted by the Division of Taxation concerning an audit or an examination of the return.

Example 1: Taxpayer prepared a gross income tax return relying upon a Form 1099-INT for interest income received from various investments. The provider of the form reissues it as a result of a significant error in calculation. Taxpayer, upon receipt of the reissued form, immediately files an amended tax return, but does not have the means to pay the tax at that time, and enters into a payment plan. The penalty and interest calculated on such penalty will be waived.

Example 2: Taxpayer did not charge sales tax on a certain service after receiving erroneous written advice furnished by an employee of the Division of Taxation that taxpayer reasonably relied upon. Subsequently, after audit, it was determined that such services were taxable. The taxpayer does not have the resources to pay the tax liability in full at the time of audit and enters into a payment plan with the Division. Therefore, the penalty and interest calculated on such penalty will be waived.

Example 3: Due to fiscal constraints, a business delays recording its taxable sales to the following quarter, postponing remittance of the sales tax collected. Such delay by the taxpayer does not constitute an honest misunderstanding of fact or law. Therefore, the penalty and interest calculated on such penalty will not be waived.

2. In determining if the taxpayer exercised ordinary business care and prudence in providing for the

payment of his tax liability, consideration will be given to the nature of the tax which the taxpayer has failed to pay. Thus, for example, facts and circumstances which, because of the taxpayer's efforts to conserve assets in marketable form, may constitute reasonable cause for nonpayment of income taxes may not constitute reasonable cause for failure to pay over trust fund taxes such as sales and gross income withholding taxes.

(e) The provisions of this section shall apply to the extent pertinent where any taxpayer substantially understates the amount of taxes required to be shown on the return and such understatement or omission was due to reasonable cause and not due to willful neglect. Reasonable cause and the absence of willful neglect may be determined to exist only where the taxpayer has acted in good faith.

Amended by R.1991 d.528, effective November 4, 1991.

See: 23 N.J.R. 1899(a), 23 N.J.R. 3342(c).

Added new (b)-(e).

Amended by R.1997 d.98, effective March 17, 1997.

See: 28 N.J.R. 3716(a), 29 N.J.R. 913(b).

In (a), added last sentence; and substantially amended (d)1iii.

Administrative correction.

See: 38 N.J.R. 4882(b).

Amended by R.2015 d.207, effective December 21, 2015.

See: 47 N.J.R. 1921(a), 47 N.J.R. 3150(a).

Section was "Abatement of penalty and interest". Rewrote the section