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Technical Advice Memo No: 2006-0001

Requested By: Chris Beach
Requested Date: 12/05/2005
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SUBJECT: Reasonable Cause for Late Payment Penalties

QUESTION(S) PRESENTED

May FTB find reasonable cause for the late payment penalty of Revenue and Taxation Code Section 19132 where the taxpayer has paid 90% or more of the amount shown on the return by the original due date regardless of whether the remaining amount is paid "with the return?"

CONCLUSION

FTB has considerable flexibility in determining what should be considered "reasonable cause" where 90% of the amount due for the year has been paid by the original due date. There is no statutory requirement that FTB require the remaining amount to be paid with the filing of the return in order to find reasonable cause for the late payment penalty. Because of practical issues associated with e-filing and electronic payments it is common that the return is processed before any payments made with the filing are processed or received. Therefore, FTB may presume reasonable cause and not assess the late payment penalty where at least 90% or more of the amount shown on the return has been paid by the original due date.

ANALYSIS AND DISCUSSION

Revenue and Taxation Code (RTC) Section 19132 is based on and substantially similar to Internal Revenue Code (IRC) section 6651(a)(2). It provides for a penalty for failure to pay tax shown on a return, unless the failure is due to reasonable cause.

Treas. Reg. § 301.6651-1(c)(3) provides that for taxable years after December 31, 1995, if an individual taxpayer satisfies the automatic extension requirements, reasonable cause will be presumed for the period of the extension if the excess of the amount of tax shown on the individual return over timely prepayments is no more than 10% , [§301.6651-1(c)(3)(i)], and any balance due shown on the original return is remitted with the return [§301.6651-1(c)(3)(ii).] For corporations, similar rules apply, although §301.6651-1(c)(4)(ii) specifically provides that the remaining balance shown on the Form 1120 must be paid on or before the extended due date of the return rather than "with the return" as for individuals.

It is the second requirement, that any balance due shown on the original return be remitted with the return for individuals, that is the subject of this request.

This requirement has been in the federal regulations for individuals since at least 1971. It was amended in 1995 to take into account the IRS automatic paper extension process.

While as a general rule, federal regulations will apply in interpreting corresponding California statutes, that principle applies where state and federal statutes and procedures are substantially identical. (See *Rihn v. FTB*, (1955) 131 Cal.App.2d 356.) In this case, however, the federal regulation relates to the imposition of the penalty where the federal paper extension process applies. Since the 1991 tax year, California has allowed automatic paperless extensions, unlike the corresponding federal law. (See RTC §18567, FTB Notice 91-3.) Therefore, because of this difference, the federal regulation is not directly applicable to California filing procedures.

In addition, the federal regulation has not been revised to take into account either state or federal electronic filing where the filing of the return electronically is a separate process from submitting the payment due as shown on that return.

In your memo, you describe practical problems that have caused the penalty to be assessed in cases where in fact the taxpayer paid the remaining amount shown on the return as instructed, but received the penalty because the return was processed before the payments posted. As a policy matter, FTB may determine that the advantages of encouraging e-filing and electronic payment justify relaxing the strict federal rule that in some situations imposes the late filing penalty even though 90% of the total amount shown as due has been paid by the original due date.

Given these state-federal differences and the practical issues described in your memo relating to the posting of payments and e-filed returns, FTB could presume reasonable cause for late payment where only the 90% test is met, and is not required to impose the penalty if the remaining amount due is not paid when the return is filed.