



James W. [unclear] copy  
My File: Income Tax: Penalties  
Corporate: Penalty

# COMMONWEALTH of VIRGINIA

Department of Taxation  
Richmond, Virginia 23282

## MEMORANDUM

TO: W. S. Cordle, Director  
Field Services Division

Ronald W. Wheeler, Director  
Office Services Division

DATE: October 26, 1990

SUBJECT: Application of Penalty to Corporate and Individual  
Income Tax Audits

It was recently suggested that legislation be proposed to enable the Department to impose an underpayment penalty on corporate income tax audits, similar to that authorized for the sales and use tax.

Upon review of the existing statutes, legislation is unnecessary to accomplish this objective. Va. Code § 58.1-455 sets forth the requirement for timely payment of annual corporate income tax. This section further states:

If any payment is not made in full when due, there shall be added to the entire tax or any unpaid balance of the tax a penalty . . . In the case of an additional tax assessed by the Department, if the return was made in good faith and the understatement of the amount in the return was not due to any fault of the taxpayer, there shall be no penalty on the additional tax because of such understatement. [emphasis added]

This language is strikingly similar to that contained in Va. Code § 58.1-635 relating to the retail sales and use tax. This section states in part:

When any dealer fails to make any return and pay the full amount of the tax required by this chapter, there shall be imposed in addition to other penalties provided herein, a



specific penalty . . . If such failure is due to providential or other good cause shown to the satisfaction of the Tax Commissioner, such return with or without remittance may be accepted exclusive of penalties. [emphasis added]


The language authorizing imposition of a penalty if the tax is not paid in full when due is strikingly similar in both sections. Both sections also allow for waiver of the penalty if the taxpayer is not at fault. Although the waiver language in each section is different, there is little functional difference between the two sections. In both cases, imposition of the penalty requires a two-part test:

- 1- the tax was not paid in full when due, and
- 2- the failure was not due to taxpayer error.


We are currently administering this two-part test in the context of sales and use tax audits and there is no apparent legal impediment to adopting a similar procedure in corporation income tax audits. If anything, Va. Code § 58.1-635 provides broader discretion for penalty waiver in sales and use tax. Further, a similar conclusion applies to the individual income tax penalty authorized by Va. Code § 58.1-351.

I hope that this answers the questions which have been raised regarding the application of penalty to income tax assessments. However, we attempted only to respond to the request for an analysis of current law and did not examine the operational impacts of a change in current policy. Any change which is implemented would most likely impact systems, forms and other operational areas, and we assume that these issues would be resolved in the normal manner for implementing changes in operational policy. Further, we would assume that significant further discussion is required as to the extent of implementation of this policy, particularly as it extends beyond corporate income tax audits.

If we can answer any questions or provide further information, please let us know.

  
Janie E. Bowen, Director  
Tax Policy Division

APPROVED:

  
W. H. Forst, Tax Commissioner

10/24/90  
Date