

State of Louisiana
Department of Revenue

JOHN BEL EDWARDS
Governor



KIMBERLY J. LEWIS
Secretary

August 5, 2021

Via e-mail (return receipt requested) to:

The Honorable Stuart J. Bishop
Chairman of the House Committee on Ways and Means
P.O. Box 94062
Baton Rouge, Louisiana 70804
apa.h-wm@legis.la.gov

The Honorable R.L. "Bret" Allain, II
Chairman of the Senate Committee on Revenue & Fiscal Affairs
P.O. Box 94183
Baton Rouge, Louisiana 70804
apa.s-r&f@legis.la.gov

Re: Proposed Amended Regulation LAC 61:III.2121-2125 – Abatement of Presumed Accuracy-Related Penalties

Chairman Bishop and Chairman Allain:

On June 10, 2021, a copy of the *Notice of Intent* issued by the Department of Revenue ("Department") for promulgation of proposed regulation LAC 61:III.2121-2125 – *Abatement of Presumed Accuracy-Related Penalties* was sent to your committee for review. The purpose of the proposal reflected in the *Notice of Intent* is to provide additional guidance on the exceptions to the accuracy-related penalty presumptions created in LA R.S. 47:1604.1 and to provide procedures for requesting abatement of penalties based on those exceptions.

The *Notice of Intent* was published in the June 2021 issue of the *Louisiana Register*. A public hearing was held in the LaSalle Building on Wednesday, July 28, 2021. No written or oral comments were received. No changes will be made to the text of the amended rule before it is finalized.

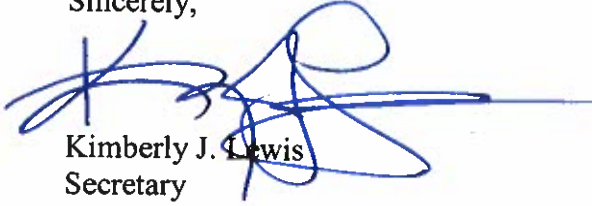
This report is being made in accordance with R.S. 47:968(D)(1)(b) of the Administrative Procedure Act. Unless otherwise directed, the proposed amendment will be submitted for publication as a final rule in the September 2021 edition of the *Louisiana Register*.

Contributing to a better quality of life.

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Should you have any questions or need additional information, please contact me at (225) 219-2700.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Kimberly J. Lewis', with a long horizontal flourish extending to the right.

Kimberly J. Lewis
Secretary

Cc: The Honorable Patrick Page Cortez, President of the Senate, apa.senatepresident@legis.la.gov
Office of the State Register Reg.Submission@la.gov

NOTICE OF INTENT

Department of Revenue Policy Services Division

Abatement of Presumed Accuracy-Related Penalties (LAC 61.III.2121-2125)

Under the authority of R.S. 47:1511, and in accordance with the Administrative Procedure Act, R.S. 49:950 *et seq.*, the Department of Revenue, Policy Services Division, gives notice that rulemaking procedures have been initiated to enact LAC 61.III.2121-2125, to provide guidance on the exceptions to the presumption of penalties provided in LA R.S. 47:1604.1 and to provide procedures for requesting abatement of a presumed penalty.

R.S. 47:1511 authorizes the secretary to prescribe rules and regulations to carry out the purposes of Title 47 and the purposes of any other statutes or provisions included under the secretary's authority. Pursuant to LA R.S. 47:1604.1(A)(2), the negligence penalty is presumed to apply if the taxpayer understates tax liability by ten percent or more. However, such penalty shall not apply if the understatement is due to reasonable cause where the taxpayer acted in good faith. Additionally, pursuant to LA R.S. 47:1604.1(E)(3), willful disregard is presumed when a taxpayer fails to timely remit tax that is withheld or collected from others, absent a showing of good cause. The purpose of this regulation is to provide further guidance on regarding the reasonable cause and good faith and the good cause exceptions and to provide procedures for requesting relief when the exceptions apply.

Title 61 REVENUE AND TAXATION Part III. Administrative and Miscellaneous Provisions Chapter 21. Interest and Penalties

§2121. Reasonable cause and good faith exception to presumption in R.S. 47:1604.1(A)(1).

A. Definitions. For purposes of this Section, the following terms shall have the meaning ascribed herein.

Advice-Any communication, including the opinion of a professional tax advisor, setting forth the analysis or conclusion of a person, other than the taxpayer, provided to (or for the benefit of) the taxpayer and on which the taxpayer relies, directly or indirectly, with respect to the imposition of the R.S. 47:1604.1 negligence penalty. Advice does not have to be in any particular form.

Professional Tax Advisor-A person or entity whose job duty, function or service focuses on or involves providing tax and tax related advice or products, which may include the preparation of or providing the use of or access to tax returns, forms or documents

Professional Tax Preparer-A person or entity whose job duty, function or service focuses on or involves the preparation of or providing the use of or access to tax returns, forms or documents, which may include providing tax and tax related advice or products.

B. The penalty for negligent failure to comply authorized in R.S. 47:1604.1(A)(1) is presumed to apply when a taxpayer understates his tax liability by ten percent or more, but did not demonstrate a willful disregard of the tax laws.

C. The presumed penalty shall not apply when the understatement was due to reasonable cause where the taxpayer acted in good faith.

D. A determination of reasonable cause and good faith will be made on a case-by-case basis, considering all relevant facts and circumstances.

1. Generally, the most important factor in determining reasonable cause and good faith is the extent of the taxpayer's effort to assess the proper tax liability.

2. Circumstances that may indicate the extent of the taxpayer's effort to assess the proper tax liability, include but are not limited to:

a. An honest misunderstanding of fact or law that is reasonable in light of all of the facts and circumstances, including the experience, knowledge, and education of the taxpayer.

b. An isolated computational or transcriptional error.

c. Reliance on an information return, advice, or other facts, if under all the circumstances such reliance was reasonable and the taxpayer acted in good faith.

3. Reliance on an information return, including the return of a pass-through entity, or on the advice of a professional tax advisor or tax preparer does not automatically demonstrate reasonable cause and good faith.

a. All facts and circumstances shall be considered when determining whether a taxpayer has reasonably relied in good faith on an information return or the advice of a professional tax advisor or tax preparer. Facts to be considered include, but are not limited to, the taxpayer's education, sophistication and business experience.

b. A determination of whether a taxpayer acted with reasonable cause and in good faith with respect to an underpayment that is related to an item reflected on the return of a pass-through entity will take into account the taxpayer's own actions, as well as the actions of the pass-through entity.

c. Generally, a taxpayer knows, or has reason to know, that the information on an information return is incorrect if such information is inconsistent with other information reported or otherwise furnished to the taxpayer, or with the taxpayer's knowledge of the transaction. This knowledge includes, for example, the taxpayer's knowledge of the terms of his employment relationship or of the rate of return on a payor's obligation.

d. Reliance shall not be considered reasonable or in good faith if the taxpayer knew, or reasonably should have known, that the advice was rendered by a non-tax professional or non-tax preparer, or a professional tax advisor or tax preparer who lacked knowledge in the relevant aspects of federal or Louisiana tax law.

e. The advice relied on by the taxpayer shall be based upon all relevant facts and circumstances and the law as it relates to those facts and circumstances. Reliance shall not be considered reasonable or in good faith if the taxpayer fails to disclose a fact that he knows, or reasonably should know, to be relevant to the proper tax treatment of an item.

f. The advice relied on by the taxpayer shall not be based on unreasonable factual or legal assumptions and shall not unreasonably rely on the un-true or inaccurate assumptions, representations, statements, findings, or agreements of the taxpayer or any other person. For example, the advice shall not be based upon a representation or assumption which the taxpayer knows, or has reason to know, is unlikely to be true, such as an inaccurate representation or assumption as to the taxpayer's purposes for entering into a transaction or for structuring a transaction in a particular manner.

g. A taxpayer may not rely on an opinion or advice that a regulation is invalid to establish that the taxpayer acted with reasonable cause and good faith unless the taxpayer discloses the

position that the regulation in question is invalid in a statement attached to and filed with the taxpayer's return containing the understatement.

h. A taxpayer may not rely on an opinion or advice that is contrary to existing, applicable case law.

i. For purposes of this Paragraph, advice is any communication, including the opinion of a professional tax advisor, setting forth the analysis or conclusion of a person, other than the taxpayer, provided to (or for the benefit of) the taxpayer and on which the taxpayer relies, directly or indirectly, with respect to the imposition of the R.S. 47:1604.1 negligence penalty. Advice does not have to be in any particular form.

§2123. Good cause exception to presumption of willful disregard

A. For purposes of the penalty for willful disregard provided in R.S. 47:1604.1(D)(1), willful disregard is presumed when a taxpayer fails to timely pay tax that has been collected or withheld from others unless good cause is shown.

B. Examples of good cause for failing to timely pay taxes collected or withheld from others, include:

1. The delinquency was directly attributable to a significant disaster or emergency declared by the President or the governor.

2. The delinquency was directly attributable to an extraordinary circumstance beyond the taxpayer's control such as, but not limited to, the following:

a. An actual or threatened event, other than a presidential or gubernatorial declared disaster or emergency, such as fire or casualty; and

b. An action against the taxpayer's tax preparer or legal representative for acts constituting fraud, theft, embezzlement, fraudulent conversion, or misappropriation of the taxpayer's property.

§2125. Request for Abatement of Presumed Penalty

A. A request for abatement of penalty under this section shall be limited to the following instances:

1. A penalty is assessed pursuant to the presumption in R.S. 47:1604.1(A)(2)(a) and the taxpayer is requesting abatement based on the exception set forth in R.S. 47:1604.1(A)(2)(b); or

2. A penalty is assessed pursuant to a presumption of willful disregard in accordance with R.S. 47:1604.1(E)(3) and the taxpayer is requesting abatement on the basis that good cause exists for the failure to timely pay collected or withheld taxes.

B. This section does not apply to any penalty assessed pursuant to R.S. 47:1604.1(A)(1).

C. Taxpayers requesting an abatement of penalty based on the exception set forth in R.S. 47:1604.1(A)(2)(b) or R.S. 47:1604.1(E)(3) shall comply with the following procedures:

1. A request for abatement shall be in writing, on a form prescribed by the secretary and shall:

a. contain a clear explanation detailing the basis for reasonable cause and good faith, or good cause;

b. be signed and dated by the taxpayer or an authorized representative with personal knowledge of the facts;

c. be accompanied by documentation supporting the basis for the request; and

d. be submitted to the Department of Revenue prior to the date that the assessment of the penalty pursuant to the presumption in R.S. 47:1604.1(A)(2)(a) or R.S. 47:1604.1(E)(3) becomes final in accordance with R.S. 47:1565(B).

AUTHORITY NOTE: Promulgated in accordance with R.S. 47:1511

HISTORICAL NOTE: Promulgated by the Department of Revenue, Policy Services

Division, LR 47:

Family Impact Statement

The proposed rule might have a slight positive impact on family as defined by R.S. 49:972(D) or on family formation, stability and autonomy by clarifying circumstances and procedures for requesting relief from certain penalty assessments. The proposed rule has no other known or foreseeable impact on:

1. The stability of the family.
2. The authority and rights of parents regarding the education and supervision of their children.
3. The functioning of the family.
4. Family earnings and family budget.
4. The behavior and personal responsibility of children.
5. The ability of the family or a local government to perform this function.

Poverty Impact Statement

The proposed rule has no known impact on poverty as described in R.S. 49:973.

Small Business Impact Analysis

The proposed rule may have a slight economic impact on small businesses by clarifying circumstances and procedures for requesting relief from certain penalty assessments. The proposed rule has no other known measurable impact on small businesses as described in R.S. 49:965.6.

Provider Impact Statement

The proposed rule has no known or foreseeable effect on:

1. The staffing levels requirements or qualifications required to provide the same level of service.
2. The total direct and indirect effect on the cost to the provider to provide the same level of service.
3. The overall effect on the ability of the provider to provide the same level of service.

Public Comments

All interested persons may submit written data, views, arguments or comments regarding this proposed rule to Brandea Averett, Attorney, Policy Services Division, Office of Legal Affairs, P.O. Box 44098, Baton Rouge, LA 70804-4098. Written comments will be accepted until 4:30 p.m., July 27, 2021.

Public Hearing

A public hearing will be held on July 28, 2021 at 10:00AM in the LaBelle located on the 1st floor of the LaSalle Building, 617 North Third Street, Baton Rouge, Louisiana.

Kimberly J. Lewis
Secretary of Revenue

FISCAL AND ECONOMIC IMPACT STATEMENT FOR ADMINISTRATIVE RULE RULE TITLE: Exceptions to Presumed Accuracy-Related Penalties

I. ESTIMATED IMPLEMENTATION COSTS (SAVINGS) TO STATE OR LOCAL GOVERNMENTAL UNITS (Summary)

The proposed rule changes will not result in implementation costs or savings to state or local governmental units. The proposed rule is to provide guidance regarding the exceptions to the penalties pursuant to LA R.S. 47:1604.1 as amended by Act 348 of 2020 Regular Session. The statute provides that an accuracy-related penalty is presumed to apply if a taxpayer understates

their tax liability by ten percent or more except when the taxpayer's understatement is due to reasonable cause and the taxpayer acted in good faith. The statute further provides that a willful disregard of the law is presumed when a taxpayer fails to timely remit tax that is withheld or collected from others, unless the failure was due to good cause. The proposed rule also provides procedures for requesting relief when the exceptions apply.

II. ESTIMATED EFFECT ON REVENUE COLLECTIONS OF STATE OR LOCAL GOVERNMENTAL UNITS (Summary)

The proposed rule will have an indeterminable impact on annual state revenue collections. The impact is dependent upon taxpayer behavior. The proposed rule provides guidance regarding exceptions to the application of the presumed penalties and procedures for requesting relief when these exceptions apply. Clarifying the exceptions and providing procedures for requesting relief will afford taxpayers a better understanding of the circumstances under which relief from the penalties may be requested and encourage better compliance.

While the proposed rule offers guidance regarding the penalties provided in LA R.S. 47:1604.1 and clarification of the circumstances that may allow a taxpayer to make an application for relief from the penalties, it does not directly affect revenues. In FY 19, an amount of \$11.9M was collected from the basic Negligence Penalty assessed per the provisions of R.S. 47:1604.1 prior to the amendments that occurred as a result of Act 348 of 2020. With the passage of Act 348, the section changed from Negligence Penalty to Accuracy-related penalty. In addition, Act 348 designated that the funds associated with this penalty would no longer be self-generated funds but would go to the State General Fund beginning July 1, 2022.

III. ESTIMATED COSTS AND/OR ECONOMIC BENEFITS TO DIRECTLY AFFECTED PERSONS, SMALL BUSINESSES, OR NON-GOVERNMENTAL GROUPS (Summary)

The proposed rule will have a slight economic impact on the affected taxpayer by clarifying circumstances and procedures for requesting relief from the penalty assessments.

IV. ESTIMATED EFFECT ON COMPETITION AND EMPLOYMENT (Summary)

The proposed rule does not affect competition or employment.

Kimberly J. Lewis
Secretary of Revenue

Gregory V. Albrecht
Chief Economist
Legislative Fiscal Office