

CHAPTER 2

GENERAL POLICIES AND PROCEDURES

Authority

N.J.S.A. 54:50-1.

Source and Effective Date

R.1993 d.542, effective November 1, 1993.
See: 25 N.J.R. 3107(a), 25 N.J.R. 4927(b).

Executive Order No. 66(1978) Expiration Date

Chapter 2, General Policies and Procedures, expires on November 1, 1998.

Chapter Historical Note

Chapter 2, General Policies and Procedures, became effective with Subchapter 1, Forms, adopted as R.1974 d.182, effective July 3, 1974. See: 6 N.J.R. 250(c), 6 N.J.R. 328(a). Subchapter 2, Penalties and Interest, was adopted as R.1975 d.284, effective September 25, 1975. See: 7 N.J.R. 439(d), 7 N.J.R. 490(b). Subchapter 2 was amended by R.1976 d.94, effective March 26, 1976, and R.1988 d.407, effective September 6, 1988. See: 8 N.J.R. 154(a), 8 N.J.R. 261(c); 19 N.J.R. 2255(b), 20 N.J.R. 2310(c).

Pursuant to Executive Order No. 66(1978), Chapter 2 expired on September 6, 1993, and subsequently was adopted as new rules by R.1993 d.542. See: Source and Effective Date. See, also, section annotations for specific rulemaking activity.

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SUBCHAPTER 1. FORMS

18:2-1.1 Reproduction of forms

(a) Subject to conditions and requirements hereinafter described, the Director will accept, for filing purposes, reproductions of flat, printed return forms in lieu of the official forms printed and furnished by the Director. Card or tab-type return forms may not be reproduced.

(b) In order to be acceptable for filing purposes, reproductions of flat, printed return forms must meet the following conditions and requirements:

1. Reproductions must be facsimiles of the complete official forms, for the proper tax period, produced by photo-offset, photoengraving, photocopying or other similar reproduction processes.

2. Reproductions must be on paper of substantially the same weight and texture, of a quality at least as good as that used in the official form and of any color.

3. Reproductions must be of the same size as that of the official form, both as to the overall dimensions of the paper and the image reproduced thereon.

4. Format of pages shall adhere to the following:

i. It is preferable that both sides of the paper be used in making reproductions. However, reproduction on one side will be acceptable;

ii. All reproductions must result in the same page arrangement as that of the official form and the spacing of the printed matter on each page and the fold must be the same as on the official form;

iii. Separate pages must be fastened together in numerical order;

iv. Each separate page must be clearly identified by listing at the top of the page the taxpayer's name, the Federal identification number and the appropriate New Jersey serial number.

5. The quality of the reproduction of the printed matter must be substantially the same as that of the official form, and the filled-in information must be entirely legible.

6. The taxpayer's full and correct name and address and the identifying number as it appears on the form furnished by the Director must be typed or legibly printed on the reproduction.

7. Reproduction of forms may be made after insertion of the tax computations and the other required informa-

tion. However, all signatures on forms to be filed must be original signatures, affixed subsequent to the reproduction process.

8. The Director does not approve or disapprove the specific equipment or process used in reproducing official forms, but requires only that the reproduced forms satisfy the stated conditions. It should be noted, however, that photostats do not meet all of the above conditions.

9. The Director does not approve or disapprove the specific writing medium or style of writing to be used, but requires that the filled-in information on the reproduced form be of good quality black-on-white, with handwriting of satisfactory legibility.

R.1974 d.182, effective July 3, 1974.
See: 6 N.J.R. 250(c), 6 N.J.R. 328(a).

SUBCHAPTER 2. PENALTIES AND INTEREST

18:2-2.1 Application

This subchapter is applicable to penalty and interest impositions made on and after October 1, 1975, pursuant to P.L. 1975, c.177, approved August 4, 1975 and the State Tax Uniform Procedure Law, as amended to and including P.L. 1987, c.76.

18:2-2.2 Tax laws affected

The provisions of the State Tax Uniform Procedure Law and this subchapter shall apply to any tax which is payable to or collectible by the Director of the Division of Taxation, unless the law imposing such tax specifically provides that the State Tax Uniform Procedure Law and this subchapter shall not apply, or unless the specific provisions of the law imposing such tax provide for penalty and interest which is different from the provisions of the State Tax Uniform Procedure Law and this subchapter.

18:2-2.3 Failure to file return on time

(a) On or before December 8, 1987, any taxpayer failing to file a return within the time prescribed by the act imposing a particular tax shall be liable for the following:

1. A late filing penalty of \$2.00 for each day that the return is delinquent; plus

2. A penalty of five percent per month or fraction thereof of the total tax liability not to exceed 25 percent of such tax liability.

(b) On and after December 9, 1987, any taxpayer failing to file a return within the time prescribed by the act imposing a particular tax shall be liable for the following:

1. A late filing penalty of \$100.00 per month or any part of a month that the return is delinquent; plus

2. A penalty of five percent per month or any part of a month of the total tax liability not to exceed 25 percent of such tax liability.

(c) Both penalties set forth in (a) and (b) above shall be imposed on the first day following the original due date of the return and on the same calendar day of each succeeding month thereafter. The following are examples of penalty computations.

1. A corporate taxpayer filed its 1987 corporation business tax return with a due date of April 15, 1988 on June 1, 1988. The return is 47 days late. The taxpayer had a total tax liability for 1987 of \$10,000.00. In addition to the unpaid tax the taxpayer owes the following amounts:

Delinquency penalty: \$100.00 per month for two months	\$ 200.00
Late filing penalty: five percent per month of the tax liability	
5% × 2 months = 10 percent of \$10,000.00	\$ 1,000.00
Tax liability	<u>\$10,000.00</u>
Total	<u>\$11,200.00*</u>

* In addition, the taxpayer will be liable for interest (see N.J.A.C. 18:2-2.4) and may be liable for other penalties (see, for example, N.J.A.C. 18:2-2.4 and N.J.S.A. 54A:9-6).

2. An individual taxpayer filed the 1987 NJ-1040 due on or before April 15, 1988 on October 16, 1988. The return is six months and one day late. In addition to a \$1,200.00 outstanding tax liability on April 15, 1988, the taxpayer owes the following amounts:

Delinquency penalty: \$100.00 per month for seven months	\$ 700.00
Late filing penalty: five percent per month of the tax liability not to exceed 25 percent	\$ 300.00
Tax Liability	<u>\$1,200.00</u>
Total	<u>\$2,200.00*</u>

* In addition, the taxpayer will be liable for interest (see N.J.A.C. 18:2-2.4) and may be liable for other penalties (see, for example, N.J.A.C. 18:2-2.4 and N.J.S.A. 54A:9-6).

18:2-2.4 Failure to pay on time; extensions of time to pay

(a) Any taxpayer failing to pay a tax within the time prescribed by the act imposing a particular tax shall pay, in addition to the unpaid tax, the following:

1. Interest on said tax at the rate of one percent for each month or fraction thereof that the same remains unpaid, to be calculated from the date the tax was originally due until October 1, 1975, and at the rate of one and one-half percent per month or fraction thereof from October 1, 1975 to the date of actual payment or until December 8, 1987, whichever is earlier. On and after December 9, 1987, interest on the unpaid tax shall be charged at an annual rate of five percentage points above the prime rate, compounded daily upon the amount that remains unpaid, calculated from the date the tax was originally due until the date of payment. Interest on penalties which are assessed on and after December 9, 1987 shall be charged at the same rate from the date the penalty is assessed until the date of payment.

2. A sum equivalent to five percent of the tax shall be added to the amount of the tax as a penalty.

(b) The following examples apply only to tax liabilities paid prior to December 9, 1987:

1. Taxpayer failed to pay a tax that was due on April 15, 1975. On January 15, 1976, the Division of Taxation imposed interest and penalty charges for such failure. Interest will be calculated from April 15, 1975, to October 1, 1975, at the rates in effect immediately prior to October 1, 1975, and at the rate of 1½ percent for each month or fraction thereof that the tax remained unpaid from October 1, 1975, to the date of payment, plus a penalty of five percent of the balance of tax due.

2. In example 1, if taxpayer also failed to file his return (due April 15, 1975) until January 15, 1976, he would be subject to additional penalties set forth in Section 3 of this Subchapter.

3. On May 1, 1975, the division assessed the taxpayer for additional taxes due and at the same time imposed additional interest charges at the rate of one percent per month. On February 15, 1976, taxpayer offers to pay his unpaid taxes. Additional interest shall be calculated from April 15, 1975, to October 1, 1975, at the rate of one percent per month or fraction thereof, and from October 1, 1975, to February 15, 1976, (the date of payment) at the rate of 1½ percent per month or fraction thereof. In addition, a five percent penalty may be imposed on the balance of tax due.

(c) The following example applies only to tax liabilities paid on or after December 9, 1987:

1. Corporation X's Corporation Business Tax return was due and filed on April 15, 1988. A deficiency of \$50,000.00 is assessed by the Division. Payment is due on July 31, 1988.

The taxpayer must submit the following amounts on or before July 31, 1988.

Late payment penalty: five percent of the balance of tax due	\$ 2,500.00
Deficiency assessed:	<u>\$50,000.00</u>
	<u>\$52,500.00</u>

Interest on tax, calculated at an annual rate of the prime rate plus five percentage points compounded daily from the original due date (April 15, 1988) until the date of payment (assume July 31, 1988), plus interest on penalty, calculated at the same rate from the date the penalty is assessed until the date of payment. The applicable prime rate shall be the rates effective on January 1, 1988 and April 1, 1988, which are assumed to be nine percent and nine and one-half percent, respectively, for the purposes of this example.	<u>\$ 2,222.30</u>
Total	<u>\$54,722.30</u>

(d) Where the director is authorized by law and grants an extension of time in which a tax shall be paid, the taxpayer shall be liable for the payment of interest on the unpaid tax

at the rate of three percentage points above the prime rate, to be compounded daily from the date such tax was originally due to the date of actual payment. If any or all of such tax is not paid within the time fixed under the extension, the interest on the amount of such unpaid tax shall be computed at the annual rate of five percentage points above the prime rate, to be compounded daily from the date the tax was originally due to the date of actual payment.

(e) On and after December 9, 1987, which is the first day immediately following the 90 day tax amnesty period authorized by P.L. 1987, c.76, for purposes of calculating interest unpaid tax shall mean the total of the following:

1. The actual unpaid tax liability;
2. All penalties accrued to that date; and
3. Interest accrued to that date.

18:2-2.5 Cost of collection defined

(a) Cost of collection means the amount of expense incurred by the State with respect to the issuance of a certificate of debt for, and the collection of, any State tax not paid within the time prescribed by law. These expenses include, but are not limited to the following:

1. Cost of postage;
2. Cost of telephone;
3. Cost of photocopying;
4. State payroll hours used, including all associated overhead;
5. Cost of filing and prosecuting suit;
6. The cost of agents, contractors, subcontractors or others employed or otherwise engaged by the State of New Jersey for the efficient and expeditious collection of unpaid tax; and
7. Any other expense deemed by the Director to be reasonably related and necessary for the collection of any unpaid tax.

(b) The Director may, in his discretion, impose the actual cost of collection, or, in lieu of ascertaining and imposing the actual cost of collection, may impose a fee as follows:

1. In the event that any State tax is not paid within the time prescribed by law and the Director issues a certificate of debt pursuant to N.J.S.A. 54:49-12, the greater of five percent of the tax or \$100.00;
2. In the event that any State tax remains unpaid following the issuance of the certificate of debt and the Director takes any further collection action, including but not limited to, referral of the matter to the Attorney General, the greater of 10 percent of the tax or \$200.00;
3. In the event that any State tax remains unpaid and suit is instituted against the taxpayer for collection of the tax, the greater of 20 percent of the tax or \$500.00.

(c) In determining whether the Director shall impose the actual cost of collection or a fee in lieu thereof, the following factors shall be among those considered:

1. Whether the taxpayer fails to properly maintain books and records as required;

2. Whether the taxpayer fails to make books and records available for examination;

3. Whether the taxpayer fails to secure proper license or fails to register with the Division of Taxation as required;

4. Whether the taxpayer operates under a voided corporate charter or after the revocation of authority to do business in New Jersey;

5. Whether the taxpayer remits payment which subsequently became dishonored or defaults on a bond or other security posted with the Division or on a Deferred Payment Plan;

6. Whether the Director finds that a taxpayer intends to leave this State, or to remove therefrom possessions, or any property subject to any State tax; or that taxpayer does any other act tending to prejudice, delay or negate proceedings to assess, collect, or pay any State tax;

7. Whether the taxpayer fails to collect, or truthfully account for, or file a return or file any other information as required;

8. Whether the taxpayer's non-compliance induces the Division of Taxation to issue a Warrant for Execution.

(d) Any fees imposed as cost of collection or in lieu thereof shall be in addition to any interest or penalties, or both, otherwise provided by law, and shall be payable to and recoverable by the Director, along with all penalties and interest as if they were part of the tax imposed.

(e) Interest or penalties shall not be assessed against any fees imposed as cost of collection or in lieu thereof; however, the cost of collection may reflect the passage of time between the date the costs were incurred and the date they are paid.

(f) For the purposes of calculating the percentage of the tax to be imposed in lieu of a fixed fee or the actual cost of collection, the tax shall mean: unpaid tax, penalties and interest.

18:2-2.6 Additional assessment of tax

(a) Upon audit or investigation of a return that has been filed, where it is determined that there is a deficiency with respect to the payment of any tax due, the additional taxes shall be assessed together with penalties of five percent of the additional tax and interest at the rate in effect immediately prior to October 1, 1975, and at the rate of 1½ percent per month or fraction thereof from October 1, 1975, to the date of payment or until December 8, 1987, whichever is earlier. On and after December 9, 1987 interest shall be charged at the annual rate of five percentage points above the prime rate, compounded daily from the later of the date the tax was originally due or December 9, 1987, to the date of payment. The taxpayer shall be given notice of such assessment and a demand made upon him for payment. The following are examples of interest and penalty liability:

1. On June 15, 1974, a taxpayer filed a return. On February 15, 1976, the taxpayer was notified of an additional assessment and a demand was made upon him for payment. The additional tax bears interest at the rate of one percent per month or fraction thereof from the date the tax was originally due to October 1, 1975, and at the rate of 1½ percent per month or fraction thereof from October 1, 1975, to the date of payment. In addition, taxpayer is subject to penalties of five percent of the additional tax. This example applies only to tax liabilities incurred prior to January 1, 1987 and paid prior to December 8, 1987, the final day of the 90 day tax amnesty period authorized by P.L. 1987, c.76.

2. Corporation X was a fiscal year taxpayer whose year ended July 31, 1984. The final return was due and filed on November 15, 1984. Upon audit in July, 1987, it was determined that there was a \$1,000 deficiency with respect to tax due. If Corporation X pays the deficiency on the final day of the 90 day tax amnesty period authorized by P.L. 1987, c.76, which ends December 8, 1987, the following amounts would be due:

Deficiency assessed:	\$1,000.00
Simple interest calculated at nine percent per annum* from November 16, 1984 through December 8, 1987	\$ 275.75
Total due	<u>\$1,275.75</u>

*Through statutory interest to December 8, 1987 was 18 percent, P.L.1987, c. 76 mandates a nine percent rate for debts paid during the 90 day amnesty period.

3. Corporation X fails to pay the deficiency assessed within the amnesty period. When payment is made on May 6, 1988 the taxpayer remits \$1,746.63 which represents the following amounts:

Deficiency assessed:	\$1,000.00
Late payment penalty: five percent of the balance of tax due	\$ 50.00
Simple interest calculated at the rate of one and one-half percent per month from November 16, 1984 through December 8, 1987	\$ 555.00
	<u>\$1,655.00 PLUS</u>

Interest on \$1,655.00, calculated at an annual rate of the prime rate plus five percentage points compounded daily from December 8, 1987 until the date of payment (May 6, 1988). The applicable prime rate shall be the rates effective on July 1, 1987, October 1, 1987 and January 1, 1988. For the purposes of this example the prime rate is assumed to be:

July 1, 1987	8.25 percent	
October 1, 1987	8.75 percent	
January 1, 1988	9.00 percent	\$ 91.63
	Total	<u>\$1,746.63</u>

18:2-2.7 Abatement of penalty and interest

(a) If the failure to pay any tax when due or the failure to file any return is explained to the satisfaction of the Director, he may abate the payment of the whole or any part of any penalty and may abate the payment of any interest charge in excess of the rate of one-half of one percent per month from the due date to October 1, 1975, and three-quarters of one percent per month from October 1, 1975, to the date of payment (N.J.S.A. 54:49-11) or December 8, 1987, whichever is earlier. On and after December 9, 1987 the Director may abate the payment of any interest charge in excess of the rate of three percentage points above the prime rate compounded daily to the date of payment on the entire existing liability including any tax, penalty, and/or accumulated interest charges.

(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 and makes full payment of the taxes 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 exemplify grounds for reasonable cause, where 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, 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 concern 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, 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: 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.

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: Due to an inability to obtain certain records, a taxpayer was unable for reasons beyond its control to determine its proper tax liability prior to the prescribed date for paying its tax. The taxpayer timely filed a return and paid the tax due on that portion of the tax liability which was ascertainable. Attached to the return was a rider which explained in detail why the proper tax liability could not be determined prior to the due date. When the records in question were obtained and assembled, an amended return was immediately filed and the additional tax due was 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 may constitute reasonable cause, until the time in which the taxpayer has exhausted its administrative or judicial remedies, as applicable, for a taxable period or periods the return or returns for which are due subsequent to the commencement of the conference proceeding, or the commencement of the judicial action or proceeding provided that:

- i. The action or proceeding involves a question or issue affecting whether or not the individual or entity is required to file a return and/or pay tax;
- 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, after a hearing, 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, however, will not be considered as 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 his 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 taxpayer, containing all of the facts alleged as a basis for reasonable cause, it was determined that the taxpayer 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 in excess of the statutory minimum 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 overcollection 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 taxpayer 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 in excess of the statutory minimum would 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 he exercised ordinary business care and prudence in providing for payment of his tax liability and was nevertheless either unable to pay the tax or would suffer an undue hardship if he 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 his 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) he could, at the time of such expenditures, reasonably expect to receive prior to the date prescribed for the payment of the tax. Thus, for example, a taxpayer who incurs lavish or extravagant living expenses in an amount such that the remainder of his assets and anticipated income will be insufficient to pay his tax, has not exercised ordinary business care and prudence in providing for the payment of his 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 his tax liability unless, at the time of the investment, the remainder of the taxpayer's assets and estimated income will be sufficient to pay his 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 he made reasonable efforts to conserve sufficient assets in marketable form to satisfy his 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. The reliance by the taxpayer on written advice provided by an officer or employee of the Division of Taxation, any written information, professional advice or other facts provided such reliance was reasonable and the taxpayer had no knowledge of circumstances which should have put the taxpayer upon inquiry as to whether such facts were erroneous; 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.

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).

Case Notes

Computation of interest mitigated by absence of fraud. *General Trading Co., Inc. v. Director, Div. of Taxation*, 83 N.J. 122, 416 A.2d 37 (1980).

18:2-2.8 Criminal penalties

(a) The State Tax Uniform Procedure Law contains criminal penalties for persons who violate the State tax laws administered by the Division of Taxation. Criminal provisions are prescribed by law for the following acts or omissions:

1. Any of the following constitute a disorderly persons offense:

i. Failure to file any return or report required by any State tax law;

ii. Failure to pay over any tax required by any State tax law;

iii. Filing or causing to be filed, or made any return, certificate, affidavit, representation, information, testimony or statement, required or authorized by any State tax law, which is false;

iv. Failure to file a bond required to be filed by any State tax law;

v. Failure to file an application for registration, certification, or such data in connection therewith as the director by regulation or otherwise may require under any State tax law;

vi. Failure to display or surrender any certificate of authority as may be required by any State tax law;

vii. Assigning or transferring any certificate of authority in violation of any State tax law;

viii. Failure to charge any state tax as required by any State tax law;

ix. Failure to separately state or account for any State tax as required by any State tax law;

x. Failure to withhold any State tax as required by any State tax law; or

xi. Failure to keep any records required by any State tax law or rule of the Director issued thereunder.

2. The offenses provided in (a)1 above shall be in addition to any other penalties prescribed in P.L. 1987, c.76 or otherwise prescribed by law.

3. Any of the following constitute a fourth degree crime:

i. Intentionally providing false information to hinder an official investigation, inquiry examination or audit by the Division of Taxation (N.J.S.A. 54:52-7);

ii. Failure to license or register with the Division of Taxation and/or engaging in conduct which would require registration with the intention to evade tax (N.J.S.A. 54:52-13);

iii. Knowingly operating under a voided corporate charter (N.J.S.A. 54:52-16);

iv. Knowingly dealing with unlicensed persons and assisting such person in avoiding or evading any State tax (N.J.S.A. 54:52-17); or

v. Knowingly swearing to any false or fraudulent statement with an intention to evade or avoid any tax penalty or interest (N.J.S.A. 54:52-19).

4. Any of the following constitutes a third degree crime:

- i. Failure to file a return or report with intention to evade or avoid tax, fee, penalty or interest pursuant to State Tax Uniform Procedure Law (N.J.S.A. 54:52-7);
 - ii. Failure to remit any sums collected for the benefit of the State with intent to evade or avoid tax, fee, penalty and interest (N.J.S.A. 54:52-9);
 - iii. Preparation of false or fraudulent return report or statement with intent to evade or avoid any tax, fee, penalty or interest (N.J.S.A. 54:52-10);
 - iv. Preparation or maintenance of fraudulent or false books or records with intention to evade or avoid tax, fee, penalty or interest (N.J.S.A. 54:52-11);
 - v. Failure to maintain books or records as required by State tax law with intent to evade or avoid tax, fee, penalty or interest (N.J.S.A. 54:52-12); or
 - vi. Failure to collect or withhold any State tax with intention not to make timely payment of tax, fee, penalty or interest (N.J.S.A. 54:52-13).
5. The intentional failure to remit taxes collected or withheld of \$75,000.00 or more shall be considered a second degree crime.

18:2-2.9 (Reserved)**18:2-2.10 Credit for erroneous payments and collections**

(a) Where it is determined as a result of the audit of any taxpayer that a State tax has been erroneously or illegally collected from such taxpayer, or has been paid by such taxpayer under a mistake of law or fact, and where no questions of law or fact are involved, the Director may credit the erroneous overpayment of tax to the account of the taxpayer to offset the amount of a deficiency assessment. Such offsets will be made with the following limitations:

1. Credit for the erroneous payment must be made within the time in which a deficiency assessment must be made for such tax as provided by law; and
2. Credit shall only be applied in order to offset a liability for a period which is covered by the applicable assessment period; and
3. Credit for erroneous overpayments shall only be made to offset a deficiency assessment made by the Director under the same state tax law.

(b) An audit of a taxpayer can only be initiated by the Division and not at the request of a taxpayer.

18:2-2.11 Prime rate defined

For the purposes of determining the interest charge to be assessed against a taxpayer, prime rate shall mean the average predominant prime rate, as determined by the Board of Governors of the Federal Reserve System, quoted by commercial banks to large businesses as of the first business day of the calendar quarter immediately preceding the quarter within which the tax or payment became due. The applicable rate shall be adjusted on the first business day of each quarter thereafter over the life of the debt.

SUBCHAPTER 3. REQUIREMENTS FOR PAYMENT OF TAXES BY ELECTRONIC FUNDS TRANSFER

Source and Effective Date

R.1994 d.63, effective February 7, 1994.
See: 25 N.J.R. 1078(a), 26 N.J.R. 824(a).

18:2-3.1 Purpose

These rules enable the State to receive the actual tax monies from certain taxpayers, by the payment due date, because the taxpayers are required to pay their taxes by electronic funds transfer, instead of being allowed to pay by check or other similar instrument.

18:2-3.2 Scope

This subchapter establishes the bases for determining which taxpayers must pay taxes by electronic funds transfer (EFT), as well as the basic requirements for paying by EFT.

18:2-3.3 Definitions

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise.

“ACH” (automated clearing house) means a Federal reserve bank, or an organization established by agreement with the National Automated Clearing House Association (NACHA), which operates as a clearing house for transmitting or receiving entries between banks and bank accounts, and which authorizes an electronic transfer of funds between the banks or bank accounts.

“ACH credit” means a transaction in which the taxpayer, through its own bank, originates an entry crediting the State of New Jersey’s bank account and debiting its own bank account for the amount of the payment due.

“ACH debit” means a transaction in which the State of New Jersey, through its designated depository bank, originates an ACH transaction debiting the taxpayer’s bank account and crediting the State’s bank account for the amount of the payment due.

“Director” means the Director of the Division of Taxation in the Department of Treasury.

“EFT” (electronic funds transfer) means any transfer of funds, other than a transaction originated by check, draft or similar paper instrument, that is initiated through an electronic terminal, telephonic instrument or computer or magnetic tape for the purpose of ordering, instructing or authorizing a financial institution to debit or credit an account.

“Prior year liability” means the total liability for any tax imposed on, collected by or withheld by the taxpayer in the calendar year or the fiscal or calendar privilege period, as determined under the specific law regarding that tax, ending before the calendar year or fiscal or calendar privilege period for which an electronic funds transfer payment is determined to be required.

“State tax” means any tax which is payable to or collectible by the Director.

“Taxpayer” means any person or entity owing or liable to pay any tax, or any person or entity deemed to be so owing or liable.

18:2-3.4 Payments required to be paid by electronic funds transfer

(a) Between March 1, 1993, and February 28, 1994, a taxpayer that had a prior year liability for any type of tax, with certain exceptions in (f) below, in the amount of \$200,000 or more shall remit all its State tax payments of all types, with certain exceptions in (f) below, by using EFT. The taxpayer may choose the ACH debit method or the ACH credit method of EFT.

(b) Between March 1, 1994, and February 28, 1995, a taxpayer that had a prior year liability for any type of tax, with certain exceptions in (f) below, in the amount of \$100,000 or more shall remit all its State tax payments of all types, with certain exceptions in (f) below, by using EFT. The taxpayer may choose the ACH debit method or the ACH credit method of EFT.

(c) Between March 1, 1995, and February 29, 1996, a taxpayer that had a prior year liability for any type of tax, with certain exceptions in (f) below, in the amount of \$50,000 or more shall remit all its State tax payments of all types, with certain exceptions in (f) below, by using EFT. The taxpayer may choose the ACH debit method or the ACH credit method of EFT.

(d) Beginning March 1, 1996, a taxpayer that had a prior year liability for any type of tax, with certain exceptions in (f) below, in the amount of \$20,000 or more shall remit all its State tax payments of all types, with certain exceptions in (f) below, by using EFT. The taxpayer may choose the ACH debit method or the ACH credit method of EFT.

(e) The EFT requirements of (a) through (d) above apply to any estimated tax payments due from a taxpayer.

(f) The EFT requirements of (a) through (d) above do not apply to payments of the following types of taxes:

1. Transfer inheritance tax imposed pursuant to N.J.S.A. 54:33-1;
2. Estate tax imposed pursuant to N.J.S.A. 54:38-1;

3. Gross income tax payments of estimated or final tax liability imposed pursuant to N.J.S.A. 54A:8-5 and N.J.S.A. 54A:8-1, but not including withholding tax imposed pursuant to N.J.S.A. 54A:7-1 and 54A:7-1.1.

18:2-3.5 Specific requirements

(a) A taxpayer that is required to pay by EFT shall initiate the transfer and take whatever other steps are necessary so that any tax payment due is deposited in the State of New Jersey’s account in the designated depository, on or before the date that the tax is due according to the pertinent law.

(b) A taxpayer shall make separate EFT transactions for each payment of each type of tax.

(c) A taxpayer may switch its choice of method to the other method of EFT for all its payments if the taxpayer gives the Director notice in writing 60 days in advance of using the other method.

(d) Whichever method (ACH credit or ACH debit) a taxpayer chooses for complying with its EFT requirements, the taxpayer shall use the same method for payment of all the types of taxes it is required to pay by EFT.

(e) If a taxpayer chooses the ACH debit payment option and the banking information necessary to generate ACH debits changes, the taxpayer shall give the Director notice in writing at least 60 days prior to the date the change will take effect.

18:2-3.6 Determination of prior year liability

(a) The Director will annually, on such date as is practicable, determine taxpayers’ prior year liability for one or more types of taxes. If an actual prior year liability cannot be determined, the Director may make a determination according to an estimated prior year liability.

(b) For tax payments due between March 1, 1993 and February 28, 1994, the Director shall base “prior year liability” on:

1. The tax liability for calendar year 1992, if the Director is determining a prior year liability with regard to a type of tax for which liability is based on one or more calendar months, one or more calendar quarters or a calendar year; or
2. The tax liability for any fiscal year or privilege period ending between January 1, 1992 and December 31, 1992, if the Director is determining a prior year liability with regard to a type of tax for which liability is based on a fiscal year or privilege period.

(c) For tax payments due between March 1, 1994 and February 28, 1995, the Director shall base “prior year liability” on:

1. The tax liability for calendar year 1993, if the Director is determining a prior year liability with regard to a type of tax for which liability is based on one or more calendar months, one or more calendar quarters or a calendar year; or

2. The tax liability for any fiscal year or privilege period ending between January 1, 1993 and December 31, 1993, if the Director is determining a prior year liability with regard to a type of tax for which liability is based on a fiscal year or privilege period.

(d) For tax payments due between March 1, 1995 and February 29, 1996, the Director shall base "prior year liability" on:

1. The tax liability for calendar year 1994, if the Director is determining a prior year liability with regard to a type of tax for which liability is based on one or more calendar months, one or more calendar quarters or a calendar year; or

2. The tax liability for any fiscal year or privilege period ending between January 1, 1994 and December 31, 1994, if the Director is determining a prior year liability with regard to a type of tax for which liability is based on a fiscal year or privilege period.

(e) For tax payments due in March of 1996 and thereafter, the Director shall base "prior year liability" on:

1. The tax liability for the calendar year preceding the calendar year in which the Director makes the prior year liability determination, if the Director is determining a prior year liability with regard to a type of tax for which liability is based on one or more calendar months, one or more calendar quarters or a calendar year; or

2. The tax liability for any fiscal year or privilege period ending in the calendar year preceding the calendar year in which the Director makes the prior year liability determination, if the Director is determining a prior year liability with regard to a type of tax for which liability is based on a fiscal year or privilege period.

18:2-3.7 Notice to taxpayers

(a) The Director will notify taxpayers of their EFT payment requirements at least 30 days prior to the date on which the Director first requires compliance with N.J.A.C. 18:2-3.4(a) through (e).

(b) The failure of the Director to notify a taxpayer as required by (a) above shall not relieve a taxpayer from compliance with its EFT payment requirements. However, if the Division's records indicate that the Director failed to notify the taxpayer as required by (a) above, the Director may take the lack of notice into consideration with respect to any request for a waiver of penalty or interest.

(c) The Director will annually, on such date as is practicable, notify those taxpayers that do not meet the current "prior year liability" threshold for being required to pay by EFT.

18:2-3.8 Penalties and interest for late EFT payments

(a) If an EFT payment is deposited later than the date required by N.J.A.C. 18:2-3.5(a), the Director shall, for the period between the required and the actual deposit date, assess late payment penalties and interest as provided under the State Tax Uniform Procedure Law or under the pertinent State tax law.

(b) If the availability of funds for EFT payment is delayed, and if the taxpayer shows, to the satisfaction of the Director, that the delay was due to reasons beyond the control of the taxpayer, the Director shall abate penalties and interest. Circumstances such as the taxpayer being in a poor financial condition will not, by itself, be deemed to be reasons beyond the control of the taxpayer.

18:2-3.9 Failure to comply

(a) If a taxpayer is required to remit a tax payment by EFT and the taxpayer pays (with sufficient funds) by check, draft or similar instrument, payment shall be deemed to have been made on the third business day after the date the Director receives the check, draft or similar paper instrument.

Example 1: Funds represented by a check on a bank seized by bank regulators are considered received when honored, rather than tendered, even though there were sufficient funds at the time of tender.

Example 2: A check drawn on sufficient funds is considered received when honored, rather than tendered, if honoring the check is delayed due to computer failure (other than a failure of the Division's computers).

(b) The Director will not consider any claim or assertion by a taxpayer that its check, draft or other instrument cleared prior to the date it was deemed to have been paid under (a) above.

Amended by R.1994 d.305, effective June 20, 1994.
See: 26 N.J.R. 1612(a), 26 N.J.R. 2591(a).

18:2-3.10 Voluntary EFT payment

(a) A taxpayer not required to remit payments by EFT may, upon written approval from the Director, use the ACH debit or ACH credit method for EFT payment for such types of taxes as the taxpayer elects.

(b) Once the Director has given written approval, a taxpayer must use the approved EFT method of payment unless the taxpayer gives the Director notice in writing at least 30 days prior to withdrawing from voluntary participation.

(c) Except as otherwise provided in this section, any taxpayer voluntarily remitting taxes by EFT must follow the EFT requirements of this subchapter and any pertinent guidelines prescribed by the Director.

18:2-3.11 Effect of subchapter

If the provisions of these rules conflict with the provisions of any other tax rule concerning the payment of State taxes, except those taxes excepted in N.J.A.C. 18:2-3.4(f), the provisions of N.J.S.A. 54:48-4.1 and these rules shall govern, unless the context clearly indicates otherwise.