

Date of Payment of Gains Tax and of Penalty Imposition

This is to clarify the time at which gains tax is due in those cases where questionnaires are filed less than 20 days before the transfer and the Tentative Assessment and Return is not issued before the transfer. **IN EVERY CASE, TAX IS DUE ON THE DATE OF TRANSFER.** (Tax Law, § 1442)

Section 1442 of the Tax Law states that "The tax imposed by this article shall be paid by the transferor to the tax commission, or to any agent of such commission appointed pursuant to section fourteen hundred forty-nine-b of this article, on the date of transfer."

Notwithstanding the foregoing, if a transferor qualifies and elects to pay the tax in installments as provided in section 1442, a portion of the tax may be due on the date of transfer.

Section 1446.2 states in part "Any transferor failing to file a return or to pay any tax within the time required by this article shall be subject to a penalty If the tax commission determines that such failure or delay was due to reasonable cause and not due to willful neglect, it shall remit, abate, or waive all of such penalty and such interest penalty."

Based on the foregoing, the following procedures apply:

1. A 10% penalty will be assessed by the Audit Division in any case in which tax was not paid on the date of transfer. (Tax Law, § 1446.2)
2. A 2% interest penalty will be assessed by the Audit Division for each month of delay after the expiration of the first month not to exceed 25%.
3. Penalty and interest penalty may be waived only by the Tax Commission. (Tax Law, § 1446.2)
4. A written request for waiver of penalty and interest penalty must be submitted stating the facts which support a finding of reasonable cause and negate a finding of willful neglect. (Tax Law, § 1446.2) The request must also include the date of transfer of the real property (closing), the date of the filing of the questionnaires, the date the Tentative Assessment and Return was received, and the date payment of tax and interest was made.
5. The Commission will consider all the facts in each case to determine if a good faith effort was made to comply with the law. For transfers which occurred before the date of this notice, although not conclusive, it will be relevant to establish good faith that payment of tax and accrued interest is made promptly after the issuance of this notice.

6. In cases where a tentative assessment has not been received prior to the date of transfer, the tax due must be estimated and paid to: New York State Department of Taxation and Finance, Bldg. 9, Room 403, State Campus, Albany, New York 12227. The payment should be accompanied by sufficient information to clearly identify to which transaction the payment is to be applied. The names of the transferor and transferee, the location of the property transferred (including unit number, if applicable), case number (if applicable), the date the questionnaires were submitted, if submitted, and date of transfer must be included.

To ensure that no penalty and interest penalty are imposed, the transferor may estimate the tax due as 10% of the total consideration. A refund will be granted to the extent the original purchase price is established. If payment is made based on the taxpayer's calculation of gain and the Department determines a greater amount of gain, penalty and interest penalty will be assessed on that portion of the tax that was due but was not paid. The taxpayer's miscalculation of the tax due will not be grounds, in and of itself, for a finding of reasonable cause.

A payment which is made prior to submitting transferor and transferee questionnaires DOES NOT relieve the parties from the requirement to file such forms.

7. In the case of an acquisition of a controlling interest, the consideration is the fair market value of the real property interest acquired. Since it may not be possible to determine the consideration until some time after the acquisition has occurred, the Commission will consider this fact in determining if reasonable cause existed for the failure to pay the gains tax. To establish that this was the case, the taxpayer should contact the Department no later than the time at which an acquisition is known to have occurred. Although forms need not necessarily have been filed, the basic facts of the case should be disclosed to the Department.

8. This notice is intended to clarify the Department's policy on the imposition of penalty and interest penalty where the gains tax filing has been made, but a tentative assessment has not been issued.

9. Nothing herein is intended to imply that the Tax Commission will waive penalty and interest penalty in a case where a tentative assessment has been issued and the transfer has occurred but the tax was not paid, nor in a case where the transferor substantially failed to comply with the pre-transfer audit procedures for a transfer.

10. In every case, regular interest imposed under section 1446.1 of the Tax Law is due and will be assessed. This amount may not be waived by the Commission.