Tax Interest and Penalties Under ACES and Current Law

Distributed by the Department of Revenue — October 29, 2007

Under AS 43.05.220, the state may levy three types of civil penalties for failure to file a return or report or pay the full amount of tax. These include a basic penalty for underpayment or failure to file, a penalty for negligence, and a penalty for fraud. All three are general provisions applying to all state taxes, including the oil and gas production tax. Penalties are calculated as a percentage of the tax deficiency and are cumulative, so that a fraudulent taxpayer, for example, could be assessed the fraud penalty, in addition to the negligence penalty and the basic failure to file or pay penalty.

Basic Penalty

The basic failure to file penalty arises when the taxpayer fails to file a return or report when required or pay the full amount due. Five percent of the unpaid balance of the tax liability is added to a tax for each 30 day period, or fraction of the period of noncompliance. This penalty may not exceed a total of 25% of the unpaid balance. The penalty may be forgiven if the taxpayer shows that the failure to file or pay is due to reasonable cause and not willful neglect.[1]

Reasonable cause is not easy to show and the burden of proof lies with the taxpayer. The taxpayer must demonstrate in writing, and under penalty of perjury, that they acted in good faith to take all reasonable steps to ensure timeliness of the filing or payment. In determining whether the taxpayer has shown that the failure was due to reasonable cause and not willful neglect, the department considers the standards imposed by the Internal Revenue Code. Circumstances that may constitute reasonable cause include, acts of God, war, other disaster that made filing or delay unavoidable, or acts by another person beyond the control of the person required to file.[2]

Negligence Penalty

In addition to the basic penalty, if a deficiency is due to negligence or intentional disregard of a law or regulation, the department will, in its discretion, assess a penalty of 5% of the total amount of the deficiency. The penalty is calculated based on the total deficiency, even if only a part of the deficiency is due to negligence or intentional disregard. Negligence or

[1] AS 43.05.220(a). For more detail on failure to file and failure to pay penalties, see 15 AAC 05.210.
[2] 15 AAC 05.200.

intentional disregard may be shown by any relevant evidence including that the taxpayer has substantially deviated from the statutes or regulations, failed to keep adequate records, exaggerated deductions, or understated income without justification. [3]

Fraud Penalty

If a deficiency is due to fraud, the department shall add a penalty equal to 50% of the tax due or $500, whichever is greater. The penalty is calculated based on the total deficiency, even if only a part of the deficiency is due to fraud. To establish fraud, the department must show by clear and convincing evidence that the taxpayer understated a tax liability with the intent to evade tax. The intent to evade the tax may be shown by any relevant evidence including evidence of false explanations regarding income, false source documents, unjustified omissions or significant understatements of income, or substantial overstatement of a deduction.[4]

In addition to the three civil penalties discussed above, AS 43.05.290 provides for a number of criminal penalties for tax evasion and willful failure to comply with payment, filing, truthful accounting and information requirements, and for perjury. Along with several misdemeanors, penalties include felonies for willfully attempting to evade a tax, willfully failing to truthfully account for and pay a tax, and willfully and knowingly assisting in preparing or presenting a false return.

ACES does not propose any change to these penalties or their current application to the oil and gas production tax. ACES does, however, add penalties for failure to comply with the various information reporting requirements contained in the bill. The penalty provisions allow the department to assess against a person that fails to make the required report a penalty of not more than $1000 per day for each day the person fails to file the document. The reason for these additional penalty provisions is to ensure compliance with reporting requirements regardless of whether there is any tax deficiency. Unlike other penalties currently available to the department, the new penalties in ACES are not calculated based on a tax deficiency. This is important because the department needs timely and complete reporting of costs, potential tax credits, etc., even from explorers and producers that may not currently owe any tax.

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[3] AS 43.05.220(b); 15 AAC 05.210(g). For more detail on the additional penalty for negligence or intentional disregard, see 15 AAC 05.220.

[4] AS 43.05.220(c); 15 AAC 05.230.

Interest

The production tax currently requires monthly installment payments, in addition to annual payments and tax returns. The monthly payment is an estimate of 1/12th of the anticipated annual tax liability. The annual payment, which is accompanied by a return, requires payment of any difference between the estimated liability and actual liability during the 12 month period. The current production tax statute sets a generally lower interest rate for underpayments or overpayments of monthly installments of estimated tax due to the estimated nature of the monthly payment.

Interest on an unpaid amount of a monthly installment payment bears interest at the rate prescribed under the Internal Revenue Code, compounded daily from the date the installment is due until paid (if paid not later than when the annual return is due). That rate is currently at 8%. For corporate underpayments exceeding $100,000, the rate increases to 10%.[5]

Overpayments of monthly installments also bear interest as stated in the Internal Revenue Code, generally at lower rates than those for underpayments. Overpayments bear interest at 8% (7% for corporations) and 5.5% for the portion of a corporate overpayment greater than $10,000.[6]

Any portion of monthly installment payments that remains unpaid as of the annual filing date, as well as the interest accrued for those payments, is treated as a delinquent tax. Delinquent taxes are subject to a higher interest rate, currently 11% compounded quarterly.[7]

If the taxpayer has overpaid as of the annual return, the department has 90 days after the later of the date the return was filed or the due date of the return to refund the overpayment without incurring interest. After that, the state owes interest, currently 11% compounded quarterly.[8]

[5] AS 43.55.020(g); 26 U.S.C. 6621.
[6] AS 43.55.020(h); 26 U.S.C. 6621.
[7] AS 43.55.020(g); 43.05.225.
[8] AS 43.55.020(h); 43.05.225.