**AP 633: Guidelines for the Waiver and Abatement of Penalties**

 **Procedure**633: Guidelines for the Waiver and Abatement of Penalties
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**I.  Introduction**
The General Laws of Massachusetts provide for the imposition of penalties when taxpayers fail to comply with the tax laws of Massachusetts. The General Laws also permit the Commissioner of Revenue to waive or abate such penalties under certain circumstances.

Penalties are not intended as a source of revenue. Rather, penalties are meant to provide taxpayers with an incentive to comply voluntarily with their tax obligations. To promote voluntary compliance, and to foster public confidence in the integrity and effectiveness of the taxation process, penalties must be administered in a fair and consistent manner. In this regard, the Department of Revenue (DOR) has developed and revised these Guidelines for Waiver and Abatement of Penalties (Guidelines). The Guidelines discuss criteria relevant to consideration of requests for penalty waiver or abatement. The revisions to the Guidelines are intended to reflect developments in the law and to clarify the standards for waiver or abatement of penalties.

The Guidelines address penalties and applicable waiver standards set forth in four sections of G.L. c. 62C.  Section 33 (a)-(c) imposes penalties for three types of noncompliance: late filing of a return; late payment of tax; and failure to pay an assessment of tax that was not shown on a return as required.  G.L. c. 62C, § 33(a)-(c).  Section 33 (g) imposes a penalty in an amount not greater than $100 for a taxpayer’s failure to conform a filing, data transfer or payment with the method prescribed by the Commissioner.  *Id. at* § 33(g).  Section 33 also allows waiver or abatement of these penalties, in whole or in part, if a taxpayer demonstrates that noncompliance resulted from reasonable cause and not willful neglect.  *Id.* at § 33 (f).

G.L. c. 62C, § 28 applies when a taxpayer fails to file a return or files an incorrect or insufficient return. G.L. c. 62C, § 28. If a taxpayer refuses or neglects to file a proper return within thirty days of being notified of a deficiency, § 28 authorizes the Commissioner to determine the tax due based on his best information and belief, and to assess the tax up to double the amount so determined. Section 28 also applies to a taxpayer that files a false or fraudulent return or files a return with a willful attempt to defeat or evade the tax.

G.L. c. 62C, § 34 imposes a penalty of five dollars for every day a partnership is in default of its obligation to file an annual information return. G.L. c. 62C, § 34. The Commissioner may waive or abate this penalty for good and sufficient cause.

Finally, G.L. c. 62C, § 35 imposes a penalty upon every person who tenders a check or electronic funds transfer in payment of any tax, interest, penalty, fee, or other charge, if the check or electronic funds transfer is not duly paid.  G.L. c. 62C, § 35.  The Commissioner may waive or abate this penalty for good and sufficient cause.

**II.  Section 33 Penalties**
The late filing and late payment penalties set forth in G. L. c. 62C, § 33(a) - (c) may be waived or abated if a taxpayer demonstrates that the failure to file or pay resulted from reasonable cause and not willful neglect. To meet this standard, a taxpayer must establish that care was exercised to the same degree that an ordinary taxpayer in the same position would have exercised.

Each request for waiver or abatement of penalties consists of its own unique facts and circumstances. Consequently, cases must be evaluated individually to determine if a taxpayer exercised the requisite degree of care.

A taxpayer is entitled to a partial waiver or abatement of penalties when reasonable cause excuses a portion of the delay. Partial relief is appropriate if a taxpayer demonstrates the existence of facts that excuse a delay, but an ordinary taxpayer under similar conditions would have complied sooner.

**A.  Factors That Support a Claim for Reasonable Cause**
DOR will presume that reasonable cause exists for at least a portion of a delay when a taxpayer demonstrates that the delay resulted from any of the following reasons. These reasons and the associated examples do not represent all situations that warrant a waiver or abatement of penalties.

**1.  The delay was the direct result of a death or serious, incapacitating illness that impacted the taxpayer's ability to file or pay timely.**
**Example 1a:**The taxpayer spent several months caring for a terminally ill person with whom she lived. After the person's death, the taxpayer realized she had not filed her personal income tax return or an extension for the preceding year. Within a reasonable time of her discovery and without unnecessary delay, the taxpayer filed the return with full payment and requested a waiver of late filing and late payment penalties.

The waiver is granted. Given the gravity of the taxpayer's circumstances, her delay was reasonable. Moreover, her prompt resolution of the matter demonstrates that she attended to her tax obligations as would an ordinary taxpayer.

**Example 1b:**Husband and wife taxpayers operate a small business during the time that one of their children becomes seriously ill. Husband and wife are the only employees. No additional staff or bookkeepers maintain the business operations. During their child's illness, taxpayers fail to file sales tax returns or pay sales taxes for their business. Upon notice from DOR that the returns are outstanding, Taxpayers respond to the notice in a timely fashion and make arrangements to have the returns filed and the taxes paid. Taxpayers request a waiver of all penalties.

The waiver is granted. The illness was serious and reasonably affected the Taxpayers' ability to comply with their obligations. Taxpayers had no business staff that was in a position to file the returns and/or pay the taxes due.

**Example 1c:**The comptroller for a corporation suffered from a debilitating illness and was unable to return to work for more than a year. Three months after the comptroller fell ill, the treasurer discovered that no one had assumed the comptroller's task of preparing monthly withholding tax returns and paying withholding taxes. The treasurer immediately filed the delinquent returns with full payment and requested a waiver of late filing and late payment penalties.

The waiver is granted. The taxpayer timely discovered a delay, promptly filed delinquent returns and paid the taxes and interest.

**Example 1d:**Same facts as in Example 1c except, the treasurer discovered the problem two months after the comptroller fell ill but was unable to immediately file the returns because required records could not be located for two additional months. Once she had all necessary information the treasurer waited another 12 months before filing all delinquent returns with full payment and requested a waiver of late filing and late payment penalties.

A portion of the penalties is waived. Part of the delinquency was caused by a reasonable delay in assuming the comptroller's duties and obtaining records. An ordinary taxpayer under similar circumstances would have acted to ensure compliance well before an additional year had expired.

**2.  The delay was caused by an unavoidable absence of the party responsible for filing and payment. Consideration will be given to whether such person should have delegated authority or otherwise ensured timely compliance in his or her absence.

Example 2a:**While traveling overseas, the taxpayer was delayed by unforeseeable and unavoidable conditions. Upon returning home, she immediately filed her individual income tax return with full payment. Subsequently, DOR assessed the taxpayer penalties and interest. The taxpayer requested an abatement of late filing and late payment penalties.

The abatement is approved. The taxpayer could not have anticipated or avoided her absence.

**Example 2b:**The taxpayer spent every winter in Florida. He returned to Massachusetts in May and promptly filed his individual income tax return with full payment and requested a waiver of late filing and late payment penalties.

The waiver is denied. Because the taxpayer knew that he would be away when his return was due, he should have requested an extension of time to file or filed his return while in Florida.

**3.  The delay was caused by the destruction of property or records by natural disaster, fire or other casualty.**
**Example 3a:**A flood destroyed the payroll records of a company. The company's treasurer reconstructed the records and filed monthly withholding tax returns two months late with full payment and requested a waiver of late filing and late payment penalties.

The waiver is granted. After the records were destroyed, the taxpayer promptly reconstructed the tax records and complied with his tax obligations.

**Example 3b:**A fire destroyed a portion of a variety store, which severely impaired the store's operation for several months. The owner did not file sales tax returns for the first twelve months following the fire. In response to a DOR Notice of Failure to File, the owner filed the delinquent returns and requested a waiver of late filing and late payment penalties.

A portion of the penalties is waived. It is reasonable to allow the owner some time to return the store to full operation after the fire, however, an ordinary taxpayer under similar circumstances would have acted sooner to ensure compliance.

**4.  The delay arose from the taxpayer's inability to obtain the records or information necessary to determine the amount of tax due. The inability must stem from reasons beyond the taxpayer's control.**
**Example 4a:**In 1998, the taxpayer and his spouse separated. In early 1999, the taxpayer requested documents from the spouse that contained information needed to file his 1998 tax return. The spouse refused to hand over the documents. The taxpayer estimated the amount of tax due and timely filed an extension with an estimated payment. In December 1999, after the expiration of the extension period, the spouse withholding the information relented and allowed taxpayer the opportunity to duplicate the records. In April 2000, when taxpayer also submitted his 1999 return, taxpayer filed a complete and accurate 1998 return with full payment showing a liability substantially greater than previously estimated. DOR assessed the taxpayer penalties and interest. The taxpayer requested an abatement of late filing and late payment penalties.

The abatement is approved. The taxpayer exercised the degree of care of an ordinary taxpayer under similar circumstances.

**Example 4b:**
Same facts as in Example 4a, except the taxpayer submitted his 1998 return in June 2000.

A portion of the abatement is approved. While the taxpayer's efforts to obtain the information were diligent, an ordinary taxpayer under similar circumstances should not have waited six months from receipt of the information to file the return.

**Example 4c:**A small retail business hired a consultant during 1998 to test its upgraded computer tax software program. The consultant assured the company the upgrade would function without problems. In January, 1999, the computer crashed. The company immediately called the consultant, who spent the next two months re-writing and testing various programs. As soon as the system was up and running in March, and all information from January and February had been entered on the system, the company ran sales reports for January and February, filed sales tax returns with full payment, and requested a waiver of late filing and late payment penalties.

The waiver is granted. The taxpayer took immediate steps to correct a problem he could not have reasonably anticipated. As soon as the proper information was available, the returns were promptly filed.

**5.  A taxpayer who had furnished all necessary and relevant information to DOR received erroneous, written information from DOR personnel acting in their official capacity which prevented taxpayer's compliance.**
**Example 5:**A New Hampshire sole proprietor made and sold handcrafted furniture. The taxpayer had sales in Massachusetts and traveled to Massachusetts to make repairs and deliveries. Because the taxpayer had no previous business experience, he contacted DOR prior to opening the business, described its operation in detail, and inquired whether he must collect and pay over sales tax. He received an e-mail from an employee of DOR, which stated that he did not have an obligation to file and pay Massachusetts sales tax. Several months later he was informed by DOR that he did have a requirement to file. He immediately filed all missing returns with full payment and requested a waiver of late filing and late payment penalties.

The waiver is granted. The taxpayer relied on written advice received from an employee of DOR, after having provided the required information to DOR.

**6.  The taxpayer was incorrectly advised by a tax professional competent in applicable tax matters after furnishing such advisor all necessary and relevant information.**
**Example 6a:**
A California resident, who developed and patented a formula for a new drug product, granted a license to a Massachusetts pharmaceutical company for production of the product at its Massachusetts plant. The company began production in 1997 and during that same year, the taxpayer received Massachusetts royalty income from the patent license. In early 1998, the taxpayer hired an accountant to prepare her 1997 tax return, disclosed the license, and asked the accountant whether she needed to file a Massachusetts income tax return. The accountant informed her that she was not required to file a Massachusetts return and that she should report all income on her California return. In late 1998, the taxpayer received a Notice of Failure to File from DOR. She promptly filed the 1997 return with full payment and requested a waiver of late filing and late payment penalties.

The waiver is granted. The taxpayer's accountant provided the taxpayer with incorrect advice. Once informed of the error, the taxpayer immediately complied with her tax obligations.

**Example 6b:**
In 1998, a Massachusetts company hired a nonresident for six months to oversee the production of a plant located in Massachusetts. The taxpayer failed to inform her accountant of this assignment and neglected to give the Form 1099 from the Massachusetts Company to her accountant. The accountant did not file a Massachusetts income tax return for 1998. In November 1999, the taxpayer received a Notice of Failure to File from DOR. She promptly filed returns with full payment and requested a waiver of late filing and late payment penalties.

The waiver is denied. The taxpayer failed to disclose the Form 1099 from the Massachusetts company and therefore cannot rely upon her accountant's failure to file a Massachusetts tax return.

**7.  The delay stems from a lack of clarity in the law or its interpretation. Requests for waiver or abatement of penalties which assert a lack of clarity will be evaluated as follows:**The taxpayer must demonstrate that the law relating to the matter at issue is unclear and that a prudent effort was made to establish its proper treatment; and

The proper treatment of an item or transaction will not be considered unclear when DOR has issued a written policy statement that addresses the issue in a clear and direct manner. Conversely, the lack of a written policy statement does not necessarily indicate a lack of clarity in the law or its interpretation.

**Example 7:**A newly formed corporation conducted business in several states and had limited contact with Massachusetts. A thorough examination of relevant statutes, Public Written Statements, and case law did not provide sufficient guidance to conclude that the corporation's activities in Massachusetts subjected it to the corporate excise. Consequently, the corporation did not file a corporate excise return for its first year of operation. Several months after the corporation's return was due, DOR published a DOR Directive that concluded taxable nexus was present given facts substantially similar to those of the taxpayer. Soon after issuance of the Directive, the corporation filed the outstanding return with full payment and requested a waiver of late filing and late payment penalties.

The waiver is granted. Having reviewed available information, the taxpayer made a reasonable attempt to comply with the law. Once the interpretation of the Massachusetts law was clarified, the taxpayer acted quickly to fulfill its filing and payment obligations. The waiver would not have been granted had there been a previously issued written policy statement which addressed the issue in a clear and direct manner.

**8.  The taxpayer relied upon a person to file returns and pay the tax and the person failed to file returns and misappropriated the taxpayer's funds.**
**Example 8:**A company's staff accountant, who was responsible for preparing and filing withholding tax returns, submitted completed monthly withholding tax returns to the vice-president for signature and payment. The vice-president signed the returns on a timely basis and returned them with payment to the staff accountant. The staff accountant failed to file the returns and misappropriated the funds. Several months later, when DOR contacted the company for its missing returns, the vice-president discovered that the staff accountant had never submitted the returns and had embezzled the funds. The vice-president promptly filed the missing returns with full payment and requested a waiver of late filing and late payment penalties.

The waiver is granted. The taxpayer reasonably believed that the returns were filed and the taxes paid on a timely basis. Upon discovery of the embezzlement, the taxpayer acted promptly to correct the situation.

**B.  Additional Factors That Affect Reasonable Cause Determination**
The following factors should be considered in determining whether reasonable cause exists. The weight afforded to these factors will depend upon the totality of the circumstances. Standing alone, no single factor will sustain or defeat a claim of reasonable cause. However, the factors may support or detract from the taxpayer's request for a penalty waiver or abatement, and may similarly affect a determination that a partial waiver or abatement is appropriate:

1. The relative expertise and knowledge of the taxpayer;
2. Whether the taxpayer took reasonable steps to become familiar with tax obligations;
3. Whether the taxpayer voluntarily disclosed the delinquency and cooperated with any subsequent (or ensuing) DOR investigation;
4. The compliance history of the taxpayer;
5. The number of tax periods involved in the delinquency;
6. Whether a financial benefit arose from the delinquency; and
7. Whether the taxpayer should have requested an extension of time for filing.

**Example a:**The taxpayer opened a small restaurant. Taxpayer had not previously been in business and had no knowledge of applicable tax laws. During his first month of operations he contacted the DOR and apprised himself of the registration and filing requirements for his business. The first month of meals tax returns were filed late with payment. All subsequent returns were timely filed and the taxes were timely paid. In response to an assessment of late filing and late payment penalties, the taxpayer requested an abatement of penalties.

The abatement is approved. The taxpayer's lack of knowledge of his tax responsibilities, his voluntary disclosure, inquiry to the DOR and subsequent compliance history are all factors that, when combined, would qualify as reasonable cause.

**Example b:**
The taxpayer opened a small bakery that sold cups of coffee and individually packaged baked goods. Before opening the bakery, the taxpayer asked a friend, also in the bakery business, about his tax filing requirements. The taxpayer's friend incorrectly advised the taxpayer that he did not have to collect any sales tax on meals. Based upon this advice the taxpayer did not file tax returns. Several months later, the taxpayer received a Notice of Failure to File from DOR. He promptly filed all delinquent returns and requested a waiver of late filing and late payment penalties.

The waiver is denied. It was unreasonable for the taxpayer to rely on the advice of a friend as to his tax requirements. The ordinary taxpayer operating a business should reasonably consult with the DOR or a tax professional.

**Example c:**In January 2000, DOR billed the taxpayer for failure to file a monthly withholding tax return for September 1999. The taxpayer maintained that the return was timely filed and submitted a second return, along with a request for an abatement of late filing and late payment penalties. The taxpayer timely filed returns and paid the tax for 2 years prior to September 1999 and thereafter.

The abatement is approved. Taxpayer's compliance history coupled with the possibility that a single tax return was lost in the mail would qualify as reasonable cause.

**Example d:**Same facts as in Example b, except the taxpayer has a history of delinquency and numerous monthly returns are involved.

The abatement is denied. The taxpayer is chronically delinquent, and it is highly unlikely that numerous returns were lost in the mail. Mitigating factors do not support this claim for abatement of penalties.

**Example e:**A bed and breakfast sells small gifts in its gift shop. Since it started in business two years ago, the inn has reported the sales taxes it collected on its monthly room occupancy excise returns. Upon audit, DOR informs the bed and breakfast that it must report the sales of gift items on sales tax returns. The taxpayer immediately filed sales tax returns for both years with full payment and requested a waiver of late filing and late payment penalties.

The waiver is granted. The taxpayer did not financially benefit from the incorrect reporting and immediately corrected the error, once it was discovered.

**C.  Factors That Do Not Support a Claim for Reasonable Cause**
Ordinarily, the following factors, in and of themselves, do not support a claim of reasonable cause:

1. Taxpayer's lack of funds to make timely payment.

2. Taxpayer's reliance on an employee or agent to file the return or make the payment.

**Example a:**Because the taxpayers had major financial difficulty, they did not file their income tax return until 6 months after it was due.

The waiver is denied. Taxpayers' financial status does not support an assertion of reasonable cause.

**Example b:**The taxpayer relied on his bookkeeper to prepare and file monthly withholding tax returns when due. Without any underlying justification, the bookkeeper failed to submit the returns for taxpayer's signature. It was not until the taxpayer received an assessment from DOR for the delinquent periods that he submitted returns with a request for abatement of late filing and late payment penalties.

The waiver is denied. Had he properly exercised his responsibility to ensure that returns were prepared for signature the problem would have been identified and resolved within a reasonable period of time.

**D.  Reasonable Cause under Section 33 (g) Penalty for Failure to File, Report or Pay Electronically**

The Commissioner has the authority to require that returns and payments be made in a prescribed manner. G.L. c. 62C, § 5.  The Commissioner has issued requirements that certain tax returns and payments be made electronically. *See* TIR 04-30.  Failure to file returns or to make payment electronically, as required, may subject filers to a penalty of up to $100 “for each improper return, document or data transmission, and for each improper payment.”  G.L. c. 62C, § 33(g).  This penalty may be imposed in addition to late filing and late payment penalties imposed pursuant to § 33 (a)-(c).  This penalty may be waived if the failure to file electronically is due to reasonable cause and not to willful neglect.  The discussions above regarding factors that support a claim for reasonable cause, under subsection A; additional factors that affect the reasonable cause determination, under subsection B; and factors that do not support a claim for reasonable cause, under subsection C also apply to the waiver or abatement of the penalty under M.L. c. 62C, § 33(g).  The fact that a taxpayer does not own a computer or is uncomfortable with electronic data or funds transfer will not support a claim for reasonable cause.  In addition, taxpayers and practitioners are expected to take reasonable precautions in securing computer systems and data, by securing their systems from unauthorized access and by maintaining backup files.  The following examples may serve to illustrate reasonable cause in the context of failure to use electronic means to file a return or make a payment when required to do so.

**Example a:**The taxpayer runs an automobile parts store and has 5 employees.  The amount of the taxpayer’s wage withholding and sales tax is over the electronic filing threshold. A computer virus attack occurs the day before the taxpayer’s sales tax return is due.  The attack overloads the taxpayer’s computer system and the hard drive crashes.  The taxpayer hires a computer specialist to restore the computer system.  Meanwhile, the taxpayer files a paper sales tax return and pays the amount due by check.  The taxpayer requests waiver of the penalty for failure to file electronically.

The waiver is approved.  The failure to file electronically was due to reasonable cause and not willful neglect.

**Example b:**
The taxpayer is a Massachusetts corporation with gross receipts in an amount above the electronic filing threshold.  The taxpayer hires a tax preparer to prepare the corporation’s 2005 corporate excise return.  The preparer files a paper return that is signed by the corporation’s treasurer, who is not aware of the electronic filing requirement.  DOR imposes a $100 penalty for failure to file the return electronically, and the taxpayer requests an abatement.

The abatement is denied.  The treasurer failed to review available information regarding the corporation’s filing obligations.  The corporation is held responsible for its failure to file using electronic means.

**III.  Section 28 Penalties and Section 38 Waiver of Such Penalties**
Section 28 of G.L. c. 62C provides that, upon a taxpayer's failure to respond to the Commissioner's notice of failure to file a proper return, the Commissioner may assess a tax up to double the amount of tax determined to be due. Written notice of a failure to file a return or of the filing of an insufficient or incorrect return will be sent by mail. If the taxpayer files a proper return within 30 days of the date of the Notice of Failure to File or of the Notice of Incorrect or Insufficient Return, no § 28 penalty will be assessed. An additional assessment, not greater than double the amount of the tax, will be imposed, without notice, when it has been determined that a taxpayer has filed a false or fraudulent return or has filed a return with a willful attempt to defeat or evade the tax.

Abatements of § 28 double assessments are governed by § 38 of G.L. c. 62C. Decisions about abatements of § 28 penalties will be based upon a case-by-case review of all of the facts and circumstances presented by the taxpayer relative to the existence of reasonable cause which resulted in the failure to timely respond to a Notice of Failure to File (NFF) or a Notice of Incorrect or Insufficient Return (NIR). A taxpayer that receives either type of Notice should be aware that the purpose of such Notices are to set a uniform deadline within which the taxpayer should reasonably be able to correct the asserted deficiency, whether it is the lack of any filed return (NFF) or the lack of a properly completed return (NIR). If the taxpayer knows that it will not be able to correct the deficiency within that thirty day period, then the taxpayer should contact the Department well prior to the expiration of the thirty day period, acknowledge the receipt of the Notice, explain the reason why the thirty day period is not sufficient to furnish a response and request an extension. The taxpayer that fails to respond at all or responds only after the thirty day period has expired must demonstrate that there was reasonable cause for the lack of a response or for the late response.

The same criteria that are employed in determining whether reasonable cause exists to allow for the abatement of § 33 penalties may be considered in determining whether to abate § 28 penalties. In those circumstances where, for example, the Commissioner finds that a taxpayer has demonstrated reasonable cause to excuse only part of a taxpayer's delay in responding to an NFF or to an NIR, an abatement of only a pro-rata portion of the § 28 penalties could be justified such that some fraction of the original additional assessment remains.

The Commissioner lacks the authority and has no discretion under the provisions of § 38 to abate the amount of the § 28 penalty assessed in circumstances in which it has been determined that the taxpayer has filed a false or fraudulent return or has filed a return with a willful attempt to defeat or evade a tax liability.

**A.  Failure to File**
If a taxpayer does not respond to a Notice of Failure to File within thirty days, the Commissioner may determine the tax due and assess up to double the amount of tax. At the request of a taxpayer, the Commissioner may extend the time in which the taxpayer must file a proper return beyond the thirty-day period. The circumstances described in these guidelines as reasonable cause for the abatement of § 33 penalties may be grounds for granting an extension.

**Example a:**Based upon information provided by the Internal Revenue Service, the Department of Revenue determined that non-resident taxpayers should have been filing Massachusetts non-resident returns with respect to an item of Massachusetts source income for the three most recent tax years. DOR sent a Notice of Failure to File to the taxpayers. The taxpayers failed to respond within thirty days. Using all information available to the Commissioner, the Department of Revenue assessed the taxpayers at double the amount of tax it determined was properly due. After receiving a Notice of Assessment, taxpayers promptly filed proper returns and requested an abatement of the § 28 addition to tax. The taxpayers, however, offered no basis for the failure to timely respond to the Notice of Failure to File.

The abatement is denied. Since the taxpayers did not respond to the Notice of Failure to File and offered no explanation as to the failure to respond, the amount of tax shown on the taxpayers' returns remains doubled.

**Example b:**Same facts as in the prior example except that the taxpayers were caring for their seriously ill child who had been hospitalized for a month prior to their receipt of the Notice of Failure to File. The child remained hospitalized for three additional months after receipt of the Notice of Failure to File. Following their receipt of the Department's assessments, the taxpayers explained and documented these circumstances in their abatement applications which were filed along with the requested returns within 30 days after their daughter's recovery and release from the hospital.

The abatement is granted. The taxpayers demonstrated that they had reasonable cause for their failure to respond to the Notice of Failure to File followed by a prompt response once the cause for the delay abated.

**Example c:**Same facts as in Example a except that the taxpayers initially responded within thirty days of their receipt of the Notice of Failure to File and requested and were granted an additional 60 days to file their returns. The taxpayers thereafter filed one of the three requested returns (1998) within the extension period granted but did not file returns for the other two years (1999 and 2000) until two months after the extension period had expired. Nor did they request a further extension of time to file or respond to a reminder notice sent by the Department. By the time the Department had received the two outstanding returns, the Department had proceeded with an assessment which included a § 28 doubling of the assessed tax for those two years. The taxpayers received the Department's Notice of Assessment just five (5) days after they had filed their returns prompting them to seek, by way of an abatement application, the reduction of the tax to the amounts of tax shown on the two filed returns and an abatement of all of the § 28 penalties. The taxpayers asserted in their abatement application as to the 1999 period that they were required to send a request for information to, and to wait for a response from, a mutual fund company concerning their "basis" in several investments for which they were reporting capital gains. As to the 2000 period, the taxpayers asserted that while they had all the necessary information needed to complete that return, the general press of other business matters that they had to attend to in their busy schedules had prevented them from meeting the agreed upon 60-day extension and that they had simply lost track of the expiration of the 60-day extension period. Both the 1999 and 2000 returns were filed within ten days of their receipt of the information which they had requested from the mutual fund company.

Abatement as to the § 28 penalties granted in part and denied in part. The § 28 penalties are reduced to the amount of tax shown as due on the 1999 and 2000 returns. Since the taxpayers did not demonstrate that they had reasonable cause as to the year 2000 return, in light of the fact that they had all the information with which to complete that return within the agreed extension period, the § 28 penalty will not be reduced below double the amount of the tax shown on the return. Abatement of the § 28 penalties is granted as to the 1999 period as the taxpayers demonstrated reasonable cause for the delay in that they had to rely upon the input of others to provide them with the data needed to complete that return.

In connection with each of the three above examples, assuming that the taxpayers had in each case also sought an abatement of § 33 penalties, the taxpayers would have been required to separately demonstrate that reasonable cause existed for their having failed to file non-resident returns for each of the three years in question. The fact that reasonable cause may have been demonstrated by the taxpayers with respect to delays occurring after the receipt of the Notice of Failure to File would not constitute reasonable cause for the late payment and late filing for the three years in question all of which originated prior to the issuance of the Notice of Failure to File.

**B.  Incorrect or Insufficient Returns**
A return is considered to be insufficient if the taxpayer has left pertinent line items blank, failed to attach necessary schedules, or failed to file other required attachments. A return is considered to be incorrect if the Department determines that the level of income, expenses or other taxable transactions are unrealistic, based upon all information available to the Commissioner. The following situations illustrate insufficient or incorrect returns for which § 28 penalties may or may not be abated.

**Example a:**A Massachusetts book store began business and registered for sales tax in August 1997. The taxpayer filed monthly sales tax returns, and reported the total tax amount. The taxpayer never reported any gross sales, deductions, or use tax amounts. In March 1999, the Department of Revenue sent a Notice of Incorrect or Insufficient Return to the taxpayer. The taxpayer responded immediately with proper returns, reporting additional amounts due.

The company is assessed on the additional amounts. Since the taxpayer responded to the Notice of Incorrect or Insufficient Return and provided the requested information, a § 28 addition to tax is not imposed.

**Example b:**
Taxpayer, a resident of Massachusetts, deposited money in a mutual fund in 1993. Each year thereafter, the taxpayer reported the mutual fund dividends as 5% income. In 1996, DOR audited the taxpayer and the auditor informed him that mutual fund dividends are taxable at 10%. The taxpayer paid the additional assessment for 1993, 1994 and 1995. In 1999, the taxpayer was audited again. The auditor discovered that the taxpayer had continued to report mutual fund dividends as 5% income. The auditor sent a Notice of Incorrect or Insufficient Return for 1996, 1997 and 1998 to the taxpayer; the taxpayer did not respond. The taxpayer was assessed at double the amount properly due, under § 28, and received a Notice of Assessment. The taxpayer filed an application for abatement of the § 28 addition to tax.

The abatement is denied. The taxpayer filed returns raising issues which had been explained and adjusted in a prior audit by the Department.

**Example c:**A vendor of consumer electronics products operating through a nationwide chain of retail outlets opened three retail outlets in Massachusetts and a warehouse facility in New Hampshire and began business in October, 1996. It registered with the Department of Revenue for sales and withholding taxes. From the inception of its operations, the taxpayer filed composite monthly sales tax returns for all three retail outlets, reporting exempt sales at a substantially higher proportion of its total sales than those of its direct Massachusetts competitors. In June, 1997, the Department received a complaint from an anonymous source that the taxpayer was offering its customers in its Massachusetts stores the option of taking delivery of their purchased items directly from its New Hampshire warehouse. Customers who elected that option were not charged sales or use tax though the sale transaction was otherwise documented and completed in the Massachusetts store. That tip, coupled with a review of the taxpayer's filed returns prompted the Department to open an audit of the taxpayer beginning in October, 1997. Based upon information developed from the taxpayer's records, the Department issued a Notice of Incorrect or Insufficient Return covering the prior twelve monthly periods. In response, the taxpayer chose not to file amended returns for past periods within the thirty day period, and instead asserted that the sales in question were not taxable and that it intended to challenge the Department's interpretation of the statute. The Department then completed its audit of the periods at issue based upon the information provided to the Commissioner and doubled the amount of the proper sales/use tax due. For purposes of seeking an abatement of the § 28 penalty, the taxpayer filed proper returns under protest.

The abatement is denied. Since the taxpayer did not respond to the Notice of Incorrect or Insufficient Return by filing proper returns, there is no reasonable cause upon which to base an abatement.

**Example d:**Same facts as Example c, except the taxpayer upon its receipt of the Notice of Incorrect or Insufficient Return instructed each of its store managers on an interim basis to either discontinue the practice or to include the challenged sales as taxable sales on its returns. The taxpayer did not contact the Department within thirty days of the Notice of Incorrect or Insufficient Return. However, within that thirty day period it consulted with local Massachusetts counsel about the Department's position. However, the taxpayer did not furnish its counsel with a copy of the Notice of Insufficient Return (NIR) or explain the thirty-day response deadline in the Notice. After receiving an opinion from its counsel, the taxpayer collected the sales data from its three stores necessary to complete and file proper returns for the periods at issue. It also issued a written policy to its store managers discontinuing the policy of referring customers to its New Hampshire warehouse. The consultation with their counsel and the collection of the necessary information allowed the taxpayer to file proper returns within 90 days of its receipt of the Notice of Incorrect or Insufficient Return. The taxpayer filed abatement applications as to the § 28 penalties along with its amended returns and argued that the § 28 penalties should be abated in full because (i) the number of periods at issue was small, (ii) as a relatively new Massachusetts taxpayer it did not appreciate the impact of its failure to respond to the NIR and (iii) it acted as quickly as possible to investigate the Department's position and to correct the problem.

The abatement is granted in part and denied in part. The § 28 penalties are reduced by half the amount of the additional penalty originally assessed, i.e., 1 and 1½ times the tax amount due. The § 28 penalties are not abated in their entirety because the taxpayer failed to respond in any manner to the NIR within the initial thirty-day period. However, the delay after the receipt of the NIR is partially excused in that the taxpayer promptly consulted with counsel, obtained an opinion, and gathered the data necessary to file amended returns.

**C.  False or Fraudulent Returns**
A taxpayer who files a return containing a false representation of a material fact with knowledge of its falsity for the purposes of inducing the reliance of the Department on the misrepresentation is subject to a § 28 assessment. A fact is material if it is related to the calculation of the tax. The Commissioner does not have the authority or discretion to abate § 28 penalties where it is determined that a taxpayer has filed a false or fraudulent return. The statute does not require notice to the taxpayer before assessment.

**Example:**
Taxpayer is a Massachusetts resident who consistently filed income tax returns accurately reporting amounts of wages, interest, dividends and capital gains as taxable income. In 1999, taxpayer was convicted in federal court on charges of selling controlled substances over the period from 1996 through 1998 and for federal tax evasion for failing to report the income from his illegal activities in those years. In 2001, the Department of Revenue assessed the taxpayer for the unreported illegal source income using information concerning the amount of that income shown on the Revenue Agent Report of the Internal Revenue Service after the taxpayer failed to report this additional income to Massachusetts as a federal change pursuant to the provisions of G.L. c. 62C, § 30. The Department assessed the taxpayer double the tax amount that it determined was properly due. The taxpayer filed amended returns disclosing the previously unreported income in the amounts assessed by the Department and requested an abatement of the § 28 penalties.

The abatement is denied. The taxpayer intentionally understated his income for the years in question as part of his desire to conceal his criminal activities. He has filed a false and fraudulent return. The Department lacks the authority or discretion to abate the § 28 penalties.

**D.  Willful Attempts to Evade or Defeat a Tax Liability**
A taxpayer who files a return attempting by unlawful means to reduce or eliminate tax liability is subject to a § 28 assessment. The Commissioner lacks the authority or discretion to abate § 28 penalties once it has been determined that a taxpayer has attempted to evade or defeat his tax liability. The statute does not require notice to the taxpayer before assessment.

**Example:**
Taxpayer is a Massachusetts resident who holds the belief that the Commonwealth does not have the constitutional or statutory authority to impose a tax upon his income. The taxpayer regards himself as a so-called "tax protester." The taxpayer in 1999 filed a blank Form 1 income tax return and attached the W-2 statement received from his employer to that blank Form 1. While the taxpayer had other sources of substantial income requiring that he file a return, the taxpayer did not list them on the return, made no entries whatsoever upon the Form 1, and did not sign the return. Written requests by the Department to obtain a completed and signed return from the taxpayer were ignored. The Department audited the taxpayer, determined certain amounts of unreported income from information obtained from third party sources and otherwise made an assessment based upon its best information and belief. The Department allowed standard deductions based upon its own research, credited the taxpayer with the withholding tax withheld by his employer and issued its assessment at double the amount of the unpaid tax. The taxpayer thereafter corresponded with the Department asserting spurious arguments that the federal and Massachusetts constitutions prohibit the taxation of his wages, all of which have been repeatedly rejected by state and federal courts. The taxpayer did not otherwise challenge the amount of the assessment made. The Department treated the taxpayer's correspondence as an application for abatement of all assessments of tax, penalties and interest, including the § 28 addition to tax.

The abatement is denied. The taxpayer's conduct indicates a purposeful attempt to preclude the Department from being able to process the taxpayer's return or to otherwise determine, with the assistance of the taxpayer, his taxable income and tax liability for the year. The taxpayer has willfully attempted to evade and defeat the imposition of his tax liability. The Department lacks the authority or the discretion to abate the § 28 penalties.

**IV.  Section 34 Information Returns – Partnerships**
Section 7 of G.L. c. 62C requires every partnership having a usual place of business in the Commonwealth to file an annual information return. Section 34 includes a penalty of five dollars a day for failing to file a § 7 return on time. Section 34 also provides for waiver or abatement, in whole or in part, of penalties, for good and sufficient cause.

**A.  Good and Sufficient Cause**
The fact which constitute reasonable cause as detailed in Section II of these guidelines (§ 33 Penalties) will constitute good and sufficient cause for waiving or abating a § 34 partnership return penalty.

**B.  Other Factors**
The following factors do not constitute good and sufficient cause, but may be considered with other factors:

1.  Whether each partner, whose distributive share of partnership income should have been reported under § 7, has filed a proper return for the year in question and made full payment of all taxes properly due.

2.  Information reported in the partnership return shows that no additional taxes are properly due.

**V.  Section 35 Penalty for Protested ("Bad") Check or Electronic Funds Transfer**

Section 35 of G.L. c. 62C imposes a penalty upon every person who tenders a check or electronic funds transfer in payment of any tax, interest, penalty, fee, or other charge that is not duly paid. G.L. c. 62C, § 35. The amount of the penalty imposed is $30 or the amount of the payment, whichever is less. The penalty does not apply if the person tendered the payment "in good faith and with reasonable cause to believe that it would be duly paid." *Id.* In determining whether to abate the penalty, the Department will consider information which includes, but is not limited to the following:

1.  Evidence that the taxpayer's bank account contained sufficient funds at the time the check or electronic funds transfer was submitted for payment to the bank;

2.  A statement from the taxpayer's bank which explains the reason the check or electronic funds transfer did not clear, indicating circumstances beyond the taxpayer's control;

3.  Evidence that the check or electronic funds transfer was not honored because of a bank or Department of Revenue error.

**VI.  Other Penalties**
The standards for waiving or abating § 33 penalties, outlined in section II, may be applied to other penalties imposed under G. L. c. 62B or G.L. c. 62C, where appropriate.  However, the standards set out in AP 633 are not applicable to penalties imposed pursuant to G.L. c. 62C, §§ 35A-35E.  *See* DD 12-7 for the guidelines applicable to the § 35A penalty.

**VII.  Procedures**
**A.  Waiver of Penalties**The Taxpayer Services Division, the Audit Division, and the Problem Resolution Office are each authorized to make penalty waiver determinations. The Taxpayer Services Division will normally act upon waiver requests that originate in areas of the Department other than the Audit Division. If taxpayers are disputing proposed tax assessments and penalties, then the Office of Appeals may make determinations on penalty issues when a hearing is requested at a § 26(b) pre-assessment conference or a § 37 abatement hearing. Penalties may also be waived or partially waived as a result of the settlement of a case being handled by the Office of Appeals or by the Litigation Bureau. The procedures and standards for waiving penalties are the same for all bureaus and divisions.

**1.  Waiver Requests.**
Penalty waiver requests shall include a statement of facts, signed by the taxpayer, supporting the taxpayer's contention that noncompliance was due to reasonable cause and not due to willful neglect. The Commissioner may require the taxpayer to sign the statement under the penalties of perjury.

Prior to considering a penalty waiver request, the Commissioner may require:

- the tax return(s) at issue; and

- payment of the tax and interest due, or evidence of such payment.

For original returns, the Department makes every effort to make determinations on penalty waiver requests when the return is processed. To request a waiver of penalties, the taxpayer must attach a cover letter to the front of the tax return, at the time the return is filed.

**2.  Waiver Determinations.**
The Commissioner will notify the taxpayer in writing of the determination of the penalty waiver request.

**3.  Waiver Appeals.**
The Office of Appeals does not conduct conferences relating solely to the imposition of penalties prior to assessment unless the Initiating Bureau, in its discretion, specifically refers the issue to the Office of Appeals.  Once the tax has been assessed, the taxpayer may apply for an abatement of any and all penalties.

The Customer Service Bureau will accord great weight to the decision made on the penalty waiver request.

The taxpayer may submit a request for settlement consideration either before or after assessment to appeal the imposition of penalties.

**B.  Abatement of Penalties**
Requests for abatement of penalties are subject to the rules governing all abatements. Abatement applications must be made on Form CA-6 or electronically and submitted to the Department. *See* G.L. c. 62C, §§ 37, 38 and 830 CMR 62C.37.1

**1.  Prerequisites to filing an application for abatement.**
Any person filing an application for abatement must have filed, at or before the time of filing the abatement application, a tax return for the relevant period, unless the taxpayer is disputing its filing obligation. An application for abatement may not be filed until the tax is actually assessed.
**2.  Time for filing an abatement application.**
The Department must receive the application for abatement within three years from the date the return was filed, within two years from the date shown on the notice of assessment or within one year from the date the tax was paid, whichever is later. However, the deadline for filing an application for abatement extends to the end of any agreed additional period for making an assessment in cases where the taxpayer and the Commissioner have agreed to such an extension. *See* G.L. c. 62C, § 37, as amended, and TIR 93-11.

**3.  Abatement determinations.**
The Commissioner will notify the taxpayer in writing, of the determination of the application for abatement of the penalties.

REFERENCES:
G.L. c. 62B
G.L. c. 62C, §§ 5, 7, 26(b), 28, 30, 32(e), 33(a), (b), (c), (f), (g), 34, 35, 37, 38
G.L. c. 63, § 33M
830 CMR 62C.37.1
TIR 93-11
TIR 99-18
TIR 01-5
TIR 04-30
DD 12-7, Section 35A Penalty for Underpayment of Tax Required to be Shown on Return
Form 1, Resident Income Tax Return
Form CA-6, Application for Abatement – Amended Return
Form 1099 (Federal)