

or other family relationship has no effect concerning whether a person is (or is not) a beneficiary.

17:7-22.5 Lack of beneficiary designation

(a) If a participant failed to designate a beneficiary (including a failure because the participant's beneficiary designation is invalid or ineffective) or no beneficiary designated by the participant is living or exists when the distribution otherwise would become payable, then the participant's estate is the beneficiary to the extent of the failure or invalid or ineffective designation. For the purposes of this subsection, the Plan Administrator may rely on an appropriate court order or the personal representative's written statement as to the identity (including name, address, and taxpayer identifying number under IRC § 6109) of and shares allocable to the persons entitled to such estate.

(b) Invalid designations include any document that contains:

1. Provisions that have been crossed out;
2. Provisions that have been whited out;
3. Provisions completed in pencil;
4. Provisions that list the same individual(s) as both the primary and contingent beneficiary;
5. Provisions that use nicknames; the beneficiary's legal name must be provided;
6. Provisions that use general terms, like "my children" or "my grandchildren"; the specific name of each individual beneficiary must be listed;
7. In cases where a participant provides a distribution using specific percentages, provisions that do not add up to 100 percent; and
8. In cases where the participant provides a distribution using specific fractions, provisions that do not add up to one.

17:7-22.6 A slayer cannot be a beneficiary

A named beneficiary who feloniously and intentionally kills the participant or another beneficiary is not a beneficiary and is not entitled to any distribution or any other right under the Program or any Plan under the ABP Program; and any benefit is paid as though the killer had predeceased the participant or beneficiary.

17:7-[22.1]22.7 Death [or retirement] of participant; notice

(a) Upon receiving notification of the death [or retirement] of a participant, [the employing institution shall notify] the Division [of Pensions and Benefits.

(b) The Division shall process the necessary forms related to such death [or retirement] and notify the insurer providing life insurance coverage.

17:7-[22.2]22.8 Assignments; group life insurance

(a) (No change.)

(b) Any such assignment, whether made before or after June 28, 1973, the effective date of this [rule] section, shall entitle the insurer to deal with the assignee as the owner of all rights and benefits conferred on the insured under the group life policy in accordance with the terms of the assignment.

17:7-[22.3]22.9 (No change in text.)

(Agency Note: N.J.A.C. 17:7-22.4 is proposed for recodification as N.J.A.C. 17:7-18.4.)

Recodify existing N.J.A.C. 17:7-22.5 and 22.6 as **22.10 and 22.11** (No change in text.)

(Agency Note: N.J.A.C. 17:7-22.7 is proposed for recodification as N.J.A.C. 17:7-8.8.)

TREASURY — TAXATION

(a)

DIVISION OF TAXATION

General Policies and Procedures Penalties and Interest Civil Fraud

Proposed New Rule: N.J.A.C. 18:2-2.9

Authorized By: Michael Bryan, Director, Division of Taxation.

Authority: N.J.S.A. 54:49-9.1 and 54:50-1.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2014-041.

Submit comments by June 6, 2014, to:

Mitchell C. Smith
Administration Practice Officer
Division of Taxation
P.O. Box 269
Trenton, NJ 08695-0269
Email: Tax.RuleMakingComments@treas.state.nj.us

The agency proposal follows:

Summary

The proposed new rule incorporates the civil fraud penalty provided for by N.J.S.A. 54:49-9.1 into the rules concerning penalties and interest found at N.J.A.C. 18:2-2. N.J.S.A. 54:49-9.1 states: "If any part of an assessment is due to civil fraud, there shall be added to the tax an amount equal to 50% of the assessment. This amount shall be in lieu of any other additions to the tax imposed by R.S. 54:49-4 and R.S. 54:49-9." The proposed rule provides that the civil fraud penalty will be 50 percent of the entire assessment. Pursuant to N.J.S.A. 54:49-6.b, there is no statute of limitations for assessments in the case of false or fraudulent returns.

Circumstantial evidence of fraud may include elements of common law fraud as described in *Jewish Center of Sussex County v. Whale*, 86 N.J. 619 (1981); *New Jersey Economic Authority v. Pavonia Restaurant, Inc.*, 319 N.J. Super. 435 (App. Div. 1998); *Genie & Company v. Comptroller of the Treasury*, 668 A.2d 1013 (Md. Ct. Spec. App. 1995); *Bradford v. Comm'r*, 796 F. 2d 303 (9th Cir. 1986); *Stolzfus v. United States*, 398 F.2d 1002, 1004 (3rd Cir. 1968), cert. denied 393 U.S. 1020, (1969); *Banco Popular N. Am. v. Gandi*, 184 N.J. 161 (2005). The indicia of fraud listed in the proposed rule are consistent with Federal case law and the Internal Revenue Service manual on civil fraud.

Proposed N.J.A.C. 18:2-2.9(a) reflects the statutory authority for assessing the civil fraud penalty. N.J.S.A. 54:49-9.1 imposes a penalty for civil fraud equal to 50 percent of the assessment. This penalty shall be in lieu of any other additions to the tax imposed by N.J.S.A. 54:49-4 and 54:49-9. This subsection explains that 50 percent of the assessment means 50 percent of the portion of the assessment that relates to tax only, exclusive of amnesty penalty and/or interest, including any portion of the tax assessment that is not due to civil fraud. An example is provided.

Proposed N.J.A.C. 18:2-2.9(b) provides that, in general, civil fraud is characterized by a taxpayer's intent to evade or avoid the payment of taxes known to be owing by conduct intended to conceal, mislead, or otherwise prevent the collection of taxes.

Proposed N.J.A.C. 18:2-2.9(c) provides that if the Division of Taxation determines that a taxpayer filed a false or fraudulent return with the intent to evade tax or failed to file a return at all, the Division of Taxation may assess tax at any time.

Proposed N.J.A.C. 18:2-2.9(d) provides that the Division of Taxation may impose the penalty provided for in subsection (a) where there is clear and convincing evidence of the taxpayer's intent as required in subsection (b). Intent is distinguished from inadvertence, reliance on incorrect technical advice, honest difference of opinion, negligence, or carelessness.

Proposed N.J.A.C. 18:2-2.9(e) lists indicia of fraud that the Division of Taxation may consider to determine whether any part of an assessment is due to civil fraud.

Proposed N.J.A.C. 18:2-2.9(f) provides that, depending on the facts and circumstances of a matter, a finding of one or more indicia of civil fraud listed in subsection (e) may be sufficient to establish civil fraud for purposes of assessing the penalty.

Proposed N.J.A.C. 18:2-2.9(g) provides that the Division of Taxation will advise the taxpayer whenever the civil fraud penalty is assessed.

Proposed N.J.A.C. 18:2-2.9(h) provides that a civil fraud determination is a finding of the Director of the Division of Taxation, and that the protest and appeal rights provided in N.J.S.A. 54:49-18 will apply to such determination.

Because the Division of Taxation has provided a 60-day comment period for this notice of proposal, this notice is exempted from the rulemaking calendar requirements, pursuant to N.J.A.C. 1:30-3(a)5.

Social Impact

The proposed new rule advises taxpayers and their attorneys and accountants that the Division of Taxation will assess the penalty provided by N.J.S.A. 54:49-9.1 if the Division of Taxation determines that any part of an assessment is due to civil fraud. The Division of Taxation believes that the civil fraud penalty will serve as an effective collection and enforcement tool and will deter taxpayers from committing civil fraud. N.J.S.A. 54:49-9.1 requires that if any part of an assessment is due to civil fraud, a penalty of 50 percent of the assessment is to be added to the tax. This penalty is imposed in lieu of the penalties available under N.J.S.A. 54:49-4 (which imposes late filing and late payment penalties) and N.J.S.A. 54:49-9 (which imposes a penalty for failing to pay an arbitrary assessment imposed pursuant to N.J.S.A. 54:49-5 or 54:49-7 within 15 days).

The civil fraud penalty is set forth at N.J.S.A. 54:49-9.1 and is separate from criminal fraud as provided for under Title 2C of the New Jersey Statutes. The proposed new rule is codified at N.J.A.C. 18:2-2.9, under General Policies and Procedures, in order to inform taxpayers that the civil fraud penalty is applicable to all State taxes.

Economic Impact

The proposed new rule will help increase compliance with tax laws by alerting taxpayers to the possible imposition of the penalty provided in N.J.S.A. 54:49-9.1. N.J.S.A. 54:49-9.1 imposes a penalty equal to 50 percent of the assessment. This amount shall be in lieu of any other additions to the tax imposed by N.J.S.A. 54:49-4 and 54:49-9.

N.J.S.A. 54:49-4 imposes a late filing penalty of “\$100 for each month or fraction thereof that such return is delinquent, plus a penalty of 5% per month or fraction thereof of the underpayment not to exceed 25% of such underpayment, except that if no return has been filed within 30 days of the date on which the first notice of delinquency in filing the return was sent to the taxpayer, the penalty shall accrue at 5% per month or fraction thereof of the total tax liability not to exceed 25% of such tax liability. Unless any part of any underpayment of tax required to be shown on a return or report is shown to be due to reasonable cause, there shall be added to the tax an amount equal to 5% of the underpayment.” N.J.S.A. 54:49-9 imposes a penalty equal to 5 percent of the tax if an arbitrary assessment imposed under N.J.S.A. 54:49-5 or 54:49-7 is not paid within 15 days.

The 50 percent civil fraud penalty imposed under N.J.S.A. 54:49-9.1 is greater than the late filing and late payment penalties imposed under N.J.S.A. 54:49-4 or 54:49-9, which cannot exceed 30 percent of the assessment.

Federal Standards Statement

A Federal standards analysis is not required because the subject of this rulemaking is governed by State law, specifically N.J.S.A. 54:49-9.1, which is independent of and not governed by the Federal tax fraud provision found at 26 U.S.C. § 6663.

Jobs Impact Statement

The proposed new rule should not result in the creation or loss of jobs in the State. The proposed new rule addresses an issue of tax administration related to the Division of Taxation.

Agriculture Industry Impact

The proposed new rule will have no impact on the agriculture industry in this State because the rule involves tax administration.

Regulatory Flexibility Statement

The proposed new rule describes the imposition of a statutory penalty of 50 percent of the assessment when the Division of Taxation determines that any part of an assessment is due to civil fraud committed by a taxpayer. The rule is potentially applicable to any taxpayer the Division of Taxation determines has committed civil fraud in failing to comply with applicable State tax statutes, including a small business, as that term is defined in the Regulatory Flexibility Act, N.J.S.A. 54:14B-16 et seq.

The statutory provision on which the rule is based, N.J.S.A. 54:49-9.1, is found in the State Uniform Tax Procedure Law and applies to all taxpayers. Therefore, there is no basis to provide differentiation based on business size in this new rule.

The proposed rule does not impose any new reporting, recordkeeping, or compliance requirements. There is no added cost and the use of professional services is not required. However, large and small businesses may wish to obtain the services of legal or accounting professionals to review the proposed new rule, since the rule concerns an aspect of State tax administration that is applicable to all taxpayers.

Housing Affordability Impact Analysis

The proposed new rule will not result in a change in the average costs associated with housing. The proposed new rule will have no impact on any aspect of housing because it concerns civil fraud in the context of taxes.

Smart Growth Development Impact Analysis

The proposed new rule will not result in a change in the housing production within Planning Areas 1 or 2, within designated centers, under the State Development and Redevelopment Plan. The basis for this finding is that the proposed new rule has nothing to do with housing production, either within Planning Area 1 or 2, within designated centers, or anywhere in the State of New Jersey. The proposed new rule applies to civil fraud in the context of State taxes.

Full text of the proposed new rule follows:

18:2-2.9 Part of assessment due to civil fraud; addition to tax

(a) If the Division determines that any part of an assessment is due to civil fraud, the Division shall add a penalty to the tax in an amount equal to 50 percent of the assessment, pursuant to N.J.S.A. 54:49-9.1. This amount shall be in lieu of the late filing and/or late payment penalties imposed by N.J.S.A. 54:49-4 and the penalty imposed under N.J.S.A. 54:49-9 for failure to timely pay an estimated or arbitrary assessment imposed pursuant to N.J.S.A. 54:49-5 or 54:49-7.

1. For the purposes of (a) above, the 50 percent penalty is assessed against the entire tax assessment, including any portion of the tax assessment that is not due to civil fraud.

2. For example, the Division of Taxation makes an assessment of \$50,000 for sales tax, \$7,500 for corporation business tax, and \$2,500 for gross income tax (employer) withholding, plus applicable penalties and interest. The Division finds that a portion of the sales tax assessment was due to civil fraud. The portion of the entire assessment that relates to tax only is \$60,000; thus, the Division adds a 50 percent civil fraud penalty to the entire amount of tax assessed, or \$30,000, plus applicable interest.

(b) In general, civil fraud is characterized by a taxpayer's intent to evade or avoid the payment of taxes known to be owing by conduct intended to conceal, mislead, or otherwise prevent the administration and collection of the taxes imposed by the laws of this State.

(c) If a taxpayer files a false or fraudulent tax return with the intent to evade tax or fails to file a tax return, the Division of Taxation may make an assessment of tax at any time, pursuant to N.J.S.A. 54:49-6.b.

(d) The Division of Taxation may impose the penalty provided for in (a) above where there is clear and convincing evidence of the taxpayer's intent to commit fraud as required by (b) above. Intent is distinguished from inadvertence, reliance on incorrect technical advice, honest difference of opinion, negligence, or carelessness.

(e) When making a determination as to whether any part of an assessment is due to civil fraud, the Division of Taxation may consider indicia of fraud that may include, but are not limited to:

1. A pattern of substantially understating income (or sales, in the case of sales tax);
2. A history of failing to maintain adequate books and records;

- 3. Implausible or inconsistent explanations of behavior;
- 4. Concealing or transferring assets;
- 5. Repeated or continuing failure to cooperate meaningfully and fully with the Division of Taxation;
- 6. Collecting and/or withholding any trust fund tax and failing to remit the tax funds collected to the Division of Taxation;
- 7. A pattern of failing to file tax returns, remit taxes, or report income or sales;
- 8. Destruction of records;
- 9. Making misrepresentations of material facts;
- 10. Accounting irregularities (two sets of books, false entries on documents);
- 11. Taking fictitious or improper deductions (for example, overstatement of deductions, personal items deducted as business expenses);

- 12. Engaging in illegal activities; and/or
- 13. Maintaining or presenting false or altered documents.

(f) Depending on the facts and circumstances of a matter, a finding of the existence of one or more indicia of civil fraud listed in (e) above, or other indicia not listed therein, may be sufficient to establish that any part of an assessment is due to civil fraud for the purposes of assessing the penalty provided for in (a) above.

(g) Whenever the Division of Taxation assesses the penalty provided for in (a) above, the Division shall advise the taxpayer in writing as to the reasons for the finding of civil fraud.

(h) When the Division of Taxation determines that any part of an assessment is due to civil fraud, such determination is a finding of the Director and the provisions of N.J.S.A. 54:49-18 will apply.
