

## NOTICE OF RULE DEVELOPMENT WORKSHOP

DEPARTMENT OF REVENUE

COMPROMISE AND SETTLEMENT

RULE NO.: RULE TITLE:

12-13.0074 Willful Negligence and Willful Neglect

12-13.0076 Calculation of Penalty Subject to Compromise for Reasonable Cause

**PURPOSE AND EFFECT:** The purpose of the creation of Rule 12-13.0074, F.A.C. (Willful Negligence and Willful Neglect), is to incorporate the provisions of the Expert System for determining Willful Negligence or Willful Neglect. This system is currently under development by the Department for purposes of determining whether a taxpayer's noncompliance was not due to willful negligence or willful neglect based on the facts and circumstances of the specific case. The effect of the proposed amendments, when adopted, will be that the provisions of the Expert System for Determining Willful Negligence or Willful Neglect will be incorporated into the guidelines for determining the amount of compromise of penalty established in this administrative rule.

The purpose of the creation of Rule 12-13.0076, F.A.C. (Calculation of Penalty Subject to Compromise for Reasonable Cause), is to incorporate the provisions of the Expert System for Determining Reasonable Cause for Penalty Compromise. This system is currently under development by the Department for purposes of providing guidelines for determining the amount of compromise of penalty. The effect of the proposed amendments, when adopted, will be that the provisions of the Expert System for Determining Reasonable Cause for Penalty Compromise will be incorporated into the guidelines for determining the amount of compromise of penalty established in this administrative rule.

**SUBJECT AREA TO BE ADDRESSED:** The subject area to be addressed is the development of proposed Rules 12-13.0074 and 12-13.0076, F.A.C., for purposes of including the provisions of the Expert System for Determining Reasonable Cause for Penalty Compromise and the Expert System for Determining Willful Negligence or Willful Neglect currently under development by the Department.

**SPECIFIC AUTHORITY:** 213.06(1), 213.21(5) FS.

**LAW IMPLEMENTED:** 213.21(3) FS.

**A RULE DEVELOPMENT WORKSHOP WILL BE HELD AT THE DATE, TIME AND PLACE SHOWN BELOW:**

**DATE AND TIME:** May 23, 2007, 9:00 a.m.

**PLACE:** Room 118, Carlton Building, 501 S. Calhoun Street, Tallahassee, Florida.

**NOTICE UNDER THE AMERICANS WITH DISABILITIES ACT:** Any person requiring special accommodations to participate in any proceeding before the Technical Assistance and Dispute Resolution Office is asked to advise the Department at least 48 hours before such proceeding by contacting Larry Green at (850)922-4830. Persons with hearing or speech impairments may contact the Department using the Florida Relay Service, which can be reached at (800)955-8770 (Voice) and (800)955-8771 (TDD).

**THE PERSON TO BE CONTACTED REGARDING THE PROPOSED RULE**

**DEVELOPMENT AND A COPY OF THE PRELIMINARY DRAFT IS:** Thomas K. Butscher, Senior Counsel, Technical Assistance and Dispute Resolution, P.O. Box 7443, Tallahassee, Florida 32314-7443, telephone (850) 922-4710.

**THE PRELIMINARY TEXT OF THE PROPOSED RULE DEVELOPMENT IS:**

STATE OF FLORIDA  
DEPARTMENT OF REVENUE  
CHAPTER 12-13, FLORIDA ADMINISTRATIVE CODE  
COMPROMISE AND SETTLEMENT  
CREATING RULES 12-13.0074 AND 12-13.0076

12-13.0074 Willful Neglect and Willful Negligence.

(1) Scope and Definitions.

(a) Section 213.21, F.S., prohibits the Department from compromising a taxpayer's liability for penalty when the taxpayer's noncompliance is due to willful neglect or willful negligence. In order to ensure consistency in the determination of whether a taxpayer's noncompliance is due to willful neglect or willful negligence and whether the Department may exercise the authority to compromise penalty contained in Section 213.21, F.S., the Department will use the provisions of this rule to determine whether a taxpayer's noncompliance is due to willful neglect or willful negligence.

(b) For purposes of this rule, "willful neglect or willful negligence" means that the taxpayer was aware of the taxpayer's duties and obligations under the revenue laws of this state and possessed the ability to comply, but did not.

(2) Determination of Willful Neglect or Willful Negligence. The Department will determine whether a taxpayer's noncompliance is due to willful neglect or willful negligence by answering the questions listed in subsection (3).

(a) If the answer to question 1 in the table provided in subsection (3) is yes, the Department will compromise all penalty in excess of 25 percent, and the Department will use the

provisions of Rule 12-13.0076, F.A.C., to determine whether to compromise any of the remaining 25 percent of penalty. If the answer to question 1 in the table provided in subsection (3) is no, the Department will proceed to question 2 in the table provided in subsection (3).

(b) If the answer to any of questions 2a. through f. in the table provided in subsection (3) is yes, the Department will not compromise any penalty, and the provisions of Rule 12-13.0076, F.A.C., do not apply. If the answers to questions 2.a. through f. in the table provided in subsection (3) are no, the Department will compromise all penalty in excess of 25 percent, and the Department will use the provisions of Rule 12-13.0076, F.A.C., to determine whether to compromise any of the remaining 25 percent of penalty.

(3) Willful Neglect/Willful Negligence Table.

<b><u>Step</u></b>	<b><u>Decision Question</u></b>	<b><u>Yes</u></b>	<b><u>No</u></b>
<u>1.</u>	<u>Did the death, illness, or incapacity of the taxpayer, a member of the taxpayer’s family, a person solely responsible for maintaining information necessary to comply, or of a person with sole authority to prepare required returns or reports, directly prevent compliance, or did circumstances beyond the taxpayer’s control, such as acts of war, natural disaster, or accidental destruction by fire or other casualty directly prevent compliance?</u>	<u>Compromise penalty in excess of 25 percent. Go to Rule 12-13.0076, F.A.C.</u>	<u>Proceed to question (2).</u>
<u>2.</u>	<u>Is there evidence to establish by clear proof that the taxpayer had knowledge of the duties and requirements of the law and the ability to comply, but failed to:</u>		
	<u>2.a. Register one or more locations after notification in writing by the Department of the requirement to register each business location?</u>		
	<u>2.b. Collect tax at least two or more times after notification in writing by the Department of the requirement to do so?</u>		
	<u>2.c. File a tax return two or more times after notification in writing by the Department of the requirement to do so?</u>		

	<u>2.d.</u>	<u>Remit tax two or more times after notification in writing by the Department of the requirement to do so?</u>		
	<u>2.e.</u>	<u>Pay tax at least two or more times after notification in writing by the Department of the requirement to do so?</u>		
	<u>2.f.</u>	<u>Collect tax at the proper tax rate two or more times after notification in writing by the Department of the requirement to collect tax at the proper rate?</u>		

Specific Authority 213.06(1), 213.21(5) FS. Law Implemented 213.21(3) FS. History-

New \_\_\_\_\_.

12-13.0076 Calculation of Penalty Subject to Compromise for Reasonable Cause.

(1) Scope and Definitions.

(a) Section 213.21, F.S., authorizes the Department to compromise a taxpayer's liability for penalty when the taxpayer's noncompliance is due to reasonable cause and not willful negligence, willful neglect, or fraud. In order to ensure consistency in the exercise of the authority to compromise penalty contained in Section 213.21, F.S., the Department will use the provisions of this rule to calculate the amount of penalty that will be compromised under its discretionary authority to compromise penalty on the grounds of reasonable cause pursuant to Section 213.21, F.S. The Department will apply the provisions of this rule in all instances, regardless of whether the taxpayer requests a compromise of penalty.

(b) The provisions of this rule do not apply to an issue when:

1. the taxpayer's noncompliance is due to willful negligence, willful neglect, or fraud;

2. the assessment of penalty is mandatory under Florida law and may not be waived by the Department;

3. the compromise of penalty is mandatory under Florida law (for example, under ss. 212.05(1)(a)2., 212.07(9), 212.085, 212.096(11), 212.097(14), 212.098(10), 212.11(5), 212.12(14), 213.21(9) and (10), F.S., the Department has no discretion regarding whether penalty should be compromised); or

4. tax has been compromised upon grounds of doubt as to liability (see Rule 12-13.005, F.A.C.).

(c) The provisions of this rule are not to be construed to prohibit the Department from exercising its delegated authority to compromise tax, penalty, and interest to prevent an unreasonable result due to unique specific facts and circumstances that would affect the relative value of the factors under consideration.

(d) For the purposes of this rule, the term “issue” means the application of the same statutory provisions, rule provisions, and other applicable authority to substantially identical facts and circumstances, where there has been no change in the Department’s position as to the correct tax treatment subsequent to a prior assessment.

(2) Determination of the Amount of Penalty Compromise.

(a) If the Department determines that a taxpayer’s noncompliance is not due to willful negligence, willful neglect, or fraud, the Department shall compromise all penalty in excess of 25 percent of the taxpayer’s tax liability pursuant to Rule 12-13.0074, F.A.C. The Department shall determine the amount of compromise authority to exercise with regard to the remaining 25 percent of penalty by using the Penalty Scoring Table provided in subsection (3). The Penalty Scoring Table and the provisions of this rule will be applied to each issue to determine the

percentage of the penalty related to that issue that will be compromised. If all issues under consideration involve the same responses to the Penalty Scoring Table, the Penalty Scoring Table and the other provisions of this rule will only be applied once, and the resulting penalty compromise percentage will be applied for all issues.

(b) The penalty compromise percentage is calculated based upon the response to each question listed within the Penalty Scoring Table. Point values are assigned to the questions based upon whether the question is answered “yes” or “no.”

(c) Questions 3(a) through 3(i) of the Penalty Scoring Table each list various facts and circumstances, which will be considered in answering those questions. If one or more of the facts and circumstances listed under each question are determined by the Department to apply to an issue, an affirmative response will be entered for that question and a corresponding point value will be assigned. When the facts and circumstances listed do not apply to an issue, a negative response will be entered and the corresponding point value will be assigned.

(d) When the Department determines that facts and circumstances exist that require an affirmative answer to any Question 3(a) through 3(i) but the specific fact or circumstance is not listed, the Department will identify that fact or circumstance and provide an affirmative answer to the relevant question.

(e) The percentage to be applied to the penalty amount under consideration is controlled by the following schedule:

1. If the sum of the point values assigned is not greater than 7 points, the Department will compromise all penalty that is subject to compromise on the grounds of reasonable cause.

2. If the sum of the point values assigned is greater than 7 points but not greater than 14 points, the Department will compromise all penalty in excess of 5 percent.

3. If the sum of the point values assigned is greater than 14 points but not greater than 22 points, the Department will compromise all penalty in excess of 10 percent.

4. If the sum of the point values assigned is greater than 22 points but not greater than 29 points, the Department will compromise all penalty in excess of 15 percent.

5. If the sum of the point values assigned is greater than 29 points but not greater than 36 points, the Department will compromise all penalty in excess of 20 percent.

6. If the sum of the point values assigned is greater than 36 points, the Department will only compromise penalty in excess of 25 percent pursuant to paragraph (2)(a) of this rule.

(f) If the application of this rule results in a full compromise of all penalty subject to compromise on the grounds of reasonable cause, the Department will not provide the taxpayer with the results of the Penalty Scoring Table unless the results are requested by the taxpayer.

However, the Department shall provide the results of the Penalty Scoring Table when the application of this rule results in less than a full compromise of penalty subject to compromise on the grounds of reasonable cause.

(3) Penalty Scoring Table.

<u>Step</u>	<u>Decision Question</u>	<u>YES/NO</u>	<u>Pts. For YES</u>	<u>Pts. For NO</u>
<u>1.</u>	<u>Has the Department previously assessed this issue against the taxpayer in an assessment for which the taxpayer's appeal rights have expired or has this there been a final determination of this issue?</u>		<u>20</u>	<u>0</u>
	<u>1.a</u>	<u>Has the Department issued at least two such assessments?</u>	<u>20</u>	<u>0</u>
	<u>1.b.</u>	<u>Did the taxpayer take action that materially corrected this issue in a reasonable time after the taxpayer's appeal rights expired or the issue was ultimately adjudicated against the taxpayer?</u>	<u>-10</u>	<u>0</u>
<u>2.</u>	<u>For this issue, did the taxpayer collect but</u>		<u>30</u>	<u>0</u>

	<u>Step</u>	<u>Decision Question</u>	<u>YES/NO</u>	<u>Pts. For YES</u>	<u>Pts. For NO</u>
		<u>fail to send tax to the Department?</u>			
	<u>3.</u>	<u>Do one or more of the following apply to this issue in this audit?</u>			
	<u>3.a.</u>	<u>Did the taxpayer reasonably rely on and follow the express terms of a written advice issued by the Department after the Department was apprised of all relevant facts, and is it now possible to verify such advice? For the purposes of this rule, the term “written advice” shall not include a “written determination” as provided in Rule 12-13.005, F.A.C. In addition, solely for the purposes of this rule, the term “written advice” shall include a Letter of Technical Advice.</u>		<u>-5</u>	<u>0</u>
	<u>a.1.</u>	<u>Yes. The taxpayer was issued written advice unassociated with an audit.</u>			
	<u>a.2.</u>	<u>Yes. The taxpayer was issued advice on this issue during conduct of a prior audit. Explain:</u>			
	<u>a.3.</u>	<u>Yes. Other. Explain:</u>			
	<u>a.4.</u>	<u>No.</u>			
	<u>3.b.</u>	<u>Did the assessment result from the taxpayer’s limited knowledge of business, limited education, or limited experience in Florida tax matters?</u>		<u>-2.5</u>	<u>0</u>
	<u>b.1.</u>	<u>Yes. The taxpayer has a limited knowledge of business.</u>			
	<u>b.2.</u>	<u>Yes. The taxpayer has limited education.</u>			
	<u>b.3.</u>	<u>Yes. The taxpayer has limited experience in Florida tax matters.</u>			
	<u>b.4.</u>	<u>Yes. Other. Explain:</u>			
	<u>b.5.</u>	<u>No.</u>			
	<u>3.c.</u>	<u>Did the taxpayer timely meet filing requirements?</u>		<u>-2.5</u>	<u>0</u>
	<u>c.1.</u>	<u>Yes. The taxpayer timely filed complete returns.</u>			
	<u>c.2.</u>	<u>Yes. Other. Explain:</u>			
	<u>c.3.</u>	<u>No.</u>			
	<u>3.d.</u>	<u>Were there any changes in law or the Department’s administration of law that directly affected compliance for this issue?</u>		<u>-5</u>	<u>0</u>
	<u>d.1.</u>	<u>Yes. The applicable law changed. Explain:</u>			

	<u>Step</u>	<u>Decision Question</u>	<u>YES/NO</u>	<u>Pts.</u> <u>For</u> <u>YES</u>	<u>Pts.</u> <u>For</u> <u>NO</u>
		d.2.	<u>Yes. The Department's administration of the applicable law changed. Explain:</u>		
		d.3.	<u>Yes. Other. Explain:</u>		
		d.4.	<u>No.</u>		
		3.e.	<u>Are the tax issues, their application, or the taxpayer's operational or financial situation complex?</u>	<u>-2.5</u>	<u>0</u>
		e.1.	<u>Yes. The situation is complex. Explain:</u>		
		e.2.	<u>Yes. There is contradictory written information provided by the attorney general's office, the Department, or a Florida court. Explain:</u>		
		e.3.	<u>Yes. Other. Explain:</u>		
		e.4.	<u>No.</u>		
		3.f.	<u>Has the taxpayer instituted remedies to correct this issue?</u>	<u>-5</u>	<u>0</u>
		f.1.	<u>Yes, and the taxpayer provided supporting documentation showing that the error has been corrected.</u>		
		f.2.	<u>Yes. Other. Explain:</u>		
		f.3.	<u>No.</u>		
		3.g.	<u>Did the taxpayer reasonably rely on written advice of a person competent in Florida tax matters, and did the taxpayer solicit the advice timely and with full disclosure of all relevant facts?</u>	<u>-2.5</u>	<u>0</u>
		g.1.	<u>Yes. The taxpayer relied upon verifiable advice from a Certified Public Accountant, attorney, or trade association.</u>		
		g.2.	<u>Yes. The taxpayer relied upon verifiable advice from an outside consultant or outside bookkeeping service.</u>		
		g.3.	<u>Yes. Other. Explain:</u>		
		g.4.	<u>No.</u>		
		3.h.	<u>Is the additional tax due less than 5% of the total tax reported/remitted during the audit period?</u>	<u>-2.5</u>	<u>0</u>
		3.i.	<u>Did any extenuating or uncontrollable circumstances exist that prevented the taxpayer from complying?</u>	<u>-10</u>	<u>0</u>

	<u>Step</u>	<u>Decision Question</u>	<u>YES/NO</u>	<u>Pts.</u> <u>For</u> <u>YES</u>	<u>Pts.</u> <u>For</u> <u>NO</u>
	i.1.	<u>Yes. There was a disaster or catastrophic events beyond the control of the taxpayer.</u>			
	i.2.	<u>Yes. There was a death, illness or incapacity of the taxpayer, the taxpayer's immediate family, or a key employee which had an effect on compliance.</u>			
	i.3.	<u>Yes. There were other facts that affected compliance. Explain:</u>			
	i.4.	<u>No.</u>			

Specific Authority 213.06(1), 213.21(5) FS. Law Implemented 213.21(3) FS. History-New \_\_\_\_\_.