

Tax Penalties & Penalty Abatement

How to Draft a Winning Abatement Request

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TRN
TAX REP NETWORK

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- ▶ Focus is civil and criminal taxpayer representation before the Department of Justice Tax Division, Internal Revenue Service and state Departments of Revenue Services.
- ▶ Eric is a contributing columnist for Bloomberg Tax and has served as a columnist for CCH's Journal of Practice & Procedure.
- ▶ Attorney Green is the past Chair of the Executive Committee of the Connecticut Bar Association's Tax Section.
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- Eric is the host of the weekly Tax Rep Network Podcast
- Eric is the founder of Tax Rep Network, an online community designed to help tax professionals build their IRS Representation Practice
- He is the author of the Accountant's Guides in IRS Representation
- Partnered with UConn and creator of the IRS Representation Certificate Program
- Creator of the Tax Rep App

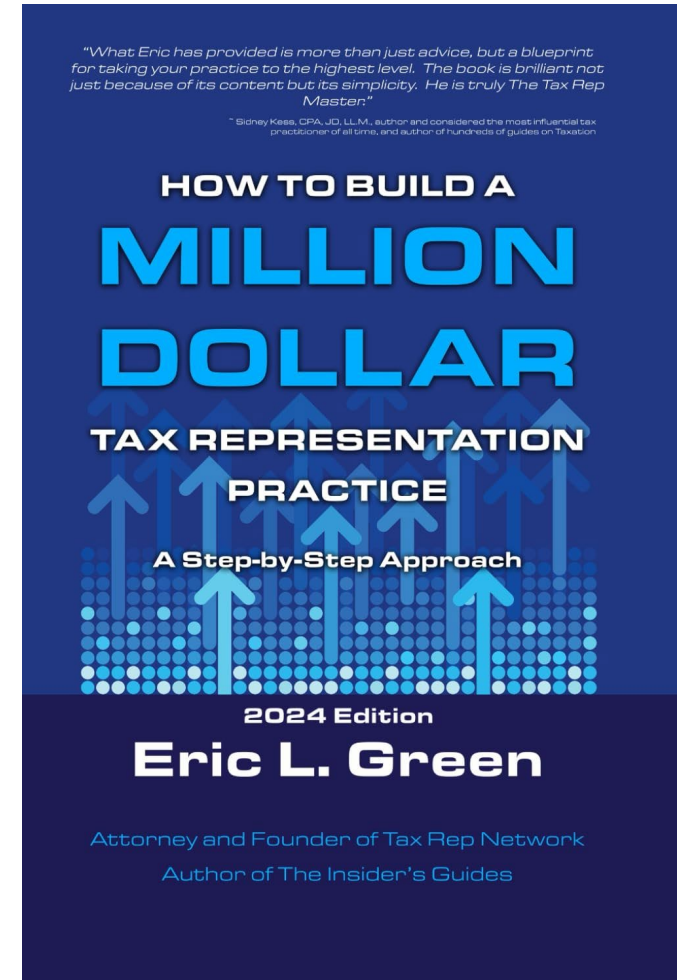
Taxes and Divorce: A Match Not Made in Heaven

- ▶ Special Workshop
- ▶ Thursday 9/10
- ▶ 1:00 pm EST – 5:00 pm EST
- ▶ 4 ce/cpe credits
- ▶ <https://taxrepllc.com/20240910-divorce/>



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- ▶ IRS enforcement tidal wave now rolling in
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11th Annual New England Rep Conference

- ▶ <https://irsrepconference.com>
- ▶ Mohegan Sun
- ▶ 11/7 and 11/8
- ▶ Early bird \$189!



4th Annual Tax Rep Summit

- ▶ 12/10/24 – 12/13/24
- ▶ Drury Plaza Hotel – Disney Springs
- ▶ Three full-days of programming
- ▶ Includes breakfast, cocktail reception and wifi
- ▶ <https://taxrepllc.com/2024-summit>



Agenda

1. Background and Issue with Penalties
2. Abatement Strategies & Drafting the request:
 - a. Identifying First-Time Abatement Opportunity
 - b. Reasonable Cause for a Bad Prior Tax Pro
 - c. Reasonable Cause for Medical Issues
 - d. Reasonable Cause for a Missed Information Return Form 5500
 - e. Reasonable Cause for Missed W-2/W-3 Form

Penalty Policy Considerations

- Encourage voluntary compliance
- Conserve IRS resources
- Provide clear guidance to taxpayers and practitioners
- Ensure consistent and fair treatment of the issues
- Ensure noncompliant behavior is penalized

First Time Abatement

- IRS allows a first time penalty abatement for failure to file and failure to pay penalty
- See IRM 20.1.1.3.3.2.1 (11-21-2017)
- IRS provides administrative relief from the following penalties if the qualifying criteria contained in this subsection are met:
 - Failure to file (FTF) penalty under IRC 6651(a)(1), IRC 6698(a)(1), or IRC 6699(a)(1),
 - Failure to pay (FTP) penalty under IRC 6651(a)(2) and/or IRC 6651(a)(3), and
 - Failure to deposit (FTD) penalty under IRC 6656.

First Time Abatement

- This administrative waiver, implemented in 2001, is referred to as First Time Abate (FTA) and is available for penalty relief the first time a taxpayer is subject to one or more of the referenced penalties for a single return. When FTA criteria have otherwise been met, do not provide penalty relief under the FTA waiver unless the following are true:
 - The taxpayer has filed, or filed a valid extension for, all required returns currently due, AND
 - The taxpayer has paid, or arranged to pay, any **tax** currently due.
- Does not apply to anything prior to 2001!

Critical Considerations

- ▶ FTA applies only to taxpayers not penalized for the three years prior
- ▶ Pull transcripts to confirm this!
- ▶ This case – “Has never owed anything”
- ▶ So far looks good....

IRS ACCOUNT STATUS DASHBOARD

Year	Return Filed	Filing Status	Extension Date	Lien Active	Collections Active	Examination Active	Assessed Balance	Accrued Balance	Transcript Date
2020	No	S					\$0.00	\$0.00	7/1/2020
2019	No	S					\$0.00	\$0.00	7/1/2020
2018	Original	MFJ	10/15/2019		4/22/2020	4/27/2020#	\$269,636.55	\$278,353.58	7/1/2020
2017	Original	MFJ	10/15/2018				\$0.00	\$0.00	7/1/2020
2016	Amended	MFJ	10/15/2017			Closed	\$0.00	\$0.00	7/1/2020
2015	Amended	MFJ	10/15/2016			Closed	\$0.00	\$0.00	7/1/2020
2014	Amended	MFJ	10/15/2015			Closed	\$0.00	\$0.00	7/1/2020
2013	Original	MFJ	10/15/2014				\$0.00	\$0.00	7/1/2020
2012	Original	MFJ	10/15/2013			Closed#	\$0.00	(\$0.73)	7/1/2020
2011	Original	MFJ	10/15/2012				\$0.00	\$0.00	7/1/2020
2010	Original	MFJ	10/15/2011			Closed	\$0.00	\$0.00	7/1/2020
2009	Original	MFJ	10/15/2010				\$0.00	\$0.00	7/1/2020
2008	Original	MFJ	10/15/2009	Removed			\$0.00	\$0.00	7/1/2020
2007	Original	MFJ	10/15/2008				\$0.00	\$0.00	7/1/2020
2006	Original	MFJ	10/15/2007				\$0.00	\$0.00	7/1/2020
2005	Original	MFJ	10/15/2006			ASED exp	\$0.00	\$0.00	7/1/2020
2004	Original	MFJ	10/15/2005				\$0.00	\$0.00	7/1/2020
2003	No	S					\$0.00	\$0.00	7/1/2020
2002	Original	MFJ	10/15/2003				\$0.00	\$0.00	7/1/2020
2001	Original	MFJ	10/15/2002				\$0.00	\$0.00	7/1/2020

Ooops.....

PENALTY AND INTEREST DASHBOARD

Year	Return Filed	FTA	PA	Penalties Failure to File	Penalties Failure to Pay	Accuracy Related Penalties	Accrued Penalty	Total Penalties*	Accrued Interest	Assessed Interest	Total Interest
2020	No						\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
2019	No						\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
2018	Original	N			\$147,801.15		\$0.00	\$147,801.15	\$8,717.03	\$121,835.40	\$130,552.43
2017	Original	N			\$63,295.94		\$0.00	\$63,295.94	\$0.00	\$48,928.11	\$48,928.11
2016	Amended	N	Y		\$93,701.63		\$0.00	\$93,701.63	\$0.00	\$52,011.86	\$52,011.86
2015	Amended	N	Y		\$18,314.56		\$0.00	\$18,314.56	\$0.00	\$74.80	\$74.80
2014	Amended	N	Y		\$62,065.80		\$0.00	\$62,065.80	\$0.00	(\$715.32)	(\$715.32)
2013	Original	N			\$21,256.24		\$0.00	\$21,256.24	\$0.00	\$9,829.42	\$9,829.42
2012	Original	N			\$21,156.48		\$0.00	\$21,156.48	(\$0.73)	\$9,694.70	\$9,693.97
2011	Original	N			\$22,879.56		\$0.00	\$22,879.56	\$0.00	\$10,798.64	\$10,798.64
2010	Original	N			\$13,672.62		\$0.00	\$13,672.62	\$0.00	\$7,838.33	\$7,838.33
2009	Original	N			\$9,100.33		\$0.00	\$9,100.33	\$0.00	\$5,867.29	\$5,867.29
2008	Original	N			\$49,332.13		\$0.00	\$49,332.13	\$0.00	\$28,906.92	\$28,906.92
2007	Original	N			\$58,617.62		\$0.00	\$58,617.62	\$0.00	\$40,252.35	\$40,252.35
2006	Original	N			\$14,215.04		\$0.00	\$14,215.04	\$0.00	\$13,972.08	\$13,972.08
2005	Original	N			\$1,928.49		\$0.00	\$1,928.49	\$0.00	\$2,514.92	\$2,514.92
2004	Original	N			\$6,166.78		\$0.00	\$6,166.78	\$0.00	\$6,290.80	\$6,290.80
2003	No						\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
2002	Original	N			\$15,795.96		\$0.00	\$15,795.96	\$0.00	\$11,335.74	\$11,335.74
2001	Original	?			\$15,528.70		\$0.00	\$15,528.70	\$0.00	\$15,165.28	\$15,165.28

Strategies for Exam

- Build credibility with the examiner through cooperation, timeliness, and transparency
- Assume penalties will be imposed and build defense throughout the exam
- Seek to discuss the examiner's position and negotiate before it goes to 30-day letter



Strategies for Appeals

Appeals will not
simply concede

Use it as a bargaining
chip

Look at timing, taxpayer
history, specific
circumstances
Make sure the story fits!

Reasonable Cause

- ▶ Wont just concede because of the policy considerations
- ▶ Argue for conceding but request the abatement
- ▶ Make sure to point out factors that support your argument:
 - a. Client actually incurred the expense
 - b. Client hired a competent-appearing professional
 - c. Client provided all info and was attempting to comply
 - d. Client has a good history

Reasonable Cause - *Appeals*

- Does T/P explanation relate to the penalty?
- Do dates and times coincide?
- Could the non-compliance have been anticipated/prevented?
- Was it an honest mistake?
- Has T/P presented sufficient detail to determine if ordinary business care/prudence was used?

Reasonable Cause - *Appeals*



- Is the T/P a financial professional?
- What is the T/P's history with compliance?
- Has the T/P had this issue before?
- Have there been prior abatements?

Practice Tips

- ▶ Pull account transcripts to review history
- ▶ Charge the consult fee to review
- ▶ Get the documentation in advance and make sure it supports/lines up with the story

Reasonable Cause

Use Form 843

Request abatement

Document your case

Appeal (30 days)

Form **843**

(Rev. August 2011)
Department of the Treasury
Internal Revenue Service

Claim for Refund and Request for Abatement

OMB No. 1545-0024

▶ See separate instructions.

Use Form 843 if your claim or request involves:

- (a) a refund of one of the taxes (other than income taxes or an employer's claim for FICA tax, RRTA tax, or income tax withholding) or a fee, shown on line 3,
- (b) an abatement of FUTA tax or certain excise taxes, or
- (c) a refund or abatement of interest, penalties, or additions to tax for one of the reasons shown on line 5a.

Do not use Form 843 if your claim or request involves:

- (a) an overpayment of income taxes or an employer's claim for FICA tax, RRTA tax, or income tax withholding (use the appropriate amended tax return),
- (b) a refund of excise taxes based on the nontaxable use or sale of fuels, or
- (c) an overpayment of excise taxes reported on Form(s) 11-C, 720, 730, or 2290.

Name(s)	Your social security number
Address (number, street, and room or suite no.)	Spouse's social security number
City or town, state, and ZIP code	Employer identification number (EIN)
Name and address shown on return if different from above	Daytime telephone number
1 Period. Prepare a separate Form 843 for each tax period or fee year. From _____ to _____	2 Amount to be refunded or abated: \$ _____
3 Type of tax or fee. Indicate the type of tax or fee to be refunded or abated or to which the interest, penalty, or addition to tax is related. <input type="checkbox"/> Employment <input type="checkbox"/> Estate <input type="checkbox"/> Gift <input type="checkbox"/> Excise <input type="checkbox"/> Income <input type="checkbox"/> Fee	
4 Type of penalty. If the claim or request involves a penalty, enter the Internal Revenue Code section on which the penalty is based (see instructions). IRC section: _____	
5a Interest, penalties, and additions to tax. Check the box that indicates your reason for the request for refund or abatement. (If none apply, go to line 6.) <input type="checkbox"/> Interest was assessed as a result of IRS errors or delays. <input type="checkbox"/> A penalty or addition to tax was the result of erroneous written advice from the IRS. <input type="checkbox"/> Reasonable cause or other reason allowed under the law (other than erroneous written advice) can be shown for not assessing a penalty or addition to tax.	
b Date(s) of payment(s) ▶ _____	
6 Original return. Indicate the type of fee or return, if any, filed to which the tax, interest, penalty, or addition to tax relates. <input type="checkbox"/> 706 <input type="checkbox"/> 709 <input type="checkbox"/> 940 <input type="checkbox"/> 941 <input type="checkbox"/> 943 <input type="checkbox"/> 945 <input type="checkbox"/> 990-PF <input type="checkbox"/> 1040 <input type="checkbox"/> 1120 <input type="checkbox"/> 4720 <input type="checkbox"/> Other (specify) ▶ _____	
7 Explanation. Explain why you believe this claim or request should be allowed and show the computation of the amount shown on line 2. If you need more space, attach additional sheets.	

Signature. If you are filing Form 843 to request a refund or abatement relating to a joint return, both you and your spouse must sign the claim.

Reasonable Cause - *Failure to File/Pay*

- Must be due to reasonable cause and not willful neglect
- Multiple years are bad
- Medical problems and death
- Insufficient funds are not a defense unless can show hardship

Example

- Taxpayer files 8 years of late returns ('03-'10)
- Daughter had brain cancer in '05 at age 16, has surgery and recovers in '06
- Older brother and daughter both out of the house now and graduated from college
- Owes \$145,000 for the unfiled years, plus penalties and interest
- Wants to seek penalty relief, which should be easy like they say on late night TV commercials

Example

- She sends us lots of medical documentation
- Consider
 - Could the non-compliance have been avoided
 - T/P's History
 - Does the story fit
 - What about the medical documentation?

Now Consider This

- Husband is self-employed financial professional
- Two small children
- Wife is bi-polar and becomes suicidal after second child is born in '04
- Ceases filing and paying his taxes for '04-'05
- Owes \$62,000 of tax plus penalties and interest
- Sends medical documentation for his wife, who is now stable

What is Different Here?

- Brief period of time
- Extreme family situation
- Medical documentation to support the story
- The story fits – non-compliance started immediately after medical crisis, ceased when under control

Drafting the request

- ▶ Make the request – we are requesting penalty abatement for the following period(s)
- ▶ Factual background – how the client got here
- ▶ History – if a good history explain that
- ▶ Review the documentation – tab exhibits

Reasonable Cause – Bad Prior Tax Professional

- ▶ What's the issue – bad advice, bad information, information missing
- ▶ Can the client show their behavior was not the issue – i.e. they were reasonable
- ▶ The issue is can we document it?

Practice Point: This goes both ways – if we need to defend you we can point to the fact the information was withheld by the client

Drafting the Request

- ▶ Make the request – we are requesting penalty abatement for the following period(s)
- ▶ Factual background – how the client got here
- ▶ History – if a good history explain that
- ▶ Review the documentation (what's in the package) – tab exhibits
 - ~ The reviewers like documents, lots of documents

Reasonable Cause – Medical Issues – The Car Accident

February 28, 2020

VIA FAX
SO
Internal Revenue Service
Address Block
Address Block

Re: TAXPAYER NAME, SSN _____

Dear Sir or Madam:

TAXPAYER had a long history of payment compliance prior to a horrific car accident in 2002, in which the taxpayer suffered lifelong injuries that have impaired her day-to-day life. Moreover, she had a long history of filing compliance until further problems arose in 2012. Due to extensive brain damage as a result of the accident, Ms. TAXPAYER has impaired cognitive ability, which has caused her to lose her job on a nearly annual basis in the highly competitive field she works in. The constant fluctuation in income and change to independent contractor employment status in 2012 has made it nearly impossible for Ms. TAXPAYER to catch up on her tax debt. She has found some stability at her current job, but is required to outlay thousands of dollars of her own money each year to cultivate new client relationships and consistently generate new work.

Ms. TAXPAYER was involved in a serious car accident on October 26, 2002. She was a

Due to her dramatic change in personality after the accident, her then-husband walked out on her and their three children. She had to prematurely return back to work before fully recuperating, as she was now a single mother. When she returned to work in late

In addition to three doctors' reports, we have included a WSJ article on internal brain injuries which describes how patients are known as the "walking wounded" as the injuries are not external but still real and problematic.

The taxpayer was completely overwhelmed in 2012, starting a job where no taxes were withheld and receiving k-1s in multiple states. Even the CPA she brought them to said he was confused and they were complex and difficult. The taxpayer also lost both of her parents the prior year, after caring for her mother through her battle with liver cancer. It

Ms. TAXPAYER clearly had no intention of disobeying the taxing statutes. It is our contention that requiring Ms. TAXPAYER to pay penalties and interest on those penalties would not support voluntary compliance by taxpayers, as there was clearly no willful intent to disobey the taxing statutes.

Practice Tip

- ▶ Make the reviewer's job easy
- ▶ Give them what they need to agree with you
- ▶ Do NOT expect them to go searching for information to help you
- ▶ Understand they are working remotely and limited, so make their decision to agree with you easy
- ▶ That case on the prior slide: IRS abated \$117,000 of penalties from 6 years!

Reasonable Cause – Medical Issues (Dementia)

- ▶ The above referenced taxpayer suffered from Alzheimer's disease and Dementia which was diagnosed in December 2011.
- ▶ In 2013 the taxpayer required 24/7 home care and hired caregivers as household employees.
- ▶ As the taxpayer's health started deteriorating, he had a friend handle payroll for the household employees through Paychex.
- ▶ The taxpayer died 5 months ago. Copies of his medical diagnosis and his death certificate are attached, as is a copy of our IRS Form 2848.

Reasonable Cause – Medical Issues (Dementia)

- ▶ The taxpayer's son then received correspondence from Paychex that made him realize Paychex had not filed quarterly 941s or the annual 940 return.
- ▶ Once it was brought to his attention that Paychex was not filing or paying quarterly and annual payroll tax returns and taxes, the son immediately filed missing returns and mailed payments for tax assessments.
- ▶ Prior to this disease the taxpayer always maintained a good history of compliance and had no intentions on disobeying the taxing statutes.

Reasonable Cause – Medical Issues (Dementia)

Highlights:

- ▶ Good history
- ▶ Dementia – document
- ▶ Neighbor trying to help
- ▶ Set-up Paychex but didn't handle the taxes
- ▶ Discovered and full-paid

Reasonable Cause – Missed 5500

- ▶ Used Accounting firm for 20 years
- ▶ Always filed on time for last 7 years
- ▶ Filed 5558
- ▶ Unclear if they failed to file the 5500 for that year, though CPA and client had a copy
- ▶ Timely filed the two prior years
- ▶ Filed as soon as notified it was missing
- ▶ No tax loss to the government, always tried to comply
- ▶ Had no reason to know of the missing return, and possible IRS lost it

Reasonable Cause – Missing W-2/W-3

- ▶ Penalized \$147,000 for failure to file W-2s and W-3 with IRS/Social Security (10% penalty of total wages)
- ▶ Had forms
- ▶ All 941s filed and full-paid timely
- ▶ 940 filed and paid timely
- ▶ All employees received W-2s, and had three sign affidavits they received them and filed their returns
- ▶ Argue it was a mere oversight
- ▶ Great history for 11 years
- ▶ All taxes paid, no loss to the government
- ▶ All employees received and filed
- ▶ Penalty is not in line with client's behavior

Questions

