

Georgia Letter Ruling: LR IT-2017-01  
Topic: Film Tax Credit  
Date Issued: May 12, 2017

This letter is in response to your letter dated October 7, 2016, requesting a ruling that if the taxpayer purchases 2015 credits after October 17, 2016 and claims such credits on an original 2015 Georgia individual income tax return filed after October 17, 2016, the taxpayer will not be subject to any Georgia penalties for filing a late return.

### **Facts as Presented by the Taxpayer**

Your letter to the Department states: “Taxpayer is an individual residing in Georgia. Taxpayer will file a Georgia resident individual income tax return for 2015. Taxpayer filed a valid Georgia extension for his 2015 Georgia income tax return. Because October 15 falls on a weekend in 2016, Taxpayer’s extended due date for filing his Georgia income tax return is October 17, 2016.

Taxpayer will purchase Georgia entertainment tax credits (“Credits”) generated by a production company with a tax year end in calendar year 2015 pursuant to O.C.G.A. § 48-7-40.26(g). Taxpayer will use the Credits against its 2015 Georgia income tax liability.

Taxpayer will not be able to purchase 2015 Credits until after October 17, 2016. After that date, Taxpayer will purchase sufficient 2015 Credits such that, when combined with 2015 estimated payments and other 2015 Georgia income taxes paid by Taxpayer prior to April 15, 2016, Taxpayer will have no Georgia income tax due on its original tax return for tax year 2015. Taxpayer will file its original 2015 Georgia income tax return after October 17, 2016.”

### **Issue**

If the taxpayer purchases 2015 credits after October 17, 2016 and claims such credits on a 2015 Georgia individual income tax return filed after October 17, 2016, will the taxpayer be subject to any Georgia penalties for filing a late return?

### **Principal Authorities**

O.C.G.A. § 48-7-57 provides that:

“(a) In case of failure to file an income tax return on the date prescribed for the filing, such date to be determined with regard to any extension of time for filing, there shall be added to the amount of tax required to be shown on the return 5 percent of the amount of the tax if the failure is for not more than one month with an additional 5 percent for each additional month or fraction of a month during which the failure to file continues. No penalty shall be assessed pursuant to this Code section which exceeds in the aggregate 25 percent of the amount of the tax. No penalty shall be assessed pursuant to this Code section when it is shown that the failure is due to reasonable cause and not due to willful neglect.

(b) For the purposes of this Code section, the amount of tax required to be shown on the return shall be reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax and by the amount of any credit against the tax which may be claimed on the return.

(c) With respect to any return, the amount of the addition under subsection (a) of this Code section shall be reduced by the amount of the addition under paragraph (1) of subsection (a) of Code Section 48-7-86 for any month to which an addition to tax applies under both subsection (a) of this Code section and paragraph (1) of subsection (a) of Code Section 48-7-86.

(d) No penalty due to late filing shall be incurred by a taxpayer if the taxpayer attaches to his return a copy of an approved extension of time within which to file his federal income tax return which has been granted by the Internal Revenue Service and also files his state return within the period of time specified in the extension. In such instances, the taxpayer need not apply to the commissioner for an extension of time within which to file his state return.”

The pertinent part of O.C.G.A. § 48-7-86 provides that:

“(a)(1) In case of failure to pay:

(A) The amount shown as tax on a return on or before the date prescribed for payment of the tax, such date to be determined with regard to any extension of time for payment, there shall be added to the amount of tax required to be shown on the return one-half of 1 percent of the amount of the tax if the failure is for not more than one month and with an additional one-half of 1 percent for each additional month or fraction of a month during which the failure continues. For the purposes of this subparagraph, the amount of tax shown on the return shall be reduced, for the purpose of computing the addition for any month, by the amount of any part of the tax which is paid on or before the beginning of the month and by the amount of any credit against the tax which is claimed on the return;

(B) Any amount in respect of any tax required to be shown on a return which is not so shown within ten days of the date of the notice and demand for the payment, the amount of tax stated in the notice and demand shall be increased by one-half of 1 percent of the amount of the tax if the failure is for not more than one month and by an additional one-half of 1 percent for each additional month or fraction of a month during which the failure continues. For the purposes of this subparagraph, the amount of tax stated in the notice and demand shall be reduced, for the purpose of computing the addition for any month, by the amount of any part of the tax which is paid before the beginning of the month.

(2) No penalty shall be assessed pursuant to this subsection which exceeds in the aggregate 25 percent of the amount of the tax or when it is shown that the failure is due to reasonable cause and not due to willful neglect.

(b) With respect to any return, the maximum amount of the addition permitted under subparagraph (a)(1)(B) of this Code section shall be reduced by the amount of the addition under subsection (a) of Code Section 48-7-57 which is attributable

to the tax for which the notice and demand are made and which is not paid within ten days of such notice and demand.

(c) If the amount required to be shown as tax on a return is less than the amount shown as tax on the return, subparagraph (a)(1)(A) of this Code section shall be applied by substituting the lower amount.

(d) For purposes of subsections (e) and (f) of this Code section, the term “underpayment” means a deficiency as defined in Code Section 48-7-1.”

## **Ruling**

The premise of the taxpayer’s inquiry is the anticipation that once the taxpayer files his return (which he has stated will be after any filing extension deadline he may have), there will be a net zero tax liability for the prior tax year due to his purchase of one or more entertainment tax credits. See generally O.C.G.A. § 48-7-40.26(g) and (h) (permitting the transfer of the tax credits and providing for the tax periods for which the credits may begin to be taken as well as the carry-forward periods). The taxpayer reasons that because O.C.G.A. § 48-7-57 provides for calculation of the late filing penalty as a percentage of “the amount of tax required to be shown on the return,” and, “the amount of tax required to be shown on the return” is allowed to be reduced “by the amount of any credit against the tax which may be claimed on the return,” the tax credit(s) will offset any tax liability that would have been due had the return been timely filed. See O.C.G.A. § 48-7-57(a) and (b).

However, the taxpayer’s analysis is flawed under the foregoing example because it incorrectly presumes that “the amount of tax required to be shown on *“the return”* refers to the return that the taxpayer files *after* the statutorily prescribed time for filing, pursuant to O.C.G.A. § 48-7-56 (setting forth the time for filing returns).<sup>1</sup> On the contrary, O.C.G.A. § 48-7-57(a) plainly states that the “date prescribed for filing” is “to be determined with regard to any extension of time for filing.” Thus, any failure to file the return by the extension deadline would cause the taxpayer to incur a penalty for late filing, calculated as a percentage of the tax that *should have been shown* on “the return” that *should have been filed* on the deadline, i.e., without regard to any future tax credit purchase. O.C.G.A. § 48-7-57(a). There is no provision in the statute for reducing the amount of tax required to be shown on a timely-filed return based upon the potential tax consequences of entertainment tax credits that will be purchased *after* the taxpayer’s return is due, at some *future* date, and for which the taxpayer delays the timely filing of his return.

This interpretation of Georgia law is consistent with interpretations under the Internal Revenue Code with respect to penalties for late filing pursuant to 26 U.S.C. § 6651. See, e.g., Swafford v. Commissioner, 1973 Tax Ct. Memo LEXIS 165, \*1, \*21, 32 T.C.M. (CCH) 528 (1973) (“[T]he

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<sup>1</sup> Code Section 48-7-56(a) provides that individual income tax returns “shall be filed with the commissioner on or before April 15 . . . the commissioner may allow further time for filing returns in the case of sickness or other disability.” O.C.G.A. § 48-7-56(a). Hence, individual income tax returns are due on April 15th of each year or as allowed by O.C.G.A. § 48-2-36 six months later on the extended due date of October 15th of each year.

fact that there may be loss carrybacks which may eliminate any tax for a particular year does not wipe out the existence of a deficiency for the purpose of computing any additions to tax [under § 6651]. Petitioners are liable for such additions to tax on the basis of the existence of a deficiency computed without regard to such carryback.”); see also Olsen v. Commissioner, 1993 Tax Ct. Memo LEXIS 443, \*1, \*8, 66 T.C.M (CCH) 767 (1993) (court rejected taxpayer’s argument that he was not required to timely file his return due to the anticipated carryback of net operating losses, stating that “[t]he question is not whether petitioner thought he owed tax, *but whether he knew he needed to file a return.*”) (emphasis added).

Not only may the taxpayer incur a late filing penalty for failure to timely file his return in the above circumstances, the taxpayer may also incur a late *payment* penalty under O.C.G.A. § 48-7-86 for failure to timely pay the taxes owed when they are due. The amount of taxes which are considered owed and due on the payment due date are “the amount shown as tax on a return *on or before the date prescribed for payment of the tax*, [reduced by] the amount of any credit against the tax which is claimed on the return.” O.C.G.A. § 48-7-86(a)(1)(A) (emphasis added). As such, the amount of taxes due are determined by reference to the filing deadline (considering any extension), as set forth above, but must be *paid* by the *payment* deadline. See O.C.G.A. § 48-7-80 (providing that individual income taxes are due to be paid on or before April 15 following the close of the calendar year); see also GA. COMP. R. & REGS. r. 560-7-8-.09(1) (“An extension of time to file a return does not extend the time for payment of tax”); Department of Revenue Forms IT-303 and IT-560 (application for extension of time to file return, and payment voucher to pay taxes due at time of filing application for extension). Additional support for this interpretation is found in the treatment of untimely tax payments for which interest is charged, where the tax owed is later reduced due to a net operating loss carry back. See O.C.G.A. § 48-7-81 (interest charged on taxes not timely paid will not be reduced, even when the amount of tax is later reduced by reason of a net operating loss carry-back); GA. COMP. R. & REGS r. 560-7-8-.15(3) (providing that penalty and interest shall be computed on the tax deficiency, without consideration of a carry-back, “*from the date such payment of tax was due* [to the last day of year in which net operating loss occurs].”) (emphasis added).

Therefore, just like the obligation to timely file a return, the taxpayer’s obligation to timely pay the taxes owed for the prior year’s tax liability is not tied to the date the return is actually filed by the taxpayer. Thus, the taxpayer may not delay payment of the taxes beyond the statutorily prescribed time for payment in anticipation that future events, such as yet-to-be-purchased entertainment tax credits will result in a net zero income tax by the time the taxpayer actually files his *late* return. The taxpayer may only take into account any credits on hand *at that time the return is due to be filed*, so if the taxpayer has not pre-paid sufficient taxes on the *payment due date* such that a tax deficiency exists on the *filing due date*, the taxpayer is subject to a late payment penalty under O.C.G.A. § 48-7-86. Such penalty could be assessed immediately upon the determination of the tax deficiency on the return filing deadline.

Again, this interpretation of Georgia law is consistent with cases decided under the Internal Revenue Code, for late payment penalties pursuant to 26 U.S.C. § 6651. See Shafmaster v. United States, 2012 U.S. Dist. LEXIS 63663, \*1, \*14, 2012-1 U.S. Tax Cas. (CCH) P50, 341 (2012)

(rejecting taxpayer's argument that a late payment penalty should not be assessed "because the final calculation of [taxpayers'] taxes for intervening years might *eventually* reduce the amount owed for that [previous] year." (emphasis added) (citing Simon v. Commissioner, 248 F.2d 869, 877 (8th Cir. 1957) ("The carryback provision does not relieve the taxpayer of the obligation to pay the tax in full when it falls due, and cannot be interpreted as deferring taxpayer's duty to pay the tax promptly.")); see also Olsen v. Commissioner, 1993 Tax Ct. Memo LEXIS 443 at \* 9-10 (holding that because "carrybacks reflect future events that are *unforeseeable* at the time when tax liability is initially determined, they may not be used to reduce the net amount due. Consequently, '[t]he fortuitous circumstances that permit the carryback of net operating losses of later years cannot serve to excuse the earlier delinquency.'" (citation omitted) (emphasis added)); Swafford v. Commissioner, *supra*.

In short, timeliness of filing and timeliness of payment are mandatory. O.C.G.A. §§ 48-7-57, 48-7-86. Thus, while entertainment tax credits purchased beyond the foregoing prescribed deadlines may ultimately reduce the taxpayer's tax liability for any given year, the failure to timely file the return and/or timely pay the taxes owed in accordance with the deadlines as set forth above could subject the taxpayer to either or both penalties.<sup>2</sup> Therefore, the appropriate procedure for the taxpayer to follow in that instance is to pay any taxes owed by the payment deadline, considering any credits then on hand, or that will be on hand by the extension return filing deadline, and to file the return no later than the extension deadline. If the taxpayer subsequently purchases tax credits that result in an overpayment of taxes for the year in question, he may then seek a refund pursuant to O.C.G.A. § 48-2-35; provided, however, no penalties or interest previously paid shall be refunded.

The opinions expressed in this ruling are based upon the information contained in your request and are limited to the specific transactions and taxpayer in question. A ruling has no precedential value except to the person to whom the ruling was issued and then only for the specific transaction addressed in the ruling. Should the circumstances regarding this transaction change, or differ materially from those represented, then this ruling may become invalid. In addition, please be advised that subsequent statutory or administrative rule changes or judicial interpretations of the statutes and rules upon which this advice is based may subject similar future transactions to a different tax treatment than those expressed in this response.

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<sup>2</sup> Both Code Sections 48-7-57 and 48-7-86 provide for a reduction in the penalty of one where a penalty has been assessed under the other, and cap the penalties at twenty-five percent of the amount of the tax. See O.C.G.A. §§ 48-7-57(a), (c); 48-7-86(a)(2), (b).