

Memorandum

To : Mr. Al Michel
Senior Tax Auditor

Date: December 2, 1996

From : Sophia H. Chung
Tax Counsel

Subject: Revenue and Taxation Code section 12258
Late Payment of Prepayment Penalty

Your memorandum dated October 11, 1996, to Mr. Robert Lambert, Senior Tax Counsel, has been referred to me for response. You request a legal opinion addressing whether the Department of Insurance has the statutory authority to deny an insurer's request for relief of the late payment of prepayment penalty imposed under Revenue and Taxation Code section 12258. By way of a memorandum from Mr. William P. Kimsey dated November 23, 1993, to Mr. Lambert, Mr. Kimsey explains that the Department of Insurance has denied requests by admitted insurers for relief of the Section 12258 penalty. With the November 23, 1993, memorandum, Mr. Kimsey has provided copies of letters issued by the Department of Insurance to the insurers, denying their requests for the waiver of the Section 12258 penalty.

DISCUSSION

Insurers transacting insurance in this state and whose annual gross premiums tax for the preceding calendar year was \$5,000 or more are required to make prepayments of the annual tax for the current calendar year, with the exception of tax on ocean marine insurance underwriting profit and retaliatory tax. (Rev. & Tax. Code § 12251.) Each insurer is required to remit prepayments on or before April 1, June 15, September 15, and December 15 of the current calendar year. (Rev. & Tax. Code § 12253.)

Revenue and Taxation Code section 12258 provides that any insurer who fails to timely pay a prepayment shall pay a penalty of 10 percent of the amount of the required prepayment, plus interest. However, the Legislature has specifically granted the Board the authority to relieve an insurer of the Section 12258 penalty under certain circumstances. Revenue and Taxation Code section 12636 provides that any insurer seeking to be relieved of the penalty

shall file a statement with the Board, signed under penalty of perjury, setting forth the facts upon which the claim for relief is based. If the Board finds that an insurer's failure to make a timely return or payment is due to reasonable cause and to circumstances beyond the insurer's control, and which occurred despite the exercise of ordinary care and in the absence of willful neglect, the insurer may be relieved of the penalty. (Rev. & Tax. Code § 12636.) Thus, under the statutory framework, once the Section 12258 penalty is imposed on an insurer, the Board has the sole jurisdiction to review an insurer's request for relief from the penalty and the sole discretion to grant or deny such request.

It appears from the letters issued by the Department of Insurance that the insurers improperly filed their requests for relief from the Section 12258 penalty with the Department of Insurance, rather than the Board. The Department of Insurance then denied the requests for relief based on its determination that the facts set forth by the insurers upon which the claim for relief is based did not constitute an excusable delay. Such action by the Department of Insurance is not authorized by statute and is in direct conflict with the provisions of Revenue and Taxation Code section 12636 which grants the Board the sole jurisdiction to review and decide these matters.

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