701—10.101(422) Penalties.

10.101(1) *Negligence penalty—delinquent returns and payment.* This subrule is only applicable to tax that is due and payable prior to January 1, 1985. Effective for fiduciary income tax returns and tax due on or after January 1, 1981, a penalty of 5 percent per month, not to exceed 25 percent in the aggregate, is imposed for failure to file a fiduciary income tax return or to pay the tax required to be shown as due, within the time prescribed by law (taking into consideration any extensions of time to file and pay), unless the failure is due to reasonable cause. In case there is both a failure to file and a failure to pay, the penalty for failure to file shall be in lieu of the penalty for failure to pay. However, the imposition of the penalty for failure to file does not preclude the imposition of a penalty for failure to pay if, after the return is filed, there is a continued failure to pay during the five-month period after the tax was due (taking into consideration any extensions of time to file and pay). The combined penalties for failure to file or to pay shall not exceed 25 percent of the tax due. The penalties are computed on the amount of the tax remaining unpaid that is required to be shown as due on the return as distinguished from the amount of the tax shown to be due on the return. Therefore, if an audit of a fiduciary return results in an additional tax which was required to be shown as due on the return, the additional tax is subject to the penalty for failure to pay, unless the failure was due to reasonable cause. See rules 10.40(422) and 10.41(422) for individual income tax penalties and subrule 10.41(2) for examples of penalty computation for tax periods ending before January 1, 1991. See rule 701—10.6(421) for individual income tax penalties and subrule 10.6(5) for examples of penalty computation for tax periods beginning on or after January 1, 1991.

10.101(2) *Fraud penalty for tax returns ending before January 1, 1991.* If the failure to file the fiduciary income tax return is willful or deliberate with the intention of evading tax or if a false return is willfully or deliberately filed for the purpose of evading the correct tax due, a penalty of 50 percent of the amount of the tax required to be shown as due is imposed. The penalty for fraud shall be in lieu of the penalties provided in subrule 10.101(1).

10.101(3) *Waiver of penalty.* This subrule is only applicable to tax that is due and payable prior to January 1, 1985. A request for waiver of penalty must be in writing, in the form of an affidavit, and be submitted to Fiduciary and Inheritance Tax Processing, P.O. Box 10467, Des Moines, Iowa 50306. It must identify the fiduciary income tax return, the taxable year for which the delinquency occurred and state the reasons for the failure. It is not sufficient for the taxpayer to simply establish that the failure was not willful. The reasons why the failure was reasonable must also be established. The affidavit must contain the facts on which a conclusion can be reached that the penalty should be waived. A mere statement of conclusions is not sufficient. See rule 701—10.8(421) for exceptions to penalty for tax periods beginning on or after January 1, 1991.

10.101(4) *Reasonable cause.* This subrule is only applicable to tax that is due and payable prior to January 1, 1985. What constitutes reasonable cause for failure to timely file the fiduciary return and pay the tax due depends on the facts and circumstances in each particular case. Factors which tend to establish reasonable cause include, but are not limited to:

a. The return filing and payment were timely, but erroneously submitted to the Internal Revenue Service or another state agency.

b. When the return and payment were mailed on or before the due date, but were not received by the department until after the due date. If the due date falls on a Saturday, Sunday or holiday, the due date is the next day which is not a Saturday, Sunday or holiday. See Iowa Code section 622.106 for what constitutes proof of the mailing date.

c. The estate's right to the income is subject to litigation and the personal representative of the estate either has not received the income, or is prohibited from disbursing the income received.

d. The condition of the decedent's books and records prevent the compilation of the data necessary to file a return.

e. The delay was caused by the death or serious illness of the taxpayer.

f. The delay was caused by the prolonged unavoidable absence of the taxpayer.

g. The delay was caused by the destruction of the taxpayer's records due to fire or other unavoidable casualty.

h. Ordinary business care and prudence was exercised to provide for the timely filing of the return and payment of the tax due, but the filing or payment was nevertheless delinquent. What constitutes ordinary business care and prudence must be determined by the particular facts and circumstances in each case. See *Armstrong v. Department of Revenue,* 320 N.W.2d 623 (Iowa 1982).

10.101(5) *What does not constitute reasonable cause.* This subrule is only applicable to tax that is due and payable prior to January 1, 1985. Factors which do not tend to establish reasonable cause include, but are not limited to:

Failure to exercise the generally accepted standards of fiduciary responsibility in providing for the timely filing of the return and payment of the tax due.

10.101(6) *Interest cannot be waived.* Interest due on unpaid tax is not a penalty, but rather it is compensation to the government for the period it was deprived of the use of money. Therefore, interest due cannot be waived. *Vick v. Phinney,* 414 F.2d 444, 448 (5th CA 1969); *Time, Inc. v. United States,* 226 F.Supp. 680, 686 (S.D. N.Y. 1964); *In Re Jeffco Power Systems,* Dep't of Revenue Hearing Officer decision, Docket No. 77-9-6A-A (1978).