

Charging reduced tax penalty 3/13/21



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The principle of penalty individualisation applies in tax law, too. Even if a taxpayer has broken the law the tax authority is permitted by law to treat the taxpayer leniently and charge half a penalty if he meets certain conditions. This article explores what conditions the latest case law says the tax authority should assess to establish that the taxpayer has filed returns and paid taxes on time.

Section 32(7) of the Taxes and Duties Act (the “Clause”) lays down four conditions that must all be satisfied before a reduced penalty can be charged:

1. The tax breach is not considered a repeated tax breach;
2. The taxpayer has cooperated with the tax authority;
3. The taxpayer has filed returns on time; and
4. The taxpayer has paid taxes on time.

The issue

According to the Supreme Court, the Clause aims to respect taxpayers who carry out their tax obligations and pay taxes on time after committing a breach and facing an additional tax assessment and penalty.

An issue arises from interpreting the Clause, given the general manner in which it is formulated, which fails to clearly answer the question of when a taxpayer can be treated as having failed to file returns and pay taxes on time.

In other words, does it matter that the taxpayer has no outstanding taxes on the date of the audit decision? This conclusion could be drawn from interpreting the Clause grammatically.

Now, it might be important to assess whether the taxpayer has ever had any outstanding taxes, which points to his honesty in carrying out his tax obligations. Does it matter that the taxpayer’s overall behaviour is not good, as he regularly fails to file returns on time?

Having evaluated these considerations, the Supreme Court finds that the lawmaker’s intention in formulating the Clause was to verify the taxpayer’s honesty in carrying out his obligations, rather than establishing that the taxpayer has failed to file returns and pay taxes on time. This explains why the Clause does not give clearer criteria for assessing taxpayer behaviour (e.g. the relevant period: proper performance of obligations in the last 6 or 12 months or at the time of the decision). According to the Supreme Court, formulating the precondition without prescribing very precise criteria allows the person applying the Clause to consider as wide a range of circumstances as possible, which can describe the taxpayer’s attitude to his tax obligations and the circumstances of the case, thereby coming closer to the goal of penalty individualisation.

Accordingly, when it comes to considering a reduced penalty, the tax authority should not only assess whether the taxpayer has honoured his obligations at the moment but should also consider historical data, such as the regularity and repetition of his breaches, the length of overdue periods, the amount of outstanding taxes (including a comparison to how much the taxpayer has paid in taxes) and the reasons

for the delay. This will provide an overall picture of the taxpayer's attitude and honesty to eventually determine his eligibility for a penalty reduction.

This is not a bad approach as it lets the tax authority assess each case comprehensively and determine why a penalty discount should be allowed. On the other hand, it certainly gives the tax authority a wide scope for interpretation.