

International Association of Tax Judges

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TAX PENALTIES

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Panel

- Chair: Philippe Martin (France)
- Maarten Feteris (Netherlands)
- Maurice B. Foley (United States)
- Anthony Gafoor (Trinidad & Tobago)
- Raphaël Gani (Switzerland)
- Vineet Khotari (India)
- Anette Kugelmüller-Pugh (Germany)
- Luis Flavio Neto (Brazil)

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Outline

- Diversity of tax penalties
- Issue 1: relationship between tax penalties and criminal penalties
- Issue 2: access to court
- Issue 3: application of legal principles governing punishment
- Issue 4: methods for judicial review of tax penalties

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Diversity of tax penalties

- Definition: tax penalties are all forms of punishment for violations of tax law, which would usually be inflicted by tax administrations, and which would fall under the jurisdiction of tax courts
- Criminal vs. Administrative (civil) penalties

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Diversity of tax penalties

- Various types of administrative punishment for tax behavior: fines, public naming and shaming, denial of government licenses or benefits (exclusion from public procurement...), withdrawal of administrative documents...
- Targeted taxpayer behavior: missing a deadline, non-electronic reporting or payment, failure to report tax base, lack of documentation, failure to pay, inaccurate statements, deliberate tax evasion, fraudulent schemes, obstruction of tax audits...

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Diversity of tax penalties

- Calculation of administrative fines: fixed amount for technical offence, fixed rate applied to tax amount or other amount, scale of fixed penalty rates, maximum amount or rate with total discretion below...

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Issue 1: Tax penalties and criminal penalties

- Is cumulative application possible? Relevance of *ne bis in idem* principle?
- If possible, what is the procedural combination between tax penalty procedures and criminal procedures ?
- Must a tax court dealing with tax penalties wait for the result of criminal proceedings? Or vice-versa?
- Is the tax court bound by the result of criminal proceedings?

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Issue 1: Tax penalties and criminal penalties

Relationship between tax penalties and
criminal penalties

Raphaël Gani

Federal Administrative Court
Switzerland

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Tax and criminal penalties : *Ne bis in idem*

- Art. 4 of Protocol No 7 annexed to the ECHR.
- The *ne bis in idem* principle provides that a person cannot be criminally prosecuted or punished twice for the same offence.
- Four conditions : (1) the person prosecuted or on whom the penalty is imposed is the same (*in idem personam*), (2) the acts being judged are the same (*in idem factum*), (3) there are two sets of proceedings in which a penalty is imposed (*bis*) and (4) one of the two decisions is final.

Tax and criminal penalties under Swiss Law : concurrency of violations?

Principle: Inadmissibility of double jeopardy „ne bis in idem“

- The more severe penalty absorbs the lighter ones, i.e. breach consumes the compromise/attempt (cf. art. 49 Swiss Criminal Code).
- Minor offences are absorbed by the bigger ones : tax fraud in **indirect taxes** thus consumes tax evasion (withholding tax: Art. 61 VStG with respect to art. 14 VStrR; VAT: Art.101 MWSTG).

Tax and criminal penalties under Swiss Law : concurrency of violations?

Exception : Income and wealth Tax

- Tax fraud and tax evasion in **direct taxes** (cf. Art. 186 par. 2 DBG): in case of tax fraud, cumulative punishment with penalties due for tax evasion.
- The direct tax Code explicitly states that a punishment for tax fraud does not exclude one for a tax evasion.
- An additional fine for an administrative duty infringement can also be imposed: the legally protected objects are different - the penalty is intended to compel the taxpayer to comply with injunctions whereas for what concerns the tax evasion, it protects the tax debt as a public asset.

Tax and criminal penalties under Swiss Law : concurrency of violations?

Exception : Income and wealth Tax (cont'd)

- Swiss Supreme Court : punishing a taxpayer for tax fraud and tax evasion do not, in itself, constitute a violation of the *ne bis in idem* principle (ATF 122 I 257; ATF 144 IV 136).
- Tax fraud does not include all the elements of tax evasion and is a separate offence. Therefore, the principle (*ne bis in idem*) is not violated when a person is convicted (by different authorities) of either of these offences.
- However, the initiation and outcome of the second procedure cannot modify what has already been decided/ruled in the first one with force of *res judicata*.

Tax and criminal penalties under Swiss Law : concurrency of violations?

Exception : Income and wealth Tax (cont'd)

- However, the second fine/judgement must take into consideration the first one, even if they are sanctioned through different authorities.
- Hence, the *ne bis in idem* principle is violated if the taxpayer is punished more severely for the sole reason that these offenses even if the tax payer is prosecuted by different authorities (i.e Tax Court and Criminal Court).
- E.g. in determining the fine for tax evasion, the tax authority is not allowed to take into account the fact that a tax fraud was also committed in order to increase the penalty imposed on the taxpayer.

Tax and criminal penalties: Compatibility of Swiss law

Compatibility of Swiss law with ECtHR case law

Facts-based assessment of whether the offences at stake are identical (*idem*) (ECtHR, Sergey Zolotukhin v. Russia, no. 14939/03).

- Prohibition of prosecution or trial for a second "offence" in so far as the latter arises from an identical or substantially identical fact pattern.
- Duplication of criminal proceedings and penalties with administrative proceedings and penalties of a criminal nature (*bis*), against the same person with respect to the same acts, can constitute a limitation of the *ne bis in idem* principle.

Tax and criminal penalties under Swiss Law : concurrency of violations?

Compatibility of Swiss law with EUCJ case law

- On 20 March 2018 the Grand Chamber of the EUCJ a case dealing with the non-payment of VAT : EUCJ, 20 Mar. 2018, C-524/15, Menci; C-537/16.
- The Italian tax authorities imposed an administrative penalty (30% of tax debt) against Italian citizen Luca Menci.
- After this decision became final, the public prosecutor launched criminal proceedings with respect to the same acts on the basis that the failure to pay VAT constituted a criminal offence.
- EUCJ decision: no violation of the *ne bis in idem* principle.

Tax and criminal penalties under Swiss Law : concurrency of violations?

Compatibility of Swiss law with EUCJ and EHRC case law

- The EUCJ came to the conclusion that under certain conditions the *ne bis in idem* principle does not preclude national legislation enabling the duplication of administrative and criminal procedures resulting both in penalties.
- Motivation seems different compared with ECtHR.
 - ECtHR: only one proceeding; EUCJ does not deny the *bis* condition to be fulfilled, but accepts that a restriction on the *ne bis in idem* principle can be justified but requires an objective of general interest.

Tax and criminal penalties: conclusion

- Cumulative application of criminal penalties and tax penalties is allowed in direct taxes (income and wealth tax) but not in indirect taxes (Stamp duties or VAT e.g.)
- Even if the double jeopardy is permitted, the second judge must take into consideration the already existing penalties even if imposed by a different authority
- Tax court and criminal court are however independent and must not wait for each other;
- But the second procedure cannot be used to restore the questions that the first judge has already decided on with force of *res judicata*.

Issue 2: Access to court

- Can tax penalties be challenged in tax court, together with the tax itself?
- Can they or must they be challenged separately? What if penalty is inflicted upon a non-taxpayer?
- If tax administration can grant discretionary relief on penalties, can a denial of application for relief be challenged in court?

TAX PENALTIES: ACCESS TO COURT

ANTHONY D.J. GAFOOR
10TH IATJ CONFERENCE
CAMBRIDGE, UK
13-14TH SEPTEMBER 2019

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PENALTIES: HOW THE SYSTEM WORKS

- For an individual who is required to file a Tax Return, that outstanding return incurs a penalty of TT\$100 for every six months it remains outstanding after the date it became due. i.e. the due date for an Individual Tax Return is April 30th, the first penalty of TT\$100 becomes due and payable at Nov 1st and increases by TT\$100 after the passage of every six months.
- With respect to Corporation Tax Returns the penalty due and payable would be TT\$1,000 for every six months, the return remains outstanding after the due date.

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CAN TAX PENALTIES BE CHALLENGED IN A TAX COURT TOGETHER WITH THE TAX ITSELF OR MUST THEY BE CHALLENGED SEPARATELY?

- The imposition of tax and/or interest on outstanding tax, being the difference between the amount paid and the amount due arises traditionally under the *Income Tax Act*, Chap.75:01, ss 102-103.
- The Board of Inland Revenue may grant a waiver of penalties and interest pursuant to s.103A but is otherwise authorised to distrain upon the debtor's goods under s.104 and to keep same for 7 days until the outstanding liability is paid or to sell such goods by auction with any balance thereof after payment of taxes being restored to the owner

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TAX COURT AND PENALTIES

- Penalties have generally been dealt with as a separate issue via negotiation with the BIR and have not been litigated before the Court
- Often, the settlement of a matter by way of consent may be held back pending the waiver of penalties and interest by the BIR
- Where the Court is required to rule on a substantive matter, the parties do not include the issue of penalties and interest

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WHAT IF THE PENALTY IS INFLICTED ON A NON-TAXPAYER?

- The judicial system in Trinidad and Tobago is such that an appeal is brought before the Court only by taxpayers and normally for the purpose of challenging the imposition of an assessment which was not overturned by the internal processes of the revenue authorities (determination of an objection to the assessment)
- It is difficult to conceive of situations whereby non-taxpayers would have business before the Court in respect of penalties

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IF THE TAX ADMINISTRATION CAN GRANT DISCRETIONARY RELIEF ON PENALTIES, CAN A DENIAL OF APPLICATION FOR RELIEF BE CHALLENGED IN COURT?

- The statutory basis for the waiver of penalties and interest resides with the revenue authorities
- Like any other administrative body, if such a discretion is unreasonably exercised or an application for waiver is denied, it may be possible to seek a judicial review of that decision but this would not relate directly to the imposition of the assessment and thus may be unlikely to fall under the Tax Court's jurisdiction

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PENALTIES IN TAXATION & ACCESS TO JUSTICE

PRESENTATION BY
DR. VINEETH
KOTHARI, JUDGE,
HIGH COURT OF
MADRAS

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ACTS

- INCOME TAX ACT,
1961
- COMPANIES ACT,
2013
- GOODS AND SERVICE
TAX ACT, 2017

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PENALTIES AND ACCESS TO JUSTICE UNDER INCOME TAX ACT, 1961

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BROAD CATEGORIES OF PENALTIES IN INDIAN TAX & CORPORATE LAWS

1. PENALTIES FOR NON-COMPLIANCES VIZ.
 - BY NOT FILING OF RETURNS OR DECLARATIONS
 - NOT COMPLYING WITH THE SUMMONS
2. PENALTIES FOR CONCEALMENT OR FILING OF WRONG RETURNS FOR
EVASION OF TAX
3. PROSECUTION FOR CIVIL JAIL FOR CERTAIN OFFENCES

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PENALTY PROVISIONS-INCOME TAX ACT 1961
SUMMARY

Section	Nature of Default	Quantum of Penalty
221(1)	Penalty for default in making a payment of tax	Not exceeding amount equal to tax in arrears
271(1)(b)*	Failure to comply with notice u/s 142(2), 142(2A), 143(2)	Rs 10,000 for each failure
271(1)(c)*	Concealment of income or furnishing inaccurate particulars	100% to 300% of tax sought to be evaded
272A (1)*	Failure to answer questions or sign statements, furnish information, returns etc	Rs 10,000 for each failure
271AAB	Undisclosed income found during search intimation u/s 132	10% ;20% or 30% of undisclosed income
271A*	Failure to maintain books or documents u/s 44AA	Rs 25000

* Sec 273B- no penalty shall be imposable if reasonable cause for such failure is proved

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SECTION 271(1)(C)
PRINCIPLES EMANATING FROM APEX COURT JUDGMENT

Is levy of penalty discretionary?*

*"Imposition of penalty is not automatic . Levy of penalty is not only discretionary in nature but such discretion is required to be exercised on the part of the Assessing Officer keeping the relevant factors in mind... The approach of the Assessing Officer in this behalf must be fair and objective"*¹

Is penalty levied only in case of positive income?

*"Whether income returned was a profit or loss, was really of no consequence. Therefore, even if no tax was payable, the penalty was still leviable. Even prior to the amendment, it could not be read to mean that if no tax was payable by the assessee due to filing of the return disclosing loss, the assessee was not liable to pay penalty even if it had concealed and/or furnished inadequate particulars."*²

1. [Dilip N Shroff vs JCIT (2007) 166 Taxman 65 (SC)]
2. [JCIT Surat vs Sahell Leasing & Industries Ltd, (2010) 191 Taxman 165(SC)]

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SECTION 271(1)(C)
PRINCIPLES EMANATING FROM APEX COURT JUDGMENT

Is Mens Rea necessary for imposing penalty ?

The penalty u/s 271(1)(c) is a civil liability. Wilful concealment is not an essential ingredient for attracting civil liability.¹

Is penalty leviable if claim not acceptable to revenue ?

*"Merely because the assessee claimed the expenditure, which claim was not accepted or was not acceptable to the revenue, that, by itself, would not attract the penalty under section 271(1)(c). If the contention of the revenue was accepted, then in case of every return where the claim made was not accepted by the Assessing Officer for any reason, assessee would invite penalty under section 271(1)(c). That is clearly not the intendment of the Legislature."*²

1. Union of India vs Dharmendra Textile [2008] 166 TAXMAN 65 (SC)
2. CIT vs Reliance Petroproducts Pvt Ltd [2010] 322, ITR 158 (SC)

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SECTION 271(1)(C)
PRINCIPLES EMANATING FROM APEX COURT JUDGMENT

Is penalty proceedings independent of Assessment proceedings ?

Since the burden of proof in a penalty proceeding varies from that in an assessment proceeding, the finding in an assessment order cannot automatically be adopted for the purpose of Section 271(1)(c). Though finding in an assessment order constitutes good evidence for penalty proceeding, the same cannot be regarded as conclusive¹

Can voluntary disclosure absolve the assessee from penal proceedings?

It is trite law that the voluntary disclosure does not release the assessee from the mischief of penal proceedings under section 271(1)(c). The law does not provide that when an assessee makes a voluntary disclosure of his concealed income, he had to be absolved from penalty²

1. Anantharam Veerasingalath & Co vs CIT (1980) 3 Taxman 56 (SC)
2. Mak Data (P.)(Ltd vs CIT [2013] 358 ITR 593 (SC)

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**SECTION 271(1)(C)
RECENT JUDICIAL RULINGS**

Penalty to be levied qua proceedings in which concealment evident

- When there is no concealment of income qua the present assessment proceedings, no question of imposition concealment penalty qua this assessment proceedings.
- once penalty had been deleted on similar facts with no distinguishing features, penalties imposed are not sustainable in law.
- On facts, there is no concealment of income albeit a shift of income from taxability in a later year to this year.

Imposition of penalty is not automatic even if tax liability is admitted

- Imposition of penalty even if the tax liability is admitted is not automatic.
- Even if the assessment is not challenged and tax and interest is paid, that would not be sufficient for the authorities to impose penalty.
- Order imposing penalty can be passed only when no explanation is offered or explanation offered is found to be false or if the explanation offered is not proved to be bonafide.

1. Arvind Gupta vs ITO (ITA No 3715/Del/12) dtd 20th Jan'15
2. CIT vs Manjunatha Cotton & Grinning Factory (2013) 35 taxman 250 (Kar)

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PENALTY FOR NON DEDUCTION OF TDS

Dishergarh Power

[2001] 71 TTJ 725 CAL

Penalty under section 271C is not an automatic but only one of the consequence of non-deduction or short deduction at source.

Eli Lilly

[2009] 178 TAXMAN 505 (SC)

The provision of 271C is not mandatory because under section 273B, the Parliament has enacted that penalty shall not be imposed in cases falling thereunder. The burden is on the assessee to prove good and sufficient reason.

**Cadbury India
66(Delhi)**

[2011] 11 taxmann

"It was neither a case of malafide intention nor that of negligent intention or want of bona fide, but a case of misconceived belief of applicability of one provision of law."

**Muthoot Bankers
203(Coch)**

[2012] 18 taxmann

In cases where tax was paid by the recipient of income and non deduction was bona fide omission and not deliberate, penalty u/s 271C was to be set aside. However the assessee should not be under repeated offence without adhering to provisions

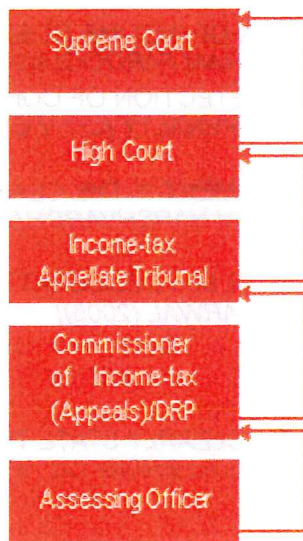
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JUDICIAL DECISIONS:

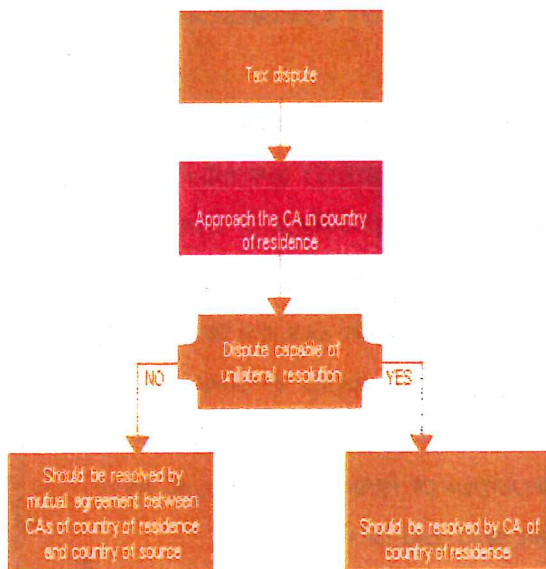
- 1) PENALTY SHOULD BE IMPOSED BY THE AO AND FIRST APPELLATE AUTHORITY/COMMISSIONER [*KAMLAPAT MOTILAL V CIT(1962)*]
- 2) INVOLUNTARY SURRENDER OF INCOME DOES NOT AVOID PENALTY [*CIT V MOHD. MOHTRAM FAROOQUI(2003)*]
- 3) REVISED RETURN AFTER DETECTION OF CONCEALED INCOME OFFERS NO IMMUNITY FROM PENALTY [*CIT V DR. A. MOHD. ABDUL KHADIR (2003)*]
- 4) NO PENALTY FOR CONCEALMENT IF THE CLAIM OF THE ASSESSEE IS ARGUABLE [*CIT V HARSHVARDHAN CHEMICALS & MINERALS LTD. (2003)*]
- 5) NO PENALTY UNLESS THERE IS A DELIBERATE ATTEMPT (MENS-REA) [*CIT V ASHIM KUMAR AGARWAL (2005)*]
MENS-REA: IF A PERSON DOES SOMETHING INCORRECT DELIBERATELY EVEN THOUGH HE KNOW THAT HIS ACT IS AGAINST LAW.
- 6) ORDER OF PENALTY MUST CLEARLY STATE THE NATURE OF PENALTY [*NEW SORATHIA ENGINEERING CO. V CIT (2006)*]

- 9) THE APEX COURT IN *HARSHAD S. MEHTA VS. CUSTODIAN [1998] 99 TAXMANN 216; 231 ITR 871* HELD THE PENALTY & INTEREST ARE NOT PART OF TAX
- 10) PENALTY FOR CONCEALMENT FOR FILING INACCURATE PARTICULARS CANNOT BE IMPOSED ON ASSESSEE FOR MERELY MAKING A CLAIM WHICH IS TO BE FOUND TO BE NOT SUSTAINABLE IN LAW *IN RE RELIANCE PETRO PRODUCTS [2010] 322 ITR 158 SC*
- 11) WHILE HOLDING SO THE SUPREME COURT THAT EARLIER DECISION IN *DILIP N SHEROFF 291 ITR 519* WAS OVERRULED IN *DHARMENDRA TEXTILES CASE 36 ITR 277 SC* ONLY ON THE ISSUE THAT MENS REA WAS NOT ESSENTIAL FOR IMPOSITION OF PENALTY U/S 271(1)(C) AS IT WAS STRICT LIABILITY TO MAKE GOOD LOSS OF REVENUE

FIVE TIER STRUCTURE OF ACCESS TO JUSTICE



MUTUAL AGREEMENT PROCEDURE (MAP) & OTHER REMEDIES



Other Constitutional Remedies May Be Invoked By Way Of Writ Jurisdiction At Any Stage Of Proceedings On Following Limited Grounds

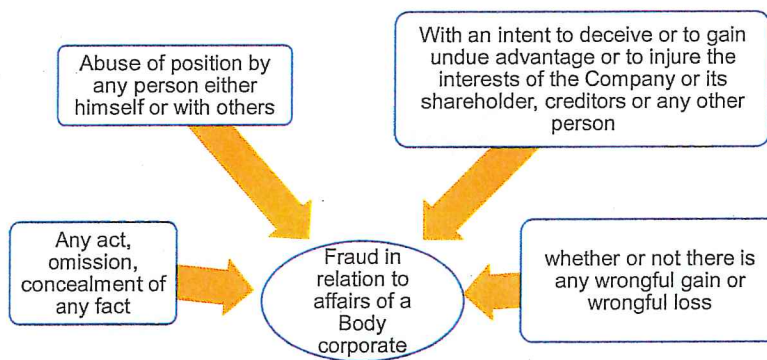
- Lack Of Jurisdiction
- Ultra Vires Of Laws, Rules Etc
- Breach Of Principles Of Natural Justice [Audi Alteram Partem]

Generally Further Appeals Over High Court Decision, Lie To Supreme Court

PENALTIES AND ACCESS TO JUSTICE UNDER INDIAN COMPANIES ACT

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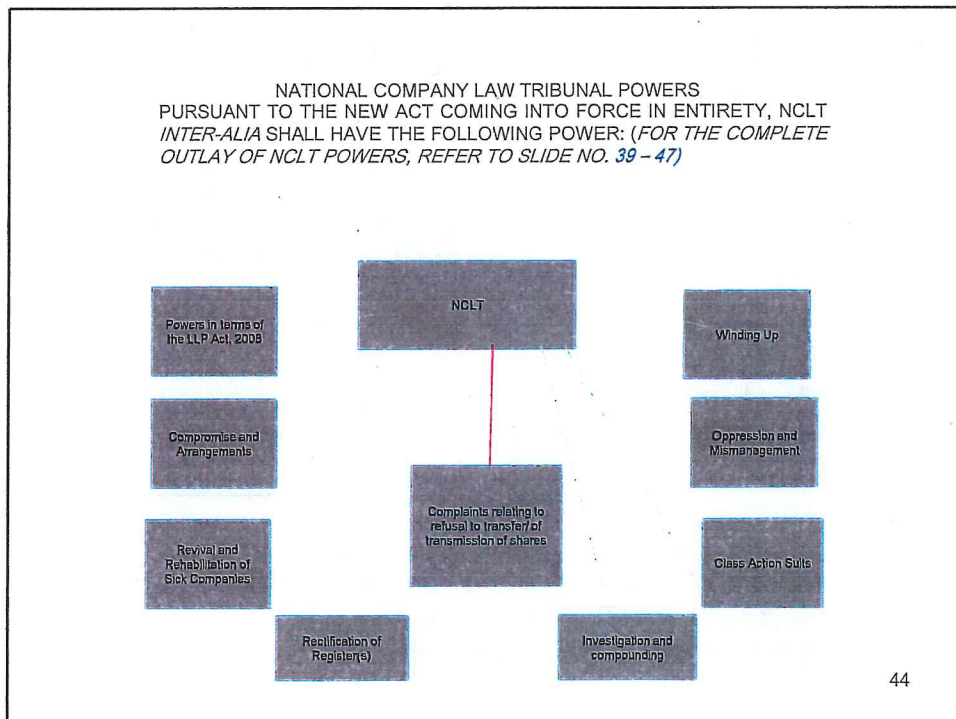
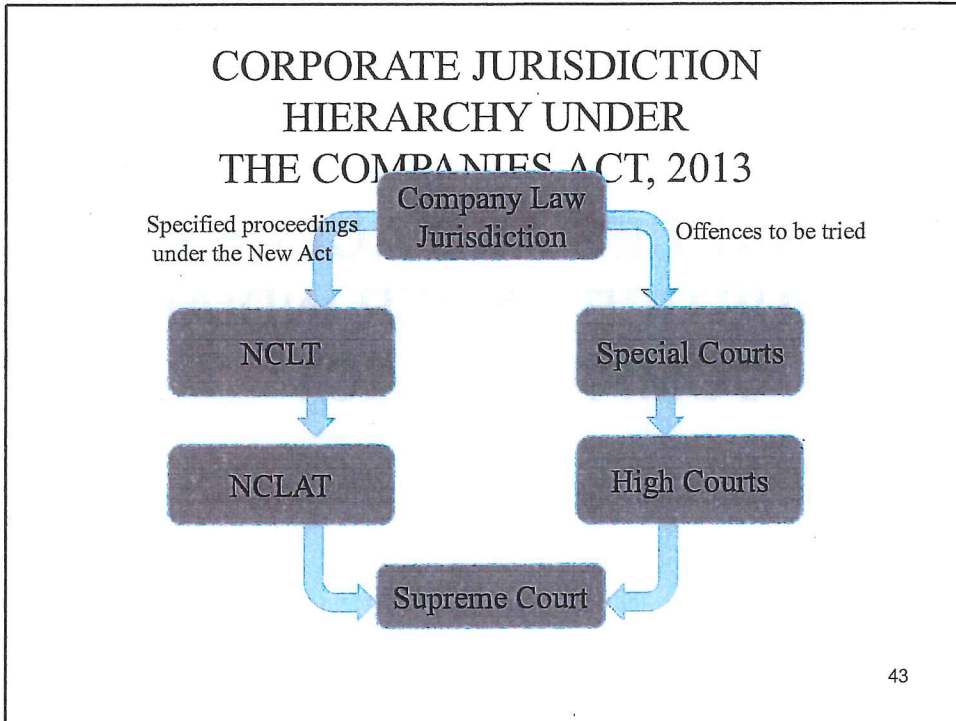
CO. ACT 2013 - FRAUD RELATED PROVISIONS



"wrongful gain" means the gain by unlawful means of property to which the person gaining is not legally entitled

"wrongful loss" means the loss by unlawful means of property to which the person losing is legally entitled

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PENALTIES UNDER INDIAN GOODS AND SERVICE TAX ACT, 2017

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OFFENCES AND PENALTIES – SEC 122

Nature of Offence	Prescribed Penalty
<ul style="list-style-type: none"> • Non payment or short payment of tax or erroneous refund or wrong availment or utilisation of input tax credit by a registered person • (a) for reason other than fraud or any wilful misstatement or suppression of facts • (b) for reason of fraud or any wilful misstatement or suppression of facts 	<p>(a) Higher of following: 1. Rs. 10,000/- or 2. 10% of tax due</p> <p>(b) Higher of the following: 1. Rs 10,000/- or 2. Tax due</p>
<ul style="list-style-type: none"> • Applicable to any person who aids or abets any of the offences specified in clauses (i) to (xxi) of sub-section 85(1); or • Who acquires possession of, or deals with any goods which he knows or has reason to believe are liable to confiscation; • Receives any supply of services in contravention • Fails to appear before GST officer to honour the summons; • Fails to issue invoice or record it 	<p>Rs. 25,000/-</p>

GENERAL DISCIPLINE RELATED TO PENALTY – SEC 126

- NO PENALTY FOR MINOR BREACH/MISTAKE WHERE THE TAX INVOLVED IS LESS THAN RS. 5,000/- AND ARE EASILY RECTIFIABLE.
- NO PENALTY WILL BE IMPOSED WITHOUT ISSUING SCN OR GIVING PERSONAL HEARING
- PENALTY CANNOT BE LEVIED SUO-MOTO ON CONTRAVENTION. REASONABLE EXPLANATION NEEDS TO BE PROVIDED BY THE OFFICER
- FOR VOLUNTARY DISCLOSURE OF NON-PAYMENT OF TAX – CONSIDERATION WHILE LEVYING PENALTY
- S-126 WILL NOT APPLY, WHERE THE PENALTY IS EXPRESSLY PRESCRIBED UNDER THE ACT AS EITHER A FIXED SUM OR EXPRESSED AS A FIXED PERCENTAGE

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Tax has been paid or short paid or erroneously refunded or ITC wrongly availed

Reasons other than fraud, etc (S.73)

By reason of fraud, etc (S.74)

Particulars	U/s 73	U/s 74
Maximum Penalty	10% of tax OR Rs.10,000 WEH	100% of tax
Period covered	3 yrs.	5 yrs.
Paid before SCN	-	15% of tax
After SCN but within 30 days	-	25% of tax
After Order issued but within 30 days	10% of tax OR Rs.10,000 WEH	50% of tax
Amount of Evasion	Imprisonment	
> Rs. 5 Cr	Upto 5 yrs. with Fine	
Rs. 2 Cr - 5 Cr	Upto 3 yrs. with Fine	
Rs. 1 Cr - 2 Cr	Upto 1 yr. with Fine	

TYPES OF OFFENSES

1. Supplies G/S without issue of any invoice
2. Issue of invoice without supply of G/S
3. Collects tax but fails to pay to the credit of Govt.
4. Takes/utilizes ITC point # 2 above.
5. Collects tax in contravention of provisions but fails to pay to the credit of Govt.
6. Evades tax, wrongly avails ITC or refund
7. Falsifies financial records
8. Prevents officer in discharge of his duties
9. Tamper or destroys any evidence
10. Engages in services which are in contravention
11. Engages in goods liable for confiscation
12. Fails to supply information under this Act
13. Attempts to commit any of the above

Penalty & Imprisonment

> Rs. 5Cr, Cognizable & Non-Bailable.

Imprisonment upto 6 month with/or Fine.

Appeals and Adjudication

Appeal Level	Orders Passed By	Can Appeal To
1 st	Adjudicating Authority	First Appellate Authority
2 nd	First Appellate Authority	Appellate Tribunal
3 rd	Appellate Tribunal	High Court
4 th	High Court	Supreme Court

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**Thank
You!!!**

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Issue 3: Application of legal principles governing punishment

- What is punishment (vs. compensation) in tax matters?
- If legislation is silent or insufficient, would tax courts establish procedural safeguards?
- Principles of necessity and proportionality. Do they apply? Applied *in abstracto* to legislation? Applied *in concreto* case by case?
- Are fixed penalties and automatic penalties legally challenged?
- Are tax penalties applied in case of seemingly legal schemes leading to illegal tax avoidance («avoidance penalties»)?

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Tax penalties and legal principles

Maarten Feteris, Cambridge @ september 2019

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Fiscal penalties in the Netherlands

- Most important way of sanctioning violations of tax legislation
- Two types of penalties
 - a) Lighter penalties up to ca. € 5.000
 - b) Heavier penalties in case of intent or gross negligence up to 100 % (in some cases 300 %)

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Character of fiscal penalties

Hoge Raad 4 January 1950, B. 8718

Penalties going up to 100 % are not to be regarded as compensation, but as punishment

**Hoge Raad 19 June 1985, BNB 1986/29
and Hoge Raad 24 January 1990, BNB 1990/287**

- Article 6 ECHR applies to fiscal penalties
- Therefore right to a fair trial before an independent court

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Principles of criminal law (1)

- Not automatically applicable to fiscal penalties
- But in various cases applied to those penalties as unwritten principles of national law:
 - a) No penalty in absence of any guilt (Hoge Raad 21 October 1987, BNB 1988/2)
 - b) The same offence cannot be punished twice by an administrative penalty (Hoge Raad 30 August 1996, BNB 1996/353)

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Principles of criminal law (2)

- c) The amount of a fiscal penalty should be appropriate and necessary (Hoge Raad 4 December 1991, BNB 1992/221)
- d) The presumption of innocence of Article 6, para. 2 ECHR applies (Hoge Raad 15 juli 1988, BNB 1988/270 and Hoge Raad 25 April 2011, BNB 2011/207)

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Penalties and tax avoidance schemes

- If the scheme (legally) works: no penalty
- If the scheme does not work (abuse of law): no penalty if the scheme is based on an arguable interpretation of the law
 - * Hoge Raad 12 september 2003, BNB 2004/75
 - * Hoge Raad 21 April 2017, BNB 2017/162

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TAX PENALTIES AND THE APPLICATION OF LEGAL PRINCIPLES GOVERNING PUNISHMENT: Brazilian perspective

Luís Flávio Neto
IATJ, Cambridge, 2019

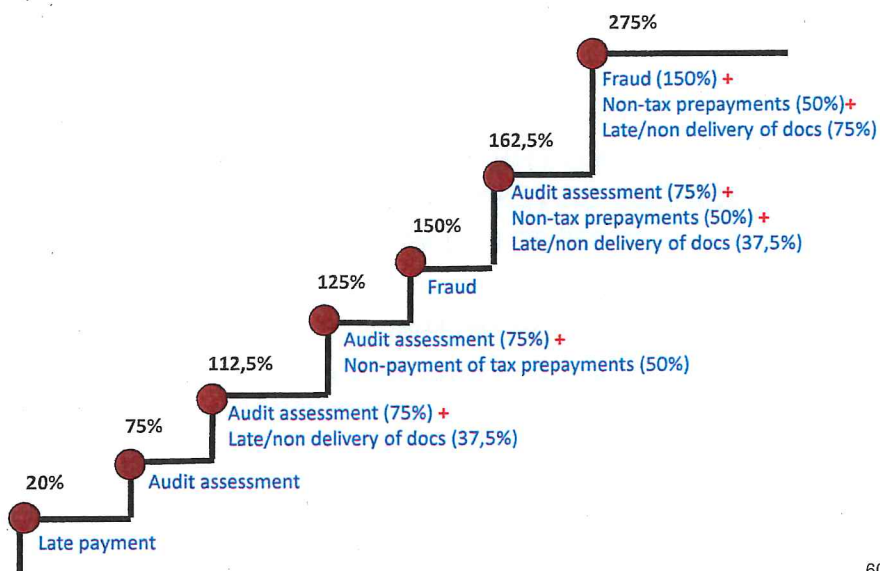
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AGENDA

1. Brazilian tax penalties at the federal level;
2. Limits established by the Brazilian Courts on tax penalties: issues discussed and principles applied;
3. What still has to be decided by the Brazilian Courts;
4. Final remarks: possible issues to be considered.

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1. BRAZILIAN TAX PENALTIES AT THE FEDERAL LEVEL



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2. LIMITS ESTABLISHED BY THE BRAZILIAN COURTS ON TAX PENALTIES: issues discussed and principles applied
TAX PENALTIES THRESHOLD AND THE ROLE OF THE JUDICIARY

A. Which legal principles are applicable to control tax penalties?

Is the principle of non-confiscatory taxation also applicable to tax penalties?
Are principles of criminal law applicable?

B. Brazilian tax penalties threshold are according to legal principles?

Penalty for late payment; Penalty for audit assessment penalty; Penalty for fraud.

C. If a tax penalty is exacerbated, can the judge decide about the threshold to be applied?

Judiciary as negative or active rule-maker in a Civil Law country.

D. Can the same set of acts be punished twice?

Right not to be punished more than once (Bis in Idem)

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2. LIMITS ESTABLISHED BY THE BRAZILIAN COURTS ON TAX PENALTIES: issues discussed and principles applied
TAX PENALTIES THRESHOLD AND THE ROLE OF THE JUDICIARY

1969. Late payment. 50% → 20%.

Rules had set maximum and minimum penalties. The tax authorities have applied the maximum level for simple delays. Penalty reduced to minimum level. (RE 55906)

1974. Late payment. 50% → 20%.

Judiciary as positive rule-maker even in a Civil Law country: the judge has to apply the rule that he would set if was the legislator. (RE 78291)

1975-1980. Late payment. 100% → 30%.

Penalty reduced to a compatible level, considering the monetary correction instrument also applied. The tax penalty is disproportionate if it becomes confiscatory. (RE 81550, 91707, 92165)

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2. LIMITS ESTABLISHED BY THE BRAZILIAN COURTS ON TAX PENALTIES: issues discussed and principles applied
TAX PENALTIES THRESHOLD AND THE ROLE OF THE JUDICIARY

2000. Late payment. 30% → 30%.

Principle of reasonableness and prohibition of confiscation in tax matters (RE 220284)

2002. Late payment: no less than 200%; Fraud: no less than 500%.

The tax penalty is disproportionate if it becomes confiscatory. The Court did not set new levels of penalties. (ADI 551)

2007. Fraud. 300% → suspended.

Principle of reasonableness and prohibition of confiscation in tax matters (ADI 1075 MC. The rule was repealed by the legislature and supreme does not need to complete the judgment).

2011. Late payment. 20% → 20%

The penalty cannot be too low (in honour of those who pay their taxes on time) neither confiscatory. (RE 582461)

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3. WHAT STILL HAS TO BE DECIDED BY THE BRAZILIAN COURTS

Is the Brazilian judiciary going to assume a very active rule-maker role on tax penalties?



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4. FINAL REMARKS: POSSIBLE ISSUES TO BE CONSIDERED

PRINCIPLE OF NON-CONFISCATORY TAXATION

What does “confiscation” mean?

PRINCIPLE OF PROPORTIONAL PUNISHMENT

What does “proportionality” mean?

Income tax
+
Social contribution
+
Other taxes
+
PENALTIES

If the principle of non-confiscatory taxation is applicable to tax penalties, the confiscatory effect should be evaluated considering all taxes and penalties together.

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Thank you!
Obrigado!

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Issue 4: Methods for judicial review of tax penalties

- What is the burden of proof? Different from litigation on tax base and amount? Potential contradictions?
- Mitigation of penalties by tax courts? Even if fixed-rate penalties or scales of fixed-rate penalties?
- If mitigation possible, what would be the criteria?

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International Association of Tax Judges



Chief Judge Maurice B. Foley
IATJ 10th Assembly
September 13-14, 2019
Cambridge, UK

Review of Tax Penalties in the US

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Pre-Judicial Review

A taxpayer can try to reach an agreement with the Internal Revenue Service (IRS) before using court system

•Examination

- Either in person or by mail
- IRS will request information/documentation about certain items shown on the tax return and set deadline for response

•IRS Office of Appeals

- An independent bureau of the IRS charged with impartially resolving disputes between the government and taxpayers
- Taxpayer may appeal the examiner's adjustments
- Informal hearings conducted in person or over the phone
- No formal rules of evidence

•Post-Appeals Mediation

- Mediator will be an employee of the IRS Office of Appeals who was not previously assigned to the case

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Judicial Review: US District Court

- Pay tax and file claim with IRS for refund, file suit if denied
- Jury trials possible
- Appeals to Federal appellate court in the geographic jurisdiction of taxpayer

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Judicial Review: Court of Federal Claims

- Pay tax and file claim with IRS for refund, file suit if denied
- Taxpayers must travel to Washington, DC to be heard
- No jury trials
- Appeals to US Appeals Court of the Federal Circuit

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Judicial Review: US Tax Court

- Pre-payment forum
- Court of limited jurisdiction (income, estate, gift, and certain excise tax deficiencies; collection cases; claims for spousal relief from “joint and several” liability; certain partnership proceedings; declaratory judgments; interest abatement; whistleblower award review; review of passport revocation due to seriously delinquent tax debt) and penalties applied to those items
- No jury trials
- Judges and Special Trial Judges travel across the country to try cases (for the benefit of the taxpayers)
- Appeals generally to Federal appellate court in geographic jurisdiction of taxpayer

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"Ticket to US Tax Court"

- Statutory Notice of Deficiency (NOD) provides taxpayer with ability to challenge taxes and penalties in US Tax Court
 - Taxpayer may petition US Tax Court within 90 (or 150) days of receiving NOD
 - If taxpayer takes no action, IRS automatically assesses the tax and penalties
- Some taxes and penalties, however, may be immediately assessed by IRS without issuing NOD
 - IRS may offer (but is not required to offer) a pre-assessment administrative hearing with the taxpayer.
 - IRS must notify the taxpayer within 60 days of assessment of amount due and demand payment ("notice and demand").
 - Taxpayer has right to collection due process hearing (CDP hearing) with IRS Office of Appeals if IRS begins collection activities (i.e., placing a lien on or proposing to levy upon taxpayer's property).
 - Taxpayer may challenge the existence or amount of assessed taxes and penalties at the CDP hearing if the taxpayer did not receive a NOD for such tax liability or did not otherwise have an opportunity to dispute such tax liability. See sec. 6330(c)(2)(B).
 - After CDP hearing IRS Office of Appeals will issue Notice of Determination regarding whether to proceed with collection activities.
 - "Ticket" is then Notice of Determination and US Tax Court may review issues properly raised at CDP hearing.

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US Tax Court Review of Penalties Pre-Assessment Review

US Tax Court may review penalties before assessment when the penalties are based on an item subject to deficiency procedures

- Examples of penalties US Tax Court may review before assessment
 - Failure to file tax return by due date. Sec. 6651(a)(1)
 - Failure to pay amount shown on return. Sec. 6651(a)(2)
 - Failure to make estimated tax payments or to properly withhold. Sec. 6654
 - Accuracy-related penalties (for substantial understatements or underpayments due to negligence or disregard of rules or regulations). Sec. 6662
 - Civil fraud penalties. Sec. 6663

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US Tax Court Review of Penalties Post-Assessment Review

US Tax Court may review immediately assessed penalties in review of CDP hearing

- Examples of immediately assessable penalties
 - Promoting abusive tax shelters. Sec. 6700
 - Aiding and abetting the understatement of tax liability. Sec. 6701
 - Filing a frivolous income tax return. Sec. 6702
 - Failure to collect and pay over trust fund taxes. Sec. 6672

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US Tax Court Review Imposition of Penalties On Its Own

- Frivolous arguments penalties. Sec. 6673
- Contempt powers. Sec. 7456(c)

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Burden of Proof in US Tax Court

- Burden of proof has two components:
 - Burden of production (i.e., burden to come forward with sufficient evidence to support a finding)
 - Burden of persuasion (satisfied by the preponderance of the evidence)
- Burden of proof is generally on the taxpayer to establish each element of the case by a preponderance of the evidence
- IRS had the burden of proof in certain circumstances
 - Any new matter asserted
 - Increases in deficiency
 - Affirmative defenses (asserted in Answer)
 - Fraud with intent to evade tax (burden of proof is clear and convincing evidence)

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Penalty Defenses Applicable to All Types of Penalties

Reasonable cause and good faith:

- Made on a case-by-case basis, taking into account all the facts and circumstances
- The most important factor is the extent of the taxpayer's effort to determine their proper tax liability for the year
- Issue of first impression

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Penalty Defenses Applicable To Accuracy-Related Penalties

- Reasonable basis and adequate disclosure
 - Reasonable basis requires a tax position that is more than merely arguable (high standard)
 - Adequate disclosure requires a statement attached to the return (generally on a specified form)
- Substantial authority
 - Exists only if the weight of the authorities supporting the treatment is substantial in relation to the weight of authorities supporting contrary treatment

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Penalty Defenses Applicable to Fraud

Subjective, good-faith misunderstanding of the law:

- Must be good-faith misunderstanding of law rather than good-faith disagreement with the law

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Interest on Penalties

- Interest itself is not a penalty, it is the cost of money
- Interest may accrue on penalties
- Interest on penalties subject to deficiency procedures
 - Interest is charged from the original due date of the return until the date of payment
 - Interest continues to accrue even when case is pending in US Tax Court
 - Generally, 10 year statute of limitations to collect interest
- Interest on immediately assessable penalties
 - If underpayment is not paid generally within 21 days of date of notice and demand, interest is charged from the date of notice and demand until date of payment
 - No additional interest due if underpayment is paid generally within 21 days of notice and demand
- If penalties are abated, so is corresponding interest
- Taxpayers may stop the accrual of interest if they make a deposit to the IRS, subject to certain requirements. See sec. 6603.

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International Association of Tax Judges



Dr. Anette Kugelmüller-
Pugh
IATJ 10th Assembly
September 13/14
2019 Cambridge, UK

Tax Penalties

International Association of Tax Judges

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Judicial review of tax penalties in German tax law

Tax penalties in German tax law (German Fiscal Code „Abgabenordnung“ - AO -)

- During procedures of tax assessment:
 - Fine for late filing of tax declaration (§ 152 AO)
 - Fine for delayed action (§ 146 II b AO)
 - Administrative fine for violation of non-presentation of documents (§ 162 IV AO)

- After tax assessment:
 - Fine for late payment of tax (§ 240 AO)
 - Interest payments (§§ 233-237 AO)

- Administrative acts other than tax assessment:
 - Coercive payment (§ 329 AO)

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Judicial review of tax penalties in German tax law

Tax penalties in German tax law (cont.)

- Charges **accessory** to tax (§ 3 IV AO)
- In general: If tax assessment is changed/cancelled > tax penalties are changed/cancelled (unless law requires otherwise)
- Provisions for tax assessment applicable to tax penalties

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Judicial review of tax penalties in German tax law

Judicial review

- Administrative review by Inland Revenue –IR- (free of charge)
> tax penalties can be increased > tax payer to be heard
- Appeal in court of first instance and (under special circumstances) in court of appeal

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Tax Penalties in German tax law

Tax Penalties during procedures of tax assessment

- Administrative fine for late filing (§ 152 AO)
 - No filing or late filing of tax declaration
 - A fine **may** be imposed > at the **discretion** of the IR
 - No fine if late filing is excusable (liability of representative attributed to taxpayer)
 - E.g. if tax declaration is not filed within 14 months of the end of the calendar year concerning (Exemption: IR granted an extension or tax liability is zero/negative)
 - Amount of fine: 0,25 % of the assessed tax for every late month, at a minimum of 10 €/month; for income taxes 0,25 % of the assessed tax reduced by advanced payments and deductions, at a minimum of 25 €/month; up to a maximum of 25.000 €
 - No tax declaration: for a duration of up to the time when the tax is first assessed

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Judicial review of tax penalties in German tax law

- Fine for late filing of tax declaration (§ 152 AO) cont.
- To be assessed together with tax > but two administrative acts
- To be appealed separately from tax assessment (arguments against tax assessment to be brought forward in separate appeal against tax assessment); tax payer to ensure that appeal is (also) against fine for late filing
- If tax is changed/cancelled > Fine to be changed/cancelled accordingly
- Administrative appeal: Increase possible (§ 367 II 2 AO)
- Appeal in court of first instance
- Assessment at the **discretion** of IR: Limited review in court
- „Late filing“; „taxpayer's/his representative's fault“: Complete review (burden of proof on IR)
- „Whether a fine should be imposed“; „amount of penalties“: Court can only review whether IR stayed within reasonable grounds of the provision and gave a written justification for its decision > no alteration of the amount of imposed fine in court if IR took reasonable decision
- Time frame for decision in court: All facts arising until the day of administrative decision by IR

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Judicial review of tax penalties in German tax law

Judicial review of tax penalties in German tax law (cont.)

- Fine for late filing of tax declaration (§ 152 AO) cont. : **Bundesfinanzhof, judgment of 17 January 2017 VIII R 52/14**
- IR asked taxpayer to hand in income tax declaration for 2010 until 31st August 2011 > to ensure the lawful implementation of tax assessment <> in general taxpayer represented by an accountant: deadline: 31st December 2011.
- Tax declaration sent to IR by accountant of taxpayer on 7th December 2011
- Tax assessment on 23rd December, in addition fine for late filing of 880 € imposed
- **Bundesfinanzhof**: Fine for late payment unlawful > Order by IR to hand in tax declaration until 31st August unlawful > no written justification of a special individual reason or purpose > tax declaration was sent within legal time frame > no grounds for fine for late filing

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Judicial review of tax penalties in German tax law

Judicial review of tax penalties in German tax law (cont.)

- Fine for delayed action (§ 146 IIb AO)
 - Taxpayer under certain circumstances can ask that electronic records can be kept and administered outside Germany
 - IR can ask taxpayer to relocate the administration back to Germany
 - If taxpayer transfers administration without consent of IR or does not relocate back if ordered: Fine between 2.500 € and 250.000 € at the discretion of the IR (5%-10% of the tax concerned)

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Judicial review of tax penalties in German tax law

Judicial review of tax penalties in German tax law (cont.)

- Fine for delayed action (§ 146 IIb AO) cont.
- Leverage > similar to fine for delayed filing (§ 152 AO)
- Preventive (documents to be delivered) and repressive meaning (sanctions for failure by taxpayer to cooperate)
- To be taken into account: Liability of taxpayer; amount of documents not provided; time of delay; financial advantage for taxpayer; wealth of taxpayer
- Assessment by separate administrative act; taxpayer to be heard before
- Behaviour of taxpayer to be taken into account
- Administrative review by IR and application for suspension possible
- Review in court: Assessment at the discretion of IR > restricted review by court; court not to replace decision by IR
- Time: Facts available at final decision of IR
- So far most appeals successful > fine very high (2.500 – 250.000 €) > principle of proportionality to observe

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Judicial review of tax penalties in German tax law
 Judicial review of tax penalties in German tax law
 (cont.)

- Fine for delayed action (§ 146 IIb AO) cont.: **Bundesfinanzhof, judgment of 24th April 2014 IV R 25/11**
- IR asked taxpayer to hand in documents ((payroll) accounts, agreements, receipts) before start of an audit; deadline 11th January 2010; otherwise a fine for delayed action to be imposed
- Taxpayer did not hand in the required documents > assessment of fine of 4.800 € on 3rd March 2010 (100 € for each day and document not handed in)
- **Bundesfinanzhof**: Fine unlawfully imposed and to be annulled; conditions of provision fulfilled (taxpayer did not hand in documents during audit) <> however the discretion provided was not exercised correctly by IR (IR assumed that any failure in handing in documents leads to a fine and did not examine the individual reasons; lump sum of 100 € per day and document unlawful; IR took into account that taxpayer appealed the order of the audit even though this behaviour has nothing to do with the non presentation of documents)

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Judicial review of tax penalties in German tax law
 Judicial review of tax penalties in German tax law
 (cont.)

- Administrative fine for violation of non-presentation of documents (§ 162 IV AO)
- Tax payer has to present documents for cross border activities, e.g. transfer pricing
- Presented documents are not relevant: Fine of minimum 5.000 €
- Late presentation of documents: Fine up to 1.000.000 €; minimum of 100 € for every day of the delayed presentation
- No fine if tax payer is not liable for violation of the duties or the liability is minimal
- Preventive purpose

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Judicial review of tax penalties in German tax law
Judicial review of tax penalties in German tax law
(cont.)

- Administrative fine for violation of non presentation of documents (§ 162 IV AO) cont.
- Decision at the discretion of IR > taxpayer's advantage to taken into account
- To be imposed after an audit
- Administrative review and judicial review in court
- No liability/little liability: full review
- Amount of fine: limited review
- Burden of proof on IR for conditions of provisions

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Judicial review of tax penalties in German tax law
Judicial review of tax penalties in German tax law
(cont.)

- Fine for late payment (§ 240 AO):
**Bundesfinanzhof, judgment of 22nd
November 2017 XI R 14/16**
- Taxpayer became insolvent; IR had to pay tax back; registration in the insolvency table: Tax due and fine for late payment
- **Bundesfinanzhof**: No fine for late payment due; tax paid during insolvency is not final; but tax due was originally paid <> late payment fine only on tax not paid at all

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Judicial review of tax penalties in German tax law
 Judicial review of tax penalties in German tax law
 (cont.)

- Interests (§ 233-237 AO)
 - Due on the difference between assessed tax and any advanced payment
 - Interest payment starts 15 months after the end of the calendar year in which the tax arises (e.g. the month of March for income tax)
 - Interest payment on deferred tax
 - Interest payment on evaded tax
 - Interest payment on suspended tax (interim measures)
 - 6 % per year

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Judicial review of tax penalties in German tax law
 Judicial review of tax penalties in German tax law
 (cont.)

- Interests (§ 233-237 AO) cont.
 - Arising automatically if legal conditions are fulfilled
 - Purpose: to cancel financial advantage taxpayer has by not paying the tax when due
 - To be assessed together with tax > but separate administrative act
 - Separate appeal
 - Administrative review and appeal in court
 - Appeal for suspension possible
 - Court not to review whether tax assessment is correct
 - If tax assessment is changed/cancelled > interest payments to be changed/cancelled
 - Burden of proof on IR for conditions of provision

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Judicial review of tax penalties in German tax law
Judicial review of tax penalties in German tax law
(cont.)

- Coercive payments (§ 329 AO)
 - Separate Administrative acts other than tax assessment: e.g. duty to co-operate in cross border issues; duty to indicate the beginning of a trade; handing in of the balance sheet on demand by IR
 - Enforcement by coercive means (**coercive payment**; substitute performance; direct force)
 - Coercive payment: up to 25.000 €; at the discretion of the IR; taxpayer to be heard

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Judicial review of tax penalties in German tax law
Judicial review of tax penalties in German tax law
(cont.)

- Coercive Payment (§ 329 AO) cont.
 - Can be assessed several times (repeated assessment); maximum amount each time: 25.000 €
 - Decision at the discretion of the IR (whether to impose and amount of coercive payment)
 - Administrative review by IR: All facts to be considered until final assessment; increase possible
 - Review at court of first instance and court of appeal (under certain circumstances)
 - Burden of proof on IR
 - Court only to review whether assessment is outside the limits of the provision
 - Arguments against the basic administrative act are excluded (§ 256 AO)

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Judicial review of tax penalties in German tax law
Judicial review of tax penalties in German tax law
(cont.)

- Coercive Payment (§ 329 AO) cont.: **Bundesfinanzhof, judgment of 22nd May 2011 VII R 79/00**
- IR announced to impose coercive payment on taxpayer for not handing in a tax declaration on demand for VAT and trade tax after granting an extension; administrative review only after two years of original assessment
- **Bundesfinanzhof:** Assessment of coercive payment lawful; only facts to be considered until final decision of IR (i.e. excluding facts arising between decision of IR and hearing in court); fact that taxpayer meanwhile insolvent not to be taken into account (alternatively imprisonment possible); longer period between assessment of coercive payment and review by IR not harmful > coercive payment only has to be assessed close to demand for handing in a tax declaration; no forfeit of coercive payment