



# Tax penalties

their ins and outs



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# Tax penalties: their ins and outs

If you drive too fast, you may receive a fine. And, in fact, something similar happens in taxes. If a taxpayer fails to meet his tax obligations, a tax penalty (or: "administrative penalty") could be imposed. The question is whether such penalty is always justified. Was there valid cause to impose the penalty? Isn't the penalty possibly too high? In any case, one may want to investigate whether there are reasons to mitigate the penalty. In practice it happens that a penalty is reduced if the case is not dealt with within a reasonable period. A tax penalty may even be void if the formal rules for imposing it have not been complied with correctly.

In this brochure, we summarize the tax penalties that a taxpayer might face, as well as the corresponding formal aspects. The penalty amounts mentioned in this brochure, are based on the applicable laws and regulations as of 1 April 2025.



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# Who could face a tax penalty?

## Who could face a tax penalty?

Imposing a tax penalty is – *grosso modo* – linked to the obligation to file a tax return and the payment of tax due. If due to gross negligence or intention a tax return has not been filed (timely, has been filed incorrectly or incompletely or has not been paid (timely), a tax penalty can be imposed.

Since July 1st, 2009 a tax penalty cannot only be imposed on the taxpayer but also on a so-called “participant in the commission”, an executive or a principal<sup>1</sup>. For qualification as participant in the commission a conscious and close cooperation between the taxpayer and the other person (for example the tax advisor) is required while, for example, filing an incorrect tax return. If the taxpayer is a legal entity, for example a BV (limited liability company), a tax penalty cannot only be imposed on the BV itself, but also on the director/shareholder and other employees, such as the in-house tax person. In case a tax inspector intends to impose a tax penalty on another than the taxpayer, he needs permission from the management of the Dutch tax authorities.

As of January 1st, 2014 tax penalties may also be imposed on the party causing, inciting or

being an accessory<sup>2</sup> to the infringement:

- An example of the party causing the infringement is the situation in which a tax advisor deliberately makes the taxpayer file a false tax return while the taxpayer is not to blame.
- Inciting requires that the party incites another to commit an offense by using one or more means of incitement such as gifts, promises or abuse of authority.
- Accessory to the infringement can be described as someone providing assistance to committing an offense (during or prior) which is committed by another. In this context, a tax return preparer can be accused of deliberately not investigating the arm's length nature of certain payments.

As of January 1st, 2020 offense penalties imposed on professional intermediaries (such as lawyers, notaries, tax advisors and accountants) may be disclosed and published on the website of the Dutch tax authorities. This only occurs in case of (conditional) intention.<sup>3</sup>

<sup>1</sup> In Dutch: medepleger, feitelijk leidinggever, opdrachtgever

<sup>2</sup> In Dutch: doen pleger, uitlokker, medeplichtige

<sup>3</sup> As per 1 April 2025, no instances of publication are known.



# 2



## Types of tax penalty

# Types of tax penalty

Two types of tax penalty can be distinguished: one for acts of omission ("omission penalties") and one for offenses ("offense penalties"<sup>5</sup>).

The goal of the **omission penalties** is to "drill" the taxpayer to be tax compliant. An omission penalty can already be imposed if a taxpayer fails to meet one or more of his tax obligations.

**Offense penalties** aim to punish more serious offenses (both actions and non-actions) involving gross negligence or intention. Such offenses do not include miscalculations or errors in writing. The tax inspector has to claim and (if disputed) demonstrate the existence of gross negligence or intention. The gross negligence or intention must be caused by the taxpayer himself.

- The knowledge of an advisor can, in principle, not be attributed to the taxpayer. However, this may be different if the taxpayer took insufficient care in the choice and engagement of his advisor.
- In general an employee's gross negligence or intention will be attributed more easily to the legal entity/employer if the employee has a top position within an organization compared to an employee of lower ranking. In respect of the latter, gross negligence or intention may still be attributed, but the burden of proof for the tax inspector is more serious than in a case of a higher positioned employee.

A penalty cannot be imposed if there is "absence of all guilt"<sup>6</sup>. An example of absence of all guilt is provided by a taxpayer which (timely) instructed his bank to transfer the tax due at a specific moment. The bank, however, made the transfer

too late. The court decided that there was absence of all guilt. In such cases, the taxpayer has to claim and prove the absence of all guilt. In addition, the tax inspector cannot impose a tax penalty in case of an "arguable position"<sup>7</sup>. An arguable position for example exists if the respective position can be defended based on literature and/or case law, even though the Dutch tax authorities may have a differing view in that respect.

For each type of penalty, a further distinction is made between the type of tax: **tax levied by assessment** and **tax levied by return**<sup>8</sup>. Accordingly, there are different penalty-causing facts and different penalty amounts for each type of tax.

**Taxes levied by return** are taxes that must be paid at the time of filing the return, such as payroll tax, value added tax, dividend tax and minimum taxation<sup>9</sup>. Corporate income tax, personal income tax, inheritance tax and gift tax are examples of **taxes levied by assessment**: the taxpayer first files a return and subsequently the tax authorities raise an assessment. In the latter situation, payment is not due before the taxpayer receives the assessment.

Within each type of taxation one distinguishes two types of omissions which may result in an omission penalty. On the one hand there is a "*filing omission*", on the other hand there is a "*payment omission*". In case both omissions occur, each omission can result in its own omission penalty.

<sup>4</sup> In Dutch: verzuimboete.

<sup>5</sup> In Dutch: vergrijpboete.

<sup>6</sup> In Dutch: afwezigheid van alle schuld (AVAS).

<sup>7</sup> In Dutch: pleitbaar standpunt.

<sup>8</sup> In Dutch: aanslagbelasting resp. aangiftebelasting.

<sup>9</sup> Dutch implementation of the OECD's Pillar 2 rules as laid down in Minimum Taxation Act 2024 (in Dutch: Wet Minimumbelasting 2024).

# Types of tax penalty

## 2.1 Omission penalties

### 2.1.1 Omission penalties for taxes levied by assessment

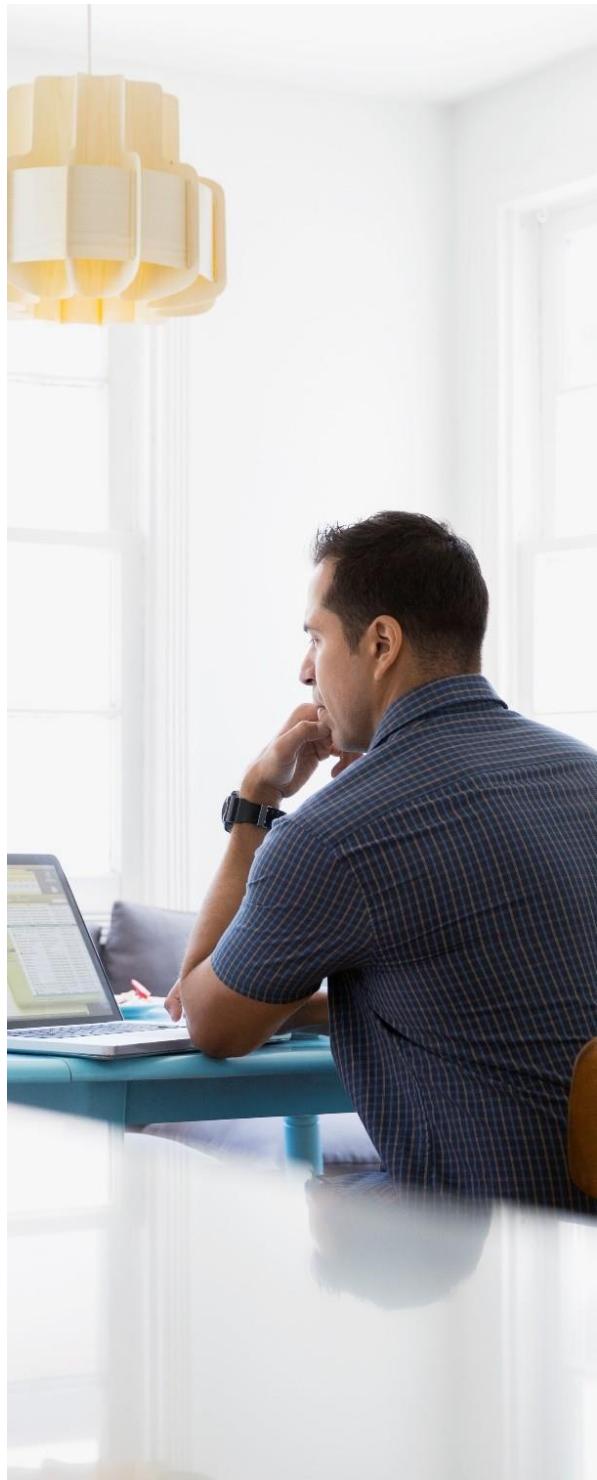
Regarding taxes levied by assessment the Dutch tax authorities can impose an omission penalty if a return is not filed or not filed on time. The maximum omission penalty amounts to €6,709<sup>10</sup>. Only in exceptional cases will this maximum amount be imposed. An example of such an exceptional case is a systematic failure of the (timely) filing of the tax return.

Not (timely) filing qualifies as a filing omission for taxes levied by assessment. The general rule is that the tax inspector imposes an omission penalty of 7% of the statutory maximum, which is an amount of €469. However, in case of a filing omission in respect of corporate income tax returns an omission penalty of €3,354 (50% of the statutory maximum) will be imposed.

An omission penalty can also be imposed for a payment omission in respect of taxes levied by assessment. A payment omission occurs if the tax assessment has not been paid, has not fully been paid or has been paid too late. The omission penalty will not be imposed by the tax inspector, but by the tax collector (the officer verifying whether the tax is paid on time). The omission penalty for a payment omission amounts to 5% of the tax which has (partially) not been paid or was paid too late, with a maximum amount of €6,709 and a minimum amount of €50.

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<sup>10</sup> Penalty amount for omissions occurred as of January 1st, 2024.



## Types of tax penalty

### 2.1.2 Omission penalties for taxes levied by return

Also, in respect of taxes levied by return an omission penalty can be imposed for both a filing omission and a payment omission.

A *filing omission* occurs if the tax return is not filed or not filed on time. If so, an omission penalty will be imposed of €165 at the most. This maximum amount only applies in an exceptional case, i.e. the systematic failure of (timely) filing of the tax return. Otherwise, an omission penalty of 50% of €165 (€82) will be imposed.

However, in respect of payroll taxes, an omission penalty will be imposed in case of not, late, incorrect or incomplete filing. A maximum amount of €1,675 will be imposed in exceptional cases, otherwise the omission penalty amounts to 5% of the maximum of €1,675 (€83).

No omission penalty will be imposed if the tax return is (correctly) filed within seven days after the day on which the tax return should have been filed.

A *payment omission* can occur in three situations.

First of all, a *payment omission* occurs if the tax due on the (timely and correctly) filed tax return has not been paid, has not fully been paid or has been paid too late. In that case an omission penalty will be imposed of 3% of the tax which was not (timely) paid. The omission penalty amounts at least €50 and at the most €6,709.

The percentage of 3 is not applicable in case of systematic omission, in which case a maximum omission penalty of €6,709 will be imposed. Payments within seven days after the day on which the tax due should have been paid, are considered as timely payments, unless the taxpayer was in default in respect of the payment for the same type of taxation in the preceding period as well.

In the second place, a *payment omission* occurs if the tax due has not been (fully) paid because the tax return was filed incorrectly. This includes the situation in which the taxpayer fails to file his tax return because he erroneously has not requested for a tax return form. In this case, an omission penalty of 10% of the respective tax due can be imposed with a minimal amount of €50 and a maximum amount of €6,709. In case of not including an addition for private use of a car in the tax base, the inspector imposes an omission penalty for 80% of the maximum amount of €6,709.

In the third place, a *payment omission* is recognized in case of a so-called "supplementary tax return" or a so-called "correction notice" (for payroll taxes). Through such supplement/correction notice a taxpayer can adjust his previously filed - incorrect - tax return. If the supplement/correction notice does not exceed the amount of €20,000 or does not exceed 10% of the tax amount which has been paid already, no omission penalty will be imposed. However, in all other cases an omission penalty will be imposed for 5% of the tax due, with a maximum of €6,709.

# Types of tax penalty

## 2.1.3 Omission penalty for non-compliance with tax obligations

In addition to penalties for late filing and late payment of taxes, omission penalties can also be imposed on non-compliance with a variety of other obligations. This for example includes the following:

- The taxpayer who does not (timely) request the tax inspector to hand out a tax return form
- The legal representative, curator (trustee or guardian), or administrator who do not comply with the tax obligations of the person put under their care
- The successor or the executor who fail to comply with the tax obligations of the deceased
- The employer which does not comply with the obligations in respect of payroll taxes, such as requesting relevant tax information from employees (including tax ID number), determination of their identity, or providing an annual statement
- The taxpayer, the withholding tax agent or parties obliged to keep an administration who do not allow the tax inspector to make copies, extracts etcetera of documents during a tax audit
- Persons who refuse access to the tax inspector, if required for his tax audit

- A company which does not provide a dividend note to the beneficiaries to the dividend<sup>11</sup>, or the company relying on the Dutch domestic dividend withholding tax exemption for distributions to non-Dutch shareholders without filing a dividend notification within a month
- The entrepreneur which does not comply with the obligations to issue an invoice according to the requirements of the Value Added Tax Act 1968
- The person who transfers the economic ownership of a property and fails to report the transfer (if not by notarial deed) to the tax inspector within two weeks

The maximum omission penalty amounts to €6,709 in case of non-compliance with the obligations mentioned above. Only in exceptional cases this maximum amount will be imposed. In all other cases, an omission penalty of 50% of the maximum will be imposed amounting to €3,354.

“Voluntary disclosure” does not mitigate an omission penalty imposed for the abovementioned offenses.

The omission penalties for non-compliance with the obligations are not included in the penalty diagrams (see below).

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<sup>11</sup> A dividend note (*dividendnota*) does not have to be provided in case of a dividend distribution within a fiscal unity for corporate income tax purposes, a dividend distribution to a major shareholder/individual (*directeur-grootaandeelhouder*) or a dividend distribution to a company which eligible for participation exemption.

## Types of tax penalty

### 2.1.4 Specific omission penalties

Aside from aforementioned offenses that can lead to an omission penalty, there are several other specific situations wherein an omission penalty can be imposed. This encompasses the following situations:

- To transport one or more persons in the carriage of a van which is exempt from Motor Vehicle Tax, or has been granted a return on Motor Vehicle Tax
- To not, not timely, or not correctly or incompletely, file corrections regarding payroll taxes
- To not, or not timely or not correctly or incompletely file the first day notice under article 28, paragraph g of the Dutch Payroll Tax Code
- To not, or not within the term, file your statement of intra-Community supplies for value added tax
- To file an incorrect or incomplete statement of intra-Community supplies.
- To not, not fully or not timely pay Motor Vehicle Tax
- To not file a correct tax return, to not meet the set requirements, to use a road while it is suspended, or to not have paid Motor Vehicle

Tax in case of a foreign vehicle or a vehicle that for no valid reason, does not have the required registration

- To use a road with a truck that is a part of a commercial vehicle park and that is connected to a trailer that is not a part of said commercial vehicle park
- To not timely file your tax returns, and/or not pay taxes due in relation to the taxation of Dutch Heavy Vehicles Code, or not pay, not pay in full or not pay timely
- In case the higher consumption tax on cigarettes or smoking tobacco has been enacted, it is as of the first day of the second month following the month where the higher tax rate has been enacted, not permitted
- To sell cigarettes or smoking tobacco to redistributors, to deliver or to offer for sale, if the packaging has the consumption tax seal of products from before the rates went up.

For these special kinds of omission penalties, the Penalty Decree contains further rules. These rules will not be further discussed in this brochure due to the specific character of these penalties, and these fines are also not listed in the penalty schedule.

# Types of tax penalty

## 2.2 Offense penalties

Similar to omission penalties, offense penalties may be imposed in respect of both taxes levied by assessment and taxes levied by return, and in general apply if insufficient tax is levied. Furthermore, offense penalties may be imposed if certain information obligations are not or not timely met, or if they are met incorrectly or incompletely.

An offense penalty can only be imposed in case of "gross negligence" or "intention"<sup>12</sup>.

*Gross negligence* means a culpable act, an act of deliberate carelessness or serious negligence bordering intention, for which the taxpayer might reasonably have suspected that his actions (or his failure to act) could have resulted in the insufficient levying of tax.

*Intention* (including conditional intention) exists if the taxpayer acted willfully and knowingly. An example of intention is the deliberate failure to declare part of the profit in the corporate income tax return.

The tax inspector has to claim and demonstrate that gross negligence or intention exists. Moreover, an offense penalty can only be imposed on basis of the tax not levied owing to gross negligence or intention. For example, if an additional assessment for corporate income tax is raised as a result of two adjustments and only one concerns gross negligence or intention, an offense penalty can only be imposed in respect of this latter adjustment.

Mitigating circumstances may be present requiring reduction of the penalty if, for example, the penalty is completely out of proportion to the facts that warranted the penalty in the first place.

### 2.2.1 Offense penalty in case insufficient tax is levied

#### Offense penalty for taxes levied by assessment

In respect of taxes levied by assessment an offense penalty will be imposed if the taxpayer deliberately has not, incorrectly or incompletely filed his tax return. Also, if the taxpayer can be blamed that the amount of the assessment is too low or otherwise insufficient tax has been levied, an offense penalty can be imposed. The maximum offense penalty amounts to 100% of the additional amount of the assessment or additional assessment. An offense penalty of 100% only occurs in exceptional cases of intention, for example if the taxpayer deliberately does not, incorrectly or incompletely file his tax return in a systematic manner. In non-exceptional cases, the offense penalty amounts to 50% in case of intention. In case of gross negligence, the offense penalty amounts to 25%, but to 50% in exceptional cases.

In respect of personal income tax, the offense penalty may amount to 300% (in exceptional cases, requiring a recurring offense) if due to gross negligence or intention the income from savings and investments (box 3 income) reported in the tax return (for example unreported savings) is too low. In principle, in such case the tax inspector will impose an offense penalty of 75% in case of gross negligence and an offense penalty of 150% in case of intention.

The tax inspector cannot impose an offense penalty if the taxpayer has taken an arguable position. An arguable position for example exists if the respective position can be defended based on literature and/or case law, even though the Dutch tax authorities may have a differing view in that respect.

<sup>12</sup> In Dutch: grove schuld of opzet

# Types of tax penalty

As of January 1, 2014, the tax inspector may impose an offense penalty for deliberately providing incorrect or incomplete information when requesting a preliminary tax assessment or a revision of a preliminary tax assessment. The offense penalty amounts to at the most 100% of the tax which would erroneously have been refunded or not have been paid.

## Imposing an offense penalty

An offense penalty is usually imposed upon an additional assessment. However, the tax inspector can also impose such a penalty upon the normal assessment in the case of a corporate income tax or personal income tax return (and other returns for taxes levied by assessment) deliberately not filed or deliberately filed incorrectly or incompletely.

## Offense penalty for taxes levied by return

In respect of taxes levied by return an offense penalty can be imposed if gross negligence or intention the taxpayer can be blamed that the tax due has not been (timely) paid. In that case, penalties can be imposed to the amount of 100% of the tax still due. In respect of these penalties the same percentages (50% or 25%) and grounds for mitigation apply as for the taxes levied by assessment.

If an offense penalty is imposed because an addition for private use of a car has not taken place where it should, the inspector imposes an offense penalty for 40% of the amount of tax still due in cases of gross negligence and for 80% in cases of intent. If the registration handed over is either incorrect or incomplete, the tax inspector imposes a fine of 100%.

## 2.2.2 Voluntary disclosure further to filling an incorrect or incomplete tax return

After filing an incorrect or incomplete tax return an offense penalty may be mitigated if the taxpayer corrects the tax return or provides the tax inspector correct and complete information ("voluntary disclosure"). Please note that a voluntary disclosure is only possible until the taxpayer knows or could reasonably suspect that the tax inspector is already investigating the error or incompleteness. For taxes levied by assessment (corporate income tax and personal income tax) the taxpayer needs to voluntarily disclose within two years after filing the tax return. If the taxpayer corrects the tax return, either provides the tax inspector correct and complete information, after those two years, the tax inspector may still reduce the offense penalty on mitigating grounds<sup>13</sup>.

As of January 1, 2020, the voluntary disclosure does not apply to income from a substantial (share) interest (box 2 income) and income from savings and investments (box 3 income). In this respect the voluntary disclosure may still qualify as a mitigating circumstance requiring reduction of the penalty.

Voluntary disclosure in relation to taxes levied by return is not embedded in Dutch tax law, but is arranged for policy-wise in the so-called Penalty Decree.

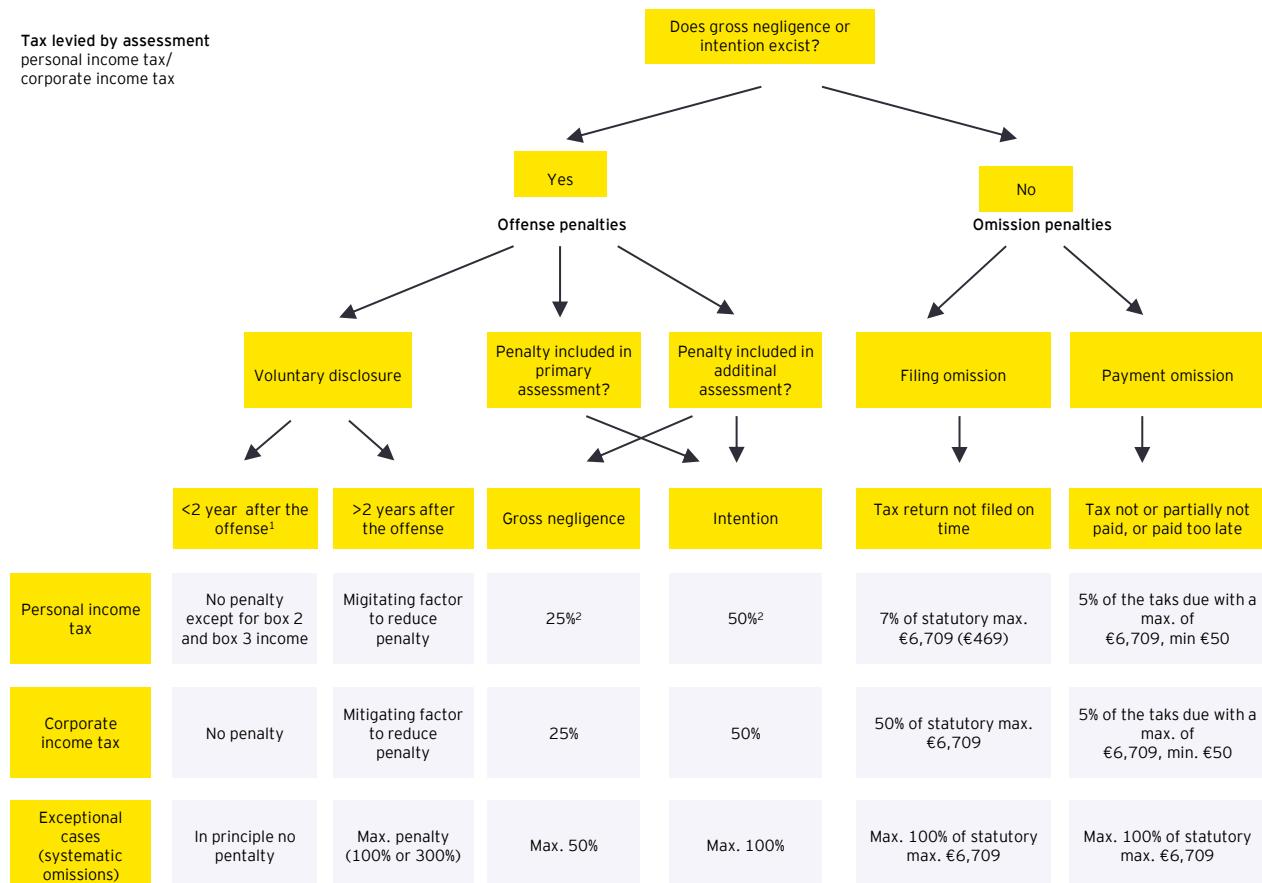
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<sup>13</sup> The Penalty Decree (in Dutch: *Besluit Bestuurlijke Boeten Belastingdienst*) also provides for voluntary disclosure if initially deliberately incorrect or incomplete information has been provided when requesting a (revised) preliminary tax assessment.

# Types of tax penalty

## Overview omission penalties and offense penalties

Using the diagrams on the next pages, for taxes levied by assessment and taxes levied by return we provide an overview of the possible omission penalties and offense penalties concerning filing omissions, payment omissions and voluntary disclosure. Please note that these diagrams do not provide a complete overview of all potential omission and offense penalties.



1. It is possible to avoid the penalty if the taxpayer voluntarily discloses and submits a correct tax return within two years after submitting the wrong or incomplete tax return, or if the correct information is provided before he knows or should reasonably know that the tax inspector has knowledge of the incorrectness or will have knowledge of it. This does not apply to income derived from a substantial interest (box 2 income) and income derived from savings and investments (box 3 income), but voluntary disclosure may still be a mitigating circumstance resulting in the reduction of the penalty.
2. For non-reported box 3 income the penalty will be 75% in the case of gross negligence and 150% in the case of intention, and a maximum penalty of 300%.

- I. These diagrams do not intend to provide a full and complete overview. Accordingly, no rights can be derived from the diagram.
- II. This diagram applies to corporate income tax and personal income tax. For other taxes levied by assessment, the resulting penalty could be different.

# Types of tax penalty

Tax levied by return  
(among which) wage tax,  
value added tax and  
dividend withholding tax

Does gross negligence or  
intention exist?

Yes

No

Offense penalties

Filing omission

Payment omission

Voluntary  
disclosure<sup>1</sup>

Wage tax

Other taxes levied  
by return

Gross negligence	Intention	Tax return not filed or not filed on time, incorrectly or incompletely	Tax return not filed or not filed on time	Payment omission in the periodic payment pattern (although correctly filed the return)	Payment omission due to insufficient tax levied (incorrect tax return)	Corrected amount of tax less than €20,000 or less than 10% of already paid tax	In all other cases
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Filing/payment within 7 days after filing date	Not applicable	Not applicable	No penalty	No penalty	No penalty unless an omission in the preceding period occurred	10% of tax due with a max. of €6,709, min. 50	No penalty	Dependent on "type" of payment omission
Each (subsequent) omission	25%	50%	5% of the statutory max. €1,675	50% of the statutory max. €165	3% of the tax due with a max. of €6,709, min. €50	10% of tax due with a max. of €6,709, min. €50	No penalty	5% of tax due with a max. of €6,709, min. €50
Exceptional cases (systematic omissions)	Max. 50%	Max. 100%	Max. 100% of the statutory max. €1,675	Max. 100% of the statutory max. €1,675	Max. 100% of the statutory max. €6,709	100% of tax due with a max. of €6,709, min. €50	No penalty	5% of tax due with a max. of €6,709, min. €50

1. The penalty decree outlines the omission penalty in case of a corrected tax return for taxes levied by return which can be considered a 'voluntary disclosure'. For completeness' sake we note that in case of voluntary disclosure regarding taxes levied by return no offense penalty will be imposed. A voluntary disclosure is only possible until the taxpayer knows or could reasonably suspect that the tax inspector is already investigating the error or incompleteness. Also, it is required that initially a tax return was filed.

# Types of tax penalty

## 2.2.3 Offense penalties for non-compliance various information obligations

Over the past years new offense penalties have been introduced in Dutch tax law which can be imposed for not, not timely, incorrectly or incompletely fulfilling information obligations (in case of intention or gross negligence).

### Active information obligation

An offense penalty may be imposed in case of non-compliance with the (active) information obligation which has been enacted as of January 1, 2012. This (active) information obligation at present applies to the following statements and tax returns:

- Supplement VAT return
- Statement "exclusive use business delivery van", statement "no private use car"
- Tax fraud related to inheritance taxes

Depending on the situation, the offense penalty in this respect amounts to a maximum of €6,709 (€3,354 in case of intention and €1,677 in case of gross negligence), or at the most 100% of the tax due which is or would not have been levied due to non-compliance with the information obligation.

As per January 1, 2021, an active information obligation also applies in relation to the Withholding Tax Act 2021. A comparable active information obligation is introduced in the Dutch implementation of the OECD's Pillar 2 rules (Wet Minimumbelasting 2024). An offense penalty can be imposed to a maximum of 100% of the tax due which is or would not have been levied due to non-compliance with the information obligation. According to the penalty decree, the penalty will be imposed at 50% in case of intention, or 25% in case of gross negligence (for the Withholding Tax Act 2021 nor the Minimum Taxation Act 2024 this is not arranged for explicitly in the penalty decree).

### Information obligation former ANBIs

An offense penalty also can be imposed in case a former "Public Benefit Organization" (Dutch: *Algemeen Nut Beogende Instelling*) does not comply with the information obligation to provide the tax inspector with a copy of the annual accounts including a specification of the donations and/or gifts made. The maximum amount of this penalty currently is €5,750 (which will be set at 25% in case of gross negligence and at 50% in case of intention).

### Information obligations International Assistance Act

In relation to the international exchange of information various offense penalties are included in the International Assistance Act (Levying of Taxes). This Act implements Directives of the Council of Europe and other measures of international and interregional law in relation to mutual assistance for the levying of taxes. The information obligations can be divided as follows:

- Taxpayers/parties obliged to keep an administration are requested to cooperate in tax audits or investigations for the purpose of the international exchange of information.
- Certain parties (such as banks and insurance companies) are required, of their own record, to provide information among others regarding income from work and income (box 1 income) and income from saving and investments (box 3 income) for the purpose of the automatic international exchange of information.
- Specific parties obliged to keep an administration (reporting financial institutions) need to, of their own record, provide information further to the FATCA treaty between the Netherlands and the USA.
- Certain companies resident in the Netherlands (group service entities) are required to, of their own record in the corporate income tax return, inform the tax inspector whether they meet the so-called substance requirements.

# Types of tax penalty

- Specific parties obliged to keep an administration (reporting financial institutions) need to fulfill obligations to automatically exchange information according to the Common Reporting Standard.
- Certain reporting entities (credit institutions, banks and other financial institutions) and certain individuals or legal entities dealing within the scope of their profession (lawyers, notaries, tax advisors, accountants) must allow tax authorities access to anti-money laundering data (know your customer data, UBO register).
- (Assistant)intermediaries (or: the taxpayer itself) are required to disclose specific reportable cross-border arrangements (see below under Mandatory Disclosure Regime - "MDR").
- As of 1 January 2023: platform operators have to maintain specific information about certain sellers on their digital platform and have to report this to the authorities annually.

In case of non-compliance with these information obligations, in case of intention or gross negligence, an administrative penalty (offense penalty) may be imposed to €25,750 at the most (€1,030,000 for MDR omissions).

According to the penalty decree, the penalty will be imposed at 50% in case of intention, or 25% in case of gross negligence (this is not arranged for MDR in the penalty decree).

Criminal prosecution is also provided for, even in case non-compliance does not result in the insufficient levying of tax. This subject is beyond the scope of this brochure.

## Mandatory Disclosure Regime (MDR)

On May 25, 2018, the Council of the European Union adopted the directive with respect to the mandatory automatic exchange of information in

the field of taxation in relation to reportable cross-border arrangements. Based on this directive, intermediaries, such as tax advisors, are required to report tax planning arrangements that are perceived potentially aggressive by the European Union. In certain cases, the reporting obligation shifts towards the taxpayer, if there is no intermediary present. Not complying with these reporting obligations can result in a penalty amounting to a maximum of €1,030,000 imposed on the taxpayer or on the intermediary. The penalty amount is determined by the tax inspector and the tax authorities' subject matter coordinator of the procedural tax law group.

Although this new information obligation applies as from January 1, 2021, it has retroactive effect for constructions of which the first step of implementation was made on or after June 25, 2018. It was announced that offense penalties will be imposed with some restraint for constructions of which the first step was initiated before July 1, 2020.

## Information obligations CbCR

Within scope of Country by Country Reporting the tax inspector, in case of intention or gross negligence, can impose an offense penalty for not, not timely, incorrectly or incompletely fulfilling the obligation to prepare and submit a Country-by-Country Report, or if the required notification is not filed in time. This penalty amounts to a maximum of currently €1,030,000. The penalty amount is determined by the tax inspector and the tax authorities' subject matter coordinator of the procedural tax law group. In case of deliberate non-compliance criminal prosecution is also possible.

For the record it is noted that non-compliance with the master file/local file requirements is not punished with beforementioned (high) penalty. Non-compliance with these requirements may however result in criminal prosecution.

## Types of tax penalty

### Information obligations Pillar 2

In light of the OECD's Pillar 2 rules, the obligation to file the so-called Globe Information Return ("GIR") is introduced. The GIR in principle only has to be filed by one group entity. The other Dutch resident group entities in that case do have to file a notification whereby they appoint the group entity that files the GIR.

In case of intention or gross negligence, the Dutch tax authorities can impose an offense penalty for not, not timely, incorrectly or incompletely fulfilling the obligation to prepare and file the GIR. This penalty amounts to a maximum of currently €1,030,000<sup>14</sup>. In case of intention or gross negligence, an offense penalty can also be imposed for not, not timely, incorrectly or incompletely fulfilling the obligation to file the notification. This penalty amounts to a maximum of currently €25,750<sup>15</sup>.

In case of deliberate non-compliance criminal prosecution is also possible.

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<sup>14</sup> Penalty amount sixth category as per 1 January 2024.

<sup>15</sup> Penalty amount fourth category as per 1 Januari 2024.

# 3



## Some formal aspects

# Some formal aspects

In the final part of this brochure, we briefly discuss some formal aspects of tax penalties. An important element in this context is that imposition of a penalty by the tax inspector is considered a form of prosecution, which means that the tax authorities must also observe formal rules to protect the legal position of the taxpayer.

## 3.1 Scope of the Penalty Decree

The regulations of the Penalty Decree which has come into force as of July 1, 2016 apply to the offenses which occur after the date of commencement, i.e. after June 30, 2016. If an offense occurs before the date of commencement of this Penalty Decree (or later, annual amendments<sup>16</sup>) the regulations apply according to the Penalty Decree which was applicable at the time of the offense. Offenses which occurred before July 1, 2016 but for which no penalty was imposed on July 1, 2016 or for which no irrevocable penalty decision exists, the regulations of the "new" Penalty Decree (or later date of amendment) will be applicable if this is in advantage of the taxpayer. This does not apply to the regulations in relation to voluntary disclosure for income from substantial (share) interest (box 2 income) and income from savings and investments (box 3 income).

## 3.2 Objections and appeal

An objection or appeal can be lodged against a tax penalty. The principal rule is that the penalty must be imposed at the same time as the (additional) tax assessment. In the case of an offense penalty, the inspector must also notify the taxpayer in writing, and in advance that he intends to impose such a penalty.

If this notification is not issued, the tax court might find this a reason to reduce the penalty or even declare it null and void in exceptional cases. The inspector also has an obligation to explain the reason for the penalty to the taxpayer in a so-called "statement", no later than when the penalty itself is imposed. This applies equally to omission penalties and offense penalties. Concerning offense penalties, this statement should also include the facts and circumstances that indicate the likelihood of gross negligence and/or intention. If this statement of the reason for the penalty is not done correctly, the entire penalty will be declared null and void according to the existing case law. If the taxpayer wishes to use his right to be heard, i.e. orally challenge the underlying reasons of the penalty imposed, then the inspector must facilitate the taxpayer thereto. For an omission offence, the possibility to be heard prior to the imposition of the penalty is generally not available.

<sup>16</sup> Most recent amendments are effective January 1, 2025.

## Some formal aspects

### 3.3 Mandatory choice of omission or offense penalty

In some situations, either an omission penalty or an offense penalty could be imposed, for instance in case of deliberate failure to file a corporate income tax return. In such cases, the tax inspector has to decide which penalty he will opt for. In principle, this decision is exclusive, so that imposing an omission penalty excludes the possibility of imposing an offense penalty based on the same fact, and vice versa. If for the same offense an offense penalty results in a lower penalty amount compared to an omission penalty, the tax inspector will choose to impose a "higher" omission penalty.

However, the tax inspector may impose an offense penalty after an omission penalty has been imposed in case of new "complaints". The imposed omission penalty is settled with an offense penalty imposed based on the same omission. Statements of the taxpayers, the withholding agent or third parties can be considered "complaints". Complaints are considered new if they have become known after the omission penalty was imposed or if the complaints have not been examined at the time the omission penalty was imposed.

### 3.4 Reasonable period

A tax penalty - like a penalty under criminal law - must be imposed within a reasonable period. This follows from the European Convention on Human Rights and Fundamental Freedoms.

Exceeding such reasonable period could result in the penalty being reduced. In general, a penalty will be reduced if more than two years have passed by before the judge decides on the lodged appeal against the tax penalty. The 2-year period applies to each separate instance, i.e. lower court, higher court and Supreme Court. The term of two years applicable to the lower court starts at the latest on the moment the imposed tax penalty has been notified to the taxpayer.

The Supreme Court has outlined rules of thumb regarding the way to adjust the tax penalty if the reasonable period has been exceeded. If the reasonable period has been exceeded with less than six months, the tax penalty will be reduced with 5%. If the reasonable period has been exceeded with six till twelve months, the tax penalty will be reduced with 10%. Tax penalties which amount less than €1,000 will not be reduced. A tax penalty will never be reduced with an amount of more than €2,500. If the reasonable period has been exceeded with more than twelve months, the judge can reduce the tax penalty to his own discretion.

## Some formal aspects

### 3.5 Criminal law and tax penalties

Further to the aforementioned administrative (tax) penalties, penalties can also be imposed based on criminal law (criminal penalties). In this respect the Protocol registration and settlement of tax offenses and offenses relating to customs and allowances (in Dutch "Protocol AAFD") provides for guidelines to proceed with administrative or criminal penalties. In order to do this correctly, the public servant of the Dutch tax authorities reports that there is a suspicion of tax fraud for the amount of at least €20,000 to the penalty-fraud coordinator. Damage is defined as the amount of tax that is (partially) not paid, or paid and/or levied too late. The penalty-fraud coordinator determines whether there is suspicion of intention for at least €20,000. In that case, next steps will follow to decide on criminal prosecution.

It is of great importance that imposing tax penalties qualifies as a form of (criminal) prosecution. The Dutch Criminal Code determines that a suspect is not obliged to answer. The right to remain silent does not entail that nobody has to contribute to his own conviction. The purpose of this provision is protecting the suspect in such way that he does not "hang" himself. This protection has been explicitly recognized in international law. The information obligation of the taxpayer and the right to remain silent can thus conflict.

The rule of thumb is that the information obligation needs to be fulfilled as long as no tax penalty is imposed or is expected to be imposed by the tax inspector. In that scenario there is no so-called "criminal charge" (yet). In case a tax penalty is imposed or expected to be imposed shortly, the taxpayer may invoke its right to remain silent. According to the Dutch Supreme Court a distinction should be made between information that exists independently or dependently of the taxpayer's will.

The definition of information (in)dependent of the taxpayer's will is not entirely clear, but the Supreme Court considers books, records and documents as independent information.

According to the Supreme Court information that is independent of the taxpayer's will always needs to be provided to the tax inspector.

The right to remain silent is not applicable to that type of information, not even if this information claimed under threat in a legal proceeding. With respect to information that exists dependent of the taxpayer's will (such as verbal statements), such information can be claimed for taxation purposes (levy of tax only) but not for imposing tax penalties. Should that information nevertheless be used to impose tax penalties, the (tax) judge should determine the consequences. This may even result in cancellation of the tax penalty.

## Some formal aspects

During any interrogation of the suspect with respect to imposing tax penalties, the officer has to explicitly indicate that the suspect is not obliged to answer (has the right to remain silent). An interrogation is recognized in case the tax inspector, considering his intention to impose a tax penalty, directly questions the taxpayer.

It is important that shifting the burden of proof does not apply in relation to imposing tax penalties (the fact that the tax assessment is issued with the application of the shift of the burden of proof may be reason to reduce the penalty). If not providing information which may be relevant for imposing tax penalties could be punished with the shift of the burden of proof, the right to remain silent in relation to imposing tax penalties would be a dead letter.



# 4



## Final remarks

## Final remarks

The subject of tax penalties is complicated and often obscure. In this brochure, we have only considered the most important aspects.

The content of this brochure is based on our interpretation of current tax legislation and case law published (April 1, 2025).

If you would like to know more about what to do in the event of a tax penalty being imposed or if you have questions arising from this brochure, we recommend you to contact your adviser at EY Belastingadviseurs B.V. You could also directly contact one of the following members of the Tax Litigation and Controversy Group.

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