

# Europe's tax penalties compared

**Piergiorgio Valente of Studio Associato Legale Tributario (Ernst & Young) gives an overview of the key principles behind administrative tax penalties in the jurisdictions of Italy, Sweden, the UK, France and Germany**

The Italian government has introduced new provisions reforming the administrative tax penalties system. These provisions, contained in three different legislative decrees, came into force on April 1 1998, and apply to pending litigation. Income taxes, value-added tax (VAT), capital duty tax and other minor taxes are affected.

Generally, the new rules introduce elements typical of the Italian Criminal Code, such as:

- the so-called legality principle, ie civil tax penalties must be set out by law and not by simple administrative regulations;
- the non-retroactivity of civil tax penalties;
- the so-called *favor rei* principle, ie if new laws are introduced after the offence is committed, the most favourable treatment, between the rules applicable at the time of the offence and the subsequently enforced rules, will apply to pending situations.

## Penalties

Previously there was a distinction between pecuniary penalty and surcharge; this has been abolished. The new provisions introduce a single financial penalty, within a minimum and maximum range, which the tax authorities are required to determine based on the seriousness of the offence and the behaviour of the individual who committed the offence. No interest is charged on penalties. Their amount can be

adjusted for inflation every three years. In addition, accessory penalties, such as a temporary ban from certain activities or professional positions, can be imposed.

## Personal liability

Under the old provisions penalties were imposed on taxpayers (eg companies) and not on individuals acting on their behalf. Penalties are now imposed on the individuals who made, or cooperated in, the offence. Where a substantial offence is committed by an individual acting as a director, representative or employee of a company, the latter is held liable, jointly with the individual for the penalties imposed. It follows that payment of the penalty by the company relieves the individual from liability, but the company has right of recourse against the individual who committed the offence.

This liability imposed on individuals may change according to their degree of consciousness of the offence.

In the case of simple negligence, the liability of individuals for each violation is limited to L100 million (\$56,000), provided they have received no benefit from the mis-

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conduct. The amount of the penalty exceeding L100 million is chargeable to the company for whom the individual acted. However, the company may take over the liability for such offences, fully discharging the individual.

In the case of gross guilt or malice, neither the L100 million limitation nor the ability of the company to take over the liability apply. Instead, the individual is fully liable.

It is not certain whether it is possible to insure against the risk of being chargeable to penalties. The Ministry of Finance has stated that such risk can be insured, but the Central Institute for Insurance Companies has denied this possibility.

Specific cases where penalties do not apply are provided for, and mainly include:

- errors of fact without negligence on the part of the offender;
- uncertainty regarding the scope or the proper application of the law;
- lack of clarity of tax return forms; and
- *force majeure*

Heirs are not liable for the administrative penalties of their relatives.

## Contribution of individuals and repeated violations

When more than one individual breaks the law, each is individually liable. However, where the offence is the failure to fulfil an obligation with which more than one individual was required to comply, only one single penalty will apply.

In the case of a single act breaking several provisions, or in the case of several acts breaking the same provision, a single but higher penalty applies.

## Transfers and mergers

In the case of a transfer of a going concern, the transferee (buyer) is liable along with the transferor for the payment of taxes and any penalties in respect of violations committed during the calendar year in which the transfer took place, as well as during the two previous years, unless the tax authorities issue a certificate fully discharging the transferee.

A company resulting from a mergers, demerger or transformation maintains the same tax liability as the pre-existing company.

## COMPARATIVE ANALYSIS

Below is a brief outline of the major principles ruling administrative tax penalties in Sweden, the UK, France and Germany.