

Legal Changes in Tax Penalties Applied to Enterprises in Vietnam in the International Integration

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Abstract: In the international integration, economic changes have had a strong influence on domestic and foreign enterprises in Vietnam regarding tax compliance. The more domestic and international activities occur, the more the enterprises have to take advantage of tax evasion and tax avoidance. By using historical methodologies, this paper tries to point out the shortcomings of the current regulations on tax penalties applied to enterprises in Vietnam and proposes orientation solutions. The research shows that as administrative sanctions change for international integration, criminal penalties therefore also change but not sufficiently. There is no distinction between criminal sanctions for taxpayers as individuals or as businesses. Tax law violations are sometimes the consequences of Vietnam's economic integration, but yet to be specified. Otherwise, many regulations can not be executed because of conflict, or tax departments do not have enough capacity or conditions to implement the regulations. Solutions to further revise and complete the tax legislation on administrative and criminal penalties applied to enterprises in Vietnam are proposed in this article.

Keywords: Tax penalties, tax evasion, tax avoidance, tax control, economic integration.

1. Introduction

In 2016, Vietnam will celebrate its thirtieth year of economic integration. After its reunification in 1975, a centrally planned mechanism was introduced in the whole country. Accordingly, the State made decisions about all types of economic activities. The economy then operated under the State's regulations not market supply and demand. This mechanism revealed so many shortcomings. In the 1975-1986 period, according to Vo Hong Thang (2005) autonomy and creativity of grass-

root units was not promoted, economic resources were not mobilized, economy-driven components were not encouraged, the economy was under-developed, investments and savings were low, international loans were plentiful, deficits in the state budget balance were serious, and currency devaluation and galloping inflation was common. The VIth congress of the Communist Party therefore affirmed the shift from the central planning mechanism to the socialist-oriented market economy. Since then, it has led Vietnam to international integration.

After thirty years of renewal and international integration, Vietnam has achieved significant results. Its relations with other

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nations and international institutions developed greatly. Vietnam became a member of the World Trade Organization (WTO), Association of South-East Asian Nations (ASEAN), the Asia-pacific Economics Cooperation (APEC)... and signed various Free Trade Agreements (FTAs), Regional Comprehensive Economic Partnership (RCEP) and Trans-Pacific Partnership (TPP). Tariff barriers were removed or reduced for goods exports and imports in order to adapt to the integration demand. Vietnam was also an active partner of major international financial institutions such as the World Bank, the International Monetary Fund, and the Asian Development Bank. Each year, a number of loan is attributed to Vietnam as official development assistance (ODA) or other kinds of aids. Vietnam's GDP maintained an incredible growth of about 6-7 per cent for several years. Exports witnessed a high growth rate, especially in rice, coffee, pepper, seafood, textile, shoes, and timber and wooden products. With an improving business environment, Vietnam was chosen by many multi-national and international companies to invest in and/or to set up a branch. This reality was endorsed by the increase in FDI flows into Vietnam. In the period 1991-1997, 2,230 FDI projects with the total capital of 16,244 billion USD were invested into Vietnam. Recently, according to the Ministry of Planning and Investment, at the end of 2014, 17,499 FDI projects worth

250,668 billion USD in registered investment capital, were invested in Vietnam. About 2 billion USD of foreign indirect investment was invested in Vietnam via investment funds. Besides, the direct investment capital outflows of Vietnamese companies also increased, at about one tenth of the direct investment capital inflows. Non-state enterprises and foreign investment enterprises (100 per cent capital from foreign investment or joint-venture) were also on the rise, when state-owned enterprises still play an important role.

In 1990, there were 12,084 state-owned enterprises in Vietnam. After 10 years, this number declined to 5,759 enterprises and in 2013, it was only 3,198 due to the privatization policy - one of the main policies of Vietnam then. However, the total number of SOEs was still high. Because of their inefficient performance, many of SOEs needed help from the State. In addition, the tax they paid was also limited. Before 1988, there were few private enterprises in Vietnam. After the entrance into the market economy, the non-state enterprises increased to over 35,000 enterprises in 2000 and 359,794 enterprises in 2013.

If FDI was considered one of the results of economic integration, there were 1,500 FDI funded enterprises in 2000 but over 10,000 enterprises in 2013. The total enterprises in Vietnam reached the number of 373,212 in 2013.

Table 1: Number of enterprises as of annual 31 Dec. by types of enterprises

	2000	2005	2010	2012	2013
Total number of enterprises:	42,288	112,950	279,360	346,777	373,212
- State-owned enterprises	5,759	4,086	3,281	3,239	3,198
- Non-state enterprises	35,004	105,167	268,831	334,562	359,794
- Foreign investment enterprises	1,525	3,697	7,248	8,976	10,220

Source: Statistical Year Books, GSO.

This means that there is fierce competition in Vietnam's market, and enterprises have to take advantage of every opportunity for development. This situation can lead enterprises to tax evasion and tax avoidance. On the other hand, because of scientific and technical advancement, new forms of ownership and services accompanied the economic integration came into existence. Unfortunately, tax policies, especially tax penalties did not change appropriately, especially criminal sanctions.

2. Research methodology

By using historical methodology, this paper aims to provide an analysis, comparison and data synthesis of the shortcomings of the existing regulations on tax penalties in Vietnam, and to propose orientation solutions. Three questions were raised in this research: (1) What legal changes were made regards tax administrative and criminal penalties in the period of international integration? (2) Did those changes meet the requirements of the integration? (3) What orientation solutions should be used in the coming time?

3. Results and discussion

3.1. Changes in legal texts relating to administrative sanctions and criminal sanctions applied to enterprises in the integration period

Administrative sanctions aim to compensate damages in the form of financial payments. The level of these penalties varies due to the nature of the offenses (no declaration or concealment of income) or by degree of severity (declarative deficiencies, no declaration, intentional fraud...). They are called "administrative sanctions" because

of the administration they have to deal with (mainly tax administration).

Criminal sanctions, aim to punish by causing public shame, with high amount of fines and including imprisonment. Criminal sanctions are initiated by the administration and then handed down by criminal courts. In contrast to the penalties imposed by the criminal court (the purpose of which is exclusively repressive), tax penalties have a mixed nature, being either purely repressive or civil compensating (Michel Bouvier, 2012 [1]).

Tax penalties have three objectives: (1) Ensuring the compliance of the declarative system; (2) Determining appropriate sanctions for tax violations; and (3) Ensuring taxpayers' accomplishment. In general, tax sanctions are divided into two types, which are tax penalty and interests. Interests are always distinguished from sanctions because they have the characteristic of financial compensation to offset the price of time, but not in the form of sanction repression. Penalties, in turn, include fines and surcharges.

In the Vietnamese tax sanction system, tax penalties include the following forms: administrative sanctions (warnings [in written forms through official texts, which name the relevant company on the mass media]) or fines applied (percentage or package), surcharges, (late payment interest rate), criminal penalties (length of imprisonment, combination of financial fines and imprisonment). In each period of time, the regulations for those kinds of penalties were different.

The Vietnamese Constitution issued in 1946 contained no regulation on tax obligation. In 1959, the new Constitution introduced the Article 41 that stipulates Vietnamese citizens have to pay tax. This regulation was maintained in the new constitution issued thenceforward. It

means that if someone does not pay tax, he/she violates the constitution.

Concerning the regulations on tax penalties, in the period 1959-1985, in some taxation legal texts, some tax penalties were fixed in detail regarding tax violations. For example, as in Resolution No.200/NQ-UBTVQH, dated 17 January 1966 of the Permanent Committee of the National Assembly on the industrial and commercial tax, any person who violates the registration, declaration and payment of industrial and commercial tax could be punished from 1 to 5 times of the tax amount. The interest rate of 0.5 per cent per day was also applied to late payment. Those regulations were remained unchanged for each type of tax, though they were stated in different tax legislation texts. This caused a lot of difficulties for taxpayers in application.

On 27 June 1985, relating to criminal sanctions, the Penal Code was issued by the Law No.17-LCT/HĐNN7 for the first time. The Article 169 of this Code fixed that “those who evade taxes in large amount or have been handed administrative sanctions but also violated, shall be sentenced to re-education without custodial sentence to 1 year or imprisonment from 3 months to 3 years”. By this time, the Penal Code was the very first legal basis that provided offences and penalties. This code was formulated on the basis of the multi-component economy and the real situation of that period. A year later, when the renovation called “Doi Moi” was introduced in 1986, this Code came into effect. Thus, it could be said at its inception, the Penal Code did not conform to the requirements of the renovation period (Nguyen Ngoc Hoa, 2007 [2]).

In 1986, Vietnam started the socialist oriented market economy. Renewal policies of

the VIth Party Congress included three pillars, specifically: (1) Transiting from a centrally planned economy to a market mechanism operation; (2) Developing a multi-component economy in which private enterprises plays an important role; and (3) Integrating effectively into the regional and international economies consistent with the practical conditions of Vietnam. In 1990, the issuance of the Law on Private Companies and the Law on Enterprises also promoted the development of enterprises. Due to the increase in the number of taxpayers, tax departments were faced with in-compliance and violation increases. Consequently, the Government approved and issued the Decree No.22/NĐ-CP dated 17 April 1996 on tax administrative penalties. This decree fixed in detail the regulations on forms of violations, sanctions, and competent agencies to handle violations. However, late payment interest was not mentioned in this Decree. It had been regulated in other tax resolutions and laws and in the Circular guiding the Decree (Circular 45TC/TCT) issued after this Decree. In comparison with other tax resolutions (e.g.: the Law on Corporate Income Tax and the Law on Value Added Tax issued in 1997) the interest for late payment was reduced to 0.1 per cent per day. The Circular 45TC/TCT dated 1 August 1996 guiding the Decree 22/NĐ-CP, fixed late payment interest of 0.2 per cent per day (only 0.1 per cent per day for late tax payment on agriculture land-use). The conflicts of the regulations regards late payment interest caused difficulties for either tax authorities or enterprises.

Relating to the criminal sanctions, with the non-conformities of the Penal Code in 1985, the new Penal Code was issued in 1999 to replace the old one. To fit the new situation, in this new Code, the handling of tax violations, criminal responsibility in tax violations as well

as other kinds of offenses was differentiated. An offense in the Penal Code in 1985 was split into several offenses at various levels. However, sanctions were unidentified, penalty thresholds were not clarified, creating subjectivity in the application. The tax authorities could apply whatever they chose, from the lowest to the highest sanction in the threshold, to enforce the violating taxpayers, and it was still correct. It also led to bewilderment, confusion and sometimes misunderstandings for tax payment violators. Although in the Penal Code in 1999, the highest penalty level was up to 7 year imprisonment, in using “or” in the text, it also could be understood that violating taxpayers can pay fines instead of being imprisoned. And if the violator used fraudulent money in the past to compensate for the violation in order not to be sentenced, the deterrent of sanctions was greatly diminished. In addition, while some new crimes were added to the Penal Code as a consequence of the integration period, such as the act of smuggling, illegal goods and currency transportation across borders, types of prohibited goods, fake goods, acts of speculation, usury, illegal funds, environmental crime..., but relating to tax violation, new types of tax evasion were not mentioned in the new Code, such as transfer pricing or electronic invoices. Those issues were not resolved even when the Law No.37/2009/QH12 was issued on 19 June 2009, amending the Penal Code of 1999. In this amended law, Articles 161 and 164 relating to tax criminal sanctions were revised but with few changes. In Article 161 on being guilty of tax evasion, only the thresholds of penalties were amended, the other content did not change at all. Article 164 added cases of violating regulations for printing, issuing, purchasing, selling, preserving and managing

invoices. There is still no distinction in handling criminal violations between the case of the violator that is an enterprise and/or an individual. However, the responsibility of the leader of the organization would be taken into account.

Besides, from 2006 until now, in the field of administrative tax sanctions, there have been changes. The issuance of the Law on Tax Administration No.78/2006/QH12, dated 29 November 2006, made a big change in tax control measures and tax penalties applied to tax payers. All the regulations on tax administration including tax penalties were consolidated in one law only, not scattered in various tax laws as before. The law on tax administration devoted one chapter to the provisions on handling of tax violation and one chapter on enforcement of tax administration decisions. Thus it can be said that the legal characteristic of tax penalties is higher than before, as being prescribed in the law as one of the main contents of tax administration, rather than being stated in one decree issued by the government. After the elaboration of the Law on Tax Administration, the regulations on tax penalties and enforcement measures for implementing tax administration decisions were also guided in Decree No.98/2007/NĐ-CP, dated 7 June 2007, and thereafter Decree No.129/2013/NĐ-CP on 16 October 2013, when the Law on tax administration was amended by Law No.21/2012/QH13, dated 20 November 2012. At the end of 2013 and in early 2014, the other two circulars were promulgated to provide detailed guidance on tax administrative sanctions: Circular No.166/2013/TT-BTC, on 15 November 2013, on tax administrative sanctions, and Circular No.10/2014/TT-BTC, on 17 January 2014, on administrative sanctions for violations of invoices.

Table 2: Summary of administrative and criminal sanctions for tax violations applied to enterprises

Forms of violations	Level of sanction
Violation on tax procedure (registering, changing registered information)	Warning or a fine from 400.000 VND to 2.000.000 VND
Omitting or error in tax declaration	A fine from 400.000 VND to 2.000.000 VND
Wrong declaration, leads to lack of tax payable or increase of tax refund	A fine from 1.200.000 VND to 3.000.000 VND if the tax file is not finalized or a fine of 20 per cent of the tax amount missing for other cases
Late declaration	Warning or a fine from 400.000 VND to 5.000.000 VND depends on number of days of late payment.
Late or not providing information as requested by tax authorities, or providing incorrect, insufficient information and documents.	A fine from 400.000 VND to 2.000.000 VND
Late payment	Penalties applied depend on type of offense + late payment interest of 0.05% per day.
Not follow decisions of tax authorities on tax control, tax inspection or tax enforcement	A fine from 800.000 VND to 5.000.000 VND
Tax evasion and tax fraud	A fine from 1 to 3 times (base on aggravating or mitigating factor) of the amount fraudulent or evaded (administrative sanction) A fine from 1 to 5 times of the amount evaded, 2 years of re-education without custodial or imprisonment from 6 months to 7 years depending on level of violation (criminal sanction)
Printing, issuing, purchasing, selling illegal invoices	A fine from 2 million to 8 million for the case providing incorrect or insufficient contents in the invoice, or not following procedures of issuing all types of invoices (including self-printing invoices, e-invoices, ordered invoices). A fine from 20 million to 50 million will be imposed on act of ordering or printing counterfeit invoices. In case violating large volumes of invoices or an offence has already sentenced administratively or having criminal sanction that has not been entitled for criminal record remission but repeats their violation: A fine from 50 million to 200 million dong, 3 years of re-education without custodial or imprisonment from 6 months to 3 years. In case of recidivism and more serious, violating taxpayer could be sentenced up to 5 years.
Violation on invoices and other tax documents preservation and management	In case the violation has already sentenced administratively or having criminal sanction that has not been entitled for criminal record remission but repeats their violation: A fine from 10 million dong to 100 million dong, 2 years of re-education without custodial or imprisonment from 3 months to 2 years. In case of recidivism and more serious, violating taxpayer could be sentenced up to 5 years.

Source: Summarized and synthesized from Decree No.129/2013/NĐ-CP, Circular 10/2014/TT-BTC, Penal Code in 1999 and Amended Law No.37/2009/QH12

The administrative fines mentioned in Table 2 are applicable for organizations. The fine rates for individuals are worth half the rate for organizations. For criminal sanctions, there is still no distinction between an organization and an individual. The threshold is kept unchanged for the case of criminal sanctions and administrative sanctions for violations on invoices. But for administrative sanctions, as mentioned in the Law on Handling of Administrative Violations No.15/2012/QH13, dated 20 June 2012, and in Decree No.129/2013/NĐ-CP, dated 16 October 2013, on tax sanctions and enforcements, if there is a threshold, the average level of the fine bracket is used for such form of violation. A mitigating circumstance shall cancel out an aggravating circumstance and vice versa. The fine must not be reduced lower than the minimum level of the fine bracket, and must not be increased higher than the maximum level of the fine bracket.

3.2. Issues on tax compliance and tax penalties in the economic integration period

Although there have been changes in the legal system, those changes are not sufficient and fail to meet the requirements of the integration period. According to the data of the General Department of Taxation, despite having collected 20,000 billion VND of the tax debt as of 31 December 2014, but till 30 June 2015, the total tax debt is still about 74,500 billion VND (equal to 10 per cent of the total tax amount that needs to be paid by enterprises in one year), of which fines and late payment interest accounts for 20 per cent of the total debt. The debts that are not recoverable (because the taxpayer is dead or missing, or concerned criminal liability) have also increased and accounted for more than 15 per cent of the total debt. Relating to tax violations, in 2010, the total number of tax

violations increased 52.6 per cent as compared to 2006. The number of cases that were transferred to criminal prosecution was nine times higher than in 2006. In 2013, the number of violations was not lower than in 2010, in contrast, criminal cases increased twelve times. Insufficient changes in the tax sanction system is believed to be one of the causes of this fact.

As mentioned above, when the economy develops, especially in the period of international integration, goods and services also increase, cash-flows become more complicated, technological advancements get higher, and more multi-national companies come into existence. Transfer pricing is one of the consequences when FDI companies enter into the Vietnamese market. In 2013, tax declarations showed that FDI companies have a 68,203 billion VND in deficit in total. Many of them are suspected of having transferred prices with their overseas-based mother companies.

In 2014, the tax authorities controlled 2,866 enterprises which had signals of transfer pricing, reducing the announced deficits of 5,830 billion VND. Tax arrears, penalties recovered and refunds were worth 1,701 billion dong. Only in the first six months of 2015, about 1,000 enterprises were controlled because of transfer pricing, reducing the companies' deficits of 1,800 billion VND. Tax arrears and penalties recovered were 218 billion VND, and the tax deduction amount reduced to 150 billion VND. Although the number was impressive, there are possibly many more multi-national companies that have transfer pricing but are yet controlled in reality. This issue is rooted from the limitations of knowledge and experience of tax agents regards the fields of the enterprises they are responsible for controlling, as well as of the relevantly legal regulations. In other countries, it takes tax authorities 1-2 years to

complete an inspection on transfer pricing in one company. In some complex cases, it even takes 12-13 years. In Vietnam, it is regulated that the time for transfer price control lasts for up to 70 days only, but in fact it often takes longer. However, after completing the inspection procedure and getting a conclusion on transfer pricing sanctions, the violating enterprise has to pay tax arrears, penalties, and late payment interest as in the case of an error in declaration. It is not fair and penalties are considered too light, because those FDI companies when entering into the Vietnamese market had already benefited from the preferential tax rate and other preferential conditions, thus it led to competitiveness increase in the market. Compared to domestic enterprises, they have more advantages to gain profit.

On the other hand, due to economic changes, in order to attract investment and the establishment of enterprises, the government removed the regulations on charter capital deposits. It led to many cases of bankrupt enterprises but the tax authorities could not apply sanctions. Moreover, the regulations on value added tax (VAT) invoices fixed by Decree No.51/2010/ND-CP also demonstrated some limitations. There are four kinds of VAT invoices, specifically: the invoice is issued by enterprises themselves, the invoice provided by tax authorities, the invoice ordered from authorized printing-houses, and the electronic invoices (e-invoices). Autonomy of enterprises is enhanced, but risks also increase, because of the increase in fake or illegal invoices. Sanctions on invoice violations were regulated in the Penal Code and the Law on Tax Administration, but they are so general that they fail to discriminate the types of violation. The way each tax authority handles each case of violation with the same characteristics therefore

varies greatly. If sanctions are not clear, deterrence will be undermined and violations will not reduce significantly. Regards administrative sanction, Decree No.41/2014/NĐ-CP, dated 14 January 2014, was issued to strictly control the invoices. Right after its issuance, Circular 10/2014/TT-BTC, dated 17 January 2014, came into effect, stipulating the administrative sanctions for all forms of invoice violation. However, relating to criminal sanctions, despite the issuance of Joint Circular No. 10/2013/TTLT-BTP-BCA-TANDTC-VKSNDTC-BTC, dated 26 June 2013, on applying guidance for the Penal Code regarding tax, financial and stock crimes, the forms of invoice violations were clarified, but the sanctions were not differentiated for each form of violation. And as mentioned above, the penalties regulated in the form of threshold as for the case of criminal sanctions, also affects the application, because determining the lowest or the highest penalty of the thresholds depends on the subjective judgment of the tax agent. Until now, the Penal Code and its guiding documents do not mention the average level of the threshold as in administrative sanctions regulations. The strictness of the law then is influenced.

One of the other issues is relating to tax enforcement and the authority of tax agents. Authority for enforcing tax violation enterprises is given to tax agents according to the Law on Tax Management. However, tax agents do not have authority to do investigations. In the case of tax violating suspects when reconciling and controlling tax documents, a tax agent has to transfer all documents to a police office (namely PC46 - Police Department of Criminal Investigation on Economic Management and Positions, Ministry of Public Security). But such police officers do not have enough technique and

experience in the field of taxation. This directly affects the scope, timing and content of the investigation. Normally, to investigate and prosecute a tax crime, it takes police officers a lot of time to work with the tax inspection to have understanding of the situation, then from 3 to 36 months to collect evidences, to confirm the tax crime and to prosecute. In such a prolonged time, the violating taxpayer may absolutely destroy documents or escape. According to tax administration, in the period of 2004-2013, in 1,623 violations with criminal signs (occupying 20 per cent of total violations) transferred to the police office by tax authorities, only 323 cases were investigated and prosecuted (equaling 19,9 per cent), 526 cases were suspended, accounting for 36,1 per cent and 714 were pending, accounting for 44 per cent. Many cases can't be concluded even after 10 years (Pham Huyen, 2015 [3]). And in some cases, the decision of enforcement can't be fully implemented because violating taxpayers use most often cash in transactions, and only keep a small amount of money in bank accounts, which must be frozen by the tax authority. So from the legal texts to reality, there is still a big gap.

4. Conclusion

The analysis shows that the legal changes on tax sanctions for enterprises in the integration period are concentrated in some main points: (1) consolidate regulations on tax penalties into the Law on Tax Administration and its guiding documents on tax sanction and enforcement of tax administrative decisions; (2) no distinction for criminal sanctions between taxpayers who are individuals or businesses; (3) over time, that which changes the most in tax

sanctions is the penalty threshold, due to the development of the economy and changes in currency values; (4) various forms of tax law violation are the consequence of the integration period, but sanctions for those forms of violation have not yet been specified; (5) some forms of sanction and enforcement are not eligible to apply in reality.

To overcome the weaknesses and adapt to the requirements of the economic integration, in the coming times, more changes in tax sanction regulations need to be considered. The draft of the Penal Code has distinguished sanctions between individuals and businesses, but it is still not clear about the responsibility of each subject in the enterprise, that need to be discussed more to complete (Nguyen Ngoc Hoa, 2015 [4]). There should be criminal sanctions for illegal invoices detailed in new forms of violations. The new forms of violations in the economic integration period, such as transfer pricing, should be clearly defined and detailed. More functions have to be delivered to the tax agents, such as investigation, because they have the technique and experience in this field, as well as having favorable conditions to prove the crime, by holding full and detailed tax invoices and records. After proving, the file can be transferred to the police department in order to conclude the prosecution. This process will reduce processing time and costs, reduce the backlog of cases, prevent ongoing violations, and reduce state revenue losses.

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