

[#19: The Netherlands discards voluntary disclosure?](#)

The (demissionary) state secretary of finance announced on [12 July 2017](#) that he wants to discard the voluntary disclosure from 2018 onwards. This announcement follows his letter to the government of 17 January 2017 in which the next steps in the 'fight against fraud' were announced. We refer to [Lawlunch #13](#) for the announced measures. To keep you posted on the recent developments we will raise some legal questions which arise following these measures. Will the voluntary disclosure for instance be completely discarded from the law? And will it also affect the possibility of voluntary disclosure in order to avoid criminal prosecution for tax fraud?

If a successful voluntary disclosure is executed based on article 67n of the General Law on State Taxes no penalty will be imposed if the voluntary disclosure is done within two years after filing the intentionally incorrect tax return. For the other taxable years the administrative penalty will be reduced. At least, that is the policy since 2009. Before then a penalty could not be imposed at all. In the following years the penalty was increased to 120% as of 1 July 2016. Noted is that the legal maximum penalty is 300%, the reduction is based on the policy of the tax authorities. We refer you to [Lawlunch #04](#) for the detailed explanation of the developments on penalty percentages.

The law provides the tax authorities with a period of twelve years in which they can recover unpaid taxes if these assets came up outside of the Netherlands. Due to this long term and the high penalty percentages, even in case of a voluntarily disclosure penalties can have a very large financial impact. The change of policy on penalties in our opinion however should not be applied retroactive, as the higher penalties were not applicable during all the relevant years. For

instance, when a tax return was filed in 2008 it is possible for the tax authorities now to impose a tax assessment and a penalty. Applying the new penalty policy on that tax return in our opinion results in a breach of the principle of legality. Jurisprudence is not completely clear on this, as the law itself did not change, the policy did. Nevertheless [a lower court recently judged](#) that the recently changed policies regarding penalties in case of a voluntarily disclosure are not applicable to tax returns filed before 1 January 2010. In short the court decides that no tougher penalty may be imposed than was applicable during the time the tax return was filed. In our opinion this is the only correct conclusion.

The voluntary disclosure is also interesting from a criminal liability perspective. Article 69 (3) of the General Law on State Taxes further prevents a criminal charge for tax fraud if a voluntary disclosure is successful. Note that voluntary disclosure does not avoid criminal liability if for instance forgery of documents is involved. In principle prosecution for other crimes than tax fraud will be declared admissible. The Supreme Court decided in [April 2017](#) that it could be declared inadmissible if principles of due proceedings are breached because of prosecution for the same facts as were object of the voluntary disclosure procedure.

The announcement of the state secretary is not as harsh as it is presented. Even though the state secretary writes that the voluntary disclosure option will be discarded, from the announcement it shows that 'only' part of article 67n of the General Law on State Taxes will be adjusted. The proposal is to also impose an administrative penalty if the disclosure has been done within two years after the intentionally incorrect tax return was filed. Explicitly is mentioned that coming forward to the tax authorities will remain a mitigating circumstance for the penalty. Therefore the legal penalty of 300% will not necessarily imposed.

In the announcement moreover is not mentioned that the

provision of 67n of the General Law on State Taxes will be removed. The same applies to the provision on criminal liability. There are also good arguments to keep the legal possibility of voluntary disclosure. Our colleagues mr. Kerckhoffs and mr. Perdaems also vouched for the preservation of this provision in their [recent publication](#). The consequence of deteriorating the provision is that tax payers would be inclined to not rectify their tax returns, since there would be no legal safeguard that they will not get the highest administrative penalty or that they will be held criminally liable for tax fraud.

Also tax laws in general are quite complex. Therefore there should be a legal provision in which the tax payer can correct a filed tax return within a reasonable period of time. The argument that due to automatic exchange of information all foreign bank accounts of Dutch tax payers will be known to the tax authorities obviously is no valid argument to deteriorate the provision, as it also can be used for other situations than a foreign bank account which was not mentioned in a tax return, such as a corporate income tax situation. The state secretary will implement the deterioration in the tax plan 2018 therefore no internet consultation will be held. Nevertheless we hope the state secretary will take notice of the wider interest to preserve the voluntary disclosure provision.

Do you have any questions about this subject, are you struggling with a related issue or would you like to discuss this with us? Please feel free to contact us via boezelman@hertoghsadvocaten.nl and boer@hertoghsadvocaten.nl.