Global Guide to Criminalization of Tax Offenses - China

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# International Guide on Criminalization of Tax Offenses

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## 1. Please define provide details of criminal tax fraud offence in your jurisdiction

**Key assumption:**

There are several tax related criminal categories covering both the tax collection and tax invoice administration perspectives set by *the PRC Criminal Law*. For the purpose of this questionnaire, we assume the tax invoice administration issues are out of scope. Furthermore, we also assume the word "tax fraud" mentioned in the questions below refers to the "tax evasion" mentioned by Article 201 of the PRC Criminal Law as the tax evasion is the most commonly observed tax non-compliant issues in practice after excluding the tax invoice issues.

## 2. What are the typical trigger points that could lead to criminal investigations? Can the application of certain tax penalties trigger criminal proceedings?

Criminal tax fraud is defined as an intentional wrongdoing with the specific purpose of evading taxes. Therefore, criminal tax fraud requires both a tax due and a misconduct with fraudulent intent. According to Article 201 of the PRC Criminal Law, criminal tax fraud exists when the following requirements are met:

(i) The taxpayer evades the taxes by making false filings or failing to make filings through deception or concealment.

(ii) The amount of the evaded taxes exceeds RMB 50,000 and the percentage of tax evaded is above 10% of the total tax payable.

## 3. Can a certain amount of tax adjustment trigger criminal proceedings for tax fraud?

Although there is also administrative penalty clause set by the PRC Tax Collection and Administration Law for tax fraud offences, such administrative penalties imposed on the tax fraud defined by the PRC Tax Collection and Administration Law may not surely trigger criminal proceedings.

## 4. Is criminal intention a requirement, or can mere negligence be the basis of a criminal offence?

For tax fraud offence, the criminal intention is a requirement. Please refer to our response to question 2.

## 5. Does the spontaneous filing of an amended tax return (either through a self-disclosure mechanism or not) have an impact on the initiation of criminal proceedings? Is full payment of tax required?

The spontaneous filing of an amended tax return and full payment of applicable tax (either through a self-disclosure program or not) will have an impact on the initiation of criminal proceedings. According to Article 201 of the PRC Criminal Law, a taxpayer can be exempted from the criminal liability if the taxpayer settles all underpaid taxes, late payment surcharges and administrative penalties before the initiation of the criminal proceedings. This exemption will not apply, however, if over the past five years the taxpayer has received criminal punishment or has been subjected to tax administrative penalties more than twice.

## 6. Can the prosecutor, on their own initiative, prosecute the tax fraud offence?

No. The criminal investigation against the tax fraud offence should be initiated by the police authority either on the police authority's own initiative or upon the existing administrative tax investigation case transferred from the tax authority. After the police authority concludes the criminal investigation and gets the conclusion that the tax fraud offence should be prosecuted, the case will be passed to the prosecutor for prosecution. However, the prosecutor will have the discretion on whether to accept the police authority's opinion or not.

## 7. What is the statute of limitation period applicable to the tax offences in your country?

For criminal offences, the statute of limitation ("**SOL**") is 10 years. For administrative offences, there is no SOL which means the tax authority can always go after the taxpayers for underpaid taxes under a tax fraud situation. However, the SOL for the administrative penalty imposed for the tax fraud should be 5 years.

## 8. When does the statute of limitation period start to run e.g., filing of a tax declaration, failure to pay tax by deadline, tax assessment as a result of a tax audit, etc.?

The statute of limitations starts to run when the term for voluntary filing of the relevant tax return ends.

## 9. What criminal sentences [e.g., custodial, criminal fines or others ] may be incurred in case of a conviction for tax offenses in your jurisdiction?

The thresholds for criminal tax fraud and the corresponding liabilities under the PRC Criminal Law are listed below:

(i) If the amount of the tax evaded is over RMB 50,000 and the percentage of tax evaded is above 10% but below 30% of total tax payable, the sentence will be an imprisonment for three years or less and a fine.

(ii) If the amount of the tax evaded is significant (not defined by the relevant regulations yet) and percentage of tax evaded is above 30% of total tax payable, the sentence will be an imprisonment for three to seven years and a fine.

## 10. Can having a compliance or risk mitigation program in place mitigate criminal liability for a Company in your jurisdiction?

It is possible that a compliance program in place mitigate the criminal liability for a Company in China. However, such practice is still at a pilot stage and the PRC Supreme People's Procuratorate has only published some guiding cases instead of a clear written regulation in this regard.

## 11. Is there a formal or informal program allowing individuals or entities to self-disclose criminal conduct and block prosecution? If not, does such a disclosure mitigate the likelihood of prosecution or reduce the potential sentence and fines?

According to Article 67 of the PRC Criminal Law, any criminal who makes self-disclosure may be given a lighter or mitigated punishment set by the PRC Criminal Law. The ones whose crimes are relatively minor may be exempted from punishment. Pursuant to the Judicial Interpretation published by the PRC Supreme Court, the self-disclosure mentioned by Article 67 of the PRC Criminal Law should meet the below two conditions at the same time:

(i) A suspect who voluntarily and directly submits himself to the police, procuratorate or court (collectively as "judicial authorities") before the offence(s) in question or the identity of the suspect is discovered by the judicial authorities, or before the suspect is interrogated or bound by any order after the offence(s) in question or the identity of the suspect is discovered.

(ii) The suspect confesses the details of his offence(s) during the self-disclosure.

## 12. Once the criminal proceeding has been initiated is there an impact in terms of liability in case of full payment of a tax assessment issued by the tax authorities (first-time offender rule)?

Yes. Please refer to our response to question 5.

## 13. Does criminal prosecution of a tax offence have an impact on the tax authorities' statute of limitation period?

Yes. If the tax authority needs to make the administrative treatment according to the court's decision, the tax authority's SOL will be extended until the court's decision is available.

## 14 Can the tax authorities assess and collect underpaid taxes even if the case becomes criminal

No. After the case becomes criminal, the tax authorities will have to follow the court's decision about the relevant tax treatment.

## 15. Is it possible to reach a tax/criminal settlement with the tax authorities/public prosecutor/judge?

In an administrative proceeding for the tax fraud offence, it is not possible to reach a formal settlement with the tax authority. In a criminal proceeding, the taxpayer can try to reach a settlement with any of the judicial authorities according to a guidance published in 2019.

## 16. Who can be prosecuted: just individuals/directors or also companies?

Both - Corporates and Individuals

Both the individuals and the companies can be prosecuted for tax fraud offence as both of them can become the legal taxpayers of certain taxes. In the situation where a company is prosecuted as it is the legal taxpayer of the underpaid taxes, the employees of the company who should be responsible for the tax fraud offence may also be prosecuted.

## 17. Can foreign employees/directors be prosecuted?

Yes.

## 18. In case of an employee / director being prosecuted in connection with the lack of payment of Company's taxes, is the Company liable for the amounts claimed to such individual?

Yes. Since the company is the legal taxpayer of the underpaid taxes, it should still be the liabilities of the company rather than the prosecuted individuals to make up the underpaid taxes.

## 19. Have you seen an increase of criminal prosecution for tax offenses over the last five years in your jurisdiction? If so, in relation to what topics?

There was an increase in criminal prosecution for tax offenses before the COVID pandemic. However, the number of tax-related criminal prosecutions decreased during 2020 to 2022. We believe it is mainly due to the impact of COVID combined with the overall economic situation.

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