

# Customs & Trade in Israel

## A Legal Newsletter

Adv. Gill Nadel, Chair of the Import, Export and International  
Trade Law Practice, Tax Department

### **Selective Enforcement by the Tax Authority in its Decision Whether to Convert an Indictment to Criminal Penalty**

Adv. Gill Nadel, Adv. Dave Zeitoun, Chen Ben-Hayoun

#### **Background**

Many Israelis find themselves subject to a criminal investigation by Israel's tax authorities for allegations relating to various tax offenses. Under special circumstances, the law permits the conversion of suspicions and charges to a fine, called a criminal penalty. In other words, where a tax offense was committed, it is possible in certain cases to avoid a criminal proceeding, with the accused instead paying a criminal penalty in return for the closing of the criminal case against him.

#### **Case Facts**

An employee of the duty free store "James Richardson" located in the Ashdod port allowed a port dock manager to enter the store and warehouse although he wasn't permitted to do so, and provided him with perfumes and beauty products on a number of occasions, without the cases and without the approval of the store manager. Following an investigation due to raised suspicions, the dock manager was found with goods valued at 4,808 ILS for which no import taxes were paid.

In addition, the employee herself was caught smuggling goods valued at 3,188 ILS for which she did not pay import taxes.

Both individuals were facing indictments.

Both individuals submitted a request to the Tax Authority for the discovery of documents relating to its enforcement and indictment policy in such cases. After receiving the documents, they both argued that the indictment against them should be canceled, as it constitutes selective enforcement. The individuals argued that after reviewing the criminal penalty decisions they were provided, it appears that in cases more severe than theirs it was decided to opt for criminal penalty payments and close the criminal proceeding.

After the Tax Authority reviewed their requests, it decided to delay the proceedings against the employee subject to payment of a criminal penalty by her. On the other hand, it decided to continue the criminal proceeding against the dock manager, who consequently decided to bring the case before the court.

## **Parties Arguments**

The dock manager argued that the state employed a discriminatory policy against him by refusing his request to convert his indictment to a criminal penalty. He claimed there are many cases, some more severe than his own, in which it was decided to apply a criminal penalty instead of an indictment, and that the decision to convert the employee's indictment to a criminal penalty only reinforces the discrimination claim.

The Tax Authority argued that the dock manager is a senior port employee, with a special fiduciary duty due to his access to sensitive locations within the port. Even so, the Tax Authority agreed that in similar cases it decided not to indict other suspects, justifying this by claiming that in those cases the involvement of the suspects was minor in the incident. In addition, the Tax Authority argued that the employee's situation differs from the dock manager's situation, as she followed his lead and lost her job due to the incident. The Tax Authority also claimed that there was a "special relationship" between the two, and that the dock manager "had influence" over the employee.

## **Legal Deliberation**

The Supreme Court previously debated the Tax Authority's power to set a criminal penalty instead of an indictment, in the Movement for Freedom of Information case. In that case, the court reviewed the advantages and disadvantages of the power to set a criminal penalty, and the importance of disclosing the existing related information in order to achieve equal treatment for suspects. The Supreme Court's ruling regarding the obligation of the Tax Authority not to discriminate are especially relevant to a decision to reject an indicted individual's request for criminal penalty instead of an indictment.

In our case, the court determined that in numerous cases it was decided to close investigations of goods smuggling by port employees in favor of criminal penalty payments. In addition, the court noted that in many cases the evaded tax value was higher than in the dock manager's case.

It is evident to all that equal treatment applies first and foremost to those accused in the same case, as long as the factual basis is similar and there is no essential difference which justifies a distinction between them. The results of the Tax Authority's different decisions display that the state discriminated the dock manager compared to the employee and to other port employees.

From the Tax Authority's perspective, the considerations for setting a criminal penalty are: the minority of the offense; the extent of the offender's involvement in the commission of the offense; personal status of the accused; the public interest in bringing the offense to trial; removal of the act and / or felony by way of payment of tax, report amendments and the like.

Among the considerations against setting a criminal penalty are: previous convictions; the severity of the offense; the offense of a representative as part of his role as a representative; the deterrent factor in some industries; offense in a field that has a duty of trust or fiduciary; another criminal offense was committed in addition to the tax offense; it was offered to the offender to pay a criminal penalty in the past and he refused to pay it.

## **Ruling**

The court ruled that the dock manager meets most of the criteria which justify converting the indictment to a criminal penalty, and accepted his claim of selective enforcement.

**The above review is a summary. The information presented is for informative purposes only, and does not constitute legal advice.**

**For more information, please contact Adv. Gill Nadel, Chair of the Import, Export and Trade Law Practice**

**Email: [Gill.Nadel@goldfarb.com](mailto:Gill.Nadel@goldfarb.com) Phone: +972-3-6089979.**