



税务快讯

制度引领和谐征纳 内控打造合规管理 聚焦海关主动披露新规——161 号公告解读

2019 年 10 月 17 日，海关总署发布《[关于处理主动披露涉税违规行为有关事项的公告](#)》（海关总署公告 2019 年第 161 号，以下简称“161 号公告”）。该公告首次公开明确海关对进出口企业、单位主动披露的涉税违规行为不予行政处罚的情形，并规范了主动披露的流程以及主动披露在企业信用管理方面的优惠措施等。公告自发布之日起实施。

背景

响应深化“放管服”改革、优化营商环境的号召，海关总署于近期公布一系列提升跨境贸易便利化水平的举措，161 号公告正是其中之一。

161 号公告所称“主动披露”一般是指进出口企业、单位主动向海关书面报告其违反海关监管规定的行为并接受海关处理。《中华人民共和国海关稽查条例》（国务院令 670 号）第二十六条、《〈中华人民共和国海关稽查条例〉实施办法》（海关总署第 230 号令）第四章对该项制度作了原则性规定，即有关企业、单位进行主动披露的，海关应当从轻、减轻行政处罚，在一些情形下不予行政处罚，涉及的滞纳金亦可减免。然而，一直以来，对主动披露制度下哪些情形不予行政处罚缺乏公开统一的执法标准，导致进出口企业、单位无法对主动披露的结果作出准确预判，影响了该项政策的作用发挥。部分企业、单位担心“坦白不能从宽”反而引发海关调查，宁愿抱着侥幸心理持续观望而不选择主动披露。161 号公告的发布有望改善这一现象，通过明确相关规则，提高主动披露结果的确信性和进出口企业、单位对该结果的可预判性，以发挥主动披露制度的合规引导效应。

161 号公告要点

- 公告适用范围

161号公告适用于进出口企业、单位在海关发现前主动披露影响税款征收的违反海关监管规定行为（简称“涉税违规行为”）。

【简评】

不影响税款征收的违规行为——需要明确指出的是，161号公告仅适用于涉税违规行为，走私违规行为和走私犯罪不在其列。此外，海关违规行为还包括影响海关统计准确性、海关监管秩序、国家许可证件管理、国家外汇和出口退税管理的违规行为，以及违反国家禁止、限制进出口货物规定的违规行为等等。对于上述不影响税款征收的违规行为，如何适用主动披露不予处罚的规定，161号公告并未予以明确。实践中，可能出现一项违规行为同时触发“涉税”和“不涉税”的违规罚则，如经主动披露后免于“涉税”处罚，那么“不涉税”处罚是否仍需进行，仍有待海关在实践中澄清。

不构成“主动披露”要件——根据现行规定，主动披露行为需经海关认定。而且，有下列三种情形之一的，不属于主动披露：1) 报告前海关已经掌握违法线索的；2) 报告前海关已经通知被稽查人实施稽查的；3) 报告内容严重失实或者隐瞒其他违法行为的。换言之，一旦进出口企业、单位出现上述三种情形之一，则其主动披露行为将不被海关认可。

• 不予处罚标准

海关对进出口企业、单位主动披露的涉税违规行为不予行政处罚的两种情形包括：

- 涉税违规行为发生之日起**三个月内**向海关主动披露，且**主动消除危害后果**；
- 涉税违规行为发生之日起**三个月后**才向海关主动披露的，该情形下除**主动消除危害后果**外，还必须满足以下两项条件之一：**漏缴、少缴税款占应缴纳税款比例10%以下**，或者**漏缴、少缴税款在人民币50万元以下**。

【简评】

鼓励尽早披露——161号公告首次提出了违规行为发生的“三个月内”和“三个月后”进行主动披露适用不同的处理。显然，“三个月后”主动披露需要符合更多条件以获得不予处罚待遇，因此该项制度设计体现了鼓励进出口企业和单位尽早披露违规行为的理念。实践中，纳税义务人往往会出现一些偶发失误、申报瑕疵等情况，比如较为常见的制单错误、错发货物、溢短装等，这类行为通常可以及时发现，因此“三个月内”的时限规定较为合适。

放宽适用标准——主动披露制度试点阶段，海关对内执行的不予处罚标准设定为“漏缴、少缴税款金额在25万元以下”且“占应缴纳税款比例10%以下”。与该标准相比，161号公告不仅增设“三个月内”主动披露不考虑漏缴、少缴税款金额的不予处罚标准；而且在“三个月后”主动披露中，进一步对标准作了放宽：提高漏缴、少缴税款门槛值，并将两项条件的关系由“且”更改为“或”——这意味着，进出口企业和单位将更容易达到不予处罚的标准，从而扩大了该项制度的受惠范围。

“发生之日起三个月”——尽管有上述利好，但需要注意的是，一般对于单票进出口的情形，违规行为“发生之日起三个月”的界定比较清

晰；但对于连续性的涉税违规行为，如何界定“发生之日起三个月”，实践中可能需要进一步明确。

“主动消除危害后果”——根据 161 号公告，不予行政处罚还必须满足“主动消除危害后果”的条件。按照海关实践，这一条件一般指进出口企业、单位主动向海关报明纠正程序性违规，补办加工贸易备案、暂时进出境等相关手续，补正账簿单证等账册，补缴运费、特许权使用费等涉及税款等情形。

• 主动披露程序

进出口企业、单位向海关主动披露的，需填制《主动披露报告表》，并随附账簿、单证等材料，向**原税款征收地海关**或**企业所在地海关**报告。

【简评】

报告受理海关——对于受理主动披露报告的海关，进出口企业、单位有一定选择权。如企业违规行为涉及多个申报海关（税款征收地海关），则基于商业便利，企业可以考虑向属地海关主动披露。

至于具体受理主动披露报告的海关部门，公告并没有统一规定。各地海关操作可能有所差异，部分直属海关由海关稽查部门受理，也有直属海关为便利企业提交资料，规定海关通关现场的部分综合业务科室也可以受理企业的主动披露报告。因此，企业在主动披露前应进一步了解当地海关的实际操作，避免延误关键时间节点。

• 主动披露与企业信用管理

进出口企业、单位主动披露且**被海关处以警告**或者**50 万元以下罚款**行政处罚的行为，不列入海关认定企业信用状况的记录。

认证企业主动披露涉税违规行为的，海关立案调查期间**不暂停对该企业适用相应管理措施**。

【简评】

对信用状况的影响——上述条款与此前发布的海关总署公告 2018 年第 178 号（关于实施《中华人民共和国海关企业信用管理办法》有关事项的公告）第九条保持一致，重申了主动披露产生的警告或者 50 万元以下罚款的行政处罚，不会对海关信用认证标准中“企业守法”标准评分产生不利影响。

对相应管理措施的影响——根据原有规定，认证企业涉嫌违反海关监管规定被立案调查的，海关有权暂停适用相应管理措施。因此，认证企业可能担心如果主动披露引起海关调查，会立即导致暂停享受高信用管理措施。161 号公告将打消这一顾虑，公告明确因主动披露引起的海关调查，企业享受的高信用管理措施在调查期间不受影响。

德勤建议

161 号公告进一步拓宽并明确了主动披露不予行政处罚的适用范围，为企业处理涉税违规行为提供了低成本的合规路径。企业利用自主披露制度免于行政处罚，需要着重把握以下几点：

- **建立定期复核的企业合规制度**

涉税违规行为发生三个月内的主动披露无论涉税金额，在主动消除危害后果后即可不予处罚；超过三个月的主动披露在适用不予处罚时需满足额外的税款金额条件。企业应积极顺应公告鼓励尽早披露、引导合规的政策理念，建立定期的关务全面复核合规制度，如此才能及时发现既有问题，在三个月的期限内向海关提交主动披露报告，争取不予处罚。企业在设计和建立相关制度时，则应充分考虑到企业的实际情形和海关的实践情况，以及主动披露报告的准备周期等因素。

- **积极评估违规行为性质及影响**

企业在主动披露之前，需首先评估自身是否符合“主动披露”条件，例如海关是否已经掌握违法线索或通知实施稽查等，以免出现主动披露行为不被海关认可的情形。

其次，企业还应对主动披露行为的影响作出准确预判。需要注意的是，如本文之前所讨论，161 号公告仅适用于涉税违规行为，对于不影响税款征收的违规行为，如何满足不予处罚的标准，未在 161 号公告的讨论范围中。对于一些较为复杂的违规行为，企业可能需要进一步了解海关实践以协助判断，并在必要时寻求专业机构的协助。

此外，对于部分技术上容易产生争议的海关涉税事项，企业往往难以做出准确判断，如特许权使用费是否应税、关联关系是否影响成交价格。对于这些相关事项，企业可能需综合考虑所涉及的不同海关制度间（如海关预裁定与主动披露制度之间）是否存在交互影响，从而进行整体性的合理因应。

- **高质量完成主动披露报告**

海关有完备的程序对主动披露的内容进行验证，所以有意进行主动披露的企业切不可在自查工作中存在侥幸心理，或者疏漏大意，以免丧失主动披露的优惠待遇。上述企业应做好充分准备，在主动披露报告内真实、准确、完整披露违规行为，同时还应当提交随附材料清单，如账簿、发票、函电邮件予以证明。考虑到主动披露报告的复杂性，也可以考虑委托第三方机构出具专业报告，作为自主披露的参考文件。

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Tax Newsflash

New guidance clarifies circumstances when penalties for noncompliance with customs voluntary disclosure rules can be waived

On 17 October 2019, China's General Administration of Customs (GAC) issued guidance (Bulletin on Matters Concerning the Voluntary Disclosure of Tax-related Noncompliance (Bulletin 161)), which sets out the conditions under which the customs authorities can waive administrative penalties on tax-related noncompliance, the standardized procedure for self-reporting of tax-related noncompliance and the preferential measures for credit management of customs-certified enterprises under the voluntary disclosure regime. The rules apply as from the date when the bulletin was issued.

Background

Article 26 of the customs audit regulations (Regulations of the People's Republic of China on Customs Audit (Order of the State Council of the People's Republic of China No. 670)) and implementation measures issued by the GAC (Chapter IV of the "Implementation Measures of the Customs Audit Regulations of the People's Republic of China" (Order of the GAC No. 230)) prescribe the general principles for the voluntary disclosure mechanism, whereby the customs authorities are expected to reduce, mitigate or waive administrative penalties, provided that enterprises voluntarily disclose any noncompliant activities.

Before the issuance of Bulletin 161, the voluntary disclosure mechanism lacked transparency and coordinated enforcement policies throughout the country, and, therefore, it could not be implemented effectively by the customs authorities. Enterprises have difficulties in anticipating whether voluntary

disclosure of noncompliance activities would lead to investigations or leniency. As a result, some enterprises often preferred to keep silent rather than voluntarily disclose such activities.

Bulletin 161 was issued in response to the State Council's reform measures contained in "Delegating Powers, Strengthening Regulation and Enhancing Tax Services" and its goal of optimizing the business environment to facilitate foreign trade. Bulletin 161 is expected to promote an effective voluntary disclosure mechanism by clarifying the rules and improving predictability for enterprises.

Tax-related compliance activities

Bulletin 161 applies where enterprises voluntarily disclose any tax-related noncompliance activities relating to customs regulations before the customs authorities discover the noncompliance. Criminal activities (e.g. smuggling) and various other noncompliance activities (e.g. activities that have an adverse effect on the accuracy of information used for statistical purposes, supervision orders, license controls, foreign exchange controls, or export tax refunds, as well as importing or exporting restricted or prohibited goods) are not within the scope of Bulletin 161.

Noncompliant activities include both tax and non-tax-related violations. While administrative penalties for tax-related noncompliance activities may be waived following voluntary disclosure, it is unclear whether penalties for non-tax-related noncompliance activities also should be waived.

Voluntary disclosure

According to Order of the GAC No. 230, any of the following circumstances will not be considered a voluntary disclosure:

- Where the customs authorities have identified indicators of noncompliance before a voluntary disclosure report (VDR) is submitted;
- Where the customs authorities have issued an audit notice before the VDR is submitted; and
- Where the VDR is substantially inaccurate or other noncompliance activities are concealed.

Waiver of administrative penalties

There are two situations where the customs authorities will waive administrative penalties for tax-related noncompliance activities that are disclosed voluntarily:

- The noncompliance is disclosed within three months from the date when the activities occurred, and the enterprise proactively eliminates any harmful consequences of such noncompliance.
- The noncompliance is disclosed after the three-month period, but the enterprise proactively eliminates any harmful consequences of such noncompliance, and either the underpaid tax is less than 10% of the tax payable or the underpaid tax is less than RMB 500,000.

Bulletin 161 is the first guidance to introduce time-based approaches for voluntary disclosure made "within three months" and "after three months" of the date when the tax-related noncompliance activities occurred, which should encourage earlier disclosure due to stricter conditions associated with the latter. In practice, unintentional mistakes and minor declaration defects (e.g. mistakes in document preparation, incorrect delivery of goods, over and short-shipments) are not uncommon. In most cases, enterprises generally are able to detect such mistakes within the three-month time limit to avoid the additional quantitative requirements for the waiver of administrative penalties.

Furthermore, Bulletin 161 is more lenient than what was required under the pilot voluntary disclosure program, under which the penalty was waived if the underpaid tax was less than 10% of the tax payable and less than RMB 250,000. In comparison, Bulletin 161 prescribes that penalties will be waived for companies that voluntarily disclose within the three-month period regardless of the amount of underpaid tax at stake. Bulletin 161 also increases the threshold of the underpaid tax amount (i.e. RMB 500,000 versus RMB 250,000) for the penalty waiver to apply if voluntary disclosure is made after three months. In addition, Bulletin 161 changes the above two conditions from "and" to "or," which means that companies will be more likely to fulfill the conditions to qualify for a waiver.

It is generally not difficult to determine the date of occurrence with respect to noncompliance indicated on a single customs declaration. However, further clarification is needed from the authorities as to how to determine the date of occurrence if the tax-related noncompliance activities are consecutive in nature.

According to Bulletin 161, the requirement that a defaulting enterprise proactively eliminate harmful consequences means that the enterprise must disclose the noncompliance to the customs authorities and correct the violation (e.g. complete processing trade registration or temporary import and export procedures, rectify account books and documents, pay taxes related to under-declared freight charges or royalties).

Voluntary disclosure procedures

An enterprise must complete and submit a VDR to the customs office that previously collected (or should have collected) the enterprises' taxes or the local customs office where the enterprise is established, together with the corresponding account book, vouchers and other relevant materials. If the tax-related noncompliant activities involve more than one customs office, the enterprise may choose its local customs office as the place to submit the report. Bulletin 161 does not specify which customs department actually will accept the VDR, so enterprises should understand local practices before submitting the report.

Enterprise credit management

Where an enterprise is given a warning by the customs authorities or fined with an administrative penalty of less than RMB-500,000 after voluntary disclosure, such penalties will not

be listed in the credit rating records of customs-certified enterprises. In this regard, Bulletin 161 is consistent with article 9 of GAC Bulletin [2018] No. 178 (Bulletin on Matters Concerning the Enforcement of the Measures of the Customs of the People's Republic of China for the Administration of Enterprise Credit), which states that a warning or an administrative penalty of less than RMB 500,000 as a result of voluntary disclosure would not have a negative impact on the evaluation of corporate compliance in the customs credit certification.

However, Bulletin 178 states that where a customs-certified enterprise is suspected of noncompliance and investigated by the customs authorities, any preferential administrative measures to which the enterprise is entitled may be suspended, a potential concern for enterprises considering voluntary disclosure. Bulletin 161 removes this concern by clarifying that the preferential administrative measures enjoyed by customs-certified enterprises will not be affected during an investigation of a voluntary disclosure.

Comments

Bulletin 161 expands the scope of the administrative penalty waiver for voluntary disclosure and provides a low-cost compliance approach for enterprises to manage tax-related noncompliance. To take advantage of the waiver, enterprises should set up a corporate compliance system with regular periodic reviews, assess possible noncompliant activities and any impact, and ensure that the VDR is comprehensive and accurate.

- Establish a corporate compliance system with regular periodic reviews.
 - Penalties will be waived if voluntary disclosures of tax-related noncompliance activities are made within 3 months from the date of occurrence; for voluntary disclosures that are made after 3 months from the date of occurrence, additional conditions relating to the amount of tax will need to be met for the waiver to apply. Enterprises should establish a corporate compliance policy with regular and comprehensive customs compliance review to identify existing issues and timely submit the VDR. When designing and establishing such corporate policies, enterprises should consider business operations, local customs practice, and the timeline for submitting the VDR.
- Assess potential noncompliant activities and any impact.
 - Prior to submitting the VDR, an enterprise should evaluate whether it meets the conditions of "voluntary disclosure," such as whether the customs authorities already are aware of the noncompliance and whether an audit notice has been issued (which would result in the VDR being rejected).
 - The enterprise should assess the potential impact of the voluntary disclosure. It should be noted that Bulletin 161 is not applicable to non-tax related noncompliance activities. For various complex

noncompliant activities, enterprises may need to gain further knowledge on the relevant customs' practice and seek professional assistance if necessary.

For certain disputable tax-related customs issues, it may be difficult for enterprises to determine their technical positions, such as whether the royalties should be dutiable, whether the relationship between transacting parties affects the transaction price, etc. For such cases, enterprises may need to consider whether to use (and the ultimate effect of) various administrative options such as advanced rulings or voluntary disclosure.

- Thoroughly and carefully complete the VDR.
 - The customs authorities have robust procedures to verify the contents of a VDR. Therefore, enterprises should prepare the VDR carefully to ensure that the noncompliance activities are disclosed truthfully, accurately and completely. Enterprises should also submit account books, invoices, letters, emails and other supporting materials. Considering the complexity of the VDR, enterprises should consider engaging a professional third party to issue a report to be filed along with the VDR as a reference document for voluntary disclosure.

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