

Tax Analysis

New customs discretion benchmarks promote clarity

In December 2023, China's General Administration of Customs (GAC) issued the following bulletins on the benchmarks for customs administrative discretionary penalties (hereinafter collectively referred to as "Discretion Benchmarks"), which came into force on 1 January 2024:

- Discretion Benchmark I (GAC Bulletin No. 182) on penalties for violations relating to taxes, import/export license requirements, and import/export restrictions or prohibitions;
- Discretion Benchmark II (GAC Bulletin No. 187) on penalties for violations relating to customs inspections and quarantines; and
- Discretion Benchmark III (GAC Bulletin No. 198) on penalties for violations relating to intellectual property rights protections.

These three Discretion Benchmarks establish the discretion levels and standards for customs administrative penalties according to different circumstances. They represent the first set of detailed rules on discretion benchmarks for Chinese customs administrative penalties. They aim to standardize the exercise of discretion in customs administrative penalties and provide directions and guidance for future import and export activities of businesses. Businesses can expect an increase in the stability and clarity of customs administrative law enforcement.

[Highlights of the Discretion Benchmarks](#)

The Discretion Benchmarks establish five levels of discretion of

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customs administrative penalties, as follows:

Level	Percentage of the goods value (for penalties being determined based on a certain percentage of the value of the goods involved)	Percentage of the underpaid tax amount (for penalties being determined based on a certain percentage of the amount of the relevant underpaid tax)
Level 1- exempt from penalty	0%	0%
Level 2- reduced penalty	Less than 5%	Less than 30%
Level 3- lenient penalty	5% or more, but less than 10%	30% or more, but less than 60%
Level 4- general penalty	10% or more, but less than 15%	60% or more, but less than 100%
Level 5- severe penalty	15% or more, but not greater than 30%	100% or more, but not greater than 200%

Level 1—exempt from penalty

The new bulletins have listed the circumstances when administrative penalties can be waived, such as:

- The relevant violation has not been found within two years, unless otherwise stipulated by applicable laws and regulations;
- The relevant violation is minor, and the relevant party has made corrections in a timely manner without causing adverse effects (“minor violation rule”); and
- The relevant violation has been committed by a party for the first time, and the party has made corrections in a timely manner, only causing minor adverse effects (“first-time violation rule”).

Minor violation rule

Discretion Benchmark I provides a list of violations that fall under the minor violation rule. To determine whether a violation is minor, the value of the relevant goods or the amount of the underpaid tax can be

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a key factor. For most violations, there is an upper limit of the goods value or underpaid tax amount. For example, incorrect customs declarations are considered to be a minor violation only when the underpaid tax is CNY 5,000 or less.

The customs authorities are empowered to reject the application of the minor violation rule for a party who committed a violation of customs laws and regulations within one year after the party has been ordered to make corrections by the customs authorities for a violation of the same nature.

First-time violation rule

The first-time violation rule has been introduced to align the customs penalty rules with the Law of Administrative Penalties. Discretion Benchmark I also provides a list of violations when the first-time violation rule may be applied.

To determine whether a violation has been committed by a party for the first time, the party must demonstrate that, within 24 months prior to when the violation was committed, it had no records of smuggling or other behaviors violating customs laws and regulations.

Levels 2 and 3—reduced and lenient penalty

Levels 2 and 3 normally apply to situations when the party that committed violations has been actively cooperating with the customs authorities on an investigation and have voluntarily implemented remedies, or when the adverse effects of the violation are relatively limited. For example, level 2 (i.e., reduced penalty) and level 3 (i.e., lenient penalty) will be applied to the following tax-related violations committed by entities:

Level 2-reduced penalty	Applies where the amount of the underpaid tax is less than CNY 250,000 and 10% of the total tax payable.
Level 3-lenient penalty	Applies where the amount of the underpaid tax is: <ul style="list-style-type: none">• CNY 250,000 or above, but not exceeding CNY 500,000; and• 10% or above, but not exceeding 20% of the total tax payable.

Level 4—general penalty

Level 4 is intended to cover all of the general situations that do not fall inside the scope of other levels.

For violations where the penalties are determined based on a certain percentage of the value of the goods at issue, level 4 (i.e., general penalty) is set as 10% to 15% of the goods' value. This range could be higher than that of the previous practice, as most local customs offices tended to impose a penalty of 8% to 10% of the goods' value for general cases. However, for violations where the penalties are determined based on a certain percentage of the amount of the underpaid tax, level 4 is set at 60% to 100% of the underpaid tax amount. This range appears to be more lenient than that of the previous practice, as most local customs offices tended to impose a penalty of 100% of the underpaid tax amount for general cases.

Level 5—severe penalty

Level 5 is applicable in cases when a party resists customs' enforcement through violence, threats, or attempts to conceal or destroy evidence, or resumes smuggling activities within two years of a previous smuggling conviction, or recurrently commits the same violation within a year of being penalized, and so on.

Comments

The publishing of these Discretion Benchmarks is of great help to standardize the customs law enforcement and enable businesses to establish clearer expectations about potential exposure of violations of customs laws and regulations. Businesses may also review their actual circumstances against the relevant situations listed in the Discretion Benchmarks to further assess their applicability of the waiver or reduction of the penalties.

Businesses that wish to apply for a waiver or reduction of the penalties (i.e., levels 1, 2, and 3) should consider doing the following:

- Correctly understand the relevant customs rules: A correct understanding of the relevant rules is essential for businesses to determine their eligibility for the waiver or reduction of the penalties. For example, the goods' value is a commonly used factor to decide whether a violation falls under the scope of levels 1, 2, and 3. The rules to determine the goods' value may vary in different scenarios. In some cases, the goods' value refers to the actual value of the goods imported or exported, while in other cases the goods' value may refer to the difference between the actual value of the goods imported or exported and the value of the goods already declared to the customs authorities.
- Pay attention to the documentation work: Unfortunately, the Discretion Benchmarks do not provide much guidance on the documentation of evidence. Therefore, businesses may need to review the actual case and then consider how to prepare documentation properly to prove their eligibility for favorable treatment. For example, if high-tech goods have an incorrect harmonized system classification code, materials to demonstrate the technical difficulty in the customs classification may be helpful to support that the misclassification was unintentional misconduct so that the business may still qualify for the exemption from penalties.

In addition, businesses should also bear in mind that, apart from the Discretion Benchmarks, they may leverage other customs mechanisms—notably the Voluntary Disclosure Program (VDP)—to achieve a penalty waiver or reduction. For example, tax-related violations with the underpaid tax greater than CNY 10,000 will disqualify the party under the first-time violation rule; however, businesses with such violations may consider applying for the VDP, under which the waiver of penalties may be granted to tax-related violations with underpaid tax of CNY 1 million or less.

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