

ETRS/SRTL  
**Public Ruling 2001/12**

**Public Ruling: Additional Tax**

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**Relying on this Ruling**

This is a public ruling within the meaning of Section 66 of Regulation 2000/18 (as amended). Taxpayers may rely upon information in this ruling as the basis for determining their tax liability.

**Introduction**

1. Chapter XI of Regulation 2000/18 contains measures to protect the integrity of the taxes imposed by that Regulation by encouraging compliance with taxpayer's obligations and responsibilities.
2. Two types of measures are used. The first comprises "Additional Tax" which may be imposed in respect of four matters under Regulation 2000/18:
  - Failure to deliver a tax form by the due date (s 72);
  - Failure to deliver a tax payment by the due date (s 73);
  - Understatement of tax on the tax form (s. 74);
  - Failure to create or retain records required under the Regulation (s. 75).
3. The second comprises penalties imposed in respect of various offences set out in the law.
4. Additional tax is a form of "administrative penalty", meaning it is administered by the East Timor Revenue Service. By way of contrast, penalties in respect of an offence are imposed by a court of law upon prosecution and conviction of a person for committing an offence. The Prosecutor Service within the Department of Justice conducts prosecution for an offence.
5. In the case of a failure to deliver a tax form by the due date or a failure to create or retain records only one rate of additional tax is prescribed. In the case of a failure to deliver a tax payment by the due date or an understatement of tax on the tax form three levels of additional tax are prescribed:
  - a basic level where the failure or understatement has occurred;
  - a higher level where the failure or understatement has occurred as a result of *gross carelessness* on the part of the taxpayer; and
  - a still higher level where the failure or understatement was due to a *deliberate attempt to avoid payment of tax*.

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6. The basic level of additional tax for failure to deliver a tax payment by the due date is 5 % of the tax not paid by the due date plus an additional 1 % of the tax that remains unpaid on the 15th day of each month following the due date. A further additional tax of 25 % of the tax due is imposed where the failure to deliver a tax payment by the due date is a result of gross carelessness **or** a further additional tax of 100% of the tax due is imposed where the failure to deliver a tax payment by the due date is a result of a deliberate attempt to avoid payment of tax.

7. The basic level of additional tax for an understatement of tax on the tax form is 15 % of the tax understated. A further additional tax of 25 % of the tax due is imposed where the understatement is a result of gross carelessness **or** a further additional tax of 100% of understated tax is imposed where the understatement is a result of a deliberate attempt to avoid payment of tax.

8. The second (next) part of this Ruling explains the types of situations that would be regarded as gross carelessness. The third part explains those situations where a deliberate attempt to avoid payment of tax would be regarded as having occurred. The final part of this Ruling explains in what circumstances additional tax may **not** be payable even though one of the four matters listed in paragraph 2, above, had occurred.

## What is gross carelessness?

9. If a failure to deliver tax on time is due to *gross carelessness* on the part of a taxpayer, the normal additional tax for failure to deliver tax and a further additional tax of twenty-five percent (25%) of the tax that remains unpaid is imposed (Regulation 2000/18, s. 73.1(a)). If an understatement of tax was due to *gross carelessness*, the normal additional tax for understatement and further additional tax of twenty-five percent (25%) of the tax understated is imposed (Regulation 2000/18, s 74(a)).

10. Gross carelessness is more than mere inadvertence. It is a failure to take care in a situation where a reasonable person would have taken care. The term *gross carelessness* implies a reckless disregard for the possible consequences of carelessness.

### Example:

Tim's Tasty Café is a successful restaurant selling meals and refreshments. About 60 per cent of the customers sit at tables and order through a waitress or waiter using a menu. The other 40 per cent choose items from a buffet at the back of the restaurant. In the case of customers who order through a waiter or waitress, the waiter or waitress will write the orders on order forms and total the amount due for each meal at the

bottom of the form. They present this form to the customers at the end of the meal and take the forms back along with cash payment. Usually, both these items are handed to a cashier who puts the money in a cash register and drops the order form into a box.

A slightly different procedure is used for customers who choose buffet items. They pay a standard charge for the buffet meal at the cash register next to the buffet table. Since there is one charge for the buffet, these customers are not issued with an order form. Tim has instructed his cashiers to write out an order form for each person and deposit it into a box but when the restaurant is very busy during lunch and dinner peaks the person who operates the cash registers does not follow this procedure. As a result, at the end of each day, there are normally fewer order forms in the order form box next to the buffet cash register than there were customers for that day.

As a result of an audit by the East Timor Revenue Service, Tim's Tasty Café was reassessed for services tax 20 per cent higher than that reported on the Café's Services Tax forms.

In this case 25 % additional tax for understatement of tax due to gross carelessness would be imposed on the taxpayer (as well as the ordinary 15 % additional tax for understatement of tax). A reasonable person would realise that the staff would not complete the needed forms for buffet customers unless there was a system to ensure these were completed. Failure to adopt a system would amount to gross carelessness.

## **What is a deliberate attempt to avoid payment of tax?**

11. If a failure to deliver tax on time is due to *a deliberate attempt to avoid payment of tax* on the part of a taxpayer, the normal additional tax for failure to deliver tax and a further additional tax of one hundred percent (100%) of the tax that remains unpaid is imposed (Regulation 2000/18, s. 73.1(b)). If an understatement of tax was due to *a deliberate attempt to avoid payment of tax*, the normal additional tax for understatement and further additional tax of one hundred percent (100%) of the tax understated is imposed (Regulation 2000/18, s 74(b)).

12. A deliberate attempt to avoid payment of tax is the result of a conscious decision by a person to seek to avoid the payment of tax. Whether or not a person had made such a decision is an objective question. To determine whether a taxpayer had the intention of

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avoiding payment of tax, the Commissioner will consider all the facts that are related to a failure to pay tax. Where those facts show that on a balance of probabilities the person intended to avoid tax, the person will be considered to have had this intention. These objective facts will displace any subjective claims the person may make about having another intention. The facts would also need to show the taxpayer's actions amount to more than gross carelessness.

Example:

Harriet's Home Cooking is a successful restaurant competing with Tim's Tasty Café. It operates similarly to Tim's Tasty Café, offering table service from a menu and a buffet. Harriet has not instructed her cashiers to prepare and keep order forms for persons who order the buffet. Instead, at the end of each month she makes an "estimate" of the number of persons who ordered the buffet during that month.

As a result of an audit by the East Timor Revenue Service, Harriet's Home Cooking is reassessed for services tax more than twice that reported on Harriet's services tax forms. Actual receipts for those days tested by the auditors are found to be at least twice that of the estimates made.

In this case the Commissioner would impose the 100 % additional tax for understatement of tax due to a deliberate attempt to avoid paying tax (as well as the ordinary 15 % additional tax for understatement of tax). Harriet's deliberate failure to institute a system that would enable her to accurately determine the value of her sales and her failure to use other methods such as actually counting the receipts for each day combined with the actual understatement of tax resulting from her estimation shows a deliberate attempt to avoid payment of tax.

Harriet's actions go beyond gross carelessness as she has deliberately not adopted any means of determining her sales. On the balance of probabilities this demonstrates an intention to avoid payment of tax.

## When additional tax will not be imposed

13. Additional tax is *automatically* imposed when a taxpayer has failed to comply in one of the four ways noted in paragraph 2, above. However, where the taxpayer shows good reason for the failure to comply, the Commissioner may exercise discretion to forgive some or all additional tax imposed (Regulation 2000/18, s. 71.4).

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14. The Commissioner will exercise the discretion to forgive all additional tax payable where the taxpayer is able to show that failure to comply was for a reason beyond the control of the taxpayer.

Example 1:

Two days before his Services Tax form was due to be delivered, Hans Amstel was in an accident and was rushed to hospital. He spent two weeks in the hospital and as a result failed to deliver his Services Tax form on time. Normally Hans delivered the tax forms for his business. His employees carried out manual labour in the business but had nothing to do with the accounts and would not have known anything about the tax form delivery procedure or obligation. As soon as he returned to his business from the hospital, Hans delivered the tax form.

In these circumstances, the Commissioner would likely forgive all the additional tax normally due because the taxpayer's failure to comply was for reasons beyond the control of the taxpayer.

Example 2:

U-Drive Rent a Car has a staff of 13 people, 4 of whom work in administrative roles in the head office. Normally, Hubert, the person who keeps the accounts for U-Drive with the assistance of a more junior person, Maria, delivers the tax forms. In late April Hubert was injured in an accident and was taken to hospital. He missed one month's work. On his return, he delivered the business' April and May tax forms.

In this case the Commissioner may forgive some of the additional tax but is unlikely to forgive all of the additional tax. U-Drive is aware of its responsibilities and has sufficient staff to arrange for back-up procedures in case the person normally responsible for delivering tax forms is unable to do so because of an expected absence such as a vacation or an unexpected absence such as accident or illness. When considering how much additional tax might be forgiven, the Commissioner will look to see what back-up arrangements U-Drive has made and if some were made the reason they failed in this case.

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## **Date of effect**

15. This ruling has effect from 1 January 2002.

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**Graham Burnett**  
**Acting Commissioner of East Timor Revenue Service**  
**14 December 2001**

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### *Legislative references:*

#### Additional tax for:

Failure to deliver a tax form	Reg 2000/18, s. 72
Failure to deliver a tax payment	Reg 2000/18, s. 73
Understatement of tax	Reg 2000/18, s. 74
Failure to create or retain records	Reg 2000/18, s 75
Discretion to forgive additional tax	Reg 2000/18, s. 71.4