By PwC Deutschland | 06. September 2026

Late-payment penalty after correction of VAT assessment during appeal proceedings

In a most current judgment, the Supreme Tax clarified the procedural and substantive handling of a late filing penalty when a VAT assessment is amended to a taxpayer's benefit (surplus) during ongoing litigation.

Background

The plaintiff did not file annual VAT returns for the years 2016 through 2018. The tax office estimated the tax bases and assessed the VAT for 2016 at €0, the VAT for 2017 at €684, and the VAT for 2018 at €760 in August 2020. During appeal proceedings, the value-added tax for 2018 was assessed based on the tax return filed in the meantime with a surplus of -€307.84. The late-filing penalty, though, remained unchanged.

Two tax courts – two diverging opinions

The **lower tax court** upheld the complaint against the assessment of the late-filing penalty. The relevant date for reviewing the discretionary decision regarding the late-filing penalty was the date of issuance of the last assessment notice of 18 January 2023 (assessment notice for 2018 regarding value-added tax and the late-filing penalty). Therefore, the tax office's previous response to the complaint should be used as the basis for the discretionary decision. However, the **Supreme Tax Court** did not agree and considered the tax office's appeal to be justified.

Discretionary decision vs. non-discretionary decision

According to Section 152 (1) Sentence 1 of the General Tax Code (GTC), a late filing penalty **may** be imposed on anyone who fails to file a tax return or who fails to do so on time.

Under the conditions set forth in Section 152 (2) GTC, a late-filing penalty **shall** be assessed ex officio (i.e., without discretion; where the tax office acts on its own initiative) as a so-called "binding decision".

Final decision

The late filing penalty was initially assessed - pursuant to Section 152 (2) GTC - as part of a binding decision. After the tax assessment was amended in favor of the taxpayer, the subsequent assessment became the subject of litigation (Section 68 Sentence 1 GTC). The tax office's decision to assess the late filing penalty pursuant to Section 152 (1) GTC was, **in the opinion of the Supreme Tax Court**, free from errors in the exercise of discretion.

Accordingly, the tax office was entitled to take into account that, following its incorporation in 2015, the plaintiff had not filed any returns for the 2016 and

2017 tax and assessment periods, and had filed the 2018 annual VAT return only after the 2018 value-added tax assessment had been issued by means of an estimate.

In exercising its discretion on a case-by-case basis, the tax authority must not take into account the fact that, in the event of a refund, the taxpayer did not gain any economic advantage from filing the return late. Furthermore, the taxpayer's financial situation is not a criterion that has an impact on the tax office's discretion regarding the legally prescribed amount of the penalty.

Source: Supreme Tax Court, judgment of 7 May 2026 (V R 35/24) published on 3 September 2026.

Schlagwörter

penalty