Evaluating the Efficacy of Nonmonetary Tax Penalties

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Joshua D. Blank, *Collateral Compliance*, 162 **U. Pa. L. Rev.** 719 (2014).

Monetary penalties for noncompliance are a routine feature of the tax laws. The tax literature includes extensive debate over different ways of structuring those penalties to improve tax compliance and eliminate the tax gap. In *Collateral Compliance*, Josh Blank shifts his gaze beyond that debate to examine what he labels "collateral tax sanctions"—nonmonetary penalties that federal and state governments impose, in addition to the monetary ones, for failing to comply with the tax laws.

One rather dramatic example of a collateral tax sanction comes from the Supreme Court's 2012 decision in *Kawashima v. Holder*, in which the Court upheld a Bureau of Immigration Appeals interpretation of the Immigration and Nationality Act that treated willfully filing a false tax return as an "aggravated felony" and, thus, a deportable offense for non-citizens. Less spectacularly, perhaps, states regularly suspend driver's licenses, professional licenses, liquor licenses, or hunting licenses for nonpayment of taxes. Congress has considered legislation revoking passports and denying FHA-insured mortgages as punishment for tax delinquency.

Plenty of articles examine the pros and cons of one collateral tax sanction or another. Blank's article is unique for his effort to step back and consider collateral tax sanctions more systematically. He explores in some depth why collateral tax sanctions sometimes succeed where monetary tax penalties fail. He also proposes some basic principles for structuring collateral tax sanctions to maximize their effectiveness as a mechanism for encouraging tax compliance.

Blank theorizes first that, for some taxpayers, monetary penalties are indistinguishable from the underlying tax obligation, and thus no more likely to inspire the delinquent taxpayer to pay up. By contrast, a driver's license, a passport, or a hunting license may be more valued and significant. The prospect of losing the right to drive, travel, or hunt may be more personally painful or even economically costly than paying monetary penalties. Monetary tax penalties are private, while collateral tax sanctions are often public. People may want to avoid the embarrassment of explaining a license suspension to friends, family, or potential clients. Collateral tax sanctions also reinforce the connection between paying taxes and receiving government benefits. The simple salience of collateral tax sanctions also presents potential drawbacks, including potential spillover consequences, perceptions of unfairness, horizontal equity issues, and privacy concerns. Governments could easily go overboard in imposing collateral tax sanctions, creating more harm than good.

Recognizing the drawbacks as well as the effectiveness of collateral sanction, Blank proposes three principles for their development and application. First, he contends that governments should only use collateral tax sanctions to enforce tax rules that are clear and easily understood in advance (like filing deadlines) rather than tax standards, the ex ante application of which may be more ambiguous (like the economic substance doctrine). Second, Blank suggest that tax rather than nontax laws and administrators should define the scope of the tax offenses that give rise to collateral tax sanctions, to protect the integrity of the tax laws, and also to enable tax authorities to understand the full range of consequences for tax noncompliance and use that knowledge to influence taxpayer behavior. Third, Blank counsels proportionality; the punishment should fit the crime.

Blank illustrates his three principles by evaluating the advisability of collateral tax sanctions in a few different contexts. For example, suspending a professional license when a state revenue department determines that an individual has failed to file a tax return would satisfy all three of Blank's principles. By contrast, deporting otherwise law-abiding, long-time permanent residents like the Kawashimas based on a determination by immigration officials that willfully failing to file a tax return represents "fraud or deceit" would be problematic under Blank's approach.

Finally, Blank suggests that collateral tax sanctions will only work if taxpayers know about them. He offers suggestions to government officials for publicizing collateral tax sanctions to maximize their effectiveness.

In any tax system that relies on taxpayers to self-report and pay their taxes, noncompliance will always be a problem searching for and needing not just one but many solutions. Blank offers a persuasive case, some cautionary notes, and a thoughtful proposal for developing and evaluating collateral tax sanctions as part of the compliance toolkit.

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