

Voluntary Disclosures: Second Chances in Tax and Torah

Ezer Diena, ediena@torontotorah.com



IRS Voluntary Disclosure

1. **IRS Criminal Investigation Voluntary Disclosure Practice**, <https://www.irs.gov/compliance/criminal-investigation/irs-criminal-investigation-voluntary-disclosure-practice>

You have a legal duty to fully comply with U.S. tax laws. "Voluntary compliance" is the cornerstone of our tax system. While most taxpayers voluntarily comply with their obligations, some fail to do so. We have a wide variety of civil and criminal sanctions that we may impose on non-compliant taxpayers. Failure to voluntarily comply may result in imprisonment, fines, and penalties. If you have willfully failed to comply with tax or tax-related obligations, submitting a voluntary disclosure may be a means to resolve your non-compliance and limit exposure to criminal prosecution.

Who may disclose

The Voluntary Disclosure Practice is a compliance option if you have committed tax or tax-related crimes and have criminal exposure due to your willful violation of the law. Taxpayers who participate in the Voluntary Disclosure Practice intend to seek protection from potential criminal prosecution. If your violation of the law was not willful, you should consider other options including correcting past mistakes by filing amended or past due returns. See the box "Voluntary Disclosure Not for You?" for useful links on other options.

2. **IRS News Release 2018-52**, <https://www.irs.gov/newsroom/irs-to-end-offshore-voluntary-disclosure-program-taxpayers-with-undisclosed-foreign-assets-urged-to-come-forward-now>

The relationship between "Teshuvah" and money

3. **Rambam, Laws of Repentance 2:9 (Touger translation)**

אין התשובה ולא יום הכפורים מכפרין אלא על עבירות שבין אדם למקום כגון מי שאכל דבר אסור או בעל בעילה אסורה וכיוצא בהן אבל עבירות שבין אדם לחבירו כגון החובל את חבירו או המקלל חבירו או גוזלו וכיוצא בהן אינו נמחל לו לעולם עד שיתן לחבירו מה שהוא חייב לו וירצהו אף על פי שהחזיר לו ממון שהוא חייב לו צריך לרצותו ולשאול ממנו שימחול לו...

Teshuvah and Yom Kippur only atone for sins between man and God; for example, a person who ate a forbidden food or engaged in forbidden sexual relations, and the like. However, sins between man and man; for example, someone who injures a colleague, curses a colleague, steals from him, or the like will never be forgiven until he gives his colleague what he owes him and appeases him. [It must be emphasized that] even if a person restores the money that he owes [the person he wronged], he must appease him and ask him to forgive him...

CRA Voluntary Disclosure – Then and Now

4. **Selections from Canada Revenue Agency, Information Circular IC00-1R5 – Voluntary Disclosures Program (Archived)**

4. The purpose of this information circular is to provide information about the CRA's Voluntary Disclosures Program (VDP). Taxpayers can make disclosures to correct inaccurate or incomplete information, or to disclose information not previously reported. For example, taxpayers may not have met their tax obligations if they claimed ineligible expenses, failed to remit source deductions or the GST/HST, or did not file an information return.

8. The VDP promotes compliance with Canada's tax laws by encouraging taxpayers to voluntarily come forward and correct previous omissions in their dealings with the CRA. Taxpayers who make a valid disclosure will have to pay the taxes or charges plus interest, without penalty or prosecution that the taxpayer would otherwise be subject to under the acts noted above.

9. The VDP is not intended to serve as a vehicle for taxpayers to intentionally avoid their legal obligations under the acts administered by the CRA.

11. If the CRA accepts a disclosure as having met the conditions set out in this policy, it will be considered a valid disclosure and the taxpayer will not be charged penalties or prosecuted with respect to the disclosure.

12. In addition to penalty relief, if a disclosure is accepted as valid by the CRA, the Minister may grant partial relief in the application of interest against a taxpayer in respect of assessments for years or reporting periods preceding the three most recent years of returns required to be filed.

18. Relief from penalty and prosecution, as provided for under the VDP, may be considered if a taxpayer:

- failed to fulfill their obligations under the applicable act,
- failed to report any taxable income they received,
- claimed ineligible expenses on a tax return,
- failed to remit source deductions of their employees,
- failed to report an amount of GST/HST, (which may include undisclosed liabilities or improperly claimed refunds or rebates, unpaid tax or net tax from a previous reporting period),
- failed to file information returns, and
- failed to report foreign sourced income that is taxable in Canada.

5. Canada Revenue Agency, Backgrounder - Voluntary Disclosures Program (Current),

[https://www.canada.ca/en/revenue-agency/news/2017/12/backgrounder - voluntarydisclosuresprogram.html](https://www.canada.ca/en/revenue-agency/news/2017/12/backgrounder-voluntarydisclosuresprogram.html)

Backgrounder

The Government of Canada is committed to cracking down on tax evasion and aggressive tax avoidance to ensure a system that is responsive and fair for all Canadians. On March 1, 2018, a revised Voluntary Disclosures Program (VDP) will come into effect to narrow the eligibility criteria to access the Program and to impose additional conditions on applicants, making it more difficult for those who intentionally avoid their tax obligations to benefit from the VDP.

Income Tax Disclosures

With the changes to the program, two tracks will be created for income tax disclosures:

Limited Program

The Limited Program provides limited relief for applications that disclose non-compliance where the facts suggest that there is an element of intentional conduct on the part of the taxpayer or a closely related party. Under the Limited Program, taxpayers will not be referred for criminal prosecution with respect to the disclosure and will not be charged gross negligence penalties. However, they will be charged other penalties and interest as applicable. In other cases, the General Program would generally apply.

General Program

Under the General Program, taxpayers will not be charged penalties and will not be referred for criminal prosecution related to the information being disclosed. The CRA will provide partial interest relief for years preceding the three most recent years of returns required to be filed.

A similar concept in Jewish Law?

6. Mishnah Ketubot 3:9 (Kulp translation)

הָאוֹמֵר פְּתִיטִי אֶת בִּתּוֹ שֶׁל פְּלוֹנִי, מְשַׁלֵּם בְּשֵׁת וּפְגָם עַל פִּי עֲצָמוֹ, וְאִינוֹ מְשַׁלֵּם קֶנֶס. הָאוֹמֵר גְּנֻבְתִּי וְטֻבְחֹתִי וּמְכַרְתִּי, מְשַׁלֵּם אֶת הַקָּרָן עַל פִּי עֲצָמוֹ, וְאִינוֹ מְשַׁלֵּם תְּשֻׁלוּמֵי כָּפָל וְתְשֻׁלוּמֵי אַרְבָּעָה וְחֲמִשָּׁה... זֶה הַכֹּל לְכֹל הַמְשַׁלֵּם יָתֵר עַל מֵה שֶׁהִזִּיק, אִינוֹ מְשַׁלֵּם עַל פִּי עֲצָמוֹ:

He who declares, "I seduced the daughter of so-and-so" must pay compensation for embarrassment and blemish on his own admission but need not pay the fine. He who declares, "I have stolen" must make restitution for the principal on his own evidence but need not repay double, fourfold or fivefold... This is the general rule: whoever pays more than the actual cost of the damage he has done need not pay it on his own evidence.

7. Betzalel Daniel, Fines as Compensation, <http://www.yhy.co.il/content/view/410/168/lang,he/> (Hebrew)

חיובי הממון שבתורה מתחלקים לשני סוגים:

- ממון - פיצוי על חיסרון. לדוגמה, אדם שלוה צריך להחזיר את סכום ההלוואה. חיוב זה אינו חידוש של התורה, הוא נובע מכך שממונו של אחד נמצא בידי אחר.
- קנס - תשלום לא בגובה החוסר. למשל, אדם שגנב מחבירו צריך להשיב כפול מהסכום שגנב.

The monetary obligations in the Torah can be split into two categories:

- “Mamon” – compensation for a loss. For example, someone who borrowed money needs to pay back the amount they were loaned. This obligation is not an invention of the Torah, [rather] it follows from [the fact] that one person’s money is found in another person’s hands.
- “Kenas” – a payment not equivalent to the loss. For example, a person who steals from another needs to return double the amount that was stolen.

What is the reason for this ruling?

8. Rashi to Makkot 2b

וקנס אינו משלם ע"פ עצמו - דכתיב גבי כפל אשר ירשיעון אלהים פרט למרשיע את עצמו (ב"ק דף סד):

And a fine is not paid based on his own [admission] – as it says regarding paying double: “the one who the judges [elohim] convict” (Exodus 22:8), which excludes one who convicts themselves (Bava Kama 64b).

9. Talmud Bavli Bava Kamma 75a (modified Davidson Edition translation)

אמר רבא בר אהילאי מאי טעמא דרב (שמות כב, ג) אם המצא בעדים תמצא בדיינין פרט למרשיע את עצמו

Rava bar Ahilai said: What is the reason for the ruling of Rav? With regard to theft, which is subject to a fine of double payment, the Torah states: “If the theft shall be found in his possession alive, whether it is an ox, or a donkey, or a sheep, he shall pay double” (Exodus 22:3). The verb for “shall be found” is doubled, as the verse states “himmatze timmatze.” Rav derives from the repetition that there are two matters that are found: The double payment is imposed only if it is found [himmatze], i.e., it is revealed that he stole the item, through the testimony of witnesses, and the theft is found [timmatze], as determined through judges. This excludes one who incriminates himself through his own admission.

למה לי (שמות כב, ה) מאשר ירשיעון נפקא...

Rav asks: But why do I need the Torah to teach this here? This principle is already derived from a different source: “The one whom the judges convict shall pay double to his neighbor” (Exodus 22:8), which indicates that self-incrimination is insufficient to render one liable for double payment...

10. Rambam, Laws of the Sanhedrin 18:6 (Touger translation)

גזירת הכתוב היא שאין ממיתין בית דין ולא מלקין את האדם בהודאת פיו אלא על פי שנים עדים וזה שהרג יהושע עכן ודוד לגר עמלקי בהודאת פיהם הוראת שעה היתה או דין מלכות היה אבל הסנהדרין אין ממיתין ולא מלקין המודה בעבירה שמא נטרפה דעתו בדבר זה שמא מן העמלין מרי נפש הוא המחכים למות שתוקעין החרבות בבטנם ומשליכין עצמן מעל הגגות שמא כך זה יבא ויאמר דבר שלא עשה כדי שיהרג וכללו של דבר גזירת מלך היא:

It is a Scriptural decree that the court does not execute a person or have him lashed because of his own admission. Instead, the punishments are given on the basis of the testimony of two witnesses. Joshua's execution of Achan and David's execution of the Amalekite convert because of their own statements was a directive of immediate relevance only or was by royal fiat. The Sanhedrin, however, may not execute or lash a person who admits committing a transgression, lest he become crazed concerning this matter. Perhaps he is one of those embittered people who are anxious to die and pierce their reins with swords or throw themselves from the rooftops. Similarly, we fear that such a person may come and admit committing an act that he did not perform, so that he will be executed. The general principle is the disqualification of a person's own testimony is a decree of the king.

11. אדם משיב עצמו רשע, Wikipedia (Hebrew)

הרדב"ז כתב טעם דתי: ואפשר לתת קצת טעם לפי שאין נפשו של אדם קניינו אלא קנין הקב"ה שנאמר הנפשות לי הנה (יחזקאל י"ח) הילכך לא תועיל הודאתו בדבר שאינו שלו... ומה שהוזהר אמרינן הודאת בעל דין כמאה עדים דמי וכי היכי דאין אדם רשאי להרוג את עצמו אין אדם רשאי להודות על עצמו שעשה עבירה לפי שאין נפשו קניינו..."

הרב עדין שטיינזולץ נתן הסבר מעשי לכלל: "הלכה זו, שיש לה ביסוס פורמלי כשלעצמו, שימשה בכל הדורות שבהם נהגו דיני ישראל הלכה למעשה מכשיר רב עוצמה כנגד כל ניסיון לסחוט הודאות מפי הנאשמים בדרכי כפייה או פיתוי"

Rabbi David Ibn Zimra gave a religious reason: "It is possible to give a bit of an explanation, since a person's soul does not belong to them, but rather to G-d, as it says "the souls are mine" (Ezekiel 18), therefore, one's admission will not be accepted about something which is not theirs... That which we would have said, that the admission of [one of the parties] is like 100 witnesses, just like a person is not permitted to end their own life, so too, a person may not 'admit' that they have sinned since their soul is not theirs..."

Rabbi Adin Steinsaltz gave a practical reason for this rule: "This ruling, which has a formal basis for itself, has served (through all of the generations in which Jewish law has been observed) as a tremendous instrument of strength against any attempts to squeeze confessions from guilty parties by force or seduction."

To what extent is one exempt after admitting?

12. Talmud Bavli, Bava Kamma 75a (modified Davidson Edition translation)

איתמר מודה בקנס ואח"כ באו עדים רב אמר פטור ושמואל אמר חייב

It was stated with regard to one who admits that he is liable to pay a fine, and afterward witnesses come and testify to his liability, that Rav says he is exempt, and Shmuel says he is liable.

Expansive/Maximalist view

13. Talmud Bavli, Bava Kamma 75a (modified Davidson Edition translation)

איתיביה רב לשמואל ראה עדים שממשמשים ובאים ואמר גנבתי אבל לא טבחתי ולא מכרתי אינו משלם אלא קרן אמר ליה הכא במאי עסקינן כגון שחזרו עדים לאחוריהם

Rav raised an objection to Shmuel from the following baraita: If a thief saw witnesses who were approaching with the intent to testify against him, and at that point he said: I admit that I stole an animal, but I did not slaughter or sell it, he pays only the principal. Shmuel said to him in response: With what are we dealing here in this baraita? With a case where the witnesses turned back, i.e., ultimately they did not testify.

14. Rambam, Laws of Theft 3:8 (Touger translation)

מי שהודה בקנס ואחר כך באו עדים. אם הודה בתחילה בפני ב"ד ובבית דין פטור...

The following rules apply when a person admits liability for a fine, and then afterwards witnesses come and testify to his liability. If he made his admission before a court while they were in session, he is not liable...

15. Or Sameach, Commentary to Rambam, Laws of Monetary Damages 10:14

אמנם הפירוש פשוט מאד, דניחזי, מודה בקנס דפטור אינו משום שלא מצינן להחייבו ע"פ עצמו, דהא מודה בקנס ואח"כ באו עדים פטור, ונימא דל הודאתו יתחייב משום סהדי דמסהדי, וע"כ כיון שהודה ע"פ עצמו בפני ב"ד פטרתו רהמנא מלשלם, והוא כאילו שלם בבית דין, דהודאתו במקום תשלומין קאי.

However, the explanation is very simple, as we can see that one who admits to owing a fine is exempt not because we cannot obligate them based on their own testimony, for if one admits to owing a fine, and subsequently, witnesses testify [about that same action, they are nevertheless] exempt. Why do we not say to remove their admission and let them be liable because of the testimony of the witnesses? It must be that since the individual admitted on their own to the court, the Torah exempts them from paying, as it is as if they paid [the fine] in court, as their admission stands in the place of payment.

16. Ketzot Hachoshen, Choshen Mishpat 388:11

אמנם בשיטה מקובצת לב"ק משמע דגם בקנס דרבנן מודה מיפטור...

However, in Shitah Mekubetzet Bava Kama it implies that even for a Rabbinic fine, one who admits is exempt...

17. Betzalel Daniel, Fines as Compensation, <http://www.yhy.co.il/content/view/410/168/lang,he/> (Hebrew)

הקנס הוא עונש המוטל על המזיק בשל רשעותו.

The fine [is viewed] as a punishment placed on the party that damaged for their evil actions.

Limiting/Minimalist view

18. Rambam, Laws of Theft 3:9 (Touger translation)

אבל אם אמר לא גנבתי שפטר עצמו מן הכל ובאו עדים שגנב וחזר ואמר בבית דין טבחתי או מכרתי אם באו עדים אחר כך שטבח או מכר משלם תשלומי ארבעה וחמשה. לפי שפטר עצמו תחילה מכלום עד שבאו העדים:

If, however, he denied stealing in the presence of a court in this way, freeing himself of liability, and then witnesses came and testified that he stole a sheep or a cow, at which point he admitted in the presence of the court that he slaughtered or sold the stolen animal, and then witnesses came and testified that he slaughtered or sold the animal, he is liable to pay four or five times the animal's worth. The rationale is that first he denied the obligation entirely before witnesses came.

19. Shach, Choshen Mishpat 388:51

...דאף דהוי קנס מ"מ לא אמרינן מודה בקנס פטור רק גבי קנס דאורייתא ולא בקנס דרבנן...

Even though it is considered a fine, nevertheless, we only say that “one who admits to a fine is exempt” in regards to a Biblical fine, but not to a Rabbinic fine.

20. Rashi to Bava Kamma 75a

אין גנבתי - והך הודאה דגנב לאו הודאה היא דהא מחמת הני עדים דקאמרי ליה גנבת הוא דמודה אבל הודאה דטביחה ומכירה לאו מחמת ביעותייהו אודי דהא לא אמרי ליה [טבחתי] אלא גנבת:

Yes, I stole – this admission of the theft is not considered an admission since it is [only] due to the witnesses that have told him “you stole” that he is admitting [his guilt]. However, the admission of the slaughter or sale is not an admission due to fear, since they did not tell him that he slaughtered, [they only mentioned] that he stole.

21. Betzalel Daniel, Fines as Compensation, <http://www.yhy.co.il/content/view/410/168/lang,he/> (Hebrew)

הקנס נועד לפצות את הניזק.

The fine was intended to compensate the party that was damaged.

Questions for thought:

- Is it ethical for the CRA to offer less relief when there is suspicion that the taxpayer intentionally omitted information to begin with (see IC00-1R6, 20 below)?
- According to IC00-1R6, interest relief is provided under certain circumstances:
 - **15.** In addition to penalty relief, if a VDP application is accepted by the CRA under the General Program, the Minister may grant partial relief in the application of interest against a taxpayer in respect of assessments for years preceding the three most recent years of returns required to be filed (subject to the limitation period explained in paragraph 18). Generally, this interest relief will be 50% of the applicable interest for those periods. Full interest charges will be assessed for the three most recent years of returns required to be filed.

Would interest relief be categorized as a “fine”? Based on the above discussion, would such relief be ethically required?

- Is it ethically appropriate for the CRA to limit the number of voluntary disclosure opportunities to one per taxpayer (IC00-1R6, 25)?
- Would penalties levied by the CRA for tax evasion be considered as “punishment” or “compensation”?
- Normally, CRA enforcement action prior to the Voluntary Disclosure application would be grounds to reject it (IC00-1R6, 29-30). However, the following exceptions (listed in IC00-1R6) may apply:
 - **31.** Not all CRA initiated enforcement action may be cause for a VDP application to be denied by the CRA. Examples of this include:
 - a letter from the CRA inviting the taxpayer to use the VDP to correct their tax affairs; however, this letter would be a factor that could result in the application being considered under the Limited Program; or
 - a recent audit of a taxpayer was related to a GST/HST issue. The same taxpayer is submitting a VDP application for an amount of source deductions (payroll), which was withheld but not remitted to the CRA as required. There may be no correlation between these two taxation issues and as such, the enforcement action on the GST/HST account may not be cause to deny the VDP application.

How should these exceptions be viewed in light of the earlier discussion?

- If a client intentionally omitted information on a tax return, would it be ethically appropriate to later apply for relief under the general program? What about under the limited program?

For reference: IC00-1R6 states:

- **20.** In general terms, the Limited Program provides limited relief for applications that disclose non-compliance where there is an element of intentional conduct on the part of the taxpayer or a closely related party. The following factors may be considered:
 - efforts were made to avoid detection through the use of offshore vehicles or other means,
 - the dollar amounts involved,
 - the number of years of non-compliance,
 - the sophistication of the taxpayer,
 - the disclosure is made after an official CRA statement regarding its intended specific focus of compliance (for example, the launch of a compliance project or campaign) or following broad-based CRA correspondence (for example, a letter issued to taxpayers working in a particular sector about a compliance issue).

For example, a taxpayer who opened an offshore bank account in 2010 and has been transferring undeclared business income earned in Canada to that account since that time would not normally qualify under the General Program.