DAVEY'S Locker

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The understatement penalty

Revisiting the table

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Historic position

Before the advent of the Tax Administration Act on 1 October 2012, a taxpayer was entirely at the mercy of SARS in the imposition of penalties, which ranged up to 200%, with no objective guidance in the legislation as to the amount of a penalty.

Moreover, the old s 82 of the Income Tax Act cast the onus of the burden of proof on the taxpayer, who thus had to prove that the imposition of a penalty and its amount was incorrect.

The recently reported case of SARS *v Pretoria East Motors (Pty) Ltd* (291/12) [2014] ZASCA 91 (see the Monthly Listing) illustrates the principle that SARS is obliged to engage constructively with the taxpayer in an administratively fair manner and not merely raise additional assessments arbitrarily.

Revised penalty table

The current version of the understatement penalty table contained in s 223 introduces some welcome guidance on the amount penalties, varying in a standard case from 10% to 150%.

(If the understatement results from a *bona fide*, inadvertent error, s 222 imposes no penalty).

The five categories of sanctioned behaviours are described as:

- ☐ Substantial understatement (10%).
- ☐ Reasonable care not taken in completing return (25%).
- ☐ No reasonable grounds for 'tax position' taken (50%).
- ☐ Gross negligence (100%).
- ☐ Intentional tax evasion (150%).

Importantly, s 102(2) provides that the burden of proving the facts on which SARS bases the imposition of an understatement penalty is upon SARS.

My experience is that disputes abound regarding the categorization of a behaviour and hence the applicable penalty percentage.

In the absence for the moment of any local case law, my advice is to resort to foreign precedents, especially from the United Kingdom and New Zealand.

TSH