



**DAVEY'S**  
**Locker**

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## **USP and *bona fide* inadvertent error**

### **Understatement penalties**

**by Tony Davey**

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#### **Automatic imposition?**

It appears to be fairly standard practice for SARS automatically to impose understatement penalties (USP) in circumstances of an alleged 'understatement' by a taxpayer. A USP can range from 10% to 200%, depending upon the nature and circumstances of the situation.

In *SARS v Pretoria East Motors (Pty) Ltd* (291/12) [2014] ZASCA 91 (135 TSH 2014) it was held that SARS must engage constructively with the taxpayer in an administratively fair manner, and not merely raise additional assessments arbitrarily.

Further support for an approach requiring the Commissioner specifically to apply his mind is to be found in ITC 1876 (2014) 77 SATC 175 (147 TSH 2015), where it was stated

by Rogers J that:

In the case of the powers which the Commissioner can exercise upon being satisfied of particular matters, one is dealing with a different situation. One is not dealing with a situation where the law prescribes that certain expenses shall be disallowed or certain income shall be taxed if a certain state of affairs objectively exists. *One is dealing, rather, with a situation where a particular fiscal result follows only if the Commissioner himself is satisfied of certain matters. In the latter class of case it is the Commissioner's satisfaction upon the points in question which constitute the jurisdictional fact for the issuing of the assessment.* (My emphasis.)

In *South Atlantic Jazz Festival (Pty) Ltd v CSARS* (A 129/2014) [2015] ZAWCHC 8 (144, 145 TSH 2015) it was held that an appeal to the tax court can include a review of the Commissioner's decision in an administrative action so as to ascertain whether the Commissioner has properly exercised his discretion.

It was held that s 117(1) of the Tax Administration Act does not prevent the tax court from reviewing a discretionary decision. This rationale, it is submitted, applies equally to the tax board as constituted and governed under ss 108 to 115 of the Tax Administration Act.

#### **Onus of proof**

Thanks to s 102(2) of the Tax Administration Act, the Commissioner has to discharge the

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burden of proof that the penalty is justified, having regard to the taxpayer's behaviour.

### **Defence against usp**

A defence available to a taxpayer, since an amendment made in 2013 but effective as from 1 October 2012, arises if the understatement results from a 'bona fide inadvertent error'.

This expression is not defined in the act. But, in a very recent case, TC IT 13772 (4 November 2016) (see the

Monthly Listing and the Monthly Notebook), the court, after reviewing dictionary definitions, found in favour of the taxpayer and remitted penalties, on the basis of the existence of a *bona fide* inadvertent error—an innocent misstatement by the taxpayer on its return, resulting in an understatement, while acting in good faith and without the intention to deceive.

[In Tony's piece in 163 *TSH* 2016, I erroneously changed the effective rate of tax under the *svdp*, forgetting that the relevant maximum marginal rate in the 2015 year of assessment was 40%, and not 41%—the corresponding rate applying to the 2016 year. The effective rate of the *svdp* tax is therefore 40% of 40%, or 16%. Cheap at the price.—Ed]