

SARS has power to impose 200% penalty

TAXPAYERS are often faced with a 200% penalty pursuant to the issue of additional assessments by the South African Revenue Service (SARS). Section 76 of the Income Tax Act provides that additional tax up to 200% may be imposed by the receiver in the following circumstances:

- If the taxpayer makes default in rendering a return;
- If the taxpayer omits from his return any amount which ought to have been included. It is specifically provided that a taxpayer who deducts or disregards or excludes an amount which is not otherwise permissible under the provisions of the financial laws, is deemed to have omitted an amount from his return;
- If the taxpayer makes an incorrect statement in any return which results or would, if accepted, result in an assessment of an amount less than the tax properly chargeable.

Fortunately for taxpayers the imposition of a 200% penalty should

not be automatic. SARS is entitled to remit the whole or any part of the additional tax as he sees fit.

However, it is provided that, unless SARS is of the opinion that there were extenuating circumstances, he is not entitled to remit the additional tax if he is satisfied that any act or omission of the taxpayer was done with the intention to evade taxation.

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In other words, where no fraud has occurred, SARS can reduce the additional tax. There are two enquiries:

- Whether there is an intention to evade taxation;
 - If there is no intention to evade taxation, regard must be had to all relevant factors, and not only to extenuating circumstances.
- In determining the extent of the additional tax, three factors should be taken into account:
- Punishment of the taxpayer;
 - Deterrent effect on the taxpayer; and
 - Deterrent effect on others.

Applying these principles, the court in *ITC 1377* remitted the entire amount of additional tax in circumstances where the taxpayer believed that the amount concerned constituted proceeds of a capital nature. It has been indicated that the concept of extenuating circumstances refers not only to the moral guilt of the taxpayer, but all relevant factors.

In a recent case the tax court specifically had to deal with the imposition of a 200% penalty against the background of undisclosed amounts being discovered by SARS pursuant to an investigation.

During argument a concession was made on behalf of SARS that in most cases a penalty of 100% is imposed and not 200%. It was specifically indicated by the court that SARS cannot automatically impose a fixed penalty of 200%. The receiver is obliged to consider the circumstances of each case.

In this context the circumstances of the taxpayer, his financial position and the involvement of third parties, such as bookkeepers, and opinions from third parties, would be important. If these factors are present, there is an obligation to reduce the additional tax appropriately.

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