

# Tax Dispute Resolution:

## Onus of proof dischargeable by SARS.

In order to encourage tax compliance and to deter unwanted behavior of non-tax compliances including tax evasions, the South African Revenue Service (SARS) which administers tax Acts is empowered to impose sanctions where non-tax compliance is established. Sanctions include but not limited to administrative non-compliance penalties, understatement penalties as well as the laying of criminal charges where tax offence has been committed. In this article, we deal with the onus of proof dischargeable by SARS in the case of imposition of an understatement penalty.

SARS is empowered to impose an understatement penalty where non-tax compliance behavior is detected or established. In terms of section 102(2) of the Tax Administration Act (the TAA), the burden of proving the facts on which SARS based imposition of understatement penalty is upon SARS. This is one of few provisions in the tax Act which places the burden of proof on the shoulder of SARS.

How does a taxpayer determine whether SARS has successfully discharged its onus of proof in terms of 102(2) of TAA? Where SARS bears the onus of proof, only a court or other judicial forum is empowered to decide whether SARS has successfully discharged the onus.

**To successfully discharge its onus of proof in the event of imposition of an understatement penalty, SARS must prove the following:**

- the existence of an understatement as defined in section 221 of the TAA;
- that the understatement caused prejudice to SARS or the fiscus; and
- the behavior on which SARS based the imposition of an understatement penalty.

The decision by SARS to impose understatement penalty is subject to objection and appeal. It is important to note that in the case of appeal against understatement penalty, the tax court is empowered in terms of section 129(3) of the TAA to reduce, confirm or increase the understatement penalty. Such powers must be exercised by the tax court within the Rules prescribed for governing the conduct and hearing of an appeal before a tax court.

It is thus imperative that appropriate tax advice be sought before appealing the understatement penalty to the tax court as the outcome of the tax court could result in an increase in the penalty percentage payable.

**In conclusion**

- SARS is empowered to impose an understatement penalty where non tax compliance behavior is established;
- the burden of proving the facts on which SARS based imposition of understatement penalty is upon SARS;
- The decision by SARS to impose the understatement penalty is subject to objection and appeal;
- When SARS bears the onus of proof, only a court or other judicial forum is empowered to decide whether SARS has successfully discharged the onus.

**Have you received understatement penalty assessment? Have you received a letter of request for information, notice of audit or verification, letter of audit findings, or final letter of assessment?**

Please contact us for any assistance relating to tax dispute resolution.



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