



# Effectively apply for remission/reduction of tax penalties and interest

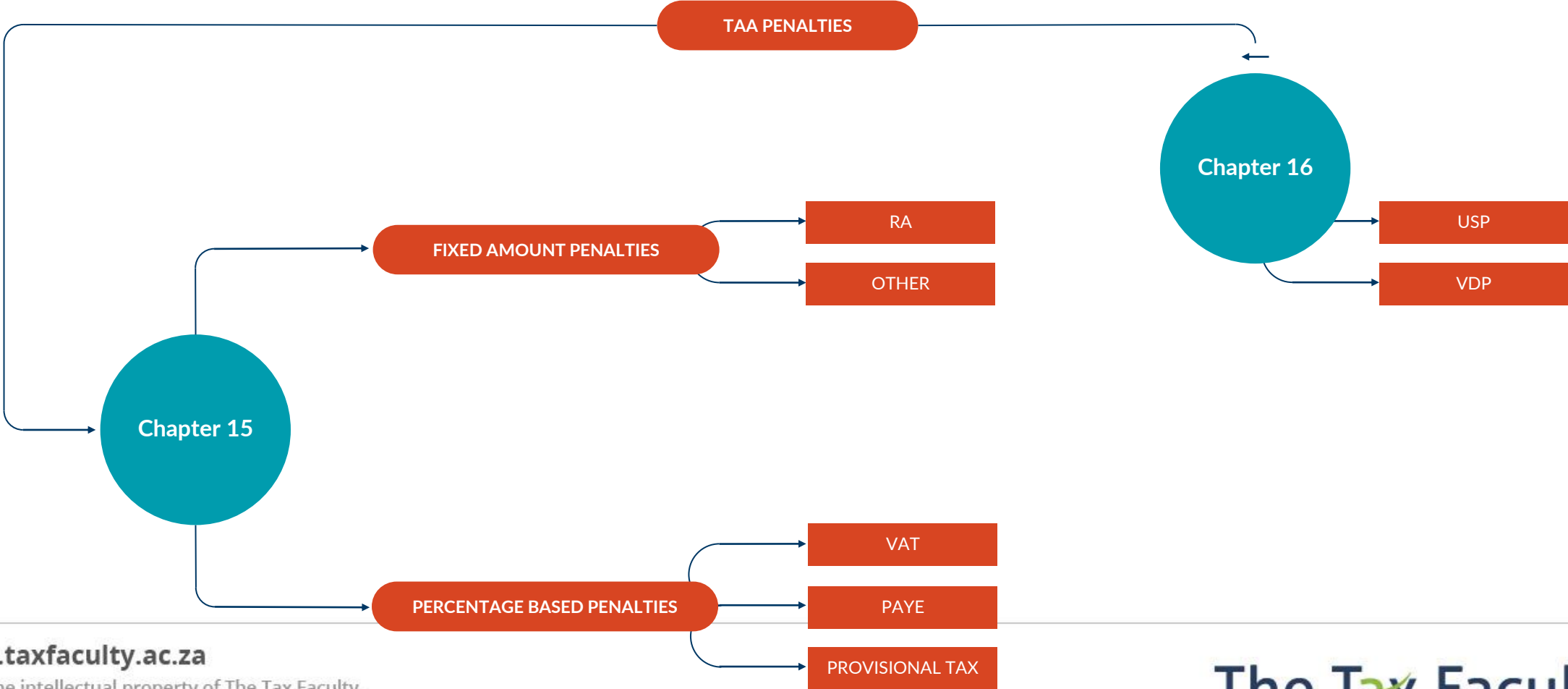
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# Overview Diagram



# Fixed Amount Penalties

## Section 210

*210. Non-compliance subject to penalty.—*

- 1) If SARS is satisfied that non-compliance by a person referred to in subsection (2) exists, SARS must impose the appropriate 'penalty' in accordance with the Table in section 211.*
- 2) Non-compliance is failure to comply with an obligation that is imposed by or under a tax Act and is listed in a public notice issued by the Commissioner, other than—*
  - a) the failure to pay tax subject to a percentage based penalty under Part C;*
  - b) non-compliance in respect of which an understatement penalty under Chapter 16 has been imposed; or*
  - c) the failure to disclose information subject to a reportable arrangement penalty under section 212.*

# Chapter 5 – Information Gathering

## Public notice



Notice 1531 GG45540 Incidences of non-compliance 26 November 2021

### 2. Incidences of non-compliance subject to fixed amount penalty

- 2.1 Failure by a natural person to submit an income tax return as and when required under a tax Act, for years of assessment commencing on or after 1 March 2006, where that person has, with effect from 1 January 2022—
  - 2.1.1 two or more outstanding income tax returns for years of assessment commencing on or after 1 March 2006 but ending on or before 29 February 2020; or
  - 2.1.2 one or more outstanding income tax returns for years of assessment commencing on or after 1 March 2020.
- 2.2 Failure by a natural person to submit an income tax return as and when required under the Income Tax Act, for years of assessment commencing on or after 1 March 2006, where that person has, with effect from 1 December 2022, one or more outstanding income tax returns.

# Chapter 5 – Information Gathering

## Public notice



Notice 1372 GG 42100 14 December 2018

### **2. Incidence subject to fixed amount penalty**

Failure by a company to submit an income tax return as and when required under the Income Tax Act for years of assessment ending during the 2009 and subsequent calendar years, where SARS has issued that company with a final demand, referring to this notice and requiring the submission of the outstanding income tax return, and the company failed to submit the return within 21 business days of the date of issue of the final demand.

# Fixed Amount Penalties

## Section 211

*211. Fixed amount penalty table.—*

*1) For the non-compliance referred to in section 210, SARS must impose a 'penalty' in accordance with the following Table—*

*Table: A mount of Administrative Non-Compliance Penalty (next slide)*

# Fixed Amount Penalties

## Section 211 (continued)

1 Item	2 Assessed loss or taxable income for 'preceding year'	3 'Penalty'
(i)	Assessed loss	R250
(ii)	R0 – R250 000	R250
(iii)	R250 001 – R500 000	R500
(iv)	R500 001 – R1 000 000	R1 000
(v)	R1 000 001 – R5 000 000	R2 000
(vi)	R5 000 001 – R10 000 000	R4 000
(vii)	R10 000 001 – R50 000 000	R8 000
(viii)	Above R50 000 000	R16 000

# Fixed Amount Penalties

## Section 211 (continued)

*The amount of the 'penalty' in column 3 will increase automatically by the same amount for each month, or part thereof, that the person fails to remedy the non-compliance within one month after—*

- a) the date of assessment of the penalty, if SARS is in possession of the current address of the person and is able to deliver the assessment, but is limited to 35 months from the date of the assessment; or*
- b) the date of the non-compliance if SARS is not in possession of the current address of the person and is unable to deliver the 'penalty assessment', but limited to 47 months after the date of non-compliance.*



# Fixed Amount Penalties

## Section 211 (Examples)

Natural person A has not submitted an income tax return for the 2015 year of assessment to date. Assume the return was due by 25 November 2015. Assume further that person A's taxable income for the 2014 year of assessment was R1 000 000. Assume the penalty assessment was raised on 26 November 2015 and delivered to the taxpayer. Assume further SARS has the person A's address

Penalty calculated as follows:

In relation to 2015:

Initial penalty – R1 000.

Amount of months of non-compliance counting from 1 Month of date of penalty assessment - +/-70 months.

Total penalty:  $R1\ 000 + (R1\ 000 \times 70) = R70\ 000$

Capped to 35 months:  $R1\ 000 + (R1\ 000 \times 35) = R36\ 000$

# Fixed Amount Penalties

## Section 211 (continued)

- 3) *The following persons, except those falling under item (viii) of the Table or those that did not trade during the year of assessment, are treated as falling under item (vii) of the Table—*
- a) a company listed on a recognised stock exchange as referred to in paragraph 1 of the Eighth Schedule to the Income Tax Act;*
  - b) a company whose gross receipts or accruals for the 'preceding year' exceed R500 million;*
  - c) a company that forms part of a "group of companies" as defined in section 1 of the Income Tax Act, which group includes a company described in item (a) or (b); or*
  - d) a person or entity, exempt from income tax under the Income Tax Act but liable to tax under another tax Act, whose gross receipts or accruals exceed R30 million.*

# Fixed Amount Penalties

## Section 211 (continued)

- (4) SARS may, except in the case of persons referred to in subsections (3) (a) to (c), if the taxable income of the relevant person for the 'preceding year' is unknown or that person was not a taxpayer in that year—*
- a) impose a 'penalty' in accordance with item (ii) of column 1 of the Table; or*
  - b) estimate the amount of taxable income of the relevant person for the 'preceding year' based on available relevant material and impose a 'penalty' in accordance with the applicable item in column 1 of the Table.*
- (5) Where, upon determining the actual taxable income or assessed loss of the person in respect of whom a 'penalty' was imposed under subsection (4), it appears that the person falls within another item in column 1 of the Table, the 'penalty' must be adjusted in accordance with the applicable item in that column with effect from the date of the imposition of the 'penalty' issued under subsection (4).*

# Reportable Arrangement Penalty

What is a reportable arrangement?

Section 35(1) Section 35(2):  [Reportable arrangement notice - section 35\(2\)](#)  
SARS guide:

If there is an obligation to report and it is not reported – Penalty.

 [Reportable Arrangement Guide - External Guide](#)

Section 212:

The penalty is – R50 000 in the case of a participant other than the promoter; or R100 000 in the case of the promoter. The respective amount is charged for each month that the failure continues, for up to 12 months. The penalty is doubled if the amount of anticipated tax benefit for the participant as a result of the arrangement exceeds R5million, and is trebled if that benefit exceeds R10 million.

# Percentage Based Penalty

## Section 213 (quote)

*213. Imposition of percentage based penalty.—*

- 1) If SARS is satisfied that an amount of tax was not paid as and when required under a tax Act, SARS must, in addition to any other 'penalty' or interest for which a person may be liable, impose a 'penalty' equal to the percentage of the amount of unpaid tax as prescribed in the tax Act.*
- 2) In the event of a change to the amount of tax in respect of which a 'penalty' was imposed under subsection (1), the 'penalty' must be adjusted accordingly with effect from the date of the imposition of the 'penalty'.*

# Percentage Based Penalty

## Section 213 (continued)

Late payment of:

PAYE – paragraph 6(1) of the 4th schedule and paragraph 16(4) 4th schedule – 10% of total PAYE.

VAT – Section 39 – 10%.

Provisional tax - paragraph 27 – 10%.

Dividends withholding tax ?

Interest withholding tax?

Withholding tax on royalties?

Withholding tax on fixed property – section 35A(9)(b) – 10%.

Withholding tax on foreign entertainers and sports persons?

Donations tax?

# Procedure

Section 214



By way of penalty assessment AP34/as part of normal assessment.  
- Section 214 notice NB

# Remittance Procedure - Chapter 15 Penalties

Section 215



Section 215

When to file a remittance request.

What should it include.

Suspension of payment.

Extension periods.



# Remittance Procedure - Chapter 15 Penalties

## Section 217

Fixed amount penalties – remittable if:

- There is reasonable grounds for the non-compliance;

- The non-compliance has been remedied; and

- It is a first incidence of non-compliance; or

- For the fixed amount penalty, the duration of the non-compliance is less than 5 business days.

Then only up to an amount of R2 000 (or R100 000 in the case of a RA penalty).

Percentage based penalties – remittable if:

- It is a first incidence of non-compliance or involved an amount of less than R2 000;

- Reasonable grounds exist for the non-compliance; and

- The non-compliance has been remedied.

# Remittance Procedure - Chapter 15 Penalties

## First incidence of non-compliance

Section 208 def of 'first incidence'

*'first incidence' means an incidence of non-compliance by a person if no 'penalty assessment' under this Chapter was issued during the preceding 36 months, whether involving an incidence of non-compliance of the same or a different kind, and for purposes of this definition a 'penalty assessment' that was fully remitted under section 218 must be disregarded;*

Remember that remittance under section 217 is a SARS discretion, not an obligation ("SARS may" vs "SARS must") – when drafting request for remittance or objection, NB to show that discretion exists and then consider adding mitigating factors.

# Remittance Procedure - Chapter 15 Penalties

## Section 218

Exceptional circumstances:

Section 218 of the TAA (not for USP's):

*218. Remittance of penalty in exceptional circumstances.—(1) SARS must, upon receipt of a 'remittance request', remit the 'penalty' or if applicable a portion thereof, if SARS is satisfied that one or more of the circumstances referred to in subsection (2) rendered the person on whom the 'penalty' was imposed incapable of complying with the relevant obligation under the relevant tax Act.*

*2) The circumstances referred to in subsection (1) are limited to—*

- a) a natural or human-made disaster;*
- b) a civil disturbance or disruption in services;*
- c) a serious illness or accident;*
- d) serious emotional or mental distress;*
- e) any of the following acts by SARS—*

# Remittance Procedure - Chapter 15 Penalties

*(e) any of the following acts by SARS— (continued)*

*(i) a capturing error;*

*(ii) a processing delay;*

*(iii) provision of incorrect information in an official publication or media release issued by the Commissioner;*

*(iv) delay in providing information to any person; or*

*(v) failure by SARS to provide sufficient time for an adequate response to a request for information by SARS;*

*(f) serious financial hardship, such as—*

*(i) in the case of an individual, lack of basic living requirements; or*

*(ii) in the case of a business, an immediate danger that the continuity of business operations and the continued employment of its employees are jeopardised; or*

*(g) any other circumstance of analogous seriousness.*

# Remittance Procedure - Chapter 15 Penalties

Remittance under section 215(5)

For example: in the case of par 20 provisional tax penalty:

SARS may also remit if:

Serious calculation.

Due regard to the factors having a bearing thereon.

Not deliberately or negligently understated (paragraph 20(2) ITA).

(remember – show existence of discretion and then convince).

“Remittance” under section 219 [penalty incorrectly imposed]

# Understatement Penalty

Section 222



Section 222

Requirements:

Understatement; and

Not a bona fide inadvertent error.

Understatement

Defined – Section 221.



Section 221

Must be a prejudice to SARS/fiscus.

# TC – IT14247 (Meaning of prejudice TO SARS/fiscus)



## Facts (Insofar Relevant)

### Income Tax:

Taxpayer submitted a p-tax return and paid all tax due for the year under provisional tax.

When submitting the income tax return for the year, taxpayer submitted nil returns as “no trade” (if no trade, where do you get the money to pay the tax?).

Subsequently discovered that taxpayer was trading and that it should not have submitted nil returns.

SARS raised an assessment and levied 25% (initially 100%) understatement penalty.

### VAT:

Taxpayer never registered for VAT and did not submit VAT returns.

Taxpayer was, however, charging VAT.

Assessments raised and 50% (initially 100%) understatement penalty imposed.

# TC – IT14247 (Meaning of prejudice TO SARS/fiscus)



## Facts

Issue before the court – did SARS suffer any prejudice because of the taxpayer's omission on the income tax returns and default in rendering VAT returns.

If so, penalties may be imposed and may be increased by the court.



# TC – IT14247 (Meaning of prejudice TO SARS/fiscus)



Held

Income tax:

There was a prejudice despite taxpayer having paid P-tax. P-tax payments could not form part of Government Budgetary process – could not be used to fund government expenses– prejudice clearly exist.

Opportunity cost and resource allocation also a prejudice.

Penalty increased to 100% ( “gross negligence”).

VAT:

There was a prejudice.

Penalty increased to 100%.

# Case law on meaning of prejudice

Purlish Holdings (Proprietary) Limited v The Commissioner For The South African Revenue Service (76/2018) [2019] ZASCA 4 (26 February 2019)

The tax court can only increase a penalty if SARS pleaded for increase in UPS in their rule 31 or 33 statements (objections and appeals discussed later).

Prejudice to SARS also includes potential future prejudice (CBVA (Pty) Ltd v CSARS)

# Understatement Penalty

Section 222



Section 222

Requirements:

Understatement; and  
Not a bona fide inadvertent error.

Meaning of bona fide inadvertent error:

ITC 1890

“an innocent misstatement by a taxpayer on his or her return, resulting in an understatement, while acting in good faith and without the intention to deceive.”

SARS (SARS’ Draft Guide to Understatement Penalties):

“It is a misstatement that genuinely is not achieved through or does not result from deliberate planning; or a misstatement that is genuinely, sincerely, and honestly unintentional, unintended, unpremeditated, unplanned and unwitting”.

“The focus is not the bona fides of the error; it is the bona fides of its accidental nature”.  
(final guide published not exactly the same wording – but similar views expressed).

How calculated?

# Understatement Penalty

Section 222(3)



Section 222(3)

Shortfall X a percentage.

Three types of shortfalls:

223(3)(a) – (c).

# Understatement Penalty

223(3)(a) – (c) (examples)



SARS Guide to Understatement Penalties

## Example 6 – Tax chargeable shortfall

A taxpayer declares R1 000 taxable income in their return. They have therefore reported R280 tax chargeable. It transpires that the taxable income is actually R1 500 and the tax chargeable R420

Tax properly chargeable	R	420
Tax reported as chargeable	- R	280
Paragraph (a) shortfall	R	140

## Example 7 – Tax refundable shortfall

A vendor submits a VAT return that reflects a refund of R1 200. However, the calculation excludes output VAT of R700 and the VAT properly refundable is actually R500.

VAT reported as refundable	R	1 200
VAT properly refundable	- R	500
Paragraph (b) shortfall	R	700

# Understatement Penalty

## 223(3)(a) – (c) (examples)

### Example 8 – Assessed loss or other benefit shortfall

A taxpayer declares a loss of R1 000 in their return but because the calculation excludes income of R700, the actual assessed loss is R300.

Assessed loss reported	R	1 000
Actual assessed loss	- R	300
Difference	R	700
Tax rate	x	28%
Paragraph (c) shortfall	R	196

See SARS' Draft Interpretation Note on the maximum rate of tax applicable in the case of paragraph (c) shortfalls

# Understatement Penalty

Section 223 - Understatement Penalty Percentage Table – the percentages to which the shortfall is applied:

1 Item	2 Behaviour	3 <u>Standard case</u>	4 If <u>obstructive</u> , or if it is a 'repeat case'	5 Voluntary disclosure <u>after</u> notification of audit or investigation	6 Voluntary disclosure <u>before</u> notification of audit or investigation
(i)	Substantial understatement	10%	20%	5%	0%
(ii)	Reasonable care not taken in completing return	25%	50%	15%	0%
(iii)	No reasonable ground for tax position taken	50%	75%	25%	0%
(iv)	Impermissible avoidance arrangement	75%	100%	35%	0%
(v)	Gross negligence	100%	125%	50%	5%
(vi)	Intentional tax evasion	150%	200%	75%	10%

# Understatement Penalty

Meaning “substantial understatement”  
def per section 221:

*“substantial understatement” means a case where the prejudice to SARS or the fiscus exceeds the greater of five per cent of the amount of ‘tax’ properly chargeable or refundable under a tax Act for the relevant tax period, or R1 000 000;”*



# Understatement Penalty

Meaning “substantial understatement”  
def per section 221:



[SARS Guide to Understatement Penalties](#)

<b>Example 18</b>	<b>Not substantial understatement</b>		<b>Not substantial understatement</b>		<b>Substantial understatement</b>	
Tax properly chargeable	R	30 000 000	R	30 000 000	R	30 000 000
5 %	R	1 500 000	R	1 500 000	R	1 500 000
Tax reported as chargeable	R	29 100 000	R	28 900 000	R	28 400 000
Prejudice (P)	R	900 000	R	1 100 000	R	1 600 000
	R1m > P and (5% > R1m) > P		R1m < P and (5% > R1m) > P		R1m < P and (5% > R1m) < P	

# What is a repeat case?

## Section 221

*“repeat case’ means a second or further case of any of the behaviours listed under items (i) to (v) of the understatement penalty percentage table reflected in section 223 within five years of the previous case;”*

# Understatement Penalty

## Meaning of:

*“Reasonable Care not Taken in Computing a return”.*

*“No reasonable Grounds for Tax Position Taken”.*

*“Impermissible Avoidance Arrangement”.*

*“Gross Negligence”.*

*“Intentional Tax Evasion”.*

## What is a repeat case?

Defined – section 221 – 5 years.

Example – taxpayer claims expenses in two tax year that turns out not be allowable and file returns at the same time – both years 1 and years 2 are a standard case.

If something done wrong again in future – repeat case.

# What is a tax position?

## 'Tax position'– section 221

*“tax position’ means an assumption underlying one or more aspects of a tax return, including whether or not—*

*(a) an amount, transaction, event or item is taxable;*

*(b) an amount or item is deductible or may be set-off;*

*(c) a lower rate of tax than the maximum applicable to that class of taxpayer, transaction, event or item applies; or*

*(d) an amount qualifies as a reduction of tax payable; and”.*

# Remittance/objection - Chapter 16 Penalty

Section 223(3)



Section 223(3)

The imposition of and a decision not to remit a USP is subject to objection and appeal – i.e. no need to request remittance first?

Remittance must precede an objection in the case of penalty imposed for a substantial understatement. This is important as it is a decision not to remit a penalty imposed for a substantial understatement that is subject to objection and appeal;

For penalties imposed for any of the other behaviors – objection.

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