



An analysis of the role of tax practitioners in the understatement penalty regime

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ABSTRACT

This study examined how South Africa's tax practitioner regulation interacts with its behaviour-based understatement penalty regime and benchmarked it against the laws and regulations in the United States of America and Australia. A literature and comparative review were adopted to answer the research question, which considered whether South Africa's penalty system is fair, especially when taxpayers reasonably rely on the advice from tax practitioners.

It was found that South Africa has the most severe and complex penalty regime, ranging from 10% to 200% penalties according to five behaviours, with SARS bearing the onus to prove both an understatement and prejudice to SARS and the fiscus. Courts have also confirmed relief from understatement penalties where a *bona fide* inadvertent error occurred or where a taxpayer relied on an independent opinion from a registered tax practitioner. According to the Draft Tax Administration Laws Amendment Bill (B29 of 2025), issued on 12 November 2025, the legislature proposes to limit the term *bona fide* inadvertent error only to substantial understatement.

Compared to benchmarked countries, the United States of America applies a simpler accuracy-related penalty, generally 20% and a higher 40% in some cases, with a fact-specific reasonable cause and good faith defence. However, taxpayers are still liable for penalties caused by the negligence of their tax advisors. Australia uses a behaviour-based shortfall penalties system ranging from 25% to 75% but includes a statutory safe harbour to safeguard taxpayers from these penalties where a registered tax agent made the error, the taxpayer supplied full facts, and the agent was not reckless.

In each country, tax advisors are subject to regulation and must comply with prescribed qualifications and professional rules to serve taxpayers. Although tax advisors are regulated, using their services can limit and even prevent penalty risk; yet the responsibility for any penalties, including those stemming from tax advisor mistakes, rests with the taxpayer. Overall, South Africa could improve fairness and predictability by providing better guidelines for the understatement behavioural categories and aligning guidance with the courts on *bona fide* inadvertent error, introducing a safe-harbour when a registered tax practitioner errs despite full disclosure by taxpayers. These steps would keep deterrence intact while strengthening practitioner accountability through uniform oversight and giving compliant taxpayers clearer, more reliable protection against understatement penalties.

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KEYWORDS

Non-compliance

South African Revenue Service

Tax Administration Act

Tax practitioner

Taxpayer

Understatement penalty

TABLE OF CONTENTS

ABSTRACT	I
ACKNOWLEDGMENTS	II
KEYWORDS	III
LIST OF ABBREVIATIONS	VIII
LIST OF TABLES	IX
CHAPTER 1: INTRODUCTION.....	1
1.1 Background	1
1.2 Literature review of the research area	3
1.3 Motivation of topic actuality	4
1.4 Problem statement and research question.....	5
1.5 Research objectives	6
1.5.1 Main objective	6
1.5.2 Secondary objectives	6
1.6 Research design.....	6
1.6.1 Research methodology	6
1.6.2 Research paradigms	7
1.6.3 Research methodologies	8
1.6.4 Methods	8
1.7 Ethical considerations	9
1.8 Chapter overview.....	9

1.8.1	Chapter 1: Overview of the study	9
1.8.2	Chapter 2: The relevant law.....	9
1.8.3	Chapter 3: Comparative analysis.....	10
1.8.4	Chapter 4: Conclusion	10

CHAPTER 2: TAX PRACTITIONER REGULATION AND UNDERSTATEMENT

PENALTIES	11
2.1 Introduction	11
2.2 Tax practitioners.....	11
2.2.1 The role of tax practitioners	11
2.2.2 Tax practitioner regulation	12
2.2.3 Recognised controlling bodies	14
2.2.4 Tax practitioner registration requirements	16
2.3 Understatement penalties in South Africa	17
2.3.1 Intentional tax evasion	20
2.3.2 Gross negligence	21
2.3.3 No reasonable grounds for 'tax position' taken	22
2.3.4 Reasonable care not taken in completing a return	23
2.3.5 Substantial understatement	25
2.3.6 <i>Bona fide</i> inadvertent error	26
2.4 Interaction between tax practitioner regulation and understatement penalties.....	31
2.5 Conclusion.....	35

CHAPTER 3: ANALYSIS AND COMPARISON OF THE UNITED STATES OF AMERICA AND AUSTRALIAN TAX PENALTY LEGISLATION WITH THAT OF SOUTH AFRICA	37
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3.1	Introduction	37
3.2	Overview of the United States of America tax penalties and tax practitioner regulations	37
3.2.1	Tax practitioner regulation	37
3.2.2	Tax penalties.....	39
3.2.2.1	Negligence and disregard of the rules and regulations	41
3.2.2.2	Substantial understatement of income tax	42
3.2.3	Interaction between tax practitioners and accuracy-related penalties.....	42
3.2.4	Comparison between South Africa and the USA.....	45
3.2.4.1	Tax practitioner regulation	45
3.2.4.2	Penalty systems	46
3.2.4.3	Interaction between tax practitioners and penalties	47
3.3	Overview of the Australian tax practitioner regulations and tax penalties. 49	
3.3.1	Tax agent regulation	49
3.3.2	Shortfall penalties	51
3.3.2.1	Intentional disregard	53
3.3.2.2	Recklessness	54
3.3.2.3	Failure to take reasonable care	55
3.3.3	Interaction between tax agents and shortfall penalties.....	57
3.3.4	Comparison between South Africa and Australia	58
3.3.4.1	Tax practitioner regulation	58
3.3.4.2	Penalty systems	59
3.3.4.3	Interaction between tax practitioners and penalties	60

3.4	Conclusion.....	62
CHAPTER 4: SUMMARY AND CONCLUSION		64
4.1	Introduction	64
4.2	Summary	65
4.2.1	Interaction between tax practitioners and understatement penalties in South Africa.....	65
4.2.2	Comparison between South Africa, the USA and Australia	66
4.3	Conclusion.....	67
4.4	Limitations of the study	68
4.5	Research recommendations.....	68
4.6	Areas for further research.....	68
 REFERENCES.....		 70

LIST OF ABBREVIATIONS

ATO	Australian Taxation Office
BAS	Business Activity Statements
CPA	Certified Public Accountants
IRS	Internal Revenue Service
ITA	Income Tax Act
RCB	Recognised Controlling Body
SARS	South African Revenue Service
TAA	Tax Administration Act
TASA	Tax Agent Services Act
USA	United States of America
VAT	Value Added Tax

LIST OF TABLES

Table 1-1: The understatement penalty percentage table.....	20
Table 2-1: The Australian shortfall penalty table	52

CHAPTER 1: INTRODUCTION

1.1 Background

When Albert Einstein, a man well known for his intelligence, was asked about completing his income tax return, he responded “This is a question too difficult for a mathematician. It should be asked of a philosopher.” (Einstein, 2023).

Taxpayers find it difficult to understand tax requirements and therefore place great reliance on tax advisors to act in their best interests and prevent them from becoming victims of non-compliance (Tan, 2014:243). As stated by Sakurai and Braithwaite (2003:385), taxpayers struggle to remain tax compliant, and as complexity increases, taxpayers became more reliant on tax professionals for their expertise. Kieswetter (2019:5) states that tax practitioners have a significant responsibility as intermediaries to facilitate tax compliance and promote tax morality, as this contributes to the development of the country. To ensure that taxpayers comply with their tax obligations, tax administration plays an integral role (Shandu *et al.*, 2019:168).

In the 2005 Budget Review, the Minister of Finance announced the drafting of a Tax Administration Act, which resulted in the publication of the first draft of the Tax Administration Bill in 2009, followed by an extensive public consultation process that ultimately led to the promulgation of the Tax Administration Act 28 of 2011 (TAA) on 4 July 2012. The Act came into operation on 1 October 2012 through Proclamation No. 51 of 2012, which was published in the Government Gazette 35687 on 14 September 2012 (SARS, 2018b:4).

The TAA was implemented to consolidate various Tax Acts effectively into a single piece of legislation (Schneider, 2012:1) that seeks to simplify administrative provisions, enabling taxpayers to fully comply with easily understandable regulations (SARS, 2018b:4). The TAA also aims to establish regulations that safeguard the fiscus, enforce tax payments where necessary, and promote a higher compliance rate (Schneider, 2012:2). In an attempt to enhance compliant behaviour, sections 221 to 224 in Chapter 16 of the TAA introduce a reformed understatement penalty regime (RSA, 2012).

Section 221 of the TAA provides that an understatement penalty will be imposed if a taxpayer fails to submit a return, omits information, or makes an incorrect entry in a tax return resulting in prejudice to SARS or the fiscus. Penalties range from 10% to 200%, depending on five categories of behaviour, as stipulated in section 223(1) (Croome, 2014:4). The main objective of the understatement penalty regime is to deter non-compliance (SARS, 2018b:80).

Under certain circumstances, taxpayers may be exempted from facing understatement penalties enforced by SARS (De Jager, 2019:45). The Tax Administration Amendment Bill (SARS, 2013) introduced the concept that penalties should not be levied if they resulted from a *bona fide* inadvertent error. However, SARS failed to provide an explanation as to what constitutes a *bona fide* inadvertent error. Botha *et al.* (2017:7) confirm that the term is not defined in the TAA, but SARS (2018a:17) later describes it as an involuntary typographical mistake, not excused if reasonable care was not taken.

To mitigate the risk of understatement penalties, taxpayers can obtain an opinion from registered tax practitioners in terms of section 223(3) of the TAA. If taxpayers are in the possession of such an opinion that was issued on or before the date the relevant return was due, taking into consideration the circumstances of such arrangement, SARS must remit an understatement penalty imposed for a substantial understatement. The Constitutional Court in *Thistle Trust v Commissioner for the South African Revenue Service* (2024) confirmed that taxpayers who obtain an opinion in good faith may have penalties set aside. Tax practitioners therefore play a crucial role in mitigating understatement risk.

Although the *Oxford English Dictionary* does not specifically define the term tax practitioner, it defines practitioner as “a person engaged in the practice of a particular skill, art, or discipline” (Oxford English Dictionary Online, 2022a). A tax practitioner is thus a person trained in taxation with the necessary skills and experience. Prior to the TAA, many unqualified individuals provided tax advice and filed returns, prompting government concern (Lamprecht, 2013:17). Section 67A of the Income Tax Act 58 of 1962 (ITA) was therefore replaced by Chapter 18 of the TAA to address the lack of regulation (Kotze, 2013:22).

In terms of section 240(1) of the TAA, anyone rendering tax related services for consideration must register as a tax practitioner with SARS and a Recognised Controlling Body (RCB). Exemptions apply when services are rendered without remuneration, for an employer, or under supervision of a registered practitioner. Practitioners must meet qualification and experience requirements, have no relevant criminal convictions, and complete continuing professional development (Lamprecht, 2018:23).

SARS expects practitioners to inform taxpayers of their obligations, assist them accurately and honestly, and engage with SARS on their behalf (SARS, 2003:10). The objectives of tax practitioners include ensuring tax compliance and tax planning to mitigate liabilities (Frecknall-Hughes *et al.*, 2017:733).

Despite regulatory reforms, SARS (2018a:83) maintains that taxpayers engaging registered tax practitioners remain liable for understatement penalties if the practitioner fails to exercise reasonable care. The responsibility for filing accurate returns lies with taxpayers, not practitioners (Ardé, 2014). Vanek (2010) similarly states that taxpayers remain responsible for incorrect declarations submitted by their practitioners. Despite the measures that were implemented to regulate registered tax practitioners and the significant trust that taxpayers place in them, SARS currently holds taxpayers who possess limited knowledge of tax laws accountable for understatement penalties caused by the actions of their tax practitioners.

1.2 Literature review of the research area

Audits and penalties have been proven to be effective measures in ensuring that taxpayers comply with tax laws and regulations (Dare, 2020:17). Furthermore, the TAA was introduced to combat non-compliance among taxpayers by implementing a more transparent understatement penalty regime (Feuth, 2013:66).

Section 223(1) of the TAA provides for 20 different understatement penalty rates based on five behaviours and four circumstances. The five behaviours include intentional tax evasion, gross negligence, no reasonable grounds for the tax position taken, reasonable care not taken in completing a return, and substantial understatement (Mazansky, 2016:2). Substantial understatement means that the prejudice to SARS or the fiscus exceeds a *de minimis* threshold of 5% of the amount of tax or R1 million. The TAA does not require the default penalty of at least 10% to be imposed in each case, but the behaviour that gives rise to the understatement demands punishment in the form of a penalty (Mazansky, 2016:3). However, if the understatement is less than the *de minimis* threshold, the behaviour is not severe enough to warrant punishment. As stated by Mazansky (2016:3), SARS often seeks to impose a penalty at the rate of 25% or 50%, even if the understatement is less than the *de minimis* threshold, based on the taxpayer's lack of reasonable care, or no reasonable grounds for the tax position. SARS invites taxpayers to make a submission on whether understatement penalties should be imposed, but it is actually SARS's responsibility to prove the facts that justify the imposition of penalties (Mazansky, 2016:1).

Feuth's study (2013) investigated the understatement penalty regime and attempted to clarify problems with regard to the treatment of tax penalties. The behavioural activity that leads to the understatement penalty in South Africa was compared with those of Hong Kong, China, Australia, the United Kingdom and New Zealand. It was found that penalty provisions in South Africa are more concise than in previous legislations but are harsh when compared to foreign countries. The behaviours of taxpayers determine the understatement penalties and SARS has not provided

proper guidance on how it will determine taxpayers' behaviour to impose the correct penalties based on the correct behaviour.

In an attempt to limit the risk of understatement penalties being imposed, Hirst (2020:59) emphasises the significance of using a registered tax practitioner in filing accurate tax returns, providing tax advice, and assisting with the verification process conducted by SARS. The use of tax practitioners not only ensures that taxpayers receive the correct assessment and pay the correct amount of tax but also helps SARS to save time and deploy their resources efficiently. By leveraging the expertise of registered tax practitioners, taxpayers can avoid costly mistakes, penalties, and even legal issues, while ensuring compliance with tax regulations (Hirst, 2020:59). Therefore, it is strongly recommended that taxpayers seek the assistance of qualified tax practitioners to streamline their tax affairs and maintain a good relationship with SARS (Hirst, 2020:59).

Lakalakala (2016:42) is of the opinion that if taxpayers complete their tax returns based on incorrect advice obtained from tax professionals or tax officials, this will be regarded as having taken reasonable care, under which circumstance the understatement penalty may be waived. However, Lakalakala (2016:42) also adds that should a taxpayer know the advice from tax practitioners is not reliable and still uses the advice, the taxpayer will suffer the penalties caused by the tax practitioner.

According to SARS (2003:2), taxpayers often rely on the advice and expertise of tax consultants who bear limited responsibility for the advice given. As a result, taxpayers remain ultimately responsible for the contents of their tax return, even if completed by tax practitioners. To address this issue, SARS investigated the regulatory authority over tax practitioners in international countries, such as Australia, the United States of America (USA), and Malaysia (SARS, 2003:4). The investigation revealed that Australia had a higher degree of regulation, with tax practitioners being regulated by a governing body, whereas the USA was more flexible, recognising different categories of practitioners with varying qualification requirements (SARS, 2003:4).

1.3 Motivation of topic actuality

It is clear from the discussion above that the understatement penalty regime serves as a deterrent against non-compliant reporting by discouraging unwanted behaviour (SARS, 2018a:3). SARS will hold taxpayers accountable for non-compliance with the laws and regulations by imposing understatement penalties (SARS, 2018b:80). Section 223(1) of the TAA describes five behaviours of taxpayers and the penalties attached to each of them. The more severe the behaviour, the higher the understatement penalties.

Understatement penalties can be avoided if taxpayers can prove that the understatements were caused by a *bona fide* inadvertent error as stipulated in the Tax Administration Amendment Bill 2013 (SARS, 2013), or by obtaining an opinion from registered tax practitioners in terms of section 223(3) of the TAA. It bears mentioning that SARS attempts to limit a *bona fide* inadvertent error to the substantial understatement behaviour as contemplated in the Draft Tax Administration Laws Amendment Bill of 2025 (SARS, 2025). In an attempt to mitigate the risk of non-compliance, SARS relies heavily on tax practitioners to act as an intermediary between taxpayers and tax authorities (Legwaila *et al.*, 2019:5). Because of the important role tax practitioners play, SARS provides guidance in Chapter 18 of the TAA to regulate these professionals and implement stricter requirements on individuals who wish to register as tax practitioners, as stated in the SARS Tax Practitioner Readiness Programme of 2022 (SARS, 2022).

Taxpayers can avoid understatement penalties by seeking the opinion of registered tax practitioners. However, taxpayers must still abide by the usual understatement penalties rules of section 223 of the TAA when relying on the advice and expertise of tax practitioners to file tax returns and maintain their tax compliance.

Despite the implementation of a highly regulated system applicable to registered tax practitioners, and the reliance that SARS expects taxpayers to place on their advice and expertise to remain tax compliant, taxpayers often fall victim to undertreatment penalties due to the negligence of their appointed tax practitioners. In various court cases throughout the years, it is clear that taxpayers ultimately remain liable for understatement penalties and not the tax practitioners.

The importance of this research study is to ascertain the important role played by tax practitioners in the imposition of understatement penalties where taxpayers, who possess limited or no tax knowledge, obtained the assistance of tax practitioners. Additionally, this study aims to analyse and compare the existing application of South African tax legislation with the administration systems employed in the USA and Australia. The findings will contribute to a better understanding of the dynamics between tax practitioners, taxpayers and the imposition of understatement penalties, and will also aim to identify potential improvements based on international practices.

1.4 Problem statement and research question

The objective of the TAA, as discussed above, is to simplify tax laws, increase South African tax compliance, and provide clear consequences for non-compliance. Due to the complexity and ever-changing nature of tax laws, taxpayers seek the expertise of tax practitioners to mitigate their non-compliance risk. Chapter 18 of the TAA was introduced to regulate tax practitioners and acknowledge the crucial role they play in the tax administration process. However, relying solely

on the work of tax experts to act ethically and in taxpayers' best interests is not sufficient to indemnify taxpayers from the imposition of penalties or even imprisonment. In terms of the TAA, tax practitioners are now regulated and if a tax opinion is obtained from them, the understatement penalties should be remitted. However, SARS is of the view that taxpayers should still ultimately be held liable for understatement penalties imposed as outlined in Chapter 16 of the TAA even when reliance is placed on registered tax practitioners.

The problem identified above leads to the research question: how does the interaction between taxpayers, tax practitioners, and understatement penalties in terms of the current South African tax administration system compare with the approach adopted by other benchmark countries like the USA and Australia?

1.5 Research objectives

1.5.1 Main objective

The core objective of this research study was to assess the existing understatement penalties regime by examining the interaction between taxpayers, tax practitioners, and the penalties system, and to compare it to the tax administrative laws adopted by selected benchmark countries.

1.5.2 Secondary objectives

In order to achieve the main objective, the following secondary objectives were set out:

- (i) To investigate the mechanisms in the TAA for regulating tax practitioners, administering the understatement penalties system and to describe the interaction between both aspects. This will be outlined in Chapter 2 of this study (theoretical research objective).
- (ii) To perform a comparison of the tax legislation regulating tax practitioners, the tax penalties system, and their interaction, in South Africa with those of the USA and Australia, which operate under similar tax administrative systems, as will be set out in Chapter 3 of this study (empirical research objective).

1.6 Research design

1.6.1 Research methodology

Research is not limited to the mere gathering of information; rather, it is a means of creating knowledge that does not currently exist (Kothari, 2004:1). To enhance the knowledge of the researcher and gain insights into existing research, this study took the form of a literature review

(Western Sydney University, 2020). The research study utilised inductive reasoning to analyse data (Creswell, 2013:22). By conducting a comprehensive review of the available literature, various primary and secondary sources of information were examined with the aim to develop an understanding of the existing legislation that governs the regime of understatement penalties, tax practitioners' regulation and the role of tax practitioners in the understatement penalties.

1.6.2 Research paradigms

The two main research paradigms that guide researchers are referred to as positivism and interpretivism, each producing different knowledge (McKerchar, 2008:6).

In contrast to interpretivism, positivism holds that knowledge is obtained from empirical evidence and tested theories which emphasises detachment between the researcher and the subjects being studied. Interpretivism operates under the assumption that the researcher cannot be detached from the subjects and that this paradigm aims to provide an understanding of social reality based on the subjective interpretation of the researcher (McKerchar, 2008:6). This study evaluated the interaction between understatement penalties and tax practitioner regulation, by analysing the TAA of South Africa and tax administration laws in the USA and Australia. The aim was to identify concerns in South African tax legislation in comparison to those in other countries. To reach a conclusion, the researcher interpreted various laws and regulations, which may have different interpretations by different researchers. Therefore, an interpretivist approach was followed.

Ontology can be defined as “the study of being” (Oxford English Dictionary Online, 2022b). According to McKerchar (2008:6), ontology reflects how researchers view the world and, in the case of taxation, can be approached through various methods, as it is a social phenomenon. The aim of this study was to explore how the understatement penalties model in the TAA interacts with the regulation of tax practitioners, compared to the legislation of selected countries. This study therefore viewed understatement penalties and the role of tax practitioners as part of a legal and regulatory system whose meaning and application depend on interpretation and the circumstances in which they are applied, rather than as fixed rules.

Epistemology can be defined as “the theory of knowledge and understanding” (Oxford English Dictionary Online, 2022c). It is also described by Gall *et al.* (2003:13) as a method by which knowledge is obtained. In this study, knowledge was obtained by collecting and analysing data from various sources, including different tax laws, dissertations and theses, articles, journals, newspapers, case studies and government research reports. Knowledge in this study was

obtained by analysing and interpreting data from different sources, recognising that the researcher's understanding is important in how these sources were evaluated and explained.

1.6.3 Research methodologies

This study followed an interpretivist paradigm and utilised a qualitative methodology (McKerchar, 2008:7). Qualitative research involves methods such as interviews, focus groups, observations, and analysis of textual or visual data, emphasising various factors influencing the research topic (Creswell, 2013:45). The qualitative methodology entails gaining a comprehensive understanding of the understatement penalties, tax practitioners' regulation in the TAA, and the role of tax practitioners in the penalty regime by investigating and analysing various primary and secondary data sources that fall within the qualitative research methodology.

1.6.4 Methods

The method used when conducting research is an integral part of any research project, as it determines the approach taken to collect and analyse data (Oats, 2012:9). This study followed a doctrinal research method also known as "black letter law" (McKerchar, 2008:18). Doctrinal research, which is characterised as a traditional approach, involves a systematic process of identifying, analysing, organising, and synthesising statutes, judicial decisions and commentary through reading and scholarly analysis (McKerchar, 2008:18). As stated by Hutchinson and Duncan (2012:110), the doctrinal method is typically a two-part process, as it encompasses the initial task of identifying the legal sources, followed by the subsequent interpretation and analysis of the text. However, it is important to note that by following a doctrinal method to address a research problem, academic researchers are not obligated to provide a definitive solution (Hutchinson & Duncan, 2012:107).

Throughout this study, primary legislation such as tax laws and secondary data such as South African, USA and Australian journals and previous studies were analysed to determine how the laws and regulations of each country govern registered tax practitioners, the administration of understatement penalties, and how both these aspects interact. This falls within the doctrinal research method and is applied in Chapter 2 and Chapter 3 of this study.

Incorporated into Chapter 3 is not only a doctrinal research method, but also a comparative method. Comparative research entails the comparison of different legal systems from different countries in an effort to improve current legislation (Van Hoecke, 2015:3). By comparing one subject with another, the researcher aimed to identify the differences and similarities between them (Kigwiru, 2020). According to Hantrais (1995), comparative research can lead to fresh,

exciting insight and a deeper understanding of problems that different countries experience, while identifying knowledge gaps the researcher might not have been aware of.

Given the established nature of the tax penalties and tax practitioner regulatory frameworks in the USA and Australia, these countries were selected as comparative benchmarks for evaluating the tax administrative systems implemented in South Africa. This comparison analysed how the system of each country operates in terms of understatement penalties, regulation of tax practitioners, and the interaction between them. By examining these aspects, insights into potential areas for the improvement of tax laws and regulations were gained that might enhance the efficiency and effectiveness of the tax administration system in South Africa.

1.7 Ethical considerations

The study relied on primary legislation and secondary data sources that are publicly available and pose minimum ethical concerns. It is important to note, however, that ethical considerations remained an important aspect of this study as it progressed. Throughout this study, continuous assessments were carried out to identify any ethical implications that may arise.

1.8 Chapter overview

The chapters of this mini dissertation are set out below.

1.8.1 Chapter 1: Overview of the study

In this chapter, the research study was contextualised, in which a comprehensive summary of the subject matter was presented. The problem statement, as well as the primary and secondary objectives were established, a brief description of the research methodology adopted for the study, together with a concise explanation of what this study aims to accomplish.

1.8.2 Chapter 2: The relevant law

In Chapter 2, an extensive literature review of the understatement penalties and tax practitioners' regulation is provided to gather insights from multiple primary and secondary research documents and studies. This review provides an in-depth understanding of the current tax laws and regulations governing the understatement penalties, the regulatory requirements applicable to tax practitioners, including the role of tax practitioners in the understatement penalties table as set out in section 223 of the TAA. The review also entails analysing various court cases that shed light on the interpretation of the current legislation.

1.8.3 Chapter 3: Comparative analysis

In this chapter, the focus was on the secondary objective, which involved conducting a comparative study of tax administrative laws in South Africa with those of the USA and Australia to identify differences in their regulation of tax practitioners, tax penalties regime, and the impact of using regulated tax practitioners on the penalties system.

1.8.4 Chapter 4: Conclusion

Based on the research in Chapters 2 and 3, this chapter summarises the findings of the study and provides recommendations that address the question whether the penalty regime is fairly enforced on taxpayers if they rely on the expertise of tax practitioners. The limitations of this study and any areas for further research are also addressed.

CHAPTER 2: TAX PRACTITIONER REGULATION AND UNDERSTATEMENT PENALTIES

2.1 Introduction

In terms of the previous Section 76 of the ITA and Section 60 of the Value-Added Act, taxpayers were subject to additional taxes and penalties. However, SARS officials were afforded too much discretion, as there were no explicit rules or guidelines outlining how the Commissioner should exercise their powers (De Villiers, 2015:13). The Commissioner could exercise his discretion to impose an additional tax of up to 200%. However, the previous system was replaced with the more equitable and consistent understatement penalty regime in Chapter 16 of the TAA (SARS, 2018a:3). The implementation of the revised understatement penalty percentage provisions offered a more reasonable and fair penalty system for taxpayers compared to the previous Acts (Feuth, 2013:iv). The revised provisions also provide for greater certainty in the imposition of penalties and ensure consistent treatment of all taxpayers (SARS, 2018a:15).

As noted in Chapter 1, understatement penalties are important in promoting compliance in terms of South African tax legislation, and the conduct of tax practitioners directly affects the extent of the penalties imposed. The objective of this chapter is to explore the crucial role that regulated tax practitioners play in complying with the required standard of behaviours contemplated in the understatement penalty system. Additionally, this chapter also provides an overview of the current understatement penalties regime. Pinch (2024:19) concludes that understatement penalties will be imposed if taxpayers' conduct falls within the definition of understatement and caused prejudice to SARS or fiscus. Under certain circumstances, the penalties may not be imposed if taxpayers can prove that the understatement resulted from a *bona fide* inadvertent error (Pinch, 2024:19). To address the first objective outlined in 1.8, this chapter evaluates the legislation governing the regulation of tax practitioners, understatement penalties, and the impact tax practitioners have on the enforcement of these penalties on taxpayers.

2.2 Tax practitioners

2.2.1 The role of tax practitioners

With the increasing complexity of tax law, more taxpayers are turning to tax practitioners for assistance (Killian & Doyle, 2004:160). Tax practitioners are required to provide taxpayers with reliable advice, accurate preparations of returns and assistance during SARS verifications and audits (Hirst, 2020:58). They also serve as the contact between taxpayers and SARS (Hirst, 2020:59). A well-functioning tax system relies heavily on the expertise of tax advisors, as the

complexity of tax laws often surpasses the understanding of the average taxpayer (Thuronyi & Vanistendael, 1996:7).

A study by Tan (1999:439) concludes that taxpayers engage tax practitioners to file accurate tax returns and to avoid severe tax penalties, as the most important reason. The study also indicates that taxpayers believe that their returns will comply with tax requirements and, should their returns be audited, the chances of receiving severe penalties to be low (Tan 1999:439). By employing qualified tax practitioners, SARS can deploy its resources better through the time saved when dealing with qualified tax practitioners (Hirst, 2020:359).

Historically, tax practitioners in South Africa were operating in an unregulated environment (SARS, 2003:2). Consequently, SARS introduced measures to regulate the industry, aiming to enhance the professionalism and accountability of tax practitioners (SARS, 2024b). An essential aspect of regulating tax advisors lies in protecting taxpayers against unscrupulous and incompetent tax advisors, but also in ensuring an appropriate balance between their loyalty to the tax system and loyalty to the taxpayer (Thuronyi & Vanistendael, 1996:1). As stated by Thuronyi and Vanistendael (1996:20), it is important that tax legislation contain clear, comprehensive rules concerning penalties for violations by tax practitioners. These rules are set out in Chapter 18 of the TAA. Regulating professionals who provide services to the public is necessary to safeguard the public and the fiscus, with tax practitioners' regulation being crucial to prevent misconduct and revenue loss due to inaccurate taxpayer declarations (Munkuli, 2023:2). Given the reliance placed on tax practitioners by both taxpayers and authorities, their regulation has become essential.

2.2.2 Tax practitioner regulation

In his 2002 budget speech, Minister Trevor Manuel announced that SARS would start discussions on regulating tax consultants and advisors in South Africa, aiming to promote compliance and ensure taxpayers receive advice aligned with tax legislation (Klue, 2013). This led to the introduction of section 67A to the ITA requiring of persons providing tax advice or completing tax returns to register with SARS as tax practitioners (Klue, 2013).

Following the budget speech in 2002, SARS issued a discussion paper stipulating its proposal on how the tax profession should be regulated. In its discussion paper, the Regulating Tax Practitioners Discussion Paper issued in 2003, SARS acknowledges that the significant issues for both SARS and taxpayers are that tax practitioners are not required to meet a minimum standard of qualifications or experience, and not all practitioners are held to a professional code of conduct (SARS, 2003:2). This created potential risks in the quality of tax advice provided (SARS, 2003:2). The Budget Review 2002 emphasised the need for tighter regulation of tax

practitioners and mentioned that SARS would initiate discussions regarding the regulation of tax consultants and advisors, including imposing sanctions for non-compliance with tax legislation (SARS, 2003:2-3). A decade later, the regulation of tax practitioners was finally incorporated into the TAA.

The Tax Administration Act of 2011 was amended in December 2012, introducing section 240 in the TAA to regulate tax practitioners and Recognised Controlling Bodies to collaborate with SARS in performing regulatory functions (Lewis, 2013:21). Before the introduction of section 240 of the TAA, the tax practitioner profession was unregulated, leading to many unqualified individuals offering tax services (Thungo, 2015:10). According to Thungo (2015:10), these individuals began exploiting the e-filing system, luring taxpayers with promises of refunds from SARS and charging contingency fees ranging from 10–30% of the refund amount. According to the amendments, all tax practitioners had to be registered with an RCB by 1 July 2013, engage in continuous professional development, adhere to a tax specific code of conduct, and hold a minimum qualification registered on the National Qualifications Framework (Lewis, 2013:21).

In accordance with section 240(1) of the TAA, a natural person is required to register as a tax practitioner when he or she advises any other person about the application of a Tax Act or completes or assists with the completion of a return for another person for consideration. If a tax practitioner fails to register with SARS, section 240 effectively criminalises the practice of tax consultancy (Munkuli, 2015:40).

Section 240(2) does, however, include specific circumstances in which persons providing tax services are exempt from registering as tax practitioners. In SARS (2024a:4), the following individuals are exempt from registration as tax practitioners:

- An individual who provides tax advice or completes or assists in completing a return for no consideration to that person or his or her employer or a connected person in relation to that employer or that person.
- An individual who provides tax-related advice in anticipation of, or during any litigation to which the Commissioner is a party or where the Commissioner is a complainant.
- An individual who provides tax-related advice as an incidental or subordinate part of providing goods or other services to another person.
- An individual who provides tax advice or completes or assists in completing a return to or in respect of the employer by whom that person is employed on a full-time basis, or in respect of that employer and connected persons in relation to that employer, or under the direct supervision of a person who is registered as a tax practitioner.

These exceptions ensure that certain persons can offer tax-related assistance without the need for formal registration.

Persons who offer tax advice or help to prepare tax returns for the first time must ensure they are registered with an RCB and SARS as a tax practitioner within 21 business days of providing these services. Registration with an RCB must be completed prior to registering with SARS.

2.2.3 Recognised controlling bodies

The role of an RCB is central to the regulation of the tax profession in South Africa, as it ensures that practitioners uphold professional standards, ethics, and continuous development, thereby protecting both taxpayers and the integrity of the tax system (Naino, 2021:32; Modikwe, 2021:52). RCBs act as gatekeepers by enforcing disciplinary procedures and ensuring that members remain compliant with SARS and legislative requirements (Adendorf, 2019:27-28). SARS has therefore delegated oversight of tax practitioners to the RCBs. In essence, RCBs serve not only as membership bodies, but also as regulatory enforcers that enhance compliance, ethical conduct, and professional competence within the tax profession (SARS, 2024b).

In terms of section 239 of the TAA, an RCB has the authority to take disciplinary action against any individual who, in the course of practising their tax profession, violates the applicable rules or code of conduct (SARS, 2024a). In an attempt to regulate tax practitioners effectively, SARS works with RCBs (SARS, 2024a). Since tax practitioners need to be registered with both SARS and an RCB, SARS has now shifted the regulatory responsibility to the RCBs (Adendorf, 2019:27) and, according to Naino (2021:33), tax practitioners must adhere to the RCBs' code of conduct. Each RCB has established procedures for verifying and confirming a membership status (Modikwe, 2021:52).

To qualify as an RCB it must be listed in section 240A(1) of the TAA or recognised by the Commissioner (SARS, 2024b). Examples of RCBs are (SARS, 2024b):

- Chartered Institute of Management Accountants (CIMA),
- Chartered Governance Institute of Southern Africa (CGISA),
- Financial Planning Institute (FPI), the Institute of Accounting and Commerce (IAC),
- SA Institute of Chartered Accountants (SAICA),
- SA Institute of Professional Accountants (SAIPA),
- South African Institute of Taxation (SAIT),
- Association of Chartered Certified Accountants (ACCA),
- Chartered Institute for Business Accountants (CIBA),

- The Legal Practice Council, which is automatically recognised as a controlling body.

In accordance with section 241 of the TAA, SARS officials have the authority to lodge a complaint with an RCB if tax practitioners are found guilty of any of the following offences:

- intends to assist taxpayers in avoiding or postponing tax obligations;
- as a result of negligence, taxpayers avoided or postponed tax obligations;
- a violation of a rule or code of conduct of a controlling body, which may lead to disciplinary action;
- not exercising due diligence in the preparation, approval or submission of any tax return, affidavit or other documents;
- caused an unreasonable delay in any matter before SARS;
- carelessly provided opinions contrary to clear law;
- being grossly negligent in respect of any work performed as a tax practitioner;
- knowingly provided false or misleading information; or
- attempted to unfairly influence a SARS official on any tax related matter.

The consequences for practitioners found to be involved in fraudulent conduct are particularly serious, as they may face not only disciplinary sanctions from their RCB, but also criminal prosecution in terms of tax legislation. In *Naraidu v The State* (894/2023) (2024) ZASCA 139 (16 October 2024), the Supreme Court of Appeal considered the conviction of a tax practitioner who had been sentenced to six years' imprisonment for allegedly participating in a fraudulent VAT refund claim exceeding R2.7 million. Although the regional and high courts held that his correspondence with SARS demonstrated complicity, the SCA concluded that while Mr Naraidu acted recklessly in pursuing a claim without proper mandate or knowledge of his client's affairs, SARS failed to prove beyond a reasonable doubt that he knew the supporting invoices were fictitious. The court stressed that recklessness does not equate to fraudulent intent and accordingly set aside the conviction. This case highlights that fraudulent intent must be proven beyond reasonable doubt in criminal proceedings but also serves as a warning that reckless or negligent conduct may still expose tax practitioners to disciplinary action, reputational damage, and the potential loss of their professional standing with an RCB.

The criteria for recognition of an RCB by SARS deal with the legislative requirements that controlling bodies must maintain relevant and effective (SARS, 2024b):

- Minimum qualifications and education requirements of members;
- Disciplinary code and procedures;
- Code of ethics and conduct;

- Continuous professional education requirements; and
- Tax compliance.

An RCB must also be approved in terms of section 30B of the ITA and have at least 1 000 members when applying for registration, or reasonable prospects of having 1 000 members within a year of applying (SARS, 2024a:4). Upon recognition as a RCB, the entity is required to submit a report detailing its members and compliance within the prescribed time period, and in the prescribed form and manner (SARS, 2024b).

Before registering with SARS, individuals must fulfil specific requirements to become a member of an RCB, ensuring they meet professional standards and qualifications (SARS, 2024a:4).

2.2.4 Tax practitioner registration requirements

According to SARS (2024a:5), a person intending to become a registered tax practitioner must adhere to certain requirements. These requirements consist of the following:

- Qualification and tax working experience that are verifiable by employers or clients;
- Passed the SARS Tax Practitioner Readiness programme;
- Maintain a tax-compliant status; and
- Must not have been removed by an RCB for serious misconduct during the preceding five years or not have been convicted of an offence. Offences include serious tax offences as defined in section 1 of the TAA or theft, fraud, forgery, uttering a forged document, perjury, an offence in terms of the Prevention and Combating of Corrupt Activities Act 12 of 2004, or any other offence involving dishonesty, for which the person has been sentenced to a period of imprisonment exceeding two years without the option of a fine, or to a fine exceeding the amount prescribed in the Adjustment of Fines Act 101 of 1991. Registration as a tax practitioner is prohibited for individuals who, in the last five years, have been removed by an RCB or the controlling body of a related profession for serious misconduct.

As stated earlier, having the right qualifications combined with tax working experience is essential to becoming a registered tax practitioner. According to SARS (2024a:5), there are three acceptable combinations of qualifications and experience:

- (a) NQF level 6 and above with at least one accounting module and one tax module, plus at least 1 year's tax working experience;
- (b) NQF level 5 plus at least 4 years' tax working experience; or
- (c) NQF level 4 plus 10 years' tax working experience.

To remain current with evolving tax laws and regulations, tax practitioners must fulfil continuous professional education requirements (SARS, 2024a:6). This includes completing 10 hours focused on tax, 2 hours on ethics, and 6 hours related to the services they provide. All these hours must be verifiable and supporting evidence should be kept for five years.

The regulation of tax practitioners serves not only to enhance the professionalism and accountability of the tax advisory industry, but also to safeguard taxpayers and the fiscus against negligence, misconduct, and non-compliance. By establishing minimum qualifications, enforcing codes of conduct, and requiring continuous professional development, SARS and the RCBs have created a framework that strengthens both the quality and integrity of tax services. This regulatory environment helps to ensure that taxpayers receive competent and ethical advice, while simultaneously protecting the revenue base from the risks of inaccurate declarations and abusive practices. However, despite these regulations and compliance requirements, the legal position remains that the ultimate responsibility for the accuracy of a tax return lies with the taxpayer. This becomes apparent in the context of understatement penalties, where the conduct of both the taxpayer and the tax practitioner is assessed to determine the extent of liability and the level of sanction imposed.

2.3 Understatement penalties in South Africa

Governments, both past and present, have tirelessly searched for alternative means of promoting compliance among taxpayers (Levi & Levi, 1989:50). In an effort to improve tax compliance, many governments across the world adopted measures that complement traditional enforcement such as audits and penalties (Dare *et al.*, 2019:2). Thus, the objective of the understatement penalty regime is not to generate additional revenue for the fiscus, but to promote taxpayer compliance (Camay & Chetty, 2023).

As noted in Chapter 1, the TAA was enacted from 1 October 2012 to govern compliance by taxpayers by imposing penalties that play an important role in deterring non-compliance with laws and regulations. To understand the framework of penalties in terms of the TAA, it is necessary to distinguish between the categories of penalties available to SARS.

Chapters 15 and 16 of the TAA describe two types of non-compliance penalties that can be imposed, namely administrative non-compliance or fixed amount penalties and understatement penalties or percentage-based penalties. In terms of Chapter 15 of the TAA, administrative non-compliance penalties are imposed if taxpayers fail to comply with an obligation in terms of a Tax Act. Depending on the taxable income of taxpayers, the monthly penalty is determined at a fixed rate, varying between R250 and R16 000. However, Chapter 15 is outside the scope of the

present study and the focus of this discussion therefore moves to understatement penalties, which form the central aspect of Chapter 16 of the TAA.

In accordance with section 222(1) of the TAA, if taxpayers make 'understatements', they are required to pay an understatement penalty calculated in terms of the provisions of section 222(2), in addition to the tax payable. However, this understatement penalty may not be imposed if the understatement arises from a *bona fide* inadvertent error (Van Schalkwyk, 2023). The definition of 'tax' in section 221(1) of the TAA, explicitly excludes penalties and interest.

Understatement penalties will be imposed when taxpayers' actions meet the criteria for 'understatement' as defined in section 221(1) of the TAA, and these actions result in prejudice to SARS or the fiscus (Pinch, 2024:19). In section 221(1) of the TAA, an understatement is defined as any prejudice to SARS or the fiscus as a result of one of the following:

- (a) a default in submitting a return;
- (b) an omission from a return;
- (c) an incorrect statement in a return;
- (d) the failure to pay the correct amount of tax if no return is required; or
- (e) an impermissible avoidance arrangement.

The courts have had to interpret these provisions, particularly with reference to the requirement of prejudice to SARS or the fiscus. In the case of *Purlish Holdings (Pty) Ltd v Commissioner or South African Revenue Service* (2019), the court ruled that the Commissioner must do more than simply demonstrate that a taxpayer's actions fall within the scope of the understatement definition in section 221(1) of the TAA. The Commissioner is also required to prove that the taxpayer's reprehensible conduct resulted in prejudice to SARS or the *fiscus*. In the *Purlish Holdings (Pty) Ltd v Commissioner or South African Revenue Service* (2019) case, the appellant filed dormant or nil Corporate Income Tax and Value-Added Tax (VAT) returns for the years 2011 to 2014. At the time of filing the returns, the appellant had already paid provisional tax in the amount of R13 777 347,74. SARS conducted audits on the Corporate Income Tax for the period 2011 to 2014 and VAT for the period 2010 to 2012, and it was found that the appellant received income from consultancy agreements. SARS raised additional assessments, including understatement penalties, as the understatement falls within items (a) to (e) of section 221 of the TAA of the definition of understatement. The court, however, had to determine whether the Commissioner or the fiscus suffered any prejudice caused by the appellant. In terms of section 102 of the TAA, the responsibility of proving whether the facts justifying the imposition of an understatement penalty in terms of Chapter 16 are valid, lies with SARS. The respondent argued that the allocation of resources, including extra time and human capital required for the extensive audit, caused

prejudice to SARS, as those resources could have been utilised for other matters. The court concluded that prejudice is not only determinable in financial terms, but also includes resources and costs incurred by the Commissioner to conduct its investigations.

It was also stated by Judge Cloete in the case of *Enviroserv Waste Management (Pty) Ltd v The Commissioner for the South African Revenue Service* (2023) that the Commissioner must show that the taxpayer's conduct falls within section 221 of the TAA and that the conduct caused prejudice to SARS or the *fiscus*. SARS argued that prejudice is not limited to financial harm alone, but also includes the risk that any misstatement could hinder SARS' ability to effectively administer tax legislation. The court held that SARS did not discharge the onus of proving that the risk it was exposed to due to the misstatement of interest income led to any prejudice.

The cases referred to above demonstrate that SARS must provide evidence of prejudice resulting from the taxpayer's actions before it can impose understatement penalties. Should a taxpayer be found guilty to at least one of the acts referred to above where an understatement occurred and SARS or the *fiscus* suffered prejudice, taxpayers must pay, in addition to the actual tax payable, an understatement penalty in accordance with section 222(1) of the TAA. An understatement penalty will be determined by applying the highest applicable percentage from the understatement penalty table in section 223(1) of the TAA to each shortfall related to each understatement. A shortfall is described in section 222(3) of the TAA as:

- the difference between the amount of 'tax' properly chargeable for the tax period and the amount of 'tax' that would have been chargeable for the tax period if the 'understatement' were accepted; and
- the difference between the amount properly refundable for the tax period and the amount that would have been refundable if the 'understatement' were accepted; and
- the difference between the amount of an assessed loss or any other benefit to the taxpayer properly carried forward from the tax period to a succeeding tax period and the amount that would have been carried forward if the 'understatement' were accepted, multiplied by the tax rate determined in terms of subsection (5).

To guide both taxpayers and SARS officials in applying these provisions, SARS has published interpretative guidance. During 2018, SARS outlined its views on Chapter 16 of the TAA in its Guide to Understatement Penalties (SARS, 2018a). It is stated in the preface to SARS (2018a:i) that the guide is not an "official publication" as defined in section 1 of the TAA, and it does not establish a practice generally prevailing in terms of section 5 of the TAA. Additionally, it is not considered a binding general ruling in terms of section 89 of the TAA (Pinch, 2024:10). It is therefore important to note that this guide only provides an overview of understatement penalties,

and taxpayers should also consult additional sources, including relevant legislation and court cases, to determine the applicable penalty to be imposed. A significant component of the understatement penalty regime is the categorisation of taxpayer behaviour, which determines the severity of the penalty imposed.

The understatement penalties to be imposed on each shortfall are determined based on five different behaviours outlined in section 223 of the TAA. Section 223(1) of the TAA provides for 20 different understatement penalty rates based on five behaviours and four circumstances, as detailed in the table below.

Table 1-1: The understatement penalty percentage table

Item	Behaviour	Standard case	If obstructive, or if it is a 'repeat case'	Voluntary disclosure after notification of audit or investigation	Voluntary disclosure before notification of audit or investigation
(i)	'Substantial understatement'	10%	20%	5%	0%
(ii)	Reasonable care not taken in completing a return	25%	50%	15%	0%
(iii)	No reasonable grounds for 'tax position' taken	50%	75%	25%	0%
(iv)	Gross negligence	100%	125%	50%	5%
(v)	Intentional tax evasion	150%	200%	75%	10%

Source: Section 223(1) of the Tax Administration Act

SARS issued the Guide to Understatement Penalties in 2018 (SARS, 2018a) to clarify how the standard of reasonableness applies to different behaviours. The Guide compares a taxpayer's actions to what a reasonable person would have done in the same situation, with the severity of the deviation determining the applicable behaviour (Mazansky, 2018). It is important to understand the requirements applicable to each behaviour and the manner in which SARS defines and interprets them.

2.3.1 Intentional tax evasion

Intentional tax evasion is the most severe behaviour, attracting the highest understatement penalties. This penalty is levied when taxpayers act with the intention to evade tax, which includes making false statements on a return or even not filing a return (SARS, 2018b:84).

In terms of section 235 of the TAA, tax evasion consists of acts committed by taxpayers such as making false statements in a return, documenting and signing documents submitted without reasonable grounds for believing they are true, giving a false answer to a request for information from SARS, authorising or preparing and maintaining false books of account or other records, making use of or authorising the use of fraud or contrivance, or making a false statement for purposes of obtaining a refund of or exemption from tax. It is required that the taxpayer must have acted with the intent to evade tax, which is wilful conduct aimed at deliberately disregarding or violating a known legal obligation.

Judge Makume, in ITC 1890 (2016) 79 SATC 62, stated in paragraph 40 of the judgment,

Sections 221 and 223(3) sketch two scenarios. Firstly, it is that for appellant to be absolved from paying the understatement penalty it must prove a *bona fide* inadvertent error. Secondly if the taxpayer fails to prove that, then SARS will only remit the understatement penalties if the taxpayer proves and places itself squarely within the jurisdictional requirements of section 223(3) set out above being that the taxpayer made a full disclosure of any arrangements and or that the taxpayer acted upon an opinion obtained from a tax practitioner.

A recent example of intentional tax evasion can be found in the case of *Naraidu v The State* (894/2023) [2024] ZASCA 139. In this matter, the SCA upheld convictions for fraud where the taxpayer, together with its sole member and tax practitioner, misrepresented to SARS that the company had incurred expenses and was entitled to VAT refunds, despite knowing these claims were false. The court confirmed that such conduct constituted deliberate deception, aimed at unlawfully obtaining refunds in terms of the VAT Act. Importantly, the judgment illustrates how fraudulent misstatements to SARS are treated as clear acts of intentional evasion rather than mere negligence or inadvertence. This case reinforces that where taxpayers knowingly create and submit false claims, the behaviour falls within the definition of 'wilful intent' envisaged in section 235 of the TAA, thereby justifying the highest level of understatement penalties.

While intentional tax evasion represents the most serious form of non-compliance due to its deliberate nature, not all taxpayer misconduct involves such a clear intention to deceive. Should a taxpayer act recklessly in fulfilling his tax obligations, but without the deliberate intention to evade tax, his conduct may be classified as gross negligence.

2.3.2 Gross negligence

If no reasonable care was exercised and no reasonable grounds for the tax position taken can be demonstrated, the next behaviour to consider is gross negligence. Gross negligence entails

reckless behaviour, but unlike tax evasion, it does not require the presence of wrongful intent or a "guilty mind" or the intent to breach a tax obligation deliberately (SARS, 2018b:84).

In *Transnet Limited v The Owners of the MV Stella Tingas and the MV Atlantica* (2002), it was suggested that when assessing gross negligence in cases where a person consciously takes a risk, the conduct must reflect a departure from the standard of a reasonable person so extreme that it can be characterised as complete and utter obtuseness of mind, and this must be clearly demonstrated. SARS referred to the same case when providing guidance on this behaviour (SARS, 2018a:25).

The *Transnet Limited v The Owners of the MV Stella Tingas* case was quoted by Judge Nkosi-Thomas in ITC 1908 (2017) 80 SATC 299, where the court had to determine whether the taxpayer's conduct amounted to gross negligence. The taxpayer failed to declare income and to register and submit VAT returns, leading the judge to conclude that the taxpayer's behaviour amounted to gross negligence.

Van der Zwan (2013a) states that by implementing processes and controls to manage the tax implications of specific transactions, it is unlikely to be deemed grossly negligent. He also mentions that in a separate court case, it was suggested that gross negligence requires conduct showing an extreme departure from a reasonable person's standard, demonstrating a complete lack of judgement or intellect.

2.3.3 No reasonable grounds for 'tax position' taken

It is stated by Feuth (2013:30) that when a tax underpayment arises from a difference between the taxpayer's interpretation of a Tax Act and that of the tax authority, an understatement penalty is imposed if the taxpayer's position cannot be reasonably defended. The purpose of imposing this penalty is not because SARS disagrees with a taxpayer's position, but rather that a taxpayer adopts a position that is based on unreasonable grounds (SARS, 2018b:83).

The term 'tax position' is defined in section 211 of the TAA and means an assumption underlying one or more aspects of a tax return, including whether or not—

- an amount, transaction, event or item is taxable;
- an amount or item is deductible or may be set off;
- a lower tax rate than the maximum applicable to the taxpayer should apply; or
- an amount qualifies for a reduction in tax payable.

Given the inherent risk in assuming any tax position, taxpayers are expected to adopt a prudent approach and ensure the integrity of their tax position taken has been carefully considered (SARS, 2012b:83). The merits of an argument supporting a particular tax position are more important than the effort involved in reaching it (SARS, 2018b:24).

It is clear that the standard for having reasonable grounds to adopt a particular tax position is higher than that of taking reasonable care (SARS, 2018b:24). If a taxpayer seeks and follows the advice of a tax professional, SARS may recognise that reasonable care has been exercised. However, this does not ensure that the tax position itself will be deemed reasonable (SARS, 2018b:24). SARS is of the view that even when reasonable care has been exercised, the application of the law may still lack reasonable grounds (SARS, 2018b:24).

The term 'reasonable grounds' has been addressed in various court cases. In ITC 1880 (2014) 78 SATC 103, the judge stated that because the taxpayer completed his tax return based on advice from tax experts, he had reasonable grounds for taking the tax position he did. No facts proved that the taxpayer acted unreasonably. Judge Wepener referred to the United States Tax Court case, *Estate of Spruill v Commissioner* 88 TC 1197 (1987), where it had to determine whether the fraud penalty was properly applied to an understatement of the estate tax. The court stated on page 117 the following:

When an accountant or attorney advises a taxpayer on a matter of tax law, such as whether a liability exists, it is reasonable for the taxpayer to rely on that advice. Most taxpayers are not competent to discern error in the substantive advice of an accountant or attorney. To require a taxpayer to challenge the attorney, to seek a "second opinion", would nullify the very purpose of seeking the advice of a presumed expert in the first place . . .

In the case of *Thistle Trust v Commissioner for the South African Revenue Service* (2024), the Constitutional Court ruled that, because the taxpayer relied on legal advice, even though the court found the tax position to be incorrect, the taxpayer did not act without reasonable grounds.

Based on the facts outlined above, taxpayers should carefully consider the grounds for any tax position they adopt. One way to achieve this is by consulting tax advisors, as relying on their advice can help mitigate the risk of penalties due to the absence of reasonable grounds for the tax position taken.

2.3.4 Reasonable care not taken in completing a return

The next category of behaviour is 'reasonable care not taken in completing a return'. Reasonable care is not defined in the Acts; however, in SARS (2018b:83) it is stated that its ordinary meaning

must be relied on. 'Reasonable care' means a level of care that a reasonable person in the taxpayer's position would exercise when meeting their tax obligations, but it does not mean perfection (SARS, 2012b:83). It requires an effort commensurate with the reasonable person in the taxpayer's circumstances. In *Pick 'n Pay Retailers (Pty) Ltd v Pillay* (2021), the court reaffirmed that the reasonable person standard is an objective legal test used to assess whether a person's conduct meets the level of care, skill, and diligence that would be expected of an ordinary, prudent person in the same circumstances. Therefore, if the taxpayer uses an advisor to complete a return on his behalf and the practitioner does not exercise reasonable care, the taxpayer remains liable to pay an understatement penalty.

Several court cases have affirmed that taxpayers are responsible for ensuring the accuracy of their tax, even if reliance is placed on tax experts. In ITC 1935 (2019) 83 SATC 29, the taxpayer appointed registered tax practitioners and relied on their advice and expertise. The appointed accounting firm completed the taxpayer's return and made a false statement on the return. The court found that the tax practitioners failed to act with the expected due diligence and therefore the taxpayer did not take reasonable care in completing the return. The appeal was dismissed with costs, and the taxpayer was held liable for negligence committed by the tax practitioner. The mere fact that tax practitioners complete a tax return does not imply that the taxpayer took reasonable care. It becomes important for tax practitioners to ensure compliance with laws and regulations when providing tax services to protect taxpayers from potential financial and legal consequences (Daniels, 2024).

In another court case, ITC 1880 (2014) 78 SATC 103, the taxpayer received R841 million in proceeds from the sale of shares. When calculating his tax liability on the profit from the sale of shares the taxpayer obtained advice from professional experts and reduced the proceeds by R625 million, an amount arising from the prior sale of share transactions during 2003. The taxpayer only declared the difference of R216 million on its income tax return. SARS disagreed with the deduction from the proceeds and levied understatement penalties on the shortfall on the correct tax liability. The court, however, came to the conclusion that the taxpayer obtained advice from experts on how to calculate the capital gains and therefore had reasonable grounds for the position taken. The court ruled that the understatement penalty should be applicable at a lower rate of 10%. By seeking advice from tax experts, the penalty was minimised to the lowest percentage on the understatement penalty table.

In a recent case of *Thistle Trust v Commissioner for the South African Revenue Service* (2024), the taxpayer argued that it should not be liable for penalties for its alleged understatement, since the error was a *bona fide* inadvertent mistake made in good faith based on legal advice. However, SARS claimed that understatement penalties should be imposed based on the behaviours "no

reasonable grounds for the tax position taken” and “reasonable care not taken in completing a return”. The court concluded that the tax position taken was based on legal advice, and even though the court found the advice to be incorrect, the taxpayer had reasonable grounds for the position taken. With regard to the behaviour “reasonable care not taken”, SARS contends that the legal advice acknowledged SARS’s opposing view. SARS argued that, had the taxpayer exercised reasonable care in completing its return, it would have disregarded the advice and instead followed SARS’s stated position. The court held that this line of reasoning implies that no taxpayer can reasonably rely on advice that differs from SARS’s interpretation of tax law, effectively positioning SARS as the sole authority on reasonable interpretations of tax legislation. A similar argument was followed in the case of *Marshall N.O. v Commissioner, South African Revenue Service* (2018). The argument was therefore unsustainable, and reasonable care was taken by the taxpayer.

Reasonable care does not imply that no mistakes can occur and that taxpayers may not share a different view than SARS. Rather, it means that taxpayers should take the necessary steps and precautions to ensure the accuracy of their views to substantiate the information submitted to SARS. If a taxpayer fails to take reasonable care in completing a return, penalties may be imposed, depending on the degree of prejudice caused to the fiscus. Where the prejudice is particularly large, but none of the more serious behaviours apply, the law provides for a specific penalty category known as substantial understatement.

2.3.5 Substantial understatement

The category of behaviour with the lowest penalty percentages is substantial understatement. This category is the only behaviour explicitly defined in the TAA. As defined in section 221, this behaviour occurs when the prejudice to SARS or the fiscus exceeds the greater of 5% of the amount of tax properly chargeable or refundable in terms of a tax act, or R1 000 000. This penalty will be imposed if none of the other behaviours are applied and there is a substantial understatement (SARS, 2018b:29).

The penalty for substantial understatement can, however, be remitted. In terms of section 223(3) of the TAA, the penalty for a substantial understatement must be remitted if SARS is satisfied that the taxpayer made full disclosure of the arrangement by the due date of the relevant return. Additionally, the taxpayer must have obtained an opinion from an independent registered tax practitioner before the return’s due date, confirming that the taxpayer’s position is more likely than not to be upheld in court and the opinion must be based on the full disclosure of all relevant facts and circumstances surrounding the arrangement to qualify for the remission of the penalty (Pinch,

2024:12). Understatement penalties could also be remitted if taxpayers can provide evidence that the understatement occurred due to a *bona fide* inadvertent error.

2.3.6 *Bona fide* inadvertent error

Croome (2019) argues that the penalty structure does not distinguish adequately between deliberate tax avoidance and inadvertent errors made by taxpayers. The concept of a *bona fide* inadvertent error is critical in South Africa's legal and tax frameworks, especially in the context of taxation where mistakes can lead to significant penalties. According to section 222(1) of the TAA, an understatement penalty will not be applied if a shortfall in the tax payable by taxpayers resulted from a *bona fide* inadvertent error. This is the only section where the term *bona fide* inadvertent error in the tax acts can be found. The term *bona fide* inadvertent error was incorporated into the TAA after the amendment in the 2013 Amendment Act (De Villiers, 2015:14-19). It is exclusively used in relation to understatement penalties and is not defined in any of the tax acts including the Interpretation Act No. 33 of 1957 (Wiesener, 2020:176). However, as contemplated in the Draft Tax Administration Laws Amendment Bill of 2025, SARS planned to limit the application of a *bona fide* inadvertent error to the substantial understatement category. Accordingly, taxpayers will not only be required to demonstrate that reasonable care was taken, but the tax shortfall must also meet the statutory threshold for a substantial understatement in order for the exclusion to apply. This term, lacking a precise definition, has sparked numerous disputes between taxpayers and SARS. Understanding the meaning of *bona fide* inadvertent errors is essential for minimising and even eliminating the liability for understatement penalties.

The term *bona fide* is defined in The Oxford English Dictionary as “In good faith, with sincerity; genuinely” (Oxford English Dictionary Online, 2022d). The Oxford Dictionary defines ‘inadvertent’ as “unintentional”. The Oxford Dictionary defines ‘error’ as “a mistake”. It can be concluded that the grammatical definition of a *bona fide* inadvertent error is the unintentional misstatement of a taxpayer on tax returns that led to an understatement, while the taxpayer acted in good faith and without the intention to deceive (De Villiers, 2015:22).

Assessing whether an error qualifies as a *bona fide* inadvertent error will be determined based on the individual circumstances of the taxpayer on a per-case basis (Zegwaard, 2018:4). It should be an accidental mistake made by a taxpayer on a return while acting in good faith and without the intention to deceive the fiscus (Zegwaard, 2018:4). Care must therefore be taken to ensure the accuracy of submitted returns and implement sufficient controls in order to mitigate the risk of being imposed with understatement penalties (Van der Zwan, 2013a).

The dictionary definitions, however, differ from SARS's interpretation. According to the SARS Guide to Understatement Penalties (Issue 2) (SARS, 2018b:17), a *bona fide* inadvertent error is considered an involuntary, typographical mistake. Nonetheless, such an error will not be excused if it is determined that reasonable care was not exercised (SARS, 2018b:17).

It is evident that there is a lack of congruence between SARS's interpretation of a *bona fide* inadvertent error and the dictionary definitions. Case law, however, provides valuable insights into how the South African courts have interpreted *bona fide* inadvertent errors.

In ITC 1890 (2016) 79 SATC 62, the Cape Town Tax Court ruled on a 10% understatement penalty imposed by SARS. In this instance, the taxpayer obtained guidance from tax experts and relied on a tax expert's opinion to justify the position adopted in the submitted tax return. The taxpayer argued that the view taken in the tax return stemmed from a *bona fide* inadvertent error, as the tax return was prepared based on professional advice provided in the tax opinion. After reviewing the facts, the judge ruled in favour of the taxpayer. The taxpayer had obtained a tax opinion, relied on it in good faith, and had no intent to deceive, resulting in the remission of the understatement penalty.

In ITC 1898 (2016) 79 SATC 266, the tax practitioner inadvertently included incorrect information on the taxpayer's tax return, relying on the information provided by the taxpayer. Unfortunately, this error resulted in financial harm to the fiscus. The court carefully examined the facts and determined that the incorrect information on the tax return was not a deliberate attempt to evade taxes. Nonetheless, the court concluded that even though the return was submitted by a tax practitioner, the inclusion of the incorrect statement based on information provided by the taxpayer indicated a lack of reasonable care, leading to the imposition of a 50% penalty for which the taxpayer was held liable.

The court held in ITC 1948 (2019) 84 SATC 110 that the meaning of 'good faith' in a legal context is "a sincere, honest intention or belief that represents the mental and moral state regarding the truth". The same court case also stated that an error is not inadvertent and thus inexcusable if the taxpayer's actions or omissions are classified as a failure to take reasonable care in completing their tax return, or as being intentional or grossly negligent. This means that mistakes made due to a lack of due diligence, or deliberate or careless actions, cannot be excused as accidental errors. The judge stated, "It follows from the above that *bona fide* inadvertent error has to be 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."

In ITC 1948 (2019) 84 SATC 110, the taxpayer relied on external accountants to complete its income tax return. The accountants advised the taxpayer to change its policy and account for depreciation at wear and tear rates allowed by SARS. Upon completion of the income tax return, the accountant did not add the accounting policy adjustment, which resulted in the assessed loss being overstated. The court held the view that the taxpayer did not take reasonable measures to ensure the accuracy of the information completed on the tax return and therefore it did not constitute a *bona fide* inadvertent error. The court determined that neither the taxpayer nor the accountant could provide any evidence that an error made in one year's return would have been identified and rectified in the subsequent years. Even though the taxpayer acted prudently by appointing a tax expert to prepare and submit its tax return and relied on their expertise to file the return accurately, the court held that the taxpayer remained responsible for the accuracy of the information completed by their accountant. The court ruled that despite the appointment of an accountant, the taxpayer should have taken reasonable measures to identify any obvious mistakes in the completed return. According to the court, the taxpayer did not exercise reasonable care regarding the return submitted, and the understatement was not the result of a *bona fide* inadvertent error.

The previous two cases clearly demonstrate that incorrect information entered on a taxpayer's return by a tax practitioner does not qualify as a *bona fide* inadvertent error, due to the lack of reasonable care of the taxpayer, and will therefore result in understatement penalties. Taxpayers must do more than merely rely on tax practitioners to provide accurate information to SARS.

When taxpayers can prove that sufficient controls were implemented to mitigate the risk of capturing incorrect information, the courts have held that reasonable care was exercised, and no understatement penalties will be imposed. In ITC VAT 1788 (2023) 84 SATC 406, the judge quoted from ITC 1890 (2016) 79 SATC 62 that a *bona fide* inadvertent error is “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”. In this case, the taxpayer sought to claim input tax for expenses related to accommodation provided to employees stationed at mining sites. These costs were incurred as part of the operational requirements for housing workers. SARS denied the input tax claims, adjusted the VAT returns accordingly, and imposed a 10% understatement penalty. The court needed to determine whether the 10% penalty should be remitted. The taxpayer testified that the tax returns were inspected by their senior finance manager and their internal audit department. The internal audit department, upon request from the taxpayer, assured that the input tax was claimable. This view was upheld by the external auditors who did not raise any concerns about claiming the input tax. The court stated that the

facts presented amounted to a *bona fide* inadvertent error as the taxpayer did not act with the intention to deceive and ordered SARS to remit the 10% understatement penalty.

It is evident from the above case that the taxpayer implemented controls, including oversight by the finance manager, to ensure accurate input tax claims, and even consulted internal auditors regarding the validity of claims on meals and accommodation. The taxpayer further relied on external auditors who confirmed the accuracy of the input tax claims. By implementing controls and involving both internal and external auditors, the taxpayer sought to verify the legitimacy of input tax claims, demonstrating clear efforts to ensure compliance and avoid reckless or deceptive actions. The taxpayer therefore took reasonable care.

The courts have also judged on the term '*bona fide* inadvertent error' where taxpayers used legal opinions to substantiate their view. In the case *Appellant Company v Commissioner for the South African Revenue Service* (2018), it was determined that the appellant obtained two legal opinions from counsel who are both tax experts. Although SARS and the court did not share the same view as contained in these opinions, Judge Davis concluded that because the appellant had based its tax return declaration on the opinions of experts, the understatement of tax was due to a *bona fide* inadvertent error by the applicant and the understatement penalties were set aside.

In a recent case, *The Thistle Trust v Commissioner for the South African Revenue Service* (2024), the taxpayer obtained advice from legal advisors to substantiate its views taken when completing its tax return. Although the taxpayer acknowledged that the additional assessment raised by SARS was correct, the failure to declare the capital gains was a *bona fide* inadvertent error and no understatement penalties should be imposed. The case was presented in the Tax Court, the Supreme Court of Appeal and ultimately the Constitutional Court. The court's decision acknowledged the taxpayer's good faith effort and the unintentional nature of the mistake, emphasising the importance of reasonable reliance on professional advice in complex tax matters. This ruling underscores the legal principle that genuine, unintentional errors, especially those made based on expert guidance, should not be penalised unduly. The same view was upheld in the case *CSARS v Coronation Investment Management SA (Pty) Ltd* (2023), where the taxpayer relied on a tax opinion from tax experts. This decision reinforces the principle that taxpayers acting on expert opinions should not be penalised for understatements resulting from those opinions.

It is important to note that the burden of proof for justifying the imposition of understatement penalties lies with SARS, meaning that SARS must establish the facts supporting the penalties. Section 102(1)(a) to (f) of the TAA does not impose a burden of proof on the taxpayer to show that the understatement resulted from a *bona fide* inadvertent error (Wiesener, 2020:177). In ITC

1949 (2021) 84 SATC 129, the court noted that the legislature contemplated a three-phase process.

Firstly, SARS must consider whether the understatement constitutes an “understatement” as defined in s221 of the TAA. If it does, SARS must then consider whether the understatement results from a “*bona fide* inadvertent error”. If such an error is established, that is the end of the inquiry, and no understatement penalty may be levied. However, where there is no such error, SARS is then required to identify the appropriate behavioural category under which the taxpayer’s conduct allegedly resorts in terms of the table set out in section 223 before it can impose a penalty.

Enactment of the proposed Draft Tax Administration Laws Amendment Bill (SARS, 2025) would be likely to limit the penalty relief on the basis of a *bona fide* inadvertent error to the behaviour, substantial understatement. However, the proposed amendment had not yet been finalised at the time this study was submitted.

In ITC 1949 (2021) 84 SATC 129, SARS imposed a 25% understatement penalty based on the behaviour “reasonable care not taken in completing a return” but later testified that the correct behaviour should have been “no reasonable grounds for tax position taken”, and the penalty should increase to 50%. Judge Cloete confirmed that, in this case, the correct behaviour was “no reasonable grounds for tax position taken”, and that SARS erred in imposing a lesser penalty. During the proceedings in the High Court, SARS was unable to provide sufficient explanations for how they concluded that the correct penalty behaviour was reasonable care not taken. The court concluded that SARS failed to demonstrate that the understatement penalty was based on the correct taxpayer behaviour and thus had no reasonable grounds to recover the penalty from the taxpayer.

In the *Purlish Holdings v The Commissioner for the South African Revenue Service* (2019) case, the SCA examined the implications of section 102 of the TAA. The court held that SARS had to prove both the taxpayer’s conduct outlined in paragraphs (a) to (d) of the “understatement” definition and that such conduct caused prejudice to SARS or the fiscus (Pinch, 2024:17). SARS demonstrated that the taxpayer’s actions caused prejudice by necessitating the use of additional resources to conduct an audit of the taxpayer’s tax affairs. The court also determined that the *bona fide* inadvertent error exclusion was not applicable, as the taxpayer failed to provide any supporting evidence to that effect. Because the taxpayer was unable to provide evidence that the understatement occurred due to a *bona fide* inadvertent error, the court ruled that SARS discharged the onus of proof and the understatement penalty was not remitted.

SARS still adheres to a narrow interpretation of "*bona fide* inadvertent error" in its SARS Guide to Understatement Penalties (Issue 2) (SARS, 2018b:17). However, various cases in the Tax Court of Appeal, the Supreme Court of Appeal and Constitutional Court demonstrated that the courts adopt a broader understanding of this term.

Notably, in ITC 1890 (2016) 79 SATC 62 and ITC 1948 (2019) 84 SATC 110, it was ruled that relying solely on accountants and tax advisors' expertise when submitting a return is insufficient to avoid understatement penalties. Taxpayers must provide sufficient proof that they have acted with reasonable care. In recent cases, courts have ruled that when taxpayers can demonstrate that measures were implemented to ensure accurate return information with no intent to deceive, the error qualifies as a *bona fide* inadvertent error, warranting remission of understatement penalties.

Presently, the only instances where an understatement will go unpunished, aside from a typographical mistake combined with reasonable care, are when taxpayers rely on tax advice and tax opinions from tax experts to support their tax position. From the *Thistle Trust v Commissioner for the South African Revenue Service* (2024) case, it is evident that the advice or opinions relied upon must be based on reasonable grounds and that the advisors must have exercised due care in forming such opinions. Therefore, tax practitioners play an important role in South Africa's understatement penalty system, because they influence how taxpayers understand and apply the Acts when filing returns. Their advice and diligence are often what SARS and the courts use to judge whether a taxpayer took reasonable care, had reasonable grounds for a tax position, or instead acted with negligence or intent to evade tax. Even though taxpayers remain responsible for their returns, the quality of work done by a tax practitioner can either protect a taxpayer from understatement penalties or expose them to higher penalties. Court cases have shown that poor practitioner conduct can still leave taxpayers liable, while reliable professional input can reduce or even eliminate penalties.

SARS must prove both that an understatement occurred and that it caused prejudice to the fiscus, but taxpayers' evidence, often in the form of opinions prepared by tax practitioners, can be decisive. Courts have accepted that reliance on tax practitioners' advice, given with knowledge of the full facts, may amount to reasonable care or a *bona fide* inadvertent error. For this reason, tax advice and opinions have become central in defending against understatement penalties.

2.4 Interaction between tax practitioner regulation and understatement penalties

The South African tax law is complex and requires of taxpayers to consider many aspects before making a decision. In the Regulating Tax Practitioners Discussion Paper issued by SARS in 2003,

it was stated that the responsibility for the contents of a tax return legally rests with the taxpayer, even when prepared based on advice from tax practitioners (SARS, 2003:2).

In certain circumstances, seeking and relying on the advice from tax practitioners can help to mitigate or even prevent the imposition of penalties. In ITC 1880 (2014) 78 SATC 103, the taxpayer received R841 million proceeds from the sale of shares. When calculating his tax liability on the profit from the sale of shares, the taxpayer obtained advice from professional experts and reduced the proceeds by R625 million, an amount arising from the prior sale of share transactions during 2003. The taxpayer only declared the difference of R216 million on its income tax return. SARS disagreed with the deduction from the proceeds and levied understatement penalties on the shortfall in the correct tax liability. The court, however, concluded that the taxpayer obtained advice from experts on how to calculate the capital gains and therefore had reasonable grounds for the position taken. The court ruled that the understatement penalty should be applicable at a lower rate of 10%. By seeking advice from tax experts, the penalty was minimised to the lowest percentage on the understatement penalty table for a standard case.

In ITC 1948 (2019) 84 SATC 110, the taxpayer suffered the understatement penalty imposed due to an error made by its accountant while completing the tax return. Despite the taxpayer's reliance on professional advice, the court upheld the penalty. In another case, ITC 1935 (2019) 83 SATC 29, the taxpayer appointed registered tax practitioners and relied on their advice and expertise. The appointed accounting firm completed the taxpayer's return and made a false statement on the return. The court found that the tax practitioners failed to act with the expected due diligence and therefore the taxpayer did not take reasonable care in completing the return. The appeal was dismissed with costs, and the taxpayer was held liable for negligence committed by the tax practitioners. Therefore, tax advisors and professionals must take care when providing tax services to ensure they comply with laws and regulations to prevent financial and legal consequences (Daniels, 2024).

To support taxpayers in making informed decisions, they should obtain tax opinions from registered tax practitioners (Van der Zwan, 2013b). Tax opinions are essential in the South African tax environment, offering taxpayers critical guidance on their tax obligations and the implications of various transactions. Reliance on legal opinions, even if they do not meet the strict criteria of a 'more-likely-than-not' opinion, does not indicate bad faith on the part of the taxpayer (Van Wyk, 2024). According to Adendorff (2019:2-3), not only do opinions assist in taxpayers' decision-making, but they also attempt to mitigate the risk of penalties.

Tax opinions are not defined in the TAA or any other tax Act. Section 223(3) of the TAA mentions opinions but omits a formal definition and instead details the expected format of opinions and

specifies who can issue them. The Oxford English Dictionary Online (2022e) defines the term opinion as a view held about a particular issue, a judgement formed or a conclusion reached. Opinions issued by tax practitioners represent the application of their extensive knowledge and expertise in the tax field, grounded in their judgement of applicable laws and regulations. Opinions usually detail the specific facts of taxpayers' situations, analyse and apply the tax law to those facts, and reach a reasoned conclusion. Taxpayers seek opinions with varying goals, either to limit penalties or to pay the least amount of tax (Adendorff, 2019:4).

Rothman (2011:3-4) identified different types of opinions, such as the comfort opinion, contractual condition opinion, third-party inducement opinion, disclosure opinion and the penalty protection opinion. The comfort opinion confirms the expected tax outcome relating to a transaction. The contractual condition opinion confirms the tax consequences of a contract entered into between taxpayers. The third-party inducement opinion is not issued by the tax practitioner to its client, but rather to a third party to provide a certain course of action. Disclosure opinions confirm the accuracy of disclosures. The penalty protection opinions are obtained by taxpayers to limit their exposure to penalties.

In terms of section 223(3) of the TAA, SARS must remit a penalty imposed for a substantial understatement if SARS is satisfied that the taxpayer, by no later than the return due date:

- (a) Made full disclosure of the facts and circumstances that gave rise to the prejudice to SARS or the fiscus; and
- (b) Obtained an opinion issued by an independent registered tax practitioner who confirmed the taxpayer's position is more likely than not to be upheld if the matter proceeds to court.

Section 223(3)(b)(i) of the TAA stipulates that an opinion must be issued no later than the date the relevant returns are due. Therefore, tax practitioners should be consulted well before the tax returns are due for submission. It is essential that tax practitioners issue their opinions prior to the due date to ensure compliance. It is evident that timely engagement with tax practitioners and the early issuance of their opinions are essential to avoid penalties.

Section 223, subsection b(ii) of the TAA requires full disclosure of the specific facts and circumstances of the arrangement made. According to the Income Tax Act's anti-avoidance provisions, taxpayers must demonstrate that every step or section of an arrangement was fully disclosed to their tax practitioners, regardless of whether the tax practitioners were directly involved in those steps or sections. This responsibility falls entirely on the taxpayers, as opinions are based on the information they provide to their tax practitioners. Should SARS determine that

taxpayers failed to inform their tax practitioners of all necessary details, SARS is not legally permitted to waive any penalties imposed.

As required in section 223, subsection b(iii) of the TAA, it is important that tax opinions confirm that a taxpayer's position is more likely than not to be upheld if the matter proceeds to court. The case *Brits v Shoprite Checkers (Pty) Ltd* (2025) demonstrates that the standard of "more likely than not" represents the civil threshold of a balance of probabilities of more than 50%, requiring a court to be satisfied that, based on all the evidence, the occurrence of an event is more probable than not. It is therefore evident from the facts stated above that tax opinions could be helpful during an audit or tax dispute. The importance of obtaining a tax opinion for a position taken has increased significantly with the introduction of the TAA and the judgments in court cases. Tax practitioners need to be aware of numerous requirements contained in the TAA to provide clients with opinions for managing their exposure to understatement penalties.

While the TAA does not explicitly state that a tax opinion guarantees relief for the behaviour "no reasonable grounds for tax position taken", it is argued that obtaining an opinion offers reasonable grounds for a tax position, making it difficult for SARS to challenge the taxpayer's position and imposing understatement penalties. This view has been confirmed in the recent court case of *The Thistle Trust v Commissioner for the South African Revenue Service* (2024) when the court concluded that the imposition of an understatement penalty occurs when a taxpayer files a return that inaccurately reports lower taxable or deemed taxable income than what is actually required. This understatement entitled SARS to levy a penalty based on the circumstances giving rise to the understatement. In the *Thistle* case, SARS levied a 50% understatement penalty, since the taxpayer had "no reasonable grounds" for the tax position taken. SARS argued that the taxpayer had consciously and deliberately adopted the position it took, even though a legal opinion was obtained by the taxpayer. During the hearing, SARS conceded that, even though the taxpayer erred, the taxpayer did act in good faith and erred unintentionally by obtaining legal advice that was reasonable. SARS also conceded that the understatement penalty by the taxpayer was a *bona fide* inadvertent error and the penalty was set aside.

The case of *Appellant Company v Commissioner for the South African Revenue Service* (2018) is also important, since SARS did not share the same view as contained in the two tax opinions obtained by the taxpayer. Judge Davis concluded that, despite SARS and the court differing in their interpretation, the taxpayer's tax return was based on expert opinions. As a result, the understatement of tax was deemed a *bona fide* inadvertent error, and the penalties were dismissed.

In the study conducted by Adendorff (2019:41), tax opinions provided by tax practitioners play an important role in ensuring that taxpayers have a clear understanding of their tax obligations. By offering expert insights and interpretations, tax professionals enhance the certainty of the reported tax liabilities, aligning with the fundamental principles of a tax system. Consequently, opinions serve as a powerful tool in promoting compliance within the tax framework. Given the growing significance of opinions in terms of the TAA it is essential to ensure that those persons preparing opinions are properly regulated and held accountable for the accuracy and reliability of their expressed views (Van der Zwan, 2013b).

Although SARS acknowledged the role of tax practitioners in the tax environment and encouraged taxpayers to leverage their expertise, taxpayers still find themselves at a disadvantage. Even after almost two decades, SARS and the courts continue to hold taxpayers responsible for errors made by their accountants and tax practitioners. Nonetheless, greater certainty now exists regarding favourable outcomes for taxpayers who rely on opinions issued by registered tax practitioners.

2.5 Conclusion

The regulation of tax compliance in South Africa, particularly in the context of understatement penalties, demonstrates the intricate relationship between taxpayers, tax authorities, and tax practitioners. The application of understatement penalties is critical for ensuring that taxpayers fulfil their obligations accurately. Section 221 of the TAA defines an understatement as any action that causes prejudice to SARS or the fiscus, encompassing defaults in return submissions, omissions, incorrect statements, failures to pay the correct tax amount and impermissible avoidance arrangements. When an understatement occurs, section 222(1) of the TAA mandates the imposition of penalties, calculated based on a table in section 223(1) of the TAA that stipulates different behaviours with specific penalty rates. These behaviours range from intentional tax evasion to substantial understatement, with varying penalty percentages reflecting the severity of the understatement. To mitigate the risk of understatement penalties, taxpayers are reliant on the advice and actions of tax practitioners.

Tax practitioners are essential in tax compliance by providing crucial advice, preparing returns, and assisting with SARS verifications. Their role is to bridge the knowledge gap between taxpayers and complex tax laws. The need for their involvement is highlighted by studies showing that taxpayers engage tax practitioners to avoid severe penalties and ensure accurate returns. Because tax practitioners fulfil an important role in tax compliance, the TAA mandates their registration with RCBs and SARS. The requirements for registration include appropriate qualifications, verifiable tax working experience, successful completion of the SARS Tax

Practitioner Readiness Programme and maintaining a tax-compliant status. Continuous professional education is also required to keep practitioners updated on tax laws and regulations.

Despite the reliance of taxpayers on the expertise of registered tax practitioners, who must adhere to regulated registration and training requirements, taxpayers ultimately remain accountable for understatement penalties resulting from their advisors' negligence. It was found in this chapter that taxpayers, with limited knowledge of complex tax laws, may still not only be able to rely purely on the information that regulated tax practitioners provide to SARS on their behalf. Taxpayers must be able to prove they acted with reasonable care, even with their limited knowledge of tax laws, and that they considered the accuracy of the information submitted by tax practitioners for understatement penalties to be remitted. The courts have consistently upheld that it is the taxpayer's responsibility to ensure that all information submitted by their tax practitioners to SARS is accurate and free of misstatement. Even though tax practitioners operate in a regulated environment and taxpayers rely on their advice and expertise, taxpayers must prove that reasonable care was taken by both parties to mitigate the risk of understatement penalties. Relying only on tax practitioners to provide reasonable advice is not sufficient to prevent the imposition of understatement penalties.

The following chapter examines the regulation of tax practitioners and the tax penalty systems in the USA and Australia, focusing on how these systems are applied to non-compliant taxpayers. It aims to assess whether these approaches provide a fairer outcome for taxpayers who rely on professional tax advice, compared to the system currently applied in South Africa.

CHAPTER 3: ANALYSIS AND COMPARISON OF THE UNITED STATES OF AMERICA AND AUSTRALIAN TAX PENALTY LEGISLATION WITH THAT OF SOUTH AFRICA

3.1 Introduction

The objective of this chapter is to provide an overview of the regulatory mechanisms governing tax penalties and tax practitioners in the USA and Australia, and to compare these with practices in South Africa. The comparison focuses on the differences in the regulation of tax practitioners and the tax penalty regimes and examines how tax practitioners influence the penalty system, to address the research objective outlined in paragraph 1.5.2. To achieve this objective, the USA and Australia were selected for comparison due to their well-established tax practitioner regulations and penalty systems. As Organisation for Economic Co-operation and Development (OECD) countries, they both make significant contributions to research and development, making them ideal for this analysis.

3.2 Overview of the United States of America tax penalties and tax practitioner regulations

This paragraph aims to examine the regulatory framework governing tax practitioners and the tax penalty system in the USA. It also explores the role of tax practitioners in the context of penalties imposed on taxpayers.

The Internal Revenue Service (IRS) serves as the principal tax authority in the USA. The IRS, a branch of the United States Department of the Treasury, is the nation's tax agency responsible for administering the Internal Revenue Code of 1986 (USA, 2024) as amended (the Code), providing quality service to taxpayers, and ensuring the fair application of tax laws (Rettig, 2014:15). Operating under the Department of the Treasury, the IRS plays an essential role in managing the country's tax system and ensuring compliance with tax obligations.

3.2.1 Tax practitioner regulation

Tax practitioners and tax return preparers play an important role in helping Americans to comply with tax obligations, ensuring accurate tax return filings that protect both government revenue and taxpayer benefits while avoiding penalties, back taxes, and interest (Soled & DeLaney Thomas, 2017:169).

Section 6694 of the Code provides that tax return preparers face penalties if they knowingly prepare tax returns with an unreasonable position or engage in wilful or reckless conduct. These penalties can be avoided if tax preparers show that there is reasonable cause for the understatement and that they acted in good faith.

In the USA, tax preparers are regulated in terms of Circular 230, which outlines the statutes and regulations governing the practice of tax professionals in presentations before the IRS (IRS, 2023). Circular 230 also establishes standards for tax return preparers, such as attorneys, certified public accountants (CPAs), and enrolled agents, who must adhere to specific guidelines to maintain their credentials and practice rights.

The Office of Professional Responsibility administers and enforces the laws and regulations that govern the conduct and practice of practitioners in presentations before the IRS. This includes requirements for ethical conduct, qualifications, and penalties for non-compliance. The Office of Professional Responsibility is responsible for the regulation of attorneys, CPAs, enrolled agents, the annual filing season program and appraisers submitting appraisals supporting tax positions (Fisk, 2023).

The Office of Professional Responsibility has jurisdiction over those who practise and make presentations before the IRS, which involves any presentation to the IRS regarding taxpayers' rights, privileges, or liabilities in terms of tax laws and regulations administered by the IRS (Fisk, 2023). Included in the term presentation to the IRS are the following:

- preparation and filing of returns;
- corresponding with the IRS;
- rendering written advice;
- client representation at conferences, hearings and meetings.

Section 10.34(a) of Circular 230 (IRS, 2023) requires that practitioners' advice must have a reasonable basis, avoid wilful attempts to understate liabilities, and not involve reckless or intentional disregard of rules and regulations (Fisk, 2023). Tax practitioners must make reasonable inquiries when the information provided by taxpayers appears incorrect or inconsistent with the facts or assumptions (Wood, 2019:1824). Tax professionals can no longer accept taxpayers' representations when they seem unreasonable or false.

To improve taxpayer compliance, the Return Preparer Office is offering thorough oversight and support to tax professionals (IRS, 2024c). The Return Preparer Office improves taxpayer compliance by overseeing Preparer Tax Identification Numbers, enrolment programs, continuing education providers approved by the IRS, and the Annual Filing Season Program for tax return

preparers. Anyone who prepares or assists in the preparation of tax returns for compensation must have a valid Preparer Tax Identification Number, which is renewable on an annual basis (IRS, 2024b). The number serves as the tax return preparer's identification number and must, where applicable, be disclosed in the Paid Preparer section of any tax return prepared for remuneration (IRS, 2024b).

Enrolled agents are tax professionals authorised to represent taxpayers before the IRS who passed the IRS Special Enrolment Exam. This three-part exam consists of individuals, businesses, and representation, practices and procedures, and must be passed within a three-year period (IRS, 2024d). Former IRS employees can become enrolled agents without the Special Enrolment Examination if they have five years of relevant experience, including three years within the last five years in taxpayer-facing roles such as appeals officers, special agents, revenue officers, revenue agents, tax specialists, or settlement officers (IRS, 2024c). These requirements aim to ensure that the applicants with IRS experience offer a comprehensive background equivalent to that of a public-sector candidate who passes all three parts of the Special Enrolment Examination (IRS, 2024c). If former IRS employees' experience falls short of this standard, their enrolment will be limited to a specific area of representation (IRS, 2024c). Enrolled agents must renew their application every three years and maintain a valid Preparer Tax Identification Number, complete a minimum of 16 hours of continuing education each year, including two hours in ethics or professional conduct, and accumulate a total of 72 hours over a three-year period (IRS, 2024c).

Enrolled agents, like attorneys and CPAs, have unlimited practice rights, allowing them to represent any taxpayer, handle various tax matters, and appear before any IRS office (IRS, 2024c).

Section 330 of the Code regulates the practice of tax representatives. Before admitting a representative to practice, the individual must demonstrate good character, good reputation, possess the necessary qualifications to offer valuable services, and exhibit the competency required to advise and assist clients in presenting their cases. Because tax advisors operate in a regulated environment incorporated with ongoing training and development, they play a vital role in assisting taxpayers to comply with laws and regulations to prevent unnecessary penalties.

3.2.2 Tax penalties

According to the *IRS Internal Revenue Manual* penalties should deter non-compliance, be proportionate to the offense, objective and serve as an opportunity to educate and encourage taxpayers' future compliance (IRM, 2023).

To encourage compliance, the IRS imposes accuracy-related penalties on taxpayers who fail to demonstrate a reasonable basis for their tax positions. Penalties of 20% will be imposed on any portion of an underpayment of tax in terms of section 6662 of the Code. However, if the underpayment pertains to an undisclosed foreign financial asset, such as shares in a non-USA company, the associated penalty increases to 40% (Latorre Jeker, 2024). Underpayment is defined in section 6662 of the Code as the excess of the amount of the tax required to be shown on a return for the tax year, over the amount of the tax imposed which is shown on the return, reduced by any rebate. Accuracy-related penalties are imposed when a taxpayer's underpayment is attributed to negligence or disregard for IRS rules and regulations (Latorre Jeker, 2024).

For section 6662 of the Code penalty to apply, a taxpayer must have an underpayment of tax that is attributable to one of the specific conditions or behaviours identified as "triggers" in section 6662 of the Code (Cook & Ocheltree, 2010). These conditions and behaviours include:

- Negligence and disregard of the rules and regulations.
- Substantial understatement of income tax.
- Substantial valuation misstatement in terms of Chapter 1.
- Substantial overstatement of pension liabilities.
- Substantial understatement of estate or gift valuation.
- Disallowance of claimed tax benefits by reason of a transaction lacking economic substance or failing to meet the requirements of any similar rule of law.
- Undisclosed foreign financial asset understatement.
- Inconsistent estate basis.
- Overstatement of the deduction provided in section 170(p).
- Disallowance of a deduction by reason of section 170(h)(7).

For comparative purposes with South Africa's understatement penalty framework, this study examined the first two accuracy-related behaviours in the USA, as they align closely with those of South Africa. The first behaviour, negligence or disregard of the rules and regulations share similarities with the South African behaviours other than substantial understatement, as both address errors arising from a failure to exercise reasonable care or acting negligently. The second behaviour, substantial understatement of income tax, focuses on shortfall thresholds and imposes standard percentage penalties designed to deter understatements exceeding these thresholds. These two categories are frequently encountered in practice, have defined tests and include provisions that allow penalty mitigation where the taxpayer acted with reasonable care or relied on competent professional advice. Together, they provide a strong basis for comparing how each

country seeks to balance deterrence of non-compliance with fairness towards taxpayers who act diligently and obtain advice from regulated tax practitioners.

3.2.2.1 Negligence and disregard of the rules and regulations

"Negligence" is defined in section 6662(2) of the Code as any failure to make a reasonable attempt to comply with the provisions of the Code, and the term "disregard" includes any careless, reckless, or intentional disregard.

In the case of *Brown v Commissioner of Internal Revenue* (2011), the judge stated that negligence has also been defined as the failure to exercise due care or to act as a reasonable person would under similar circumstances. In the case, the court found the taxpayer's testimony to be credible, supporting that he mistakenly submitted an incorrect version of his 2011 tax return. There was no indication that he consulted a professional advisor or conducted research before preparing his tax return. While the taxpayer claims that he mistakenly filed a "what if" version of his return instead of the correctly prepared version, leading to errors in claimed deductions, this explanation did not demonstrate that he exercised diligence or due care in the preparation of his return and the 20% penalty was upheld. Taxpayers must demonstrate that they acted reasonably and prudently to prevent penalties (*Neely v. Comm'r of Internal Revenue*, 1985).

Section 6664-4(b)(1) of the Code states that reasonable cause and good faith may be demonstrated by an honest misunderstanding of facts or laws, considering all relevant facts and circumstances, including the taxpayer's experience, knowledge, and education. Cook and Ocheltree (2010) state that this can also be a two-edged sword, which means that taxpayers with limited experience, knowledge and education are often held to a lower standard than taxpayers who have the necessary education, knowledge and experience. However, a lack of knowledge and experience does not excuse failing to consult with tax advisors to demonstrate reasonable cause (Cook & Ocheltree, 2010).

In the case of *United States v. Boyle* (1985), the judge noted that courts have frequently held that "reasonable cause" is established when taxpayers can demonstrate that they reasonably relied on the advice of an accountant or attorney, even if that advice later turned out to be incorrect. Taxpayers who can demonstrate a reasonable attempt to comply with the Code, either through their own efforts or by reasonably relying on a tax professional, should not be considered negligent (Cook & Ocheltree, 2010).

3.2.2.2 Substantial understatement of income tax

In terms of section 6662(d)(1)(A) of the Code, an understatement of tax is substantial if the amount of the understatement for the taxable year exceeds the greater of 10% of the tax required to be shown on the return for the taxable year, or \$5 000. If the understatement of income tax for the year in question is substantial, the Commissioner has met the burden of providing evidence to justify the penalty (*Brown v Commissioner of Internal Revenue*, 2011).

The substantial understatement is not behaviour-based but is applied when a return shows an understatement exceeding statutory thresholds and can be avoided with substantial authority or reasonable basis and disclosure (Cook & Ocheltree, 2010). Section 6662-4(d) of the Code states that applicable authority could include information such as provisions of the IRC, proposed, temporary or final regulations, revenue rulings and revenue procedures, tax treaties and regulations thereunder, and Treasury Department and other official explanations of such treaties, court cases and congressional intent as reflected in committee reports. However, conclusions reached in treatises, legal periodicals, legal opinions or opinions rendered by tax professionals are not deemed to be an authority. The underlying authorities referred to in such opinions, if applicable to the facts of a particular case, may nonetheless give rise to substantial authority for the tax treatment of an item, provided they have not been overruled or modified by a body with the power to do so. It is stated in section 6662-3(b)(3) of the Code that if a return position is reasonably based on one or more of the authorities, the return position will generally satisfy the reasonable basis standard even if the return position does not satisfy the substantial authority standard in section 6662-4(d) of the Code.

3.2.3 Interaction between tax practitioners and accuracy-related penalties

While penalties can arise from tax non-compliance, taxpayers may avoid them by demonstrating "reasonable cause" for the errors or omissions, which requires showing that they exercised ordinary care and prudence, but still failed to meet their tax obligations despite these efforts (Latorre Jeker, 2024). In determining the circumstances of each case to prove care and prudence, the taxpayer's knowledge, education and experience play an important role (Latorre Jeker, 2024).

Section 6664 of the Code specifies that no penalty in terms of section 6662 or 6663 of the Code will be levied on any underpayment portion if the taxpayer can prove reasonable cause and good faith concerning that underpayment (Cook & Ocheltree, 2010). Factors such as reliance on tax professionals, serious illness, inability to obtain necessary documents, natural disasters and others may qualify as reasonable causes (Latorre Jeker, 2024). Section 6664(b) of the Code states that "reliance on an information return or on the advice of a professional tax advisor or an

appraiser does not necessarily demonstrate reasonable cause and good faith". The implementation of internal controls and procedures to detect or mitigate errors demonstrates reasonable care and good faith, as outlined in section 6664(b) of the Code.

According to section 6664(c)(1) of the Code, the determination of reasonable cause and good faith is assessed on a case-by-case basis, considering all relevant facts and circumstances. The taxpayer's education, sophistication, and business experience are relevant factors in assessing whether their reliance on tax advice was reasonable and made in good faith. Section 6664(c)(1) of the Code specifies that taxpayer reliance cannot be deemed reasonable or in good faith if the taxpayer was aware, or should reasonably have been aware, that the advisor lacked sufficient knowledge in the relevant aspects of federal tax law. In addition, section 6664-4(c)(1) of the Code provides that reliance on advice will not establish reasonable cause and good faith unless:

- The advice is based on all facts and circumstances;
- The advice does not rely on unreasonable assumptions; and
- Where the advice is based on the view that a regulation in the Code is invalid, the taxpayer adequately disclosed that position in accordance with the prescribed disclosure requirements.

In terms of section 6664(c)(2) of the Code, advice encompasses any communication, including a professional tax advisor's opinion, setting forth the analysis or conclusions of a person, provided to or for the taxpayer's benefit. Regardless of the format, this serves as the basis on which the taxpayer relies with respect to the imposition of section 6662 of the Code's accuracy-related penalties.

One way for a taxpayer to establish reasonable cause is by demonstrating that he or she reasonably relied on the opinion or advice of qualified tax professionals (Alarie *et al.*, 2023:2148). The Tax Court in the case of *Estate of Spruill v Commissioner* (1987), had to determine whether the fraud penalty was appropriately applied to an understatement of estate tax resulting from a large under-valuation of property. The valuation was determined with the advice of an attorney and an accountant and was based on an independent appraisal. The court rejected the penalty based on the fact that the taxpayer received advice from an accountant or attorney regarding tax law and therefore it was reasonable to rely thereon, as most taxpayers lack the expertise to detect errors.

In the case of *Neonatology Associates, PA v. Commissioner* (2000), it was established that to negate section 6662(a) of the Code (USA, 2024) accuracy-related penalties, taxpayers must demonstrate that they meet the criteria of a three-pronged test. Firstly, the taxpayer must prove

that the advisor consulted was a competent professional with adequate expertise to warrant reliance. Secondly, it is essential that the taxpayer provides all necessary and accurate information to the advisor. Lastly, the taxpayer must show that he or she relied in good faith on the advisor's judgement. Meeting these conditions can create a basis for reasonable reliance on the advisor's advice, which may potentially eliminate the penalty.

Relying on advice from tax practitioners differs from depending on them to complete a tax return accurately and ensure the correctness of the submitted information. This is best explained with reference to court cases. In the case of *Russian Recovery Fund Limited v. United States* (2017), the court affirmed that the mere act of tax professionals preparing and signing a tax return based on information provided by taxpayers does not, in itself, constitute reasonable care. In this case, the tax preparer relied on the information supplied by the taxpayer without conducting a proper independent investigation into its accuracy. The taxpayer argued that the preparer's signature implied professional advice had been given and thus should qualify for the reasonable cause exemption. However, the court held that the signing of a tax return by a preparer does not automatically indicate the provision of professional advice. Therefore, it does not justify the application of the reasonable cause exemption, and the penalty was upheld.

In *Pederson v Commissioner of Internal Revenue* (2021), the judge had to determine whether the taxpayer acted negligently or in disregard of the rules and regulations for the 20% accuracy penalty to be imposed. The judge held that in terms of section 7491(c) of the Code, the Commissioner has the responsibility to produce evidence supporting the imposition of accuracy penalties. However, once the Commissioner meets this burden, the taxpayer bears the burden of proof, including demonstrating that penalties are unwarranted due to reasonable cause or substantial authority in terms of section 6664 of the Code. The Commissioner discharged its burden, but the taxpayer still had the burden of proof. The court found that the taxpayer made significant errors on the tax return, which resulted in a substantial understatement of tax. The IRS imposed the 20% penalty, and the taxpayer argued that he had reasonable cause and acted in good faith, claiming reliance on a tax preparer. However, the court held that reliance on a tax preparer does not automatically protect a taxpayer from penalties, particularly when the taxpayer fails to provide the preparer with accurate information or does not take reasonable steps to ensure the return is correct. As a result, the court upheld the imposition of the accuracy-related penalties, concluding that the taxpayer failed to meet the reasonable cause exception because he did not prove that he reasonably relied on tax professionals.

The burden of proof was also referred to in the *Brown v Commissioner of Internal Revenue* (2011) case where it was stated that after the Commissioner has met the burden of proof, the taxpayer

can challenge the application of a section 6662(a) accuracy-related penalty by proving both reasonable cause for the underpayment of tax and that he acted in good faith.

Tax practitioners could have a major impact on the imposition of accuracy-related penalties. Taxpayers often rely on advice from tax professionals and argue that they had reasonable cause for the tax position taken (Latorre Jeker, 2024). Relying solely on a tax advisor to submit accurate return information is not enough to prove reasonable cause and good faith in order not to be penalised. To assess whether reliance on tax professionals' advice is reasonable, the qualifications of the advisor are critical, and the taxpayer must have supplied complete and accurate information (Latorre Jeker, 2024; *Neonatology Associates, P.A. v. Commissioner* (2000)). Because of the influence tax practitioners could have on the imposition of penalties and taxpayer compliance, their regulation is essential to ensure compliance with the high standards set by the acts.

Appointing tax practitioners to prepare and file returns does not, by itself, establish reasonable cause or good faith if the return is incorrect. The courts established that the preparation and signing of tax returns by tax practitioners was insufficient, especially where taxpayers had not supplied complete and accurate facts and information or did not check the submitted information. Even with the limited tax knowledge of taxpayers, they still remain liable for penalties caused by their tax practitioners. Tax practitioners also have an obligation to consider the accuracy of the information received from taxpayers to limit penalties. Reliance on tax practitioners' advice or opinions can negate accuracy-related penalties if the advisor is competent, the taxpayer fully discloses all relevant facts, and the taxpayer relies on the advice in good faith.

3.2.4 Comparison between South Africa and the USA

3.2.4.1 Tax practitioner regulation

The regulation of tax practitioners in South Africa and the USA has significant similarities, due to the qualifications, ethical conduct and continuous education requirements to ensure the competency of tax advisors.

South Africa follows a model that treats all paid tax practitioners alike. Tax practitioners must meet specific educational qualifications, have significant tax working experience, and complete the SARS Tax Practitioner Readiness Programme. The qualification and experience requirements follow a tiered structure. Those with NQF level 6 and above need one year of working experience; those with NQF level 5 require four years of working experience; and those with NQF level 4 need ten years of working experience. Continuous professional education requirements in South Africa mandate 18 hours of training each year, ensuring that practitioners stay updated with tax laws.

Anyone who gives tax advice or prepares a return for a fee must register with SARS and also belong to an RCB in terms of section 240 of the TAA. Practising without the necessary registration is a criminal offence. Although SARS sets the framework, RCBs enforce ethical codes, verify memberships and disciplinary processes. Tax practitioners who are not complying with the regulations are reported to its RCB.

In the USA, tax practitioner regulation in terms of Circular 230 has many similarities when compared to South Africa. Tax preparers, including attorneys, CPAs, and enrolled agents, must adhere to ethical standards set by the IRS Office of Professional Responsibility. Enrolled agents, who can represent taxpayers before the IRS, must either pass the IRS Special Enrolment Exam or, if they have recent IRS experience, qualify through that route. Practitioners must also renew their Preparer Tax Identification Number annually and complete 16 hours of continuing education each year, totalling 72 hours over a three-year period, including ethics training. The system is designed to ensure tax professionals have up-to-date expertise and act in good faith. The USA takes a two-step approach that separates “who may prepare returns” from “who may practise before the IRS”. Anyone paid to prepare a return must first obtain or renew a Preparer Tax Identification Number from the IRS. That registration alone does not allow representation before the IRS, which is reserved for credentialed professionals, attorneys, CPAs and Enrolled Agents, who are governed by Treasury Circular 230 (IRS, 2023) and regulated by the OPR. These practitioners must meet competence and ethical standards, and they can be censured, suspended or disbarred for violations. The Code also imposes direct monetary penalties on preparers who take unreasonable positions or act wilfully or recklessly.

Both South Africa and the USA regulate tax practitioners to ensure they are competent, ethical, and keep their tax knowledge up to date. The main difference is that the USA clearly separates those who prepare tax returns from those who represent taxpayers before the IRS, and it directly penalises practitioners who act carelessly or take unreasonable positions. In South Africa, all paid tax practitioners are registered through SARS and an RCB, but the law places the penalty responsibility on the taxpayer rather than the tax practitioner. Tax practitioners who act dishonestly can face disciplinary or criminal action, but there are no separate penalties that will be imposed as in the USA. Therefore, the USA system provides clearer accountability for practitioners, while in South Africa, taxpayers still carry a higher risk when they rely on professional advice.

3.2.4.2 Penalty systems

South Africa’s understatement penalty regime in Chapter 16 of the TAA ties the penalty rate to taxpayers’ behaviour. Once SARS proves there was an understatement and that SARS or the

fiscus suffered prejudice, the understatement penalty table applies. The table moves from severe consequences for intentional tax evasion, to acting with gross negligence for a tax position taken, to lacking reasonable grounds, to failing to take reasonable care, to substantial understatement. As the behaviour becomes more severe, the penalty increases accordingly. Court cases have highlighted significant uncertainty within SARS regarding the appropriate behaviour classification when determining the correct behaviour and penalties. Understatement penalties up to 200% can be imposed; however, these penalties can be minimised and even avoided. Firstly, no penalty may be imposed if the shortfall resulted from a *bona fide* inadvertent error. Secondly, if the matter is a substantial understatement, the penalty must be remitted if, by the return submission date, the taxpayer made both full disclosure of the facts and obtained a written tax opinion from a registered tax practitioner confirming that the position was more likely than not to be upheld in a court. The opinion serves as evidence that the taxpayer acted with reasonable care and in good faith based on professional advice, provided the tax practitioner took reasonable care in preparing the opinion.

The USA centres its penalty regime on the accuracy-related penalty in section 6662 of the Code. The rate is generally 20% of the underpayment, rising to 40% in certain foreign-asset cases. The penalty applies when specific triggers are present, most commonly negligence or a substantial understatement of income tax, as defined by the Code. Relief applies in terms of section 6664 of the Code for reasonable cause and good faith demonstrated by taxpayers, on which a court decides case-by-case on all the facts. At the same time, separate provisions fine preparers themselves for unreasonable positions or wilful or reckless conduct. By obtaining reasonable tax advice and opinions, the risk of penalties being imposed can be minimised and even eliminated.

The USA's tax penalty system is generally less complex and harsh than South Africa's behaviour-based framework. It applies a fixed 20% penalty rate for accuracy-related penalties, with clearly defined triggers such as negligence or substantial understatement. This structure limits interpretative uncertainty when determining the correct behaviour. South Africa's system requires SARS to select the correct taxpayer's behaviour out of five available behaviours, often leading to inconsistent outcomes. The behaviour-based penalties imposed in South Africa range from 10% to 200%, which is much higher when compared to the 20% to 40% penalty in the USA.

3.2.4.3 Interaction between tax practitioners and penalties

South African law places the ultimate responsibility for tax returns on taxpayers, even when tax practitioners prepare them. Therefore, using tax practitioners to submit information to SARS, does not automatically shield taxpayers against understatement penalties. Courts have reduced or set aside penalties where taxpayers sought timely advice and exercised oversight of the tax

practitioner's work, and yet have upheld penalties where practitioners' errors demonstrated a lack of reasonable care by the taxpayer. In terms of section 233(3) of the TAA, tax opinions can be critical to prevent understatement penalties. A substantial understatement penalty must be remitted if, by the return due date, the taxpayer both made full disclosure of the relevant facts and obtained an independent tax practitioner's opinion that the position is more likely than not to be upheld in court. Recent court cases confirm that reliance on expert opinions can amount to a *bona fide* inadvertent error, leading to penalty relief. In the Draft Tax Administration Laws Amendment Bill of 2025, SARS proposes that a *bona fide* inadvertent error will only be linked to a substantial understatement and not to all the behaviours in the understatement penalty table, which is currently allowed. Still, taxpayers remain accountable for the accuracy of returns and must demonstrate internal controls and diligence. In practice, opinions and regulated tax practitioners involvement can mitigate penalty exposure, but they do not replace the taxpayer's responsibility to ensure accurate return filings.

In the USA, accuracy-related penalties in terms of section 6662 of the Code can be avoided if the taxpayer proves reasonable cause and good faith in terms of section 6664 of the Code, a fact-specific inquiry that weighs the taxpayer's knowledge, education, experience, and the presence of internal controls. Reliance on tax professionals may demonstrate reasonable cause, but it does not do so automatically. Tax advice must be obtained from a competent advisor, be based on all relevant facts without unreasonable assumptions, and be relied on in good faith. Courts have remitted penalties where taxpayers reasonably relied on qualified tax advisors but have upheld them where reliance amounted to mere return preparation or where the taxpayer failed to supply accurate information or exercise minimal oversight. Once the IRS meets its initial burden to produce evidence supporting the penalty, the taxpayer bears the burden to prove reasonable care and good faith. Timely professional advice and taxpayers' diligence and oversight become important to mitigate or eliminate accuracy-related penalties.

When relying on tax practitioners to prepare tax returns, both the USA and South African law require taxpayers to implement internal controls and procedures to detect and correct errors. This demonstrates reasonable care and good faith when returns are prepared by tax practitioners, reducing the likelihood of penalties being imposed. However, the USA, in terms of section 6664 of the Code, allows relief from penalties after considering all relevant facts and circumstances of the case, including the taxpayer's experience, knowledge, and education. This provision is not available to South African taxpayers, leaving them extremely vulnerable to penalties. Tax practitioners can, however, mitigate penalties, but cannot eliminate exposure. One way of eliminating penalties in both South Africa and the USA is by obtaining tax opinions from registered tax advisors substantiating a tax position taken. In both countries, it is important that tax

practitioners take reasonable care when preparing tax opinions by considering all the facts and circumstances and making reasonable assumptions. The USA law goes a step further and requires tax opinions to disclose the fact that a regulation of the Code is invalid. It is clear that in both countries the ultimate responsibility for tax compliance remains with taxpayers. Even though taxpayers rely on tax practitioners to file accurate information, taxpayers still bear the risk of penalties being imposed for negligence and lack of reasonable care taken by their tax advisors.

3.3 Overview of the Australian tax practitioner regulations and tax penalties

Both South Africa and Australia have tax legislation in place to penalise taxpayers for understatement on their tax returns. Similar to the understatement penalties enforced by South African authorities as outlined in section 223 of the TAA, Australia employs a comparable approach with penalties specified in section 284-75 of the Australian Tax Administration Act of 1953. In Australia, understatement penalties are known as shortfall penalties. Both countries determine the penalty percentages to be imposed based on specific taxpayer behaviours. As established in Chapter 2, understatement penalties in South Africa could be eliminated when taxpayers can prove that the understatement was due to a *bona fide* inadvertent error. This provision allows for leniency in cases where the understatement was unintentional and made in good faith. Australia adopts a similar approach in subsections 284-75(5) and 284-75(6) of the Australian Tax Administration Act of 1953, where taxpayers could avoid shortfall penalties if they demonstrate reasonable care in making their statements by using the services of registered tax agents.

3.3.1 Tax agent regulation

Tax agents in Australia are critical to the country's tax administration system, ensuring compliance with tax laws and assisting taxpayers in their dealings with tax authorities (Walpole & Salter, 2014:335-337). As stated by Walpole and Salter (2014:339), the regulation of tax agents and Business Activity Statements (BAS) agents is primarily governed by the Tax Agent Services Act 2009 (TASA), which established the Tax Practitioners Board. Subdivision 60-1 of the TASA, states that the Tax Practitioners Board oversees registration and regulation of tax agents and reports to the Minister on its operations each year. Its aim is to enhance the integrity of the tax system and protect taxpayers.

Two categories of tax practitioners are identified in Division 90 of the TASA, namely tax agents and BAS agents. Tax agents are authorized to provide a wide range of tax services, including the preparation and lodgement of income tax returns, as well as services that BAS agents provide. BAS agents, on the other hand, are primarily responsible for services related to Business Activity

Statements, such as goods and services tax reporting and other related financial activities. Both categories require specific registration and compliance with the TASA.

The objective of the TASA in subdivision 2-A is to promote public trust and confidence in the integrity of the tax profession and system by ensuring that tax agent services are provided in line with appropriate professional and ethical standards. It is stipulated in subdivision 2-10 of the TASA that a tax agent should be registered to provide tax services for a fee or to engage in other conduct connected with providing such services. It also states that once registered, tax agents must comply with requirements set out in the Code of Professional Conduct.

To become eligible for registration as tax agents or BAS agents as stipulated in subdivision 20-5 of the TASA, the following requirements must be met:

- be 18 years or older;
- a fit and proper person;
- meets the requirements prescribed by the Tax Agent Services Regulation 2022, including but not limited to, those relating to qualifications and experience; and
- maintains or will be able to maintain indemnity insurance that meets the Board's requirements.

Subdivision 20-5 of the TASA also permits the registration of partnerships and companies as tax agents or BAS agents. When renewing their registration each year, individuals, partnerships and companies must maintain professional indemnity insurance and complete continuing professional education that meets the Board's prescribed requirements.

The qualifications and experience required to register as a tax agent or BAS agent are set out in Schedule 2 of the Tax Agent Services Regulation 2022. To become a registered BAS agent, an individual must have a Certificate IV Financial Services (or a higher award) in bookkeeping or accounting from a registered training organisation or an equivalent institution, must have successfully completed a Board-approved course in basic goods and services tax/BAS taxation principles and must have undertaken 1 400 hours of relevant experience in the past four years.

Individual tax agents may be required to complete several Board-approved courses successfully, including those in basic accountancy principles, Australian taxation law, commercial law, and a specific unit on the TASA, which includes the Code of Professional Conduct.

The Tax Practitioners Board is regulated in terms of Division 60 of the TASA. The Tax Practitioners Board is responsible for administering the registration of tax agents and BAS agents, investigating registration applications and potential breaches of the Act. It also imposes sanctions

for non-compliance with the Code of Professional Conduct, issuing guidelines to support these functions, and performing any other duties assigned by the TASA or Commonwealth law, including any related tasks necessary to fulfil its responsibilities. Because tax authorities place reliance on tax agents, they play an important role in assisting taxpayers to minimise exposure to penalties caused by non-compliance.

3.3.2 Shortfall penalties

The Australian Tax Administration Act of 1953, which has been in effect since 1 July 2000, addresses shortfall penalties in section 284-75 (ATO, 2008:3). The Commissioner issued Practice Statement Law Administration 2012/5 to provide guidelines on shortfall penalties which is imposed in terms of Schedule 1 of the Australian Tax Administration Act of 1953 for making a false or misleading statements. The guideline outlines how the shortfall penalty is assessed and when remission may be considered (ATO, 2012:1).

Paragraph 9 of the Practice Statement Law Administration 2012/5 provides the following principles to consider before shortfall penalties are imposed:

- The primary purpose of the penalty provision is to encourage taxpayers to take reasonable care in complying with their tax obligations and should therefore not be punished.
- It ensures fairness by imposing consequences on taxpayers that fail to take reasonable care or do not make a reasonable effort to comply with reporting obligations.
- Taxpayers are presumed to be honest unless existing information indicates otherwise.
- Each case must be evaluated individually, taking into consideration taxpayers' background and experience.
- The decisions made in each case must be supported by facts and evidence.
- Taxpayers should be given the opportunity to explain their action before a penalty is imposed.

According to Woellner *et al.* (2021:723), the "penalty framework in Australia aims to reflect the seriousness of the taxpayer's failure to comply", with lesser penalties imposed for mere carelessness and higher penalties for deliberate attempts to avoid tax obligations. The penalties for each shortfall are determined based on three distinct behaviours as outlined in Paragraph 99 of the Practice Statement Law Administration 2012/5 and generally range from 75% to 25% of the shortfall amount. Paragraph 99 of the Practice Statement Law Administration 2012/5 specifies three different shortfall penalty rates corresponding to three behaviours, which are detailed in the table below.

Table 2-1: The Australian shortfall penalty table

Behaviour	Base penalty amount is
Intentional disregard Applies when taxpayers knowingly engage in behaviour that violates tax law (underpaying tax or over-claiming an entitlement).	75% of the shortfall amount
Recklessness Taxpayers are reckless if a reasonable person in their circumstances would have been aware that there was a real risk of a shortfall amount arising and they disregarded, or showed indifference to, that risk.	50% of the shortfall amount
Failure to take reasonable care Generally, taxpayers fail to take reasonable care if they have not done what a reasonable person in the same circumstances would have done. Using a tax agent does not by itself mean taxpayers have taken reasonable care.	25% of the shortfall amount

It is stated in section 284-70 of the Australian Tax Administration Act of 1953 that administrative penalties will be imposed if:

- taxpayers or its agents make false or misleading statements about tax-related matters, or
- if they take a position that is not reasonably arguable about a tax-related matter, or
- the Commissioner determines a tax-related liability without having the documents the taxpayer was required to provide.

Paragraph 90 of the Practice Statement Law Administration 2012/5 clarifies that each statement by taxpayers or their agents resulting in tax shortfalls should be assessed individually, as different levels of care may apply to each shortfall. To clarify the ATO's principles and practices, especially where tax legislation may be open to diverse interpretations, the Commissioner has issued public guidance and rulings, for example, the Miscellaneous Taxation Rulings MT 2008/1 and MT 2008/2. These rulings assist taxpayers and tax agents to interpret the complexities of tax laws. To determine the different levels of care and behaviours, taxpayers and tax agents should turn to the guidelines provided in the Miscellaneous Tax Ruling MT 2008/1 (ATO, 2008a).

The shortfall penalty can also be increased. Section 281-220 of the Australian Tax Administration Act of 1953 states that the base penalty amount is increased by 20% where the taxpayer prevents

or obstructs the Commissioner from finding out about the shortfall, becomes aware of the shortfall amount after the statement has been made and does not inform the Commissioner about it within a reasonable time, or if the same penalty have been imposed previously, even if it was remitted.

3.3.2.1 Intentional disregard

In cases where taxpayers intentionally fail to comply with tax laws, the most severe penalty of 75% of the tax shortfall will be applied. Sections 109 to 116 of the MT 2008/1 explain what constitutes intentional disregard. Paragraph 110 of the MT 2008/1 states that the meaning of 'intentional' in the context of taxation implies more than mere recklessness or indifference towards the law. Unlike the objective assessment used to determine reasonable care or recklessness, intentional disregard is assessed subjectively, focusing on the actual intention of the taxpayer to be reckless.

Paragraph 112 of the MT 2008/1 indicates that for behaviour to qualify as intentional disregard, it must involve actual knowledge that a statement is false. This requires the entity to comprehend the implications of the relevant legislation and consciously decide to contravene it. Dishonesty is an essential characteristic of intentional disregard, setting it apart from the other two behaviours, mere recklessness or a lack of reasonable care, where dishonesty is not an element.

Evidence of an entity's intent can be gathered directly or inferred from its conduct and the surrounding circumstances. Notably, failing to comply with the Commissioner's perspective in a private ruling does not, in itself, constitute intentional disregard. However, if an entity disregards an unfavourable ruling when the law is clear, such behaviour may be considered intentional disregard. This view is supported by an example provided in terms of paragraph 91 of the Practice Statement Law Administration 2012/5 where the tax officer, during a field verification visit, found that the company intentionally disregarded a taxation law and imposed a 75% penalty on the tax shortfall.

The decision in *Weyers v Federal Commissioner of Taxation* (2006) illustrates that a finding of intentional disregard can be established through the facts and surrounding circumstances. In this case, the tax agent deliberately classified trust distributions as loans instead of recognising them as income. Paragraph 168 of the case concluded:

I return to the requirement of the ITA Act that a taxpayer disclose trust income. It does not really matter whether the moneys distributed by the family trust went to Nommack Nominees as banker, as bare trustee or as trustee of the Sydney trust. To the extent that such moneys and other income of the Sydney trust was distributed to the Weyers, it was income derived from one or other of the two trusts and should have been returned as such.

I cannot avoid the conclusion that Mr Steele must have known that. He intentionally disregarded the requirement for disclosure of such income. That caused the Weyers' tax shortfalls.

The court found that the tax agent knew the distributions were not loans and intentionally disregarded the obligation to disclose the income. While no direct evidence of intent was presented, the facts strongly suggested that the tax agent intentionally disregarded the tax law.

Sections 284-75(5) and 284-75(6) of the Australian Tax Administration Act of 1953 provide a safe harbour for taxpayers who rely on tax agents or BAS agents, in terms of which no penalties are imposed. However, this protection does not apply where the agent acts with intentional disregard for the law.

3.3.2.2 Recklessness

In terms of paragraphs 99 to 101 of the MT 2008/1, recklessness occurs when a taxpayer's actions significantly deviate from the level of care expected of a reasonable person in similar situations but are less culpable than an intentional disregard of a taxation law. The higher the level of carelessness, the higher the shortfall penalty that will be imposed.

This is demonstrated in the case of *Hart v Federal Commissioner of Taxation* (2002) where the court addressed the issue of the deductibility of aircraft expenses, which were ultimately disallowed, as they were determined not to be business expenses. The Commissioner imposed penalties on the basis of reckless behaviour, because the tax return was prepared by the accounting firm of the applicant's husband, who had full knowledge of the circumstances surrounding the claim. The applicant demonstrated a long history of minimal income in contrast to substantial expenditures, and the deduction amount under dispute was significant, totalling \$58 000. Paragraphs 106 and 107 of the MT 2008/1 ruling outline the decisions made by Judge Dowsett and the judgment on appeal by Judges Hill and Hely. The judges evaluated the conduct by considering what a reasonable person would do under similar circumstances. It was determined that a reasonable tax agent would not have ignored the potential risk that the expenses might not be deductible for tax purposes. Therefore, the ruling emphasised that disregarding the risk of an expense being non-deductible could be classified as reckless behaviour.

In the case *BRK (Bris) Pty Ltd v Federal Commissioner of Taxation* (2001), the taxpayer deliberately misrepresented that certain beneficiaries were entitled to trust income. The tax agent did not make sure that it was a valid appointment in terms of the trust deed. Cooper J indicated the following in paragraph 80 of the case:

... were indifferent as to whether or not the statements as to the distribution of income contained in the returns were correct. It was reasonably foreseeable to a person in their position that to allow the preparation and lodgement of the tax returns on that basis would cause the Act to operate so as to bring the income of the Trust to account under s97 of the Act rather than s99A(4), when there was a real risk that that was not the correct basis on which the income ought to be assessed.

The tax agent did not apply the standard of care that is expected of a reasonable tax agent under the same circumstances and the court ruled that the agent acted recklessly. These cases serve as a precedent, indicating that carelessness or no reasonable care taken may justify the imposition of penalties due to recklessness, even though a tax advisor was used in this case. The above case proves that tax agents should take care when providing advice or preparing tax returns, since their education, knowledge and skills are taken into consideration when incorrect information is declared to tax authorities.

3.3.2.3 Failure to take reasonable care

In an attempt to prevent shortfall penalties, taxpayers should prove that reasonable care was taken when the shortfall occurred. The term 'reasonable care' lacks a formal definition and thus is interpreted according to its ordinary meaning. Paragraph 27 of MT 2008/1 states the following about reasonable care:

The *Australian Oxford Dictionary*, 1999, Oxford University Press Melbourne, defines 'care' as "... 3 serious attention; heed, caution, pains" and 'reasonable' as "3a within the limits of reason; not greatly less or more than might be expected". Taking "reasonable care" in the context of making a statement to the Commissioner or to an entity within the meaning of subsection 284-75(4) means giving appropriately serious attention to complying with the obligations imposed under a taxation law.

Paragraph 31 of the MT 2008/1 states that the reasonable care test indicates that taxpayers exercise care in fulfilling tax obligations as expected of a reasonable person in their position, taking into consideration the taxpayer's circumstances, knowledge, and experience. In terms of paragraph 33 of the MT 2008/1, the determination of whether taxpayers acted negligently, the intent of taxpayers is not important, but rather whether reasonable care could be shown.

It is important to note that "reasonable" does not mean the highest level of care or perfection as stated in paragraph 34 of the MT 2008/1. This has been confirmed by Judge Barwick in the court case of *Maloney v. Commissioner for Railways (NSW)* (1978). The reasonable care standard does not obligate an entity to prevent every possible shortfall amount. Ensuring that accounting

systems and internal controls are well-designed and effectively monitored to minimise the likelihood of errors aligns with the standard of taking reasonable care. Reasonable care could also be demonstrated by maintaining a reasonably arguable position by using research and authoritative sources to support the stance taken in a tax return (MT 2008/1:10).

When reasonable care is determined in terms of paragraph 45 of the MT 2008/1, factors to consider should include the personal circumstances of a taxpayer such as their age, health, background, knowledge, education, experience, skills and understanding of tax laws. Paragraph 46 of the MT 2008/1 states that as transactions become more complex, a higher level of care is required, as it is expected from a reasonable person to implement appropriate record keeping systems and procedures to meet their tax obligations.

When determining reasonable care, the education, knowledge, and skills of tax professionals are taken into account. This principle is demonstrated in paragraph 54 of the MT 2008/1:

The decision in *Arnett & Ors v. FC of T* 98 ATC 2137; (1998) 39 ATR 1095 illustrates this proposition. In that case, the entity's agent had requested an amended assessment on the basis that a lump sum payment on termination of employment was a *bona fide* redundancy payment and was exempt from tax. It found that the tax agent should have been expected to know or, at least find out, about possible treatment of the lump sum payment.

The standard of reasonable care for tax agents is determined by relevant factors such as the size, resources, specialisation, and client base, and is measured against what would be expected of a reasonable and competent professional with similar practice characteristics, as stated in paragraphs 56 and 57 of the MT 2008/1. Paragraph 61 of the MT 2008/1 states that when taxpayers can demonstrate that they made the necessary effort to do research in support of their basis for a tax position taken, even if it is different from the Commissioner's, it will be an indication of reasonable care (MT 2008/1.15).

Paragraph 65 of the MT 2008/1 specifically discusses using tax agents or advisors. Using the services of tax agents does not automatically imply that a taxpayer has exercised reasonable care. The taxpayer remains ultimately responsible for disclosing all relevant information and facts to the tax advisor to demonstrate reasonable care. The MT 2008/1 demonstrates this obligation by referring to the following court case:

In *Re Sparks and Federal Commissioner of Taxation* [2000] AATA 28; (2000) 43 ATR 1324, the entity had failed to alert its accountant to the absence of a substantial amount of interest income. There was no acceptable explanation for the omission. The AAT found that the failure to disclose the interest income was not reasonable.

It remains the taxpayers' obligation to ensure that the advice they obtained is reasonable by ensuring the tax agent is suitably qualified. Conducting additional research to substantiate tax advice will show reasonable care and avoid penalties. Paragraph 52 of the Practice Statement Law Administration 2012/5 states that the more complex the tax matter and the greater the monetary amount, the greater the enquiry expected from taxpayers directed to their tax practitioners before signing documents. In circumstances where a tax agent does not apply reasonable care when interpreting information received from clients or third parties, the taxpayer will become liable for penalties imposed (ATO, 2008a:20).

In South Africa and Australia, penalties of 25% are imposed when a taxpayer or a tax practitioner does not apply reasonable care when completing tax returns. Australia, however, provides better guidance in its Practice Statement Law Administration 2012/5 and MT 2008/1 rulings. In both countries, reasonable care does not imply perfection, but merely care taken that a reasonable person in the taxpayer's position would exercise when meeting their tax obligations. The knowledge, education, experience and skills of taxpayers and their tax advisors are considered when determining whether reasonable care has been exercised. Taxpayers should therefore take the necessary steps and precautions to ensure the accuracy of their tax practitioners' views and declarations to substantiate the information submitted to tax authorities. If taxpayers fail to take reasonable care in completing a return, penalties may be imposed. Taxpayers in South Africa and Australia remain liable for the penalties caused by the negligence of their tax practitioners.

3.3.3 Interaction between tax agents and shortfall penalties

In terms of the Australian Tax Administration Act of 1953, exemptions are available that protect taxpayers from the risk of shortfall penalties. Section 284-75(5) of the Australian Tax Administration Act of 1953 states that no penalties will be imposed if taxpayers and their agents took reasonable care in making a statement. Another exception is outlined in section 284-75(6) of the Australian Tax Administration Act of 1953 and paragraph 12B of the MT 2008/01, which is a safe harbour where taxpayers will not be liable to a shortfall penalty if:

- they engage a registered tax agent or BAS agent;
- give the registered tax agent or BAS agent all relevant taxation information;
- the registered tax agent or BAS agent makes the statement; and
- the agent did not act recklessly or with intentional disregard of the law when making the false or misleading statement.

Paragraph 11B of the Practice Statement Law Administration 2012/5 states that the safe harbour exception applies only when the agent who made the statement is registered and has failed to

exercise reasonable care. Paragraph 11C of the Practice Statement Law Administration 2012/5 also states that each statement must be evaluated individually to determine whether it meets these criteria and if it does, neither the taxpayer nor the tax agent will be subject to penalties.

When assessing reasonable care, several factors must be taken into account, including whether a registered tax agent or BAS agent was appointed, and the extent of the agent's knowledge and understanding. The level of expertise and diligence demonstrated by the agent plays a significant role in determining if reasonable care has been exercised.

Even when taxpayers use registered tax agents or BAS agents, they must maintain a responsible approach to their tax matters. Simply hiring an agent does not ensure that reasonable care has been taken. Taxpayers must still establish proper reporting and recording systems, provide accurate and complete information, and verify the agent's work by questioning the advice that seems incorrect, unusual, or overly complex, especially in areas involving significant monetary amounts or intricate tax laws. Before signing documents prepared by agents, taxpayers should confirm that the information is accurate. If reasonable care is not exercised, taxpayers can be penalised for errors made by their agents. While agents are held to a higher standard due to their expertise, they are not required to audit every detail but must make reasonable inquiries if the information seems questionable.

Appointing tax agents does not absolve taxpayers of their responsibility. Since taxpayers are typically held accountable for the actions of their tax agents, except in cases where the safe harbour provisions apply, taxpayers may become liable for penalties caused by their tax agents. It would be unusual to grant full remission unless the taxpayer demonstrated that he or she has exercised reasonable care. In such situations, remission is generally only considered when it can be shown that taxpayers made a genuine effort to comply with their obligations. It is still expected of taxpayers with limited knowledge to engage actively, asking pertinent questions, or making reasonable inquiries based on their knowledge and experience to ensure reasonable care is taken when providing information to the Commissioner, even when relying on tax agents.

3.3.4 Comparison between South Africa and Australia

3.3.4.1 Tax practitioner regulation

In South Africa, any natural person who, for reward, provides tax services and assists with tax returns, must register both with SARS and an RCB. Practising without registration constitutes a criminal offence. Australia centralises regulation in the Tax Practitioners Board, created by the TASA. The Tax Practitioners Board registers two categories of tax professionals, namely tax agents, who provide comprehensive tax services, including income tax return preparation, and

BAS agents, who focus on Business Activity Statement services under a single code of professional conduct. Australia registers individuals, partnerships and companies as tax agents or BAS agents. However, the partners of a partnership and directors of a company must comply with specific requirements.

Registration and maintaining the tax practitioner status requirements are stringent in both South Africa and Australia. In South Africa, admission is mediated through an RCB and SARS. Applicants and tax practitioners must hold appropriate qualifications and verifiable experience, complete the SARS Tax Practitioner Readiness Programme, maintain a tax compliant status, and meet ongoing continuing professional education set by their RCB. In Australia, Tax Practitioners Board registration is contingent on Board-approved study in accounting, Australian taxation law, commercial law and the Code of Professional Conduct, prescribed practical experience, a proper assessment, and mandatory professional indemnity insurance. South Africa relies on RCBs as delegated authority to verify registration, enforce codes of conduct, ensure continuing professional development and run disciplinary processes, with SARS empowered to lodge complaints and to require reports on member compliance. Australia vests these functions in a single Tax Practitioners Board, which investigates breaches of the code and imposes administrative sanctions.

Both South Africa and Australia require of tax professionals to be registered with a regulatory body and registration must be renewed on an annual basis. However, in South Africa tax practitioners must also be registered with the tax authority, SARS, which is not required in Australia. South Africa only allows individuals to register as tax practitioners, whereas in Australia, partnerships and companies can also register as tax agents or BAS agents. Both countries have strict requirements to register and maintain tax practitioner registration, but Australia requires of the registered agents also to maintain professional indemnity insurance. Regulation of tax professionals in South Africa relies on the oversight of multiple RCBs to regulate tax practitioners, creating a system that depends on consistent performance across different bodies, which is sometimes difficult to achieve. Australia, on the other hand, ensures greater uniformity and accountability through a single statutory regulator, the Tax Practitioners Board.

3.3.4.2 Penalty systems

In both South Africa and Australia, the imposition of penalties for tax non-compliance serves as a deterrent to promote adherence to tax obligations. South Africa's system, in terms of the TAA, categorises taxpayer behaviour, imposing penalties ranging from 10% to 150% for a standard case based on the severity of the misconduct. This framework requires proof that taxpayers' actions led to prejudice against SARS or the fiscus. Similarly, Australia's shortfall penalties,

governed by the Australian Tax Administration Act of 1953, vary from 25% to 75%. The Australian regime is also behaviour based and assesses penalties based on taxpayers' intent and care in fulfilling tax obligations.

Both jurisdictions impose severe penalties for intentional tax evasion. In South Africa, intentional tax evasion attracts the highest penalties of up to 150% for a standard case, requiring evidence of deliberate attempts to deceive tax authorities. This behaviour compares to intentional disregard in Australia and involves a 75% penalty, focusing on the taxpayer's intent. In terms of recklessness and negligence, South Africa's focus on gross negligence entails penalties up to 125%, characterising behaviour that shows substantial deviation from reasonable care without intent to deceive. In Australia, recklessness is similarly characterised and a penalty of 50% is imposed. When taxpayers fail to take reasonable care or establish reasonable grounds for their tax positions, South Africa imposes penalties ranging from 25% to 75%. These penalties can be mitigated if taxpayers and tax practitioners can provide proof that they acted reasonably and with due care. However, taxpayers must also prove that they took the necessary steps to ensure the accuracy of the information submitted by tax practitioners. Australia's approach similarly involves a 25% penalty for not taking reasonable care, with the expectation that taxpayers exercise care that a reasonable person would under similar circumstances.

Both South Africa and Australia impose tax penalties separately for each shortfall, based on specific taxpayer behaviours. The Australian tax penalty system distinguishes between three types of behaviour, whereas South Africa recognises five behaviours, making it more complex to determine the correct classification in the South African context. Compared to South Africa, the Australian penalty regime is less severe, with penalties ranging from 25% to 75%, while South Africa's behaviour-based penalties range from 10% to 150% in standard cases, which is substantially higher than those applied in Australia. Furthermore, Australia provides comprehensive guidance through MT 2008/1 and Practice Statement Law Administration 2012/5, supported by relevant case law, which is currently lacking in South Africa.

3.3.4.3 Interaction between tax practitioners and penalties

Taxpayers in South Africa and Australia remain responsible for the information completed on their tax returns, and using a tax advisor does not, on its own, eliminate penalty risk. In South Africa, courts have made it clear that reliance on a tax practitioner does not automatically protect the taxpayer from penalties. Penalties are reduced where the taxpayer sought timely advice from a tax practitioner and maintained oversight but are upheld where practitioner errors showed that the taxpayer had not taken reasonable care to ensure the submitted information was accurate. Relief from understatement penalties is available for substantial understatement if the taxpayer,

by the return due date, made full disclosure of the facts and obtained an independent registered tax practitioner's opinion stating that the position is more likely than not to succeed in court. In such instances, SARS must remit that penalty, provided the opinion was based on reasonable grounds. Recent cases also accept that good faith reliance on expert opinions can amount to a *bona fide* inadvertent error, which removes penalties entirely, but taxpayers still need to prove the presence of internal controls, complete instructions to advisors, and that an active review of filings was carried out. Currently, the concept of a *bona fide* inadvertent error is applied in relation to all the understatement behaviours in South Africa, but SARS intends to limit it only to substantial understatement as provided in the proposed Draft Tax Administration Laws Amendment Bill of 2025 (SARS, 2025).

In Australia, taxpayers are protected from shortfall penalties if they and their tax agent took reasonable care when submitting statements to tax authorities. However, taxpayers remain liable for penalties caused by their tax agents if the agent acted recklessly with intentional disregard of the law. Australia incorporates reasonable care with a safe harbour exemption for declarations made by its tax agents. Taxpayers will not be penalised where a registered tax or BAS agent made the statement, the taxpayer gave the agent all relevant information, and the agent did not act recklessly or with intentional disregard. There is also no penalty where the taxpayer and his agent took reasonable care in making the statement, but appointing an agent is not enough. Taxpayers must keep proper records, provide full and accurate facts, query advice that seems wrong or unusual, and check documents before signing.

Australian and South African law requires of taxpayers to implement internal controls and procedures to detect and correct errors made by their tax practitioners, which demonstrates reasonable care and good faith when preparing returns, reducing the likelihood of penalties being imposed. In both countries penalties could be remitted if taxpayers rely on opinions or statements from tax practitioners; however, they must take reasonable care when providing such opinions or statements. When tax practitioners act recklessly or with intentional disregard, taxpayers remain liable for penalties imposed due to the negligence of their tax practitioners. Australia does allow relief from penalties after considering all relevant facts and circumstances of the case, including the taxpayer's experience, knowledge, and education in demonstrating reasonable care. This provision is not available to South African taxpayers, leaving them more vulnerable to penalties. It is evident that in both countries, the ultimate responsibility for tax compliance rests with the taxpayer. Although taxpayers may rely on tax practitioners to submit accurate information, they still bear the risk of penalties arising from negligence or a lack of reasonable care on the part of their tax advisors.

3.4 Conclusion

The aim of this chapter was to conduct a comparative study of tax administrative laws in South Africa, the USA and Australia, aiming to identify differences in their regulation of tax practitioners, the tax penalty regimes, and the impact of using regulated tax practitioners on the penalty system. This chapter found that the understatement penalty systems in South Africa, the USA and Australia are primarily designed with the objective of deterring non-compliance with tax laws. It was also found that tax practitioners play an important role in assisting taxpayers to meet their tax obligations and reducing the risk of tax penalties for non-compliance. However, from the discussion, it is evident that not applying reasonable care by taxpayers and tax practitioners will not eliminate penalties.

Tax practitioner regulation

A comparison of South Africa, the USA and Australia showed differences in how each country regulates tax practitioners, applies tax penalties, and connects professional advice with penalty relief. Each country aims to maintain professional standards and improve the integrity of the tax system by regulating tax practitioners. In terms of practitioner regulation, South Africa applies a model where all tax practitioners must register with an RCB and SARS, meet minimum entry requirements, and maintain continuing professional development. However, South Africa does have various RCBs where tax practitioners could register, and registration with the tax authority, SARS, is also compulsory. The USA and Australia require registration with a single regulatory board that regulates tax practitioners on behalf of the tax authority of each country, ensuring uniform compliance for all tax practitioners. In South Africa, registration is overseen by multiple RCBs each operating in terms of its own code of conduct, which may result in challenges to achieving uniform compliance.

The USA separates the right to prepare returns from the right to represent taxpayers before the IRS. While anyone may prepare returns who possesses a Preparer Tax Identification Number, only attorneys, CPAs, and enrolled agents regulated in terms of Circular 230 may engage directly with the IRS, subject to oversight by the OPR. Australia centralises regulation in terms of the Tax Practitioners Board, which licences two categories of practitioners, namely tax agents and BAS agents, sets qualification standards, and enforces a statutory code of professional conduct. Both Australia and the USA recognise two types of tax practitioners, whereas South Africa only has a single type of practitioner registration.

Tax penalties

The analysis in the chapter revealed that South Africa has the most severe penalty regime, with understatement penalties ranging from 10% to 200%, depending on the taxpayer's behaviour category. The TAA distinguishes between five different behaviours that tax authorities could apply; however, limited guidance is available on how to determine the correct behaviour. The USA, by contrast, applies a simpler approach by imposing an accuracy-related penalty of 20%, increasing to 40% in certain cases, triggered by two behaviours, namely negligence or substantial understatement, with relief based on a case-specific reasonable cause and good faith defence. Australia's penalties lie in the middle with shortfall penalties of 25% to 75% according to three behaviours and supplemented by detailed Australian Taxation Office guidance to ensure consistency. While all three countries penalise non-compliance, South Africa stands out for its harsher penalty percentages, whereas the USA and Australia have lower penalty percentages and provide clearer guidelines to ensure the appropriate penalty is imposed on taxpayers.

Interaction between tax practitioners and penalties

In South Africa, the USA and Australia, the ultimate responsibility for the accuracy of tax returns always rests with the taxpayer. Relying on tax practitioners only mitigates, rather than eliminates, exposure to penalties. In South Africa, penalties can be waived if the taxpayer has fully disclosed the relevant facts and obtained a tax practitioner's written opinion stating that their position is more likely than not to stand up in court. It is, however, important that the opinion is based on reasonable grounds and made with due care. SARS and the courts have also waived penalties where taxpayers can prove that an understatement occurred due to a *bona fide* inadvertent error where they acted in good faith and with reasonable care. In the USA, taxpayers may also avoid penalties if they can show that they reasonably relied on professional advice. Here, the advisor must be competent, the taxpayer must have provided complete information, and the reliance must have been in good faith. Taxpayers' experience, knowledge, and education are also important factors in determining whether they reasonably relied on the advice from tax practitioners. Penalties in Australia will not be imposed if taxpayers and their tax agents took reasonable care when making statements, however, taxpayers must verify the work of their tax agents to determine the reasonability thereof. This will strengthen taxpayers' proof that reasonable care was taken. Australia has also introduced a statutory safe harbour. If a registered agent makes an error, the taxpayer supplied all necessary information, and the agent did not act recklessly or with intentional disregard, then no penalty is charged.

Even though taxpayers rely on tax practitioners who are regulated, required to have training, knowledge and skills to provide reliable and reasonable advice, the principle remains that taxpayers cannot completely avoid their responsibility and prevent understatement penalties by relying solely on tax practitioners.

CHAPTER 4: SUMMARY AND CONCLUSION

4.1 Introduction

Taxpayers often struggle to understand the complexities of tax legislation and therefore rely on tax practitioners for reasonable advice, accurate reporting and maintaining tax compliance. The TAA consolidated various tax acts to streamline administration, improve compliance and safeguard the fiscus by introducing a behaviour-based understatement penalty regime. Penalties ranging from 10% to 200% are imposed depending on the taxpayer's behaviour category. Tax practitioners play an important role in mitigating these penalties, and therefore, to enhance accountability of tax practitioners, the TAA requires them to register with an RCB and SARS, adhere to qualification and ethical standards and undergo continuous professional development. Although tax practitioners are required to comply with regulated professional and ethical standards, taxpayers ultimately remain liable for any penalties arising from their practitioners' negligence.

This study aimed to address the research question of how South Africa's interaction between taxpayers, tax practitioners, and the understatement penalty system compares with that of the USA and Australia. As outlined in section 1.5, the objective of this study was to evaluate the understatement penalty regime by analysing the relationship between taxpayers, tax practitioners, and the understatement penalty system to determine the current role tax practitioners fulfil in relation to the imposition of understatement penalties. The framework adopted in South Africa was then compared to the tax laws and regulations applied in the USA and Australia to identify similarities and differences. A doctrinal and comparative methodology was applied, drawing on primary legislation, articles and case law. This final chapter provides a summary of findings relating to the research objectives. This chapter and the study close by identifying the limitations of this study and making recommendations for areas that may be considered for further research.

Chapter 2 analysed the regulation of tax practitioners in South Africa through RCBs, the application of understatement penalties, and the influence of tax practitioners on the imposition of such penalties. Chapter 3 examined the governance of tax practitioners, the penalties for tax non-compliance and the interaction between these aspects in the USA and Australia and compared them to the framework applied in South Africa. This concluding chapter presents the principal findings of the study, assessing whether the South African understatement penalty regime is fairly enforced when taxpayers rely on regulated tax practitioners, in comparison with the systems applied in the USA and Australia and provides general conclusions and recommendations.

4.2 Summary

4.2.1 Interaction between tax practitioners and understatement penalties in South Africa

Tax practitioner regulation

In South Africa, persons who provide tax advice or prepare tax returns for payment must register with both an RCB and SARS. SARS sets the basic entry and qualification requirements for tax practitioners, such as having the appropriate education, relevant work experience, completing the Tax Practitioner Readiness Programme, undertaking yearly continuing professional development, and remaining tax compliant. The RCBs then monitor professional conduct and handle disciplinary cases. However, because there are several different RCBs, each with its own code of conduct and procedures, the system can be inconsistent. This lack of uniformity can lead to unequal treatment of tax practitioners when acting recklessly or without reasonable care, which in turn causes taxpayers to become liable for understatement penalties.

Understatement penalties

The understatement penalty system in Chapter 16 of the TAA links the percentage of the penalty imposed to the taxpayer's behaviour. Once SARS proves that there was an understatement and that SARS or the fiscus suffered prejudice, the penalty table applies. The table lists five types of behaviour, ranging from failing to take reasonable care to intentional tax evasion and the penalties increase with the seriousness of the behaviour. These penalties range from 10% to 200% in some cases, and there is little guidance to assist SARS or taxpayers in determining which behaviour category applies. Currently, court cases have helped to clarify how certain behaviours should be determined. However, the courts' interpretations do not always align with the views of SARS. Taxpayers remain ultimately responsible for their own tax returns, even if a registered tax practitioner prepares and submits them.

Interaction between tax practitioners and understatement penalties

Simply using a practitioner does not mean that the taxpayer has taken reasonable care. Penalties can be reduced or prevented if taxpayers prove that they acted with reasonable care and in good faith. If an understatement resulted from a *bona fide* inadvertent error, no penalty will be imposed. The proposed changes in the proposed Draft Tax Administration Laws Amendment Bill (SARS, 2025) aim to limit this relief only to substantial understatements. For substantial understatements, penalties must also be waived if the taxpayer made a full disclosure and obtained a written opinion

from a registered tax practitioner confirming that their position is “more likely than not” to succeed in court. Overall, the South African system expects taxpayers with limited tax knowledge to ensure that the information submitted by their tax practitioners to SARS is accurate and free of misstatement. Even though tax practitioners operate in a regulated environment, taxpayers can only rely on their advice and opinions if it is based on reasonable grounds and due care was taken, but not when they rely on practitioners to submit their tax information to SARS without taking reasonable measures to ensure the accuracy thereof.

4.2.2 Comparison between South Africa, the USA and Australia

Tax practitioner regulation

The interaction between tax practitioners and understatement penalties was compared to those of the USA and Australia. In the USA, the IRS regulates tax practitioners through Circular 230 and the OPR. Only qualified professionals such as attorneys, Certified Public Accountants, and Enrolled Agents may represent taxpayers before the IRS. They must meet strict ethical and educational standards, renew their registration annually, and can be fined, suspended, or disbarred for misconduct. In Australia, tax practitioners are regulated in terms of the TASA by a single regulating body, the Tax Practitioners Board. The Tax Practitioners Board registers two types of professionals, tax agents and BAS agents. Registration is available to individuals, partnerships and companies that meet qualification, experience, and indemnity insurance requirements. The Tax Practitioners Board enforces a uniform code of professional conduct and ensures ongoing professional development.

Tax penalties

South Africa’s understatement penalty system is behaviour based and ranges from 10% to 200%, depending on the taxpayer’s conduct. The system is complex, and different interpretations of behaviour often lead to inconsistent results. In the USA, the penalty is 20% of the underpaid tax and 40% in certain cases, which applies when taxpayers act negligently or make a substantial understatement. The USA does not apply different penalty percentages on each type of behaviour but rather imposes a single penalty percentage. These penalties can be waived if the taxpayer shows reasonable cause and good faith, such as relying on competent professional advice or having sound internal controls to prevent incorrect information being submitted to tax authorities. In addition, preparers themselves can be fined for taking unreasonable or reckless positions. Australia’s penalty system falls between South Africa and the USA framework. It consists of three different behaviours which impose penalties of between 25% and 75%. Australia uses clear categories such as failure to take reasonable care, recklessness and intentional disregard. These

behaviours are supported by detailed guidelines (Practice Statement Law Administration 2012/5 and MT 2008/1), which make the system more predictable and easier to apply.

Interaction between tax practitioners and penalties

In all three countries, taxpayers rely on tax practitioners to address their tax compliance by providing reasonable advice and to file accurate information. However, taxpayers ultimately remain responsible for the accuracy of their tax returns. Appointing tax practitioners does not automatically protect them from penalties and how the law treats reliance on tax advice differs between the systems. In South Africa, penalties can be minimised or eliminated if taxpayers obtained an independent written opinion from a registered tax practitioner before filing a return, confirming that their position is more likely than not to be upheld in court. Courts have also accepted reliance on expert advice in good faith as evidence of a *bona fide* inadvertent error. In the USA, taxpayers could avoid penalties if they relied reasonably and in good faith on advice from a qualified professional. However, they must prove that the advisors were competent, fully informed, and acted honestly. The USA also has a clear separation between professional advice and simple return preparation. In Australia, the law provides a safe harbour that protects taxpayers when a registered agent makes a false or misleading statement, provided the taxpayer gave all relevant information and the agent did not act recklessly or intentionally.

4.3 Conclusion

This study found that South Africa's understatement penalty percentages are exceptionally high, with the widest range of behavioural categories to choose from that make the system complex. Furthermore, South Africa provides the least guidance on how to determine the correct behaviour, leaving significant room for interpretation by SARS when deciding on the applicable penalty.

All three countries rely on tax practitioners to assist taxpayers with compliance and prevent incorrect reporting to tax authorities. Courts have increasingly acknowledged that reliance on tax practitioners and *bona fide* inadvertent errors can serve as valid grounds to prevent understatement penalties, unless it is proven that reasonable care was not taken. The understatement penalty regime can be enforced fairly when taxpayers appoint competent and independent tax practitioners, make full disclosure of all relevant facts, obtain tax opinions in cases of substantial understatement, and maintain effective internal controls and oversight over return submissions. However, SARS still holds taxpayers responsible for ensuring that the information submitted by their regulated tax practitioners, who themselves must comply with strict RCB and SARS standards, is accurate and free from misstatements. This expectation often results in harsh penalties that may appear unfair towards taxpayers.

In summary, South Africa's understatement penalty system is both complex and severe, with the highest penalty rates and minimal guidance for determining the correct behaviour. This exposes taxpayers to uncertain outcomes and higher dispute costs. Taxpayers with limited tax knowledge remain at risk of penalties arising from their tax practitioners' mistakes, which can only be remitted if they can provide evidence that they took reasonable steps to ensure the information submitted to SARS was correct.

4.4 Limitations of the study

This study entailed a doctrinal and comparative analysis. The literature review was limited to legislation, articles and court cases. No interviews were conducted. The comparison focused only on the USA and Australia and did not include the tax laws and regulations of other countries.

At the time this study was submitted, the proposed Draft Tax Administration Laws Amendment Bill, 2025 (SARS, 2025) had not yet been finalised. If enacted, the amendment would be likely to restrict the availability of penalty relief based on a *bona fide* inadvertent error to cases involving of a substantial understatement, thereby narrowing the scope of relief currently available to taxpayers.

4.5 Research recommendations

The study suggests that South Africa would benefit from adopting a simpler, behaviour-based penalty system accompanied by clear guidance on how to classify non-compliance behaviours correctly. It would also be in taxpayers' interest to implement a safe-harbour provision, protecting them from penalties if they engaged a registered tax practitioner, provided all relevant information, and the practitioner acted reasonably and with due care. Additionally, South Africa could strengthen compliance by introducing penalties specifically targeting tax practitioners who act recklessly or with intentional disregard for tax laws.

4.6 Areas for further research

The complexity of South Africa's behaviour-based understatement penalty regime indicates the need for further research into simplification of the regime. Clearer frameworks for categorising taxpayer behaviour could ensure that penalties are more consistently applied and that their severity is proportionate to the underlying conduct. Such research would help to determine whether the relatively harsh penalty percentages imposed by the TAA are justified, or whether they unfairly burden South African taxpayers compared to international standards.

Further research could explore the introduction of safe-harbour rules that shield taxpayers who reasonably rely on professional advice from liability for understatement penalties where

misstatements result from practitioner errors. This approach may strengthen taxpayer protection, increase confidence in the tax advisory system, and ensure that accountability is shared more appropriately between taxpayers and their advisors.

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