A Comparative Analysis of South Africa's Tax Penalty Regime in Relation to the United States of America and the Commonwealth of Australia

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Declaration

I hereby declare that this research report is solely my original work, completed without any external assistance. It is being submitted in partial fulfillment of the requirements for the degree of Master of Commerce, specializing in Taxation, at the University of Witwatersrand, Johannesburg. I affirm that this report has not been previously submitted for any other degree or examination at any other academic institution.

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Summary of Abbreviations

Abbreviation	Description
ATO	Australian Taxation Office
Australia	Commonwealth of Australia
AU TAA	Tax Administration Act 1953 (Australia)
EOI	Exchange of Information
ICT	Information and Communication Technology
IRS	Internal Revenue Services
OECD	Organisation for Economic Co-operation and Development
PAYG	Pay As You Go
PS	Penalties and Sentences Act 1992
SAIT	South African Institute of Tax Practitioners
SARS	South African Revenue Services
TAA	Tax Administration Act 28 of 2011
TAB	Tax Administration Bill
the Act	Income Tax Act 58 of 1962
The Republic	Republic of South Africa
USA	United States of America
VPU	Value of the Penalty Unit

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Abstract

Undoubtedly, tax compliance poses a significant challenge for all revenue collection authorities. Aspects such as self-assessment and electronic commerce further accentuate the importance of tax compliance. With self-assessment, the onus of calculating the appropriate tax liability and ensuring compliance with payment requirements rests on the taxpayer, rather than the revenue authority.

While the Republic of South Africa has recently revised its penalty regime and enacted new legislation through the Tax Administration Act 28 of 2011, replacing the previous regime governed by Sections 75 and 76 of the Income Tax Act 58 of 1962, it remains imperative and pertinent to examine the operative penalty regime. Such an examination is essential to comprehend and confirm the extent and application of penalties in various circumstances. In order to ensure that the penalty regime of the Republic of South Africa is in accordance with internationally recognised best practices, this research report undertakes a comparative analysis with the United States of America and the Commonwealth of Australia. These jurisdictions possess extensive practical experience in the realm of tax administrative laws over an extended period. By drawing upon their insights, valuable lessons can be gleaned to enhance the effectiveness and alignment of South Africa's penalty regime.

This research report aims to provide insights into the effectiveness of South Africa's penalty regime and identify potential areas for improvement by examining the similarities and differences in the implementation and administration of non-compliance and understatement penalties in the Republic of South Africa (RSA), the United States of America and the Commonwealth of Australia. By analysing the penalty regimes of these three countries, the research report identifies challenges or disputes that may arise with reference to previous litigations and provide policymakers and tax authorities with valuable information to improve the administration and implementation of penalties.

The report suggests that, while the establishment of the new Tax Administration Act, No 28 of 2011, has demonstrated a standardised and systematic approach to non-compliance and understatement penalties, the subjective nature of the taxpayer’s behaviour is always going to result in non-compliance by some taxpayers. The comparison indicates that the South African penalty regime is relatively high in terms of understatement penalties and lower in terms of non-compliance penalties. However, the overall administrative penalties are broadly aligned with the Commonwealth of Australia and the United States of America.

Key words: behaviour, deterrence, deterrence model, economics-of-crime, non-compliance, punishment, penalty regime, regime, tax administration act, understatement penalty

Chapter 1: INTRODUCTION

1.1. Background

The examination of tax fraud holds significant relevance for several compelling reasons. First, tax fraud detrimentally impacts tax collection and overall tax performance within a country. This, in turn, may necessitate the imposition of additional taxes, thereby burdening compliant taxpayers with an increased tax burden. Moreover, tax fraud can engender misallocations in resource utilisation when individuals engage in efforts to evade their tax obligations.

Tax fraud is not defined in the Income Tax Act 58 of 1962 (the act), however, the word 'tax' it is defined in Section 1 of the act as any levy under the act, excluding penalties and interest. The word 'fraud' is not defined in the act. Lee and Tan, (1998), gives a more general definition of the word fraud and said, fraud occurs when all these factors are present: first, an individual or an organisation deliberately makes a false representation about an important fact, second, the false representation is believed by the victim, third, the victim relies and acts upon the false representation and finally the victim suffers financial loss and/or property as a result of relying and acting upon the false representation.

Fraud is categorised the same as tax evasion in section 145 of the Tax Administration Act 28 of 2011 (TAA) and according to section 235 of the TAA, the individual or an organisation who has been found guilty of tax evasion or fraud can be harshly punished and be charged a fine or be imprisoned for a period not exceeding five years. These are different to other offences that not intentional, like offences where the commissioner of the South African revenue services can be satisfied that the offence was not deliberate, for example, where a taxpayer could not file the return because he/she was out of the country and into a place where they could not connect to the internet for the period and immediately after the tax payers returned to the country filed the return and notified the South African Revenue Services (SARS) of the circumstance.

In this report the tax fraud occurs when an individual or an organisation refuses or neglect to take reasonable care when handling their taxes, act recklessly, makes false submissions and/or intentionally disregards the legislation and regulation relating to their taxes. Such fraudulent behaviour also induces behavioural changes, such as adjustments to make use of tax incentives.

By enhancing tax morale, wherein taxpayers possess a stronger sense of duty towards tax compliance, the moral costs associated with engaging in illegal activities are heightened. Consequently, this serves to diminish the incentives for committing tax fraud.

The existence of tax fraud, however, necessitates governmental investment in resources dedicated to deterring tax non-compliance. These resources are essential for implementing effective measures to combat tax fraud and promote a culture of compliance.

During the tax year 2021/2022, a notable ZAR215.45 billion (13.78% of total tax) which increased from ZAR171.97 billion (10% of total tax) in 2020/2021 collected from South African taxpayers were found to be non-compliant with their tax obligations, leading to the imposition of administrative penalties exceeding R14.2 million by the SARS [1]. While reports of corruption within the Republic of South Africa may partially account for certain taxpayers' failure to meet their tax responsibilities, it is crucial to acknowledge the moral duty to fulfil tax obligations and uphold the law.

This moral obligation arises from taxpayers' awareness that taxes play a pivotal role in financing the substantial social needs of the Republic of South Africa. In addition, SARS consistently emphasizes the importance of adhering to the spirit of the law and exhibiting good citizenship as a responsible taxpayer[2]. However, a persistent concern remains: the existence of individuals who engage in tax evasion. Tax evasion, as classified in section 235 of the Tax Administration Act 28 of 2011, is said to occur when individuals deliberately fail to comply with their tax obligation. Since the early years, taxpayers have sought methods to minimise or circumvent their tax liabilities, and this trend is expected to endure.

Spirit of the law is defined by Gordon, (2011), as a "*social and moral consensus of the interpretation of the letter of the law*". Gordon, (2011), suggests that the spirit of the law is determined by the social and moral norms whereas the letter of the law is determined by any 'formal code', 'legislation', and 'policies' set up by the government as mandatory, for example Income Tax Act 58 of 1962 has rules and regulations that must be adhered by the taxpayers and the interpretation according to the Trial judge in the Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 4 SA 593 (SCA) case is that the words used in the legislation must follow the proper approach of being given their ordinary grammatical meaning. In terms of the SARS strategic objectives (refer to chapter 3), SARS is promoting the voluntary compliance by focussing on making taxpayer awareness and education the priority and strive to clearly publish the taxpayers' rights and obligations on their website as a way of showing good citizenship.

[1] SARS Annual Report 2021/2022 tax year, pages 11 and 28.

[2] SARS eFiling's main objective is to facilitate the collection of taxes and customs duties on behalf of the South African population. Its primary aim is to ensure that every citizen contributes their fair share towards the country's development. However, it is unfortunate that some individuals do not adhere to the principles of fairness. In such cases, SARS is responsible for ensuring that these individuals fulfill their obligations through the implementation of appropriate enforcement measures.

Some obligations of the taxpayers, published by SARS in their website (SARS service-charter) are that taxpayer must be loyal to their country and tax system and must apply their fiscal citizenry responsibility all the time these clearly indicate the promotion of the spirit of the law. Regrettably, tax evasion is prevalent in South Africa, even among well-known individuals and celebrities, as evidenced by reports in television broadcasts and online news articles[3]. Addressing this issue and promoting widespread tax compliance pose ongoing challenges for the country.

Tax evasion is a severe offense in the Republic of South Africa, and to deter taxpayers from engaging in such illegal practices, the SARS imposes penalties. Previously, the penalties for tax evasion were scattered throughout various tax acts, and the result was not effective, efficient, or consistent in enforcing compliance with the provisions of the Income Tax Act 58 of 1962 (the Act). The SARS acknowledged this weakness of the prior penalty regime and, in response, consolidated the penalties which were previously available under Sections 75 and 76 of the Act. The new penalties are now housed in Chapter 15: Administrative non-compliance penalties and Chapter 16: Understatement penalties of the Tax Administration Act 28 of 2011.

Previously, Section 75 of the Act included various offenses, the penalties for which were unclear or not transparently enforceable by the SARS. Section 75(1)(a) required SARS to impose a fine (initially ZAR 100 and later amended to ZAR 500) or an imprisonment term (an initial period of three months which was later amended to twenty four months), in cases where a taxpayer failed to provide the necessary documents or submit returns to SARS[4], or refused to provide any information required by SARS without any just cause[5], or failed to disclose any part of their gross income in a return[6], or any person who failed to disclose a portion of the gross income on behalf of a taxpayer[7].

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[3] According to Phindi Mjonondwane, the spokesperson for NPA South Gauteng, former Kaizer Chiefs defender Jimmy Tau found himself in legal trouble and paid a fine of R300 as an admission of guilt. Additionally, football star Teko Modise faced fraud charges for alleged failure to submit tax returns from 2013 to 2017. Actress Katlego Danke appeared in the Johannesburg Magistrate's Court on 21 August 2018 on charges of tax-related fraud. Moreover, Kaizer Chiefs goalkeeper Itumeleng Khune was under investigation by the Hawks for allegedly not submitting tax returns for the years 2016 and 2017. (Malatji, 2018).

[4] Section 75 (1) (a) of the Income Tax Act 58 of 1962

[5] Section 75 (1) (b) of the Income Tax Act 58 of 1962

[6] Section 75 (1) (c) of the Income Tax Act 58 of 1962

[7] Section 75 (1) (d) of the Income Tax Act 58 of 1962

The section also covered cases where any individual obstructed the commissioner or any SARS officer in performing their duties[8], failed to keep records for a period of five years[9], or submitted false supporting documents, as stated in Section 73(1) of the Act.Furthermore, SARS was able to impose a fine which was initially ZAR10 and later increased to ZAR 50 for each day during which such offence continued or an imprisonment term without fine, for a period not exceeding twenty-four months (initially three months), without the option of a fine, in cases where any taxpayer failed to respond to demands issued by SARS within a specified period[10]. Under the old penalty regime, SARS was required to use discretion in its wide/loose sense in imposing these penalties, leading to inconsistencies, unjustness, inequity, and ineffective administration[11]. The term discretion can be described by narrow discretion (sometimes referred to as 'true discretion') and wide discretion (sometimes referred as discretion in the loose sense), where narrow discretion arises when there is a wide range of equally allowable choices available that the decision maker can choose from[12], and the decision cannot be found to be incorrect by the appeal, because the appeal might, had the appeal been the first instance decision maker and selected a different choice (Tafeni v S (A 282/15) [2015] ZAWCHC 150; 2016 (2) SACR 720 (WCC) (16 October 2015)).

In contrast, the wide discretion is where the decision maker does not have equally allowable choices available to choose from. Taxpayers faced fines for admitting guilt and incurred additional tax penalties for failing to submit their annual income tax returns. This gave rise to significant dissatisfaction, as illustrated in ITC 11641 ZATC (2006), where taxpayers argued that it was unconstitutional in terms of Section 35(3)(m) of the constitution of the Republic of South Africa, to be fined and subjected to additional tax for the same offense.

Section 35(3)(m) of the constitution of the Republic of South Africa states that, every accused person has a right to a fair trial, which includes the right not to be tried for an offence regarding an act or omission for which that accused person has previously been convicted.

The case of S v Odendaal (1995 (2) SACR 449 (T)) clarified that administrative penalties should not be regarded as criminal penalties.

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[8] Section 75 (1) (e) of the Income Tax Act 58 of 1962

[9] Section 75 (1) (f) of the Income Tax Act 58 of 1962

[10] Section 75 (3) (1) of the Income Tax Act 58 of 1962

[11] Section 75 (3) (1) of the Income Tax Act 58 of 1962

[12] Definition of the narrow discretion "The essence of a discretion in [the true] sense is that, if the repository of the power follows any one of the available courses, he would be acting within his powers, and his exercise of power could not be set aside merely because a Court would have preferred him to have followed a different course among those available to him." Media workers Association of South Africa and Others v Press Corporation of South Africa Ltd [1992] ZASCA 149; 1992 (4) SA 791.

The fundamental difference between administrative penalties and criminal penalties is the fact that criminal penalties are imposed when an individual is criminally charged in terms of section 35(3)(m) of the constitution of the Republic of South Africa, whereas administrative penalties are imposed in terms of the failure to comply with administrative tax laws (ITC 1825 (70 SATC 68)). It was established that the primary purpose of an administrative penalty was not punitive but aimed at ensuring the effectiveness of the tax system[13]. Concerns were raised regarding the inconsistent application of non-compliance penalties across different taxpayers and the arbitrary practices observed in various SARS branch offices when dealing with similar taxpayers.

Section 76 of the Act granted SARS the authority to impose an understatement penalty of up to twice the tax amount owed in a particular year of assessment when a taxpayer failed to submit a tax return[14]. The Act stipulated that taxpayers were required to pay a penalty of up to twice the tax amount of any omitted taxable income from the return or twice the difference between the incorrect tax amount paid and the correct tax amount that would have been charged had the taxpayer submitted an accurate return[15]. The Act provided SARS with guidance on the remittance of the imposed penalties, but SARS often disregarded it and imposed an additional 200% tax on taxpayers[16]. Before granting a remittance, SARS had to ensure that there were no extenuating circumstances and that the taxpayers had no intention of evading taxes[17].

The provisions of this section were unclear, inconsistent, and non-transparent, as SARS had the discretion to levy penalties according to its own judgment. The lack of guidance or regulations governing the imposition of additional taxes resulted in instances where the Commissioner failed to provide sufficient or any reasons at all when levying penalties as evidenced in the case of Qwa-Qwa Cash and Carry (Pty) Ltd v CSARS 2005 ZAGPHC 121, where the taxpayer requested the Commissioner of SARS to provide reasons as to motivate the assessment issued by SARS and the court found in favor of the taxpayer and ordered SARS to provide a structured response to the taxpayer that state the relevant statutory provisions, the findings of the fact on which the conclusions depended and the reasoning process which led SARS to those conclusions. To remedy these shortcomings, the previous penalty regime was abolished and substituted with the new penalty regime, which took the form of Chapter 15 and 16 of the Tax Administration Act 28 of 2011 (TAA).

[13] Section 209 of the Tax Administration Act 28 of 2011
[14] Section 76 (1) (a) of the Income Tax Act 58 of 1962
[15] Section 76 (1) (c) of the Income Tax Act 58 of 1962
[16] *CIR v Da Costa*, 1985 (3) SA 768 (A), 47 SATC 87, 1985 *Taxpayer* 209
[17] Section 76 (2 (a) of the Income Tax Act 58 of 1962

The new penalty regime is more effective in promoting compliance with the provisions of the Act[18] and it was implemented on 1 October 2012 with the aim of ensuring[19]:

> ‘(a) the widest possible compliance with the provisions of a tax act and the effective administration of tax acts; and
>
> (b) that an ‘administrative non-compliance penalty’ is imposed impartially, consistently, and proportionately to the seriousness and duration of the non-compliance.’

The SARS has acknowledged that the previous penalty regime was not in accordance with the fundamental principles of taxation, as introduced by Adam Smith in his book, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) the necessity for a penalty regime that is fair, just, clear, consistent, transparent, and equitable[20]. The new penalty regime addresses non-compliance and understatement of taxes penalties in Chapters 15 and 16 of the TAA. The TAA encompasses various parts that deal with "fixed amount penalties," "reportable arrangement penalties," "percentage-based penalties," procedures to be adhered to by SARS and taxpayers, as well as remedies.

The new penalty regime has been crafted with the objectives of bridging the gaps identified and admitted by SARS in the old penalty regime, it still manifests instances of opacity, as SARS needs to exercise its discretion regarding the degree of relief to be granted to taxpayers[21]. Another deficiency in the new system is that taxpayers who did not submit their returns may have also defaulted on their tax obligations and, as a result, may face a fixed amount penalty for non-compliance[22] and a percentage-based penalty for the unpaid tax amount[23]. The TAA, however, does not specify the exact percentages to be imposed by SARS, especially with respect to Part C of the TAA. These drawbacks are discussed comprehensively in the second chapter of this report, along with their adverse effects on the objectives of the TAA.

1.2. The research question

During the drafting of the TAA, it was imperative to consider the principles of international best practice in tax administration, including fairness, equity, certainty, simplicity, efficiency, and effectiveness. The Commonwealth of Australia (Australia) and the United States of America

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[18] Section 209 of the Tax Administration Act 28 of 2011
[19] Ibid
[20] Adam, 1776. *The Nature and Causes of the Wealth of Nations*, pages 451 and 452, Part II.
[21] Section 211 (3) of the Tax Administration Act 28 of 2011
[22] Section 210 (2) of the Tax Administration Act 28 of 2011
[23] Section 213 of the Tax Administration Act 28 of 2011

(USA) were among the countries selected by the SARS for comparison[24]. The Australian Tax Administration Act 1953 has similar penalty clauses to those of South Africa, specifically in Part III 'Prosecution and Offences', Division 2, from Sections 8B to 8W. In this report, these clauses are reviewed and compared to Chapters 15 and 16 of the South African TAA to determine if any improvements are necessary regarding the aforementioned international best practice principles. Additionally, the report examines which penalties are more severe between South Africa and Australia in cases of non-compliance involving non-payment of taxes or understatement of taxable income.

Similarly, the USA has tax administrative penalty clauses comparable to those of South Africa under U.S. Code 6651, Title 26, Subtitle F, Chapters 61 and 68, Subchapter A, Part I. The provisions of this legislation are also reviewed and compared to those in Chapters 15 and 16 of the TAA to assess if any improvements are necessary.

The aim of this research report is to carry out a comparative analysis of the criminal and administrative penalty regimes in South Africa, the USA, and Australia with regards to tax non-compliance or failure to pay taxes. The objective of this comparison is to evaluate the extent to which South Africa's penalty system aligns with the best international practices and to identify areas where it may require enhancement or clarification for the benefit of both SARS and taxpayers.

1.2.1. The sub-questions

1.2.1.1. What are the reasons for non-compliance with tax laws and failure to pay taxes?

This question will analyse the factors that contribute to non-compliance and investigate the circumstances under which taxpayers are more likely to not pay taxes. The TAA defines non-compliance as[25]:

> '…failure to comply with an obligation that is imposed by or under a tax act and is listed in a public notice issued by the Commissioner,…'

1.2.1.2. Which measures have been implemented in the Republic to incentivise taxpayers to comply with tax obligations and pay taxes?

This question examines the various initiatives, policies, and programmes implemented by the SARS to promote voluntary compliance.

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[24] Tax Administration Bill, '…The drafting of the TAB was informed by international best practice a comparative evaluation the tax administration laws of other countries with practical experience with tax administrative laws over long periods, such as Australia…..and the USA'

[25] Section 210 (2) of the Tax Administration Act 28 of 2011

1.2.1.3. Which corrective actions have been implemented by the Australian and United States tax revenue authorities to encourage taxpayers to comply with tax obligations and pay taxes?

This question examines the strategies used by these authorities to promote compliance, including education, enforcement, and penalty regimes.

1.2.1.4. How does the enforcement of South Africa's penalty regime, as outlined in Chapters 15 and 16 of the Tax Administration Act 28 of 2011, compare to the administrative penalty regimes of the USA and Australia?

This question specifically evaluates the percentage-based penalty for failure to pay taxes under Section 210(2) of TAA and the fixed amount penalty under Section 211(1) of TAA, in contrast to the a percentage-based penalty[26] for non-compliance and failure to pay tax under Title 26, Internal Revenue Code 6651 (IRC 6651), and Australia's penalty for non-compliance as contained in Part III 'Prosecution and Offences', Division 2, from Sections 8B to 8W of the Australian Tax Administration Act 1953.[27].

1.3. Scope and limitations

The scope of this research is focused on the evaluation of the penalty regime outlined in Chapters 15 and 16 of the Tax Administration Act (TAA) in South Africa. The report does not address Chapter 17: Criminal Offence. The analysis is restricted to penalties imposed on non-compliance with the obligations prescribed by the Act to taxpayers in the Republic of South Africa and will be compared to the penalty regimes of other countries such as the United States of America and Australia. The research will also examine U.S. Code 6651, Title 26, Subtitle F, Chapters 61 and 68, Subchapter A, Part I of the United States of America, and Part III 'Prosecution and Offences', Division 2, from Sections 8B to 8W of the Australian Tax Administration Act 1953.

1.4. Significance of the research

The significance of this research lies in its potential to inform policymakers and relevant authorities in South Africa about the necessary refinements and amendments to the current penalty regime so that it can adhere to the principles of *nulla poena sine lege*. The principle of *nulla poena sine lege* which translates to "no punishment without law," is a well-established legal principle that asserts that individuals cannot be subjected to punishment for actions that

[26] U.S. Code 301.6651-1, Title 26, Subtitle F, Chapter 61, Subchapter A, Part I
[27] Sections 8B to 8W of the Tax Administration Act 1953

are not explicitly prohibited by the law (GrÄƒdinaru, 2018). This principle holds significant implications for the concept of punishment, particularly in two key aspects (GrÄƒdinaru, 2018). First, it necessitates that penalties must be accurately and clearly defined. This means that the consequences or punishments prescribed for specific wrongdoing must be articulated in a manner that is sufficiently precise and comprehensible. By providing clarity and precision in defining penalties, the principle ensures that individuals have a clear understanding of the potential consequences of their actions, thereby safeguarding their rights to fair treatment and due process.

Second, the principle dictates that the imposition of penalties must be governed by clear legal rules. This implies that the process by which penalties are imposed must adhere to transparent and well-defined legal procedures. These legal rules must uphold the requirements of the principle of legality, which encompass notions such as predictability, accessibility, non-retroactivity, and consistency. By adhering to these legal rules, the principle of *nulla poena sine lege* serves to protect individuals from arbitrary or unfair punishment, promoting the rule of law and ensuring a just legal system.

By investigating the factors contributing to non-compliance and examining the measures implemented by the Republic of South Africa to promote compliance, this research aims to offer valuable insights for the development of an efficient and equitable tax system that fosters compliance and improves revenue collection.

Additionally, this research provides a comparative analysis of the penalty regimes of the United States of America and the Commonwealth of Australia. This comparative perspective enables policymakers to identify areas for improvement within South Africa's penalty regime. By considering international best practices and experiences, policymakers can make informed decisions regarding the enhancement of the penalty regime in South Africa. The outcomes of this research are expected to have significant implications for both the government and taxpayers. A more effective penalty regime will not only deter non-compliance but also ensure fairness and legitimacy in tax administration. It will promote a sense of equity among compliant taxpayers and contribute to the overall stability and efficiency of the tax system.

1.5. Research methodology

1.5.1 Approach

This research employed a qualitative research approach in this research report. The qualitative research approach is rooted in the interpretivist paradigm. This paradigm is an approach to social research that emphasizes on comprehending the subjective experiences and meanings that individuals attach to social phenomena.

The interpretivist paradigm holds the epistemological belief that reality is not an objective, fixed, and measurable entity, but is rather a dynamic and subjective construct that is shaped by individual perceptions, values, and cultural contexts. The research report aims to investigate the social reality by exploring the subjective experiences of Australia and the United States on America's tax administrative processes in terms of penalties and meanings attributed to it by the individuals.

In addition, this research approach acknowledges the ontological belief that social reality is socially constructed. This means that the research report recognises that social reality is established and sustained through social processes and interactions. Hence, the research aims to examine and analyse the social constructions of reality by investigating secondary text, instead of measuring or quantifying social phenomena. Through this approach, the research report intends to unveil the intricate and dynamic ways in which social reality is constructed, how individuals navigate it, and how their experiences and perspectives can be influenced by social and cultural factors.

1.5.2 Design

For this research report, a systematic literature review was conducted as a method of collecting secondary data. The review was intentionally and purposefully designed to identify relevant policy documents, journal articles, book chapters, court cases, legislations, and online publication related to the research question. The systematic literature review was chosen due to its methodical, replicable, transparent, and comprehensive nature. This approach ensures that the research process is highly structured and rigorous, allowing for a thorough analysis of the literature. The research tools utilised for the systematic literature review include Google Scholar and Science Direct databases. To identify relevant literature, a search strategy is employed, which utilises a set of pre-determined key terms. The first screening of the articles found was conducted based on the scope of the study, with any unrelated articles being deliberately excluded from the final selection. A second screening was then conducted based on the article title, abstract, and main body, with duplicated articles also removed. The final selection of articles was subjected to a rigorous analytical process, which involve the aggregation, interpretation, and synthesis of the data extracted from the literature. By utilising a systematic literature review approach, the research report will identify and analyse a comprehensive range of existing literature on the topic of interest. This approach ensures that the research is grounded in relevant and reliable sources of information, providing a strong basis for the development of further research questions and analysis.

1.6. Report outline

Chapter One of this report introduced the report. It covered the background of the study, the significance of the research, the main and sub-research objectives, the research methods employed, and the scope and limitations of the report. Chapter one is followed by Chapter Two.

Chapter Two of this report evaluates the definition of non-compliance with tax regulations, as well as failure to pay taxes. This chapter provides an in-depth analysis of the reasons why taxpayers do not comply with tax obligations and fail to remit their taxes. The examination focuses on Section 210 of the Tax Administration Act and the offenses listed in the public notice issued by the SARS.

Chapter Three of this report focuses on South Africa's approach to encouraging compliance and tax payment. The chapter examines the corrective actions taken by South Africa's tax authority, as outlined in Chapters 15 and 16 of the Tax Administration Act (TAA). This chapter also evaluates the fairness, equity, and effectiveness of the current South African tax administration penalties regime in comparison to the prior regime, as set out in Sections 75 and 76 of the Income Tax Act, by analysing Chapters 15 and 16 of South African TAA and relevant case laws[28].Chapter Four of this report examines the various types of corrective actions employed by tax revenue authorities in Australia and the United States of America to encourage compliance and ensure tax payments. This chapter reviews and analyse the relevant provisions of the Tax Administration Act 1953, Sections 8B to 8W, and U.S. Code 6651, Title 26, Subtitle F, Chapters 61 and 68, Subchapter A, Part I, and relevant case laws.

Chapter Five of this report compares South Africa's penalty regime with those of Australia and the United States of America in terms of non-compliance and failure to pay tax. The purpose of this comparison is to determine whether South Africa's penalty regime is in alignment with international best practices and to identify areas for improvement. This chapter compare Chapter 15 of the South African TAA with Sections 8B to 8HA of the Australian Tax Administration Act and Chapter 61 of Subchapter A of the U.S. Code 6651, as these provisions are similar in terms of offenses, and compare Chapter 16 of the South African TAA with Sections 8J to 8W of the Australian TAA and Chapter 68 of Subchapter A of the U.S. Code 6651. Chapter Five of this report provides an overview of the findings of the report and makes recommendations for improving South Africa's penalty regime.

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[28] Taxpayer W v Commissioner for the South African Revenue Service, (No 24622), (2019), Taxpayer S v Commissioner for the South African Revenue Service, (No 45997), (2022).

The chapter assesses whether South Africa's penalty regime is in line with international standards and highlights areas where improvement can be made. The chapter concludes with a summary of the report's main findings and recommendations.

Chapter 2: Non-compliance with tax laws and failure to pay taxes

2.1. Introduction

This chapter provides an overview of the historical context of taxation and assesses the definition of non-compliance and failure to pay taxes as outlined in tax regulations. Additionally, this chapter conducts a detailed analysis of the underlying factors that contribute to taxpayers' non-compliance with their tax obligations and failure to pay taxes, with a particular emphasis on the examination of Section 210 of the Tax Administration Act and the offenses listed in the public notice released by SARS on their official website.

2.2. History of taxes

Taxation refers to the mandatory payments made by individuals and entities to the national revenue fund, which encompasses all revenue received by the national government. Tax compliance holds great significance in most countries due to the absence of viable alternatives to taxation for financing the extensive government expenditures required by modern economies (James & Alley, 2009). These expenditures encompass various critical areas such as healthcare, education, citizen security, political stability, law and policy development, all of which necessitate substantial financial resources. While governments can generate some revenue through other activities, it is often insufficient to cover the full range of expenditures. Governments may resort to borrowing money, but they must eventually repay the loans with interest. Taxation, therefore, serves as a means to an end, rather than an end in itself (James & Alley, 2009).

While the exact origins of taxation are uncertain, historical evidence suggests that taxes were imposed in ancient times, such as the collection of tithes from citizens' harvests in Mesopotamian history (Stevens, 2006))[29]. Stevens (2006), explained "taxes" to be:

> ‘regularised payments owed to the governing political authority, often charged as a percentage of income or as a special activity fee: in other words, taxes were the secular version of tithes.”

The preceding passage suggests that in antiquity, taxes were owed to the Mesopotamian state (political) and that tithes were presented to the temple (religious). During the Mesopotamian era, taxes took the form of tithes, consisting of one percent of each landowner's produce (crops and cattle). In ancient Egypt, taxes were collected in the form of mandatory labour, whereby taxpayers were taxed on their land, which was considered wealth by the government of the time (Burg 2004).

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[29] “Offerings. The “tithe” was a cultic ritual throughout the ANE, a mandatory contribution from agriculture and animals,…”

In the Republic of South Africa, taxation can be traced back to the late 1670s, in the peace treaty between Joan Bax, the governor of the colonial government, and Gonnema, the leader of the Khoikhoi, in which Gonnema agreed to pay an annual tribute of thirty cattle to the colony[30]. Since then, the tax system in South Africa has evolved significantly, with the introduction of various types of taxes such as Income Tax, which was implemented during the transformation of the 1900s, as well as Estate Duty, Turnover Tax, Capital Gains Tax, Dividends Tax, Donation Tax, Value-Added Tax, Securities Transfer Tax and others. All of these taxes fall under the current tax legislation.

2.3. The history of non-compliance

David Burg (2004) stated in his publication:

> '…taxation has been onerous, and in many cases excessive and cruel, reaction to its enforcement has been consistent, heated, and even violent.'

It is evident from Burg's assertions that non-compliance with tax obligations and failure to pay taxes is not a recent phenomenon. Tax resistance or Tax revolt has existed since the early days of tax levies and continues to be prevalent in modern times. Historical examples of tax resistance can be found in the Han dynasty (centuries A.D.) in Asia, the era of Hammurabi (centuries B.C.) in Babylon, and the Roman Empire (centuries B.C. to A.D.), where it took the form of tax revolts or protests (Burg, 2004). Even within biblical references, symbols of tax resistance can be identified. In the book of Matthew, for example, Jesus seeks the opinion of one of his disciples regarding the payment of taxes, suggesting that not everyone complied with tax obligations even during biblical times[31]. Similarly, in the book of Mark, there are indications of tax resistance when the Pharisees and Herodians tested Jesus by posing questions related to taxes[32]. van de Braak, (1982), explains the term tax resistance as it arises where the citizens find efforts or ways to avoid the payment of taxation.

In the Republic of South Africa, non-compliance with taxes can be traced back to as early as the 1700s, and probably even earlier.

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[30] The Shaping of South African Society, 1652 – 18402, by Richard Elphick and Hermann Giliomee, published by Wesleyan University Press, 15 Jan 2014, pages 646.

[31] "…And when he was come into the house, Jesus prevented him, saying, what thinkest thou, Simon? Of whom do the kings of the earth take custom or tribute? Of their own children, or of strangers?" Matthew 17:25.

[32] "And when they were come, they say unto him, Master, we know that thou art true, and carest for no man: for thou regardest not the person of men, but teachest the way of God in truth: is it lawful to give tribute to Caesar, or not?". Mark 12:14.

Historical records indicate that the Khoikhoi people, for instance, refused to pay tribute to the colony and instead slaughtered their cattle, which they perceived as being taken from them without any tangible benefits (Elphick and Giliomee 1979)[33].

This is just one example of the long-standing reluctance of taxpayers to comply with tax obligations, which they often perceive as being punitive and unnecessary. Since the inception of taxes, there have been individuals who believe that they should not be compelled to pay taxes and will go to great lengths to avoid them. In contemporary times, taxpayers in the Republic become non-compliant when they fail to meet the expected or required tax obligations stipulated in the TAA[34].

2.4. Reasons for non-compliance with tax laws

The field of tax compliance has witnessed substantial academic research growth in recent years, with various authors offering comprehensive insights into taxpayers' behaviour and motivations in relation to tax compliance. Notable contributions include works by Becker (1968), Alm, Betty, and Mckee (1992), Doran (2009), and Wenzel (2006), which provide extensive overviews and experimental studies on the subject.

If taxpayers willingly and voluntarily comply with tax regulations, it would be highly advantageous for governments. However, why do some taxpayers resist and fail to contribute their fair share towards government expenditure? Is it because they seek value for money and want to see tangible results from their tax payments? Could it be that taxpayers desire to contribute but struggle to comprehend their tax obligations due to unclear tax legislation? Furthermore, is the administration of tax legislation applied impartially to all taxpayers? These are the essential questions that scholars tirelessly endeavour to answer, yet as research progresses, more uncertainties emerge.

What is clear is that taxation plays a pivotal role in enabling governments to provide essential services to their citizens, underscoring the importance of tax compliance. James and Alley (2009) assert that the entire purpose of raising taxation for the benefit of taxpayers diminishes when taxpayers must be compelled to comply with their tax obligations.

[33] The Company and freeburgers increased their demand for Khoikhoi animals, which were already depleted by the diseases and by 'Bushman' raids. Both parties persuade Khoikhoi into overselling and plundered them if they refused. The Khoikhoi responded with grim defiance, slaughtering their cattle rather than paying what they regarded as tribute. Page 22 of book called The Shaping of South Africa Society, 1652 – 1840., edited by Richard Elphick and Hermann Giliomee.

[34] Section 210 (2) of the Tax Administration Act 28 of 2011

Tax compliance, as defined by James and Alley (2009), denotes the voluntary willingness of individual taxpayers and other taxable entities to align their actions with both the spirit and letter of tax law and administration, without the need for enforcement activities. Governments expect taxpayers to independently assess their tax liability accurately, even in the face of unclear and uncertain tax legislation. Failure to do so may result in the imposition of penalties (Doran, 2009).

In his article on *Tax Penalties and Tax Compliance*, Doran (2009) asserts that the primary function of tax penalties is to foster tax compliance [35]. These penalties play a crucial role in defining the expected conduct that fulfils a taxpayer's obligations to the government, effectively distinguishing compliant taxpayers from non-compliant ones. Doran's statement emphasizes that tax penalties serve to influence taxpayer behaviour and encourage compliance with tax obligations. Consequently, effective tax administration relies on a deterrence system designed to motivate both delinquent and law-abiding taxpayers to fulfil their tax responsibilities.

A study conducted by Alm, Betty, and Mckee (1992) [36] aimed to examine taxpayer compliance by investigating their response to tax rates, fines, and the likelihood of detection if they chose to be non-compliant. The study posits that rational taxpayers assess their tax liability in comparison to the benefits of successful non-compliance, particularly in situations where tax rates are high. Consequently, higher tax rates tend to lead to increased levels of non-compliance. Furthermore, the study found that rational taxpayers also consider the potential fine imposed if they are caught, weighing it against the probability of detection[37]. The findings of Alm, Betty, and Mckee (1992) support the deterrence model known as the economics-of-crime, in which taxpayers evaluate the costs of detection against the advantages of non-compliance. Notably, the study suggests that as tax liabilities increase, the rate of non-compliance also tends to rise.

The next sections of the report will discuss the economic theory of criminal and non-criminal behaviour.

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[35] Michael Doran, Associate Professor, University of Virginia School of Law. B.A., Wesleyan University, 1988; J.D., Yale Law School, 1991.

[36] Alm, Betty, and Mckee suggested that the higher tax rates lead to significantly lower compliance, which is consistent with the notion that the payoff to successful evasion is greater when the tax rate is larger. Alm, Betty, and Mckee, 1992. National Tax Journal, Vol. 45, pp. 107-14.

[37] Alm, Betty and Mckee, further suggested that the compliance increases with an increase in the fine rate; however, the coefficient on FINERATE is so small that the fine rate elasticity is virtually zero, and the coefficient is also not highly significant. Alm, Betty, and Mckee, 1992. National Tax Journal, Vol. 45, pp. 107-14.

2.4.1 Economic theory of criminal behaviour (economics-of-crime deterrence model)

The initial theory employed to elucidate tax compliance is the economics-of-crime deterrence model, devised by Gary Stanley Becker (1968) who won the 1992 Nobel Memorial Prize in Economic Sciences. According to Beckers (1968) model, taxpayers adhere to their tax obligations solely due to the adverse economic repercussions stemming from detection and subsequent punishment for non-payment of taxes. A simplistic yet commonly held notion of crime categorises the population into two distinct groups: the "good guys" and the "bad guys." According to this view, the "bad guys" engage in criminal behaviour unless they are incapacitated, while the "good guys" consistently adhere to the law. However, the economic model of crime redirects attention from character to the choices individuals face. Although certain aspects of character, referred to as "preferences" in economic terms, may have some relevance, criminal activity ultimately represents a choice or series of choices available to all individuals. The decision to engage in criminal behaviour is influenced by the anticipated consequences, which vary among individuals depending on the opportunities presented to them. Consequently, this perspective naturally leads to the presumption that deterrence is effective, meaning that crime rates will exhibit an inverse relationship with the probability and severity of punishment. Individuals who have something to lose are less inclined to view involvement in criminal activities as appealing.

Under Beckers' (1968) model, the taxpayer is perceived as a potential wrongdoer, and tax compliance can solely be achieved through the "enforcement paradigm." This paradigm concentrates on suppressing illicit behaviour by conducting frequent audits and imposing strict penalties on taxpayers who have underreported their income (Alm and Torgler, 2011). Building upon the economics-of-crime model, Alm and Torgler (2011) developed an adapted model. This adaptation posits that, given a fixed income (I), individuals deliberate on the amount of income to declare in their tax returns and the extent to which they will underreport their income. Taxes are levied on the declared income (R) at a rate of (t). Individuals who underreport their income face a fixed probability of being detected (p). If an individual is audited by the tax revenue authority, such as SARS, they will be subject to a penalty rate of (f) per currency unit of unreported income.

Upon detection for underreported income, the individual's income, represented by I_c, is determined as follows:

$$I_c = I - tR - f[t(I - R)]$$ (Equation adapted from Alm and Torgler (2011))

For individuals who evade detection for underreported income, their income (I_{nc}) is represented by the following equation:

$I_{nc} = I - tR$ (Equation adapted from Alm and Torgler (2011))

The primary objective of an effective tax compliance program is to instil in taxpayers the belief that the cost of attaining I_{nc} is unaffordable or undesirable. In a fully tax-compliant system, $I_c = I - tR$, ensuring that no taxpayer underreports their income but instead pays tR based on their entire taxable income.

The deterrence model is widely recognized as a contemporary approach to punishment, emphasizing its preventive function alongside its retributive function. Deterrence aims to safeguard society by deterring potential offenders through the imposition of penalties. On the other hand, retribution is considered the oldest rationale for punishment, where the primary justification is based on the concept of deserving punishment for committing a crime. The objective of retribution is to achieve justice rather than focusing on rehabilitating the offender. In a landmark case, R v Swanepoel 1945 AD 444, reference was made to the retributive theory, which seeks justification for punishment in addressing past wrongdoing that necessitates punishment or expiation. In contrast, other theories such as reformative, preventative, and deterrent, derive their justification from future benefits that result from the punishment.

2.4.2. Economic theory of non-threatening regulatory (moral persuasion model)

In contrast to the deterrence model of the economics-of-crime, Wenzel (2001) offers an alternative perspective on taxpayer behaviour that acknowledges individuals as moral agents who recognize the importance of contributing their fair share to the government[38]. In Wenzel's (2002) working paper titled "The social side of sanctions: Personal and Social Norms as Moderators of Deterrence," it is found that a strong sense of integrity within an individual's community can positively influence their compliance with tax obligations[39]. While the deterrence model still holds relevance for individuals with low integrity, wherein punishment-based approaches may be more effective, Wenzel's research emphasizes the significant role that the relationship between individuals and their community plays in fostering tax compliance. It highlights the influence of personal and social norms in shaping taxpayers' behaviour and their sense of moral duty towards fulfilling their tax obligations.

Moore, (2020), in the review article of occupational fraud models, explained why individual commit fraud. In the first model, called the fraud triangle (see diagram 1 below), Moore, (2020),

[38] “In the survey on the cash economy (Artcraft Research, 1998) commissioned by the Australian Tax Office (Tax Office), people almost unanimously agreed that ‘tax cheats unfairly shift the burden onto honest taxpayers’ (97% agreed); and they disagreed with the statement that ‘if you are not happy with how the government spends your taxes, it’s OK to hold some of it back by not declaring everything you earn’ (95% disagreed).” Wenzel, (2001).

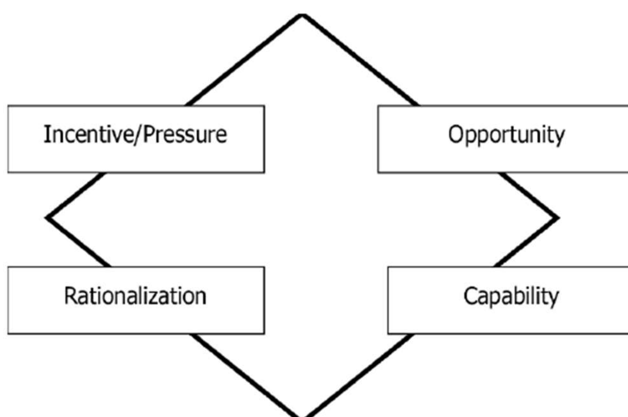
[39] Wenzel (2002) suggests that the tax compliance comes from highly honest individuals in a high integrity community that gives people an identity they value. Yet in addition the state must keep faith with high integrity citizens by deterring those with low integrity who do not pay their share.

says that fraud is committed because of ‘Opportunity’, ‘Rationalisation’ and ‘Pressure’. In terms of ‘Opportunity’ the perpetrator must have the opportunity to commit fraud, cover it up and avoid punishment, in terms of ‘Rationalisation’, the perpetrators tend to make excuses of rationalising their behaviour, and in terms of the ‘Pressure’, the perpetrators commit fraud because of financial or non-financial pressure. An example of financial pressure is where an individual or an organisation has pressure to meet a certain financial result in a particular financial year, and the example for non-financial pressure can arise where an individual or an organisation must meet a certain societal norms or values.

Diagram 1 (Moore, (2020))

Further to the fraud triangle, Moore, (2020) stated that the researchers found the fraud triangle to be limited in terms of the elements that can cause the perpetrators to commit fraud, and the fraud diamond (see diagram 2 below) was discovered. In addition to the ‘Opportunity’, ‘Rationalisation’ and ‘Pressure’, the researchers found it appropriate to rename ‘Pressure’ to ‘Incentive’ and to indicate that this element represent the motive to commit fraud and the researchers further added the fourth element called ‘Capability’ where this element determines whether fraud can occur.

Diagram 2 (Moore, (2020))



2.5. Collection of taxes and enforcement of tax laws in South Africa

Tax non-compliance is a matter of significant concern for governments, as it reduces the government revenue fund and affects government expenditures. To enforce tax collection, certain obligations must be adhered to, and failure to comply may result in non-compliance. Non-compliance with tax obligations, whether through neglect or omission, has long been considered a form of tax resistance by tax authorities or governments. This has led to the imposition of penalties as a means of enforcement. Tax resistance can be either legal or illegal, and whereas legal tax resistance can be classified as tax avoidance and illegal tax resistance be classified as tax evasion[40]. According to the general anti-avoidance rule (GAAR)[41], tax avoidance is an attempt to reduce a tax liability using the legal means, by rearranging tax affairs in such a way that a taxpayer pays a reduced or minimum tax according to the Income tax Act 58 of 1962. However, SARS must be satisfied that the intention to rearrange the tax affairs is not to avoid tax by imposing the anti-avoidance provisions 80A, 80B, 80C, 80D, 80E, 80F, 80G, 80H, 80I, 80J, 80K, and 80L of the income tax act 58 of 1962.

On the other had tax evasion is referred to the use of illegal means to reduce tax liability, by either falsifying the books, deliberately omitting some of the income from the tax return and or overstating the deductions. To address this issue, SARS has taken steps to provide taxpayers with relevant information and support services to help them understand and fulfil their tax obligations[42].

In the Republic of South Africa, the Minister of Finance is responsible for the tax legislation, while the SARS is tasked with enforcing the provisions of the tax legislation and collecting taxes from taxpayers. SARS was established as an agency under the SARS Act 34 of 1997. The SARS main responsibilities, as outlined in the SARS Act 34 of 1997, are to collect and administer all state duties, levies, and any revenue that may be levied under any other legislation, to provide customs services that facilitate trade and increase revenue collection, and to protect South Africa from illegal cross-border activities. Additionally, the SARS advises the Minister of Finance on all revenue affairs[43].

Taxpayers are required to register for all applicable tax types. The registration requirements are outlined in Chapter 3 of the TAA[44]. The requirements stipulate that taxpayers must apply for registration within a specified period, apply for the relevant tax type, and provide all

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[40] Alm, J. (2018), *What motivates tax compliance?,* Journal of Economic Survey, pp. 1-36
[41] Sections 80A – 80L of the Income Tax Act 58 of 1962
[42] Hofmann, E., Voracek, M., Bock, C. and Kirchler, E. (2017), Tax compliance across sociodemographic categories: meta-analyses of survey studies in 2011 countries, Journal of Economic Psychology, Vol. 62, pp. 63-71
[43] Section 4 of the South African Revenue Service Act 34 of 1997.
[44] Sections 22 (2)(a) - (c) to (5) (of Tax Administration Act 28 of 2011.

necessary documents to support their application. Failure to provide the required documents may result in an unsuccessful application, and SARS may decide to register the taxpayer regardless[45]. If a taxpayer fails to apply for registration, SARS may register them and demand the submission of supporting documents and tax returns. Failure to comply with this requirement within the prescribed period may render the taxpayer non-compliant in accordance with Section 210(2) of the TAA. As a result, they may be liable for penalties as outlined in Section 211(1) of the TAA.

Taxpayers are obliged, in accordance with Sections 25 to 28 of the TAA, to submit their tax returns and supporting documents within the specified period. Failure to do so will render the taxpayer non-compliant in accordance with Section 210(2) of the TAA, and therefore liable for penalties as outlined in Sections 211(1) and 212 of the TAA. Furthermore, taxpayers are required to maintain accurate records that are satisfactory to SARS for a specified period.

Failure to comply with this requirement will also result in non-compliance under Section 210(2) of the TAA and the associated penalties as outlined in Section 211(1) of the TAA. In addition to these obligations, taxpayers must settle their tax liabilities as prescribed for all relevant tax types corresponding to the activities undertaken by the taxpayer that are subject to tax. Failure to comply with this obligation will result in non-compliance under Section 210(2) of the TAA, and the associated penalties outlined in Sections 211(1), 222 and 223 of the TAA.

2.6 Conclusion

Tax non-compliance is as old as taxes. It is found in this chapter that taxes in the Republic go back to as far as 1600s and since they have been evolving with time. The significancy of complying with of taxes is clearly described by what are the taxes for to the citizens of the Republic. The non-compliance to the taxes then diminishes the significancy as it leads to government not being able to deliver to its responsibilities in terms of healthcare, education, citizen security, political stability, law and policy development. Non-compliance is described to be when taxpayers neglect or fail to meet the tax obligations.

Many scholars have done numerous studies, seeking to understand the reasons why taxpayers do not comply with taxes, and the methods used by governments assist in correcting the non-compliance. Some scholars interrogated the taxpayer’s behaviour and came up with deterrence model as a mechanism to punish non-compliance and force taxpayers to comply (Becker (1968), Alm, Betty, and Mckee (1992), Doran (2009), and

[45] Section 22 of the Tax Administration Act 28 of 2011.

Wenzel (2001) offered a different perspective where taxpayers are seen to be moral agents who understand their fair contribution to the government fund.

In summary, tax non-compliance may arise when taxpayers do not see the value in what they are paying for and constantly seek to reduce or evade their taxes. While the deterrence model may not be effective for all taxpayers, those with high moral standards and a sense of social identity are more likely to comply voluntarily, even when they question the government's service delivery.

The deterrence method is best used in the absence of voluntary compliance, while moral persuasion is effective in promoting voluntary compliance, as described by Becker (1968)[46]and Wenzel (2002)[47]. The measures implemented in the Republic to incentivise taxpayers to comply with tax obligations and pay taxes are discussed in Chapter Three.

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[46] "The anticipation of conviction and punishment reduces the loss from offences and thus increases social welfare by discouraging some offenders" Becker (1968), Crime and Punishment: Economic Approach, p 40.

[47] "..the appeal to conscience increased tax compliance more effectively (in terms of income reported) than the legal sanction threat", Wenzel (2002), The Social side of Sanctions: Personal and Social Norms as Moderators of Deterrence.

Chapter 3: Measures implemented in the Republic to incentivise taxpayers to comply with tax obligations and pay taxes

3.1. Introduction

The preceding chapter explicated the reasons behind taxpayers' non-compliance with tax obligations, while this chapter shall focus on South Africa's approach to fostering compliance and tax payment. Specifically, this chapter shall scrutinise the corrective measures implemented by the tax authority of the Republic of South Africa, as delineated in Chapters 15 and 16 of the TAA. Additionally, this chapter shall assess the impartiality, equitability, and efficacy of the present South African tax administration penalty system, relative to the previous regime enshrined in Sections 75 and 76 of the Income Tax Act (the Act), by scrutinising Chapters 15 and 16 of the TAA, as well as pertinent case laws.[48].

3.2. South Africa's tax compliance strategy

Having an understanding of taxpayers' behaviour and decision-making processes regarding tax compliance and identifying the factors that influence their attitudes towards compliance are crucial components in developing a compliance strategy Kirchler (2007). In 2012, the Republic of South Africa promulgated the TAA to promote tax compliance, enhance efficiency and effectiveness in tax administration[49].

The SARS is responsible for promoting and implementing the Republic tax compliance strategy[50]. SARS has developed nine strategic objectives with the intention of encouraging voluntary tax compliance and reducing face-to-face interaction between taxpayers and SARS personnel (SARS 2021/2022). SARS employs nine strategic objectives to encourage tax compliance in the Republic of South Africa. However, corruption, misuse of state resources, and an increase in the crime rate can counteract these efforts. In summary, the factors that influence taxpayers' compliance behaviour are primarily the image of SARS in the taxpayer's mind, their level of customer service experience, and the fear of severe non-compliance costs.

These nine strategic objectives are as follows (SARS 2021/2022):

3.2.1. To furnish clarity and certainty to taxpayers and traders of their obligations

[48] Taxpayer W v Commissioner for the South African Revenue Service, (No 24622), (2019)., Taxpayer S v Commissioner for the South African Revenue Service, (No 45997), (2022).
[49] Sections 2 -3 of the Tax Administration Act, 28 of 2011.
[50] SARS annual report 2021/2022. pp 2 – 3.

In 2020, SARS initiated a study aimed at determining the percentage of taxpayers and traders with clear and certain understanding of their tax obligations. SARS selected a sample of taxpayers and traders from the SARS register for the study.

According to the SARS annual report, the study showed improvement in taxpayers' and traders' clarity and certainty from year to year since 2020. The study results for the 2021/2022 tax year showed an increase of 4.06% (69.06%) from 2020/2021 (65%) in people satisfied with the clarity and certainty that SARS provides. However, the SARS study also revealed instability and lack of coherence in the information provided, making it difficult for participants to fulfil their obligations.

The uncertainty in the taxpayer's obligation is also confirmed by the number of litigating cases where taxpayers' challenges decisions taken by SARS to levied penalties, among the many cases these were highlighted Taxpayer W v Commissioner for the SARS 2019 (24622), where the judge found the taxpayer to have failed to take reasonable care in completing the tax return and the incorrect statement of the taxpayers tax return did not constitute a *bona fide inadvertent error* as stipulated in section 222(1) of the TAA, Taxpayer S v Commissioner for the SARS (2022) (45997), where the acting judge of the high court, Strijdom, J.J., found that the taxpayer failed to prove that all the requirements of section 24C and dismissed the application with cost. CIR v Da Costa (1985) SATC 87, ITC 1331 43 SATC 76, ITC 1351 44 SATC 58, where the judges on the three cases states above had commented that according to the act SARS has the right to impose penalty equivalent to twice the additional tax imposed. The failure by the taxpayer to disclose income is a serious offense and the penalties are punish the wrongdoers, and CIR v Di Ciccio (1985 (3)) SA 989 (T) 47 SATC 87 (1986), where the taxpayer argued that the estimated returns did not constitute returns according to section 76 of the act (old regime), however on appeal by SARS the Transvaal Provisional division found the taxpayer liable for the penalty as imposed by SARS according to section 76 of the act. All these cases are showing a lack of clarity or understanding in terms of the tax obligations on the taxpayer's perspective and the administration on the SARS perspective.

SARS places significant emphasis on taxpayer education and awareness. To this end, they have conducted webinars and monitored website hits. Additionally, SARS focuses on leveraged products and other initiatives such as the advanced pricing agreement programme, leveraged legal products, primary legislation, and the Harmonised Commodity Description and Coding System 2022.

3.2.2. To make it easy for taxpayers and traders to comply with their obligations

To improve service delivery, SARS has established an action plan (SARS 2021/2022). SARS aims to reduce face-to-face interactions with taxpayers and instead promote online assistance

to fulfil their obligations. SARS tracks its digitization progress by assessing the number of taxpayers and traders using digital platforms. According to the 2021/2022 SARS annual report, 90.74% of taxpayers and traders interacted with SARS through digital platforms. Furthermore, SARS implemented an auto-assessment system for non-provisional taxpayers, eliminating the need to file returns. The 2021/2022 SARS annual report indicates that out of 97.18% of taxpayers who were auto-assessed, 91.03% accepted the auto-assessment.

3.2.3. To detect taxpayers and traders who do not comply and making non-compliance hard and costly

SARS rigorously tests the accuracy of their risk detection methods. In the 2021/2022 period, more than 98% of compliance risks were identified through their automated risk engines. SARS' ability to detect risk has prevented over ZAR60 million of undue refunds from being issued. The primary objective of SARS' risk detection efforts is to deter non-compliance and to make it costly. To achieve this objective, SARS has established an enforcement cluster committee. The committee's functions include inter-agency liaison, criminal and illicit economic activities, criminal investigation, specialised audit, large business and international, debt, litigation, customs and excise, and enterprise data management (SARS 2021/2022).

3.2.4. To develop a high performing, diverse, agile, engaged, and evolved workforce

SARS is actively promoting employee engagement with the aim of motivating and demonstrating that their employees are valued. SARS invests appropriately and provides their employees with the necessary tools to ensure that taxpayers and traders receive services characterized by professionalism and actions that are beyond reproach (SARS 2021/2022).

3.2.5. To increase and expand the use of data, data analytics and artificial intelligence to understand the compliance behaviour of taxpayers and traders

SARS' primary strategic objective is to offer taxpayers and traders with services that furnish the necessary clarity and certainty, which, in turn, will foster voluntary compliance. To this end, SARS also gauges how the data is utilised and how it can be leveraged to enhance voluntary compliance (SARS 2021/2022).

3.2.6. To use technology to improve systems to furnish digital and streamlined online services

SARS continuously monitors the available digital platforms and assesses how effectively they enable taxpayers to fulfil their obligations. In order to facilitate ease of use, SARS performs regular planned maintenance, system enhancements, and system upgrades across all their

digital platforms. The ultimate objective is to provide taxpayers and traders with a seamless experience when meeting their tax obligations through digital means (SARS 2021/2022).

3.2.7. To exhibit effective management of the resources to deliver quality outcomes and performance excellence

SARS places a strong emphasis on the monitoring and improvement of its Information and Communication Technology (ICT) infrastructure, with the goal of ensuring efficiency and effectiveness in delivering quality services that align with international standards, such as the ICT budget benchmark set by the Organisation for Economic Co-operation and Development (OECD). To achieve this, SARS engages in regular monitoring and assessment of its ICT infrastructure, and implements necessary upgrades, enhancements, and maintenance activities to ensure optimal performance and alignment with international best practices (SARS 2021/2022).

3.2.8. To work with and through stakeholders to improve the tax ecosystem

SARS' annual report for the 2021/2022 period reveals that the organization harnesses its own strengths, as well as those of its stakeholders, to overcome tax administration obstacles and enhance voluntary compliance. SARS is fully committed to exchanging information (EOI) with its stakeholders in line with and achieving 100% compliance with the OECD EOI standards.

3.2.9. To build public trust and confidence in the tax administration system

SARS seeks to enhance voluntary compliance by monitoring the public's perceptions and attitudes towards tax compliance. To achieve this objective, SARS conducts public opinion surveys that utilize both quantitative and qualitative research methods, collecting data from over 3000 people and 30 influential public figures who are randomly selected. The factors that SARS considers important in influencing compliance can be categorized as either internal or external factors. Internal factors include operational efficiency, accessibility, and trustworthiness, while external factors include tax morality, tax diligence, fiscal citizenship, fiscal responsibility, followership, stewardship, socio-economic, and affinity (SARS, 2021/2022).

According to the SARS 2021/2022 annual report, the public opinion score stood at 71.8%, with underperformance attributed to external factors. The external drivers index declined from 75.8% in 2020/2021 to 74.6% in 2021/2022. SARS aims to improve voluntary compliance by addressing these external factors and enhancing public trust in the tax system.

3.3. Corrective actions employed by the Republic

The Republic has recently implemented corrective actions to address intentional and non-intentional tax non-compliance in accordance with the TAA. Intentional tax non-compliance is categorized as tax evasion[51], which is illegal, while unintentional non-compliance is considered as tax laws are unclear, hence SARS efforts to provide clear guidance. These corrective actions, as detailed in Chapters 15 and 16 of the TAA, are primarily aimed at deterring intentional non-compliance while also providing guidance to those who have unintentionally not complied with tax laws.

The objective of these corrective actions is to ensure that the imposition of non-compliance penalties is efficient, effective, and impartial, and that the penalties are proportional to the seriousness and duration of the non-compliance. According to Chapter 15 of the Tax Administration Act, corrective actions may be imposed when taxpayers fail to meet their obligations as specified in a public notice issued by SARS. In such cases, a "fixed amount penalty" must be imposed. The penalties range from ZAR250 for assessed loss or taxable income between ZAR0 and ZAR250 000, up to ZAR16 000 for taxable income above ZAR50 000 000[52]. If a taxpayer remains non-compliant, the penalty imposed increases by the same amount each month, limited to 35 months after the penalty assessment has been delivered to the current address on record with SARS, or up to 47 months from the date of non-compliance if SARS does not have the taxpayer's current address on record[53].

Companies listed on the stock exchange, companies with gross income exceeding ZAR500 000 000, companies forming part of a “group of companies”, or persons or entities exempt from income tax under the Income Tax Act but liable for tax under another tax act and with gross income exceeding ZAR30 000 000, will be liable for a penalty of ZAR8 000, increasing by the same amount for each month of non-compliance[54]. In cases where the taxable income of a taxpayer is unknown, SARS may impose a penalty of ZAR250 or estimate the amount of taxable income based on available relevant material and impose a relevant penalty based on Table 1[55]. If the actual taxable income of the taxpayer is found to be different from the

[51] “Tax evasion usually entails taxpayers deliberately misrepresenting or concealing the true state of their affairs to the tax authorities to reduce their tax liability, and includes, in particular, dishonest tax reporting (such as underdeclaring income, profits or gains; or overstating deductions).” From: sataxguide.co.za/tax-avoidance-and-tax-evasion-the-differences/.
[52] Sections 210 (1) and 211 (1) of the Tax Administration Act, 28 of 2011
[53] Section 211 (2) of the Tax Administration Act, 28 of 2011
[54] Section 211 (3)(a) - (d) of the Tax Administration Act, 28 of 2011
[55] Section 211 (4)(a) – (b) of the Tax Administration Act, 28 of 2011

estimated taxable income, the penalty will be adjusted in accordance with the applicable penalty outlined in Table 1[56].

Table 1: Fixed amount penalty table[57]

Item	Assessed loss or taxable income for 'preceding' year	Penalty (ZAR)
(i)	Assessed loss	250
(ii)	R0-R250 000	250
(iii)	R250 001-R500 000	500
(iv)	R500 001-R1 000 000	1 000
(v)	R1 000 001-R5 000 000	2 000
(vi)	R5 000 001-R10 000 000	4 000
(vii)	R10 000 001-R50 000 000	8 000
(viii)	Above R50 000 000	16 000

If a taxpayer fails to disclose information about a “reportable arrangement” as required by Section 37 of the TAA, they will be liable for a "reportable arrangement penalty" of ZAR50 000 if they are a participant, or ZAR100 000 if they are a promoter, for each month the failure continues for up to 12 months[58]. If the anticipated tax benefit from the arrangement exceeds ZAR5 million, the penalty amounts will be doubled, and if it exceeds ZAR10 million, the penalty will be tripled.[59].

Another penalty is the "percentage-based penalty," which is imposed when SARS determines that an amount of tax was not paid as and when required. The penalty equals the amount of unpaid tax[60]. The TAA does not specify the percentage to be applied, leaving this decision up to the Commissioner's discretion. This lack of clarity may be seen as unfair by taxpayers.

Part D of Chapter 15 of the TAA outlines the procedures for imposing penalties. When penalties are levied as per the sections mentioned above, they must be levied by way of a 'penalty assessment'. If a penalty assessment is made, SARS must give notice of the assessment in a format determined by SARS. This should include: (a) the non-compliance in respect of which the penalty is assessed and its duration; (b) the amount of the penalty levied;

[56] Section 211 (5) of the Tax Administration Act, 28 of 2011
[57] Section 211 (1) of the Tax Administration Act, 28 of 2011
[58] Section 212 (1)(a) – (b) of the Tax Administration Act, 28 of 2011
[59] Section 212 (2) of the Tax Administration Act, 28 of 2011
[60] Section 213 (2) of the Tax Administration Act, 28 of 2011

(c) the date for paying the penalty; (d) the automatic increase of the penalty; and (e) a summary of the procedures for requesting remittance of the penalty[61].

A penalty that is due upon assessment must be paid on or before the date for payment stated in the notice, or if a penalty assessment is made together with an assessment of tax, on or before the deadline for payment stated in the notice[62]. SARS must give the taxpayer notice of any adjustments to the penalty in accordance with Sections 211(2) or 213(2)[63].

Taxpayers may argue that it is unfair that they are levied penalties before they have had a chance to provide their reasons for non-compliance. For criminal offences such as deliberately, fails, or neglects to register as a taxpayer, refuse, or neglects to provide any information, documents requested by SARS or fraud, the presumption of innocence until proven guilty applies. Not all offences are criminal offences such as omitting to disclose income on the tax assessment or taxpayer failed to pay taxes. It is important to note that SARS has the burden of proof to show that the taxpayer was non-compliant, and the penalty was properly imposed. However, the taxpayer has the right to appeal in terms of section 103 of TAA.

The "Procedure to Request Remittance of Penalty" is designed to assist any person who is aggrieved by a penalty assessment notice and wishes to request SARS to remit the penalty.[64] To do so, they must submit a request in the prescribed form and manner, including a description of the circumstances that prevented them from complying with the relevant tax obligation, supporting documents, and any other information required by SARS in the prescribed manner[65].

Once SARS receives the remittance request, it must refrain from taking any collection actions relating to the penalty amount during the period beginning on the day it receives the request and ending 21 business days after it notifies the taxpayer of its decision. The only exception is if SARS has reasonable grounds to believe that there is a risk of dissipation the taxpayer's assets or fraud involved in the non-compliance or grounds for remittance[66].

The "Procedures to request remittance of penalty" aim to assist taxpayers who have received a penalty assessment notice and wish to request that SARS remit the penalty. To make a request, the taxpayer must complete the prescribed form and include a description of the circumstances that prevented compliance with the relevant tax obligation, as well as any

[61] Section 214 (1) of the Tax Administration Act, 28 of 2011
[62] Section 214 (2) of the Tax Administration Act, 28 of 2011
[63] Section 214 (3) of the Tax Administration Act, 28 of 2011
[64] Section 215 (1) of the Tax Administration Act, 28 of 2011
[65] Section 215 (2)(a) – (b) of the Tax Administration Act, 28 of 2011
[66] Section 215 (3) of the Tax Administration Act, 28 of 2011

supporting documents and information that SARS may require. During the 21-day period following SARS' decision on the remittance request, no collection actions related to the penalty amount may be taken unless there is a risk of dissipation of assets by the taxpayer or fraud involved in the non-compliance. SARS may extend the period referred to in Subsection 215(1) if the incident of non-compliance relates to Sections 216 or 217 of the TAA, and there are reasonable grounds for late receipt of the remittance request or exceptional circumstances that render a person incapable of submitting the remittance request[67].

The "Remittance of penalty for failure to register" allows SARS to remit the penalty in full or in part if the taxpayer voluntarily approaches SARS and files all the required tax returns[68]. or the "Remittance of penalty for nominal or first incidence of non-compliance," SARS may remit the penalty levied in respect of the first incidence of non-compliance described in Sections 210, 212 or 213 of the TAA. If the period of non-compliance is less than five business days and there are reasonable grounds for non-compliance, SARS may remit the penalty or a portion of up to ZAR2 000[69]. In the case of a penalty imposed under Section 212 of the TAA the limit of ZAR2 000 referred to above is changed to ZAR100 000[70]. For a penalty levied under Section 213 of the TAA, SARS may remit the penalty or a portion if it is satisfied that the penalty was levied in respect of the first incidence of non-compliance described in Sections 210, 212 or 213 of the TAA, or involved an amount less than ZAR2 000, there are reasonable grounds for non-compliance, and the non-compliance has been remedied[71].

The process for remitting penalties in exceptional circumstances is governed by SARS regulations. Upon receiving a request for remittance, SARS is required to consider the exceptional circumstances that led to the taxpayer's inability to comply with relevant tax obligations[72]. These circumstances are limited to natural or human-made disasters, civil disturbances or service disruptions, serious illnesses or accidents, serious emotional or mental distress, SARS errors or delays, serious financial hardship, or other similarly serious circumstances. If SARS determines that exceptional circumstances exist, it may remit the penalty or a portion thereof[73]. In cases where a penalty was incorrectly assessed, SARS has the authority to issue an adjusted assessment within three years of the penalty assessment[74].

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[67] Section 215 (4)- of the Tax Administration Act, 28 of 2011
[68] Section 216 (a) – (b) of the Tax Administration Act, 28 of 2011
[69] Section 217 (1) of the Tax Administration Act, 28 of 2011
[70] Section 217 (2) of the Tax Administration Act, 28 of 2011
[71] Section 217 (3) of the Tax Administration Act, 28 of 2011
[72] Section 218 (1) of the Tax Administration Act, 28 of 2011
[73] Section 218 (2) of the Tax Administration Act, 28 of 2011
[74] Section 219 of the Tax Administration Act, 28 of 2011

This is provided that SARS is satisfied that the penalty levied was not in accordance with Chapter 15 of the TAA[75].

Chapter 16 of the TAA provides for corrective actions regarding the levying of the "understatement penalty." This penalty is levied on intentional or unintentional understatements of tax liability by taxpayers, subject to reasonable grounds and SARS satisfaction. The "Understatement penalty" requires taxpayers to pay a penalty in addition to the tax payable for the relevant period. The penalty amount is determined by applying the highest applicable understatement penalty percentage, as set out in Table 2[76].

The shortfall is calculated as the sum of (a) the difference between the correct tax amount chargeable for the tax period and the incorrect tax amount that would have been chargeable if the understatement was acceptable, (b) the difference between the correct tax amount refundable for the tax period and the incorrect tax amount that would have been refundable if the understatement was accepted, and (c) the difference between the correct amount of an assessed loss or any benefit to the taxpayer carried forward from the prior tax period and the incorrect amount that would have been carried forward if the understatement was accepted, multiplied by the tax rate determined under Section 222(5)[77]. If the understatement results from both (a) and (b) above, any duplicate amount between the two paragraphs must be reduced from the shortfall[78]. The maximum tax rate that is applicable to the taxpayer, disregarding the assessed loss or any other benefit brought forward from the preceding tax period, will be chargeable[79].

Table 2: Understatement penalty percentage table[80]:

Item	Behaviour	Standard case	If obstructive, or if it is a 'repeat case'	Voluntary disclosure after notification of audit	Voluntary disclosure before notification of audit
(i)	'Substantial understatement'	25%	50%	5%	0%

[75] Section 220 of the Tax Administration Act, 28 of 2011
[76] Section 222 (1) and (2) of the Tax Administration Act, 28 of 2011
[77] Section 222 (3) of the Tax Administration Act, 28 of 2011
[78] Section 222 (4) of the Tax Administration Act, 28 of 2011
[79] Section 222 (5) of the Tax Administration Act, 28 of 2011
[80] Section 223 (1) of the Tax Administration Act, 28 of 2011

(ii)	Reasonable care not taken in completing return	50%	75%	25%	0%
(iii)	No reasonable grounds for 'tax position' taken	75%	100%	35%	0%
(iv)	Gross negligence	100%	125%	50%	5%
(v)	Intentional tax evasion	150%	200%	75%	10%

In cases where an assessment is based on an estimation determined under Section 95 of the TAA or an assessment agreed upon with the taxpayer under Section 95(3) of the TAA, an understatement penalty can also be levied[81]. SARS may remit a penalty levied for a substantial understatement if the taxpayer made a full disclosure of the arrangement that gave rise to the prejudice to SARS or the government revenue fund no later than the due date of the relevant return. Additionally, the taxpayer must have been in possession of an opinion issued by a registered tax practitioner, which took into account the specific facts and circumstances of the arrangement and confirmed that the taxpayer's position is more likely than not to be upheld if the matter proceeds to court[82]. If a taxpayer disagrees with SARS's decision not to remit the understatement penalty, they may object or appeal under Chapter 9 of the TAA[83].

Table 2 outlines that SARS will impose a penalty based on the taxpayer's behaviour, but it does not consider situations where information to determine the taxpayer's behaviour is not available. This means that if there is uncertainty regarding the taxpayer's behaviour, SARS has the discretion to levy a penalty. However, this may result in a situation where a taxpayer is charged a penalty twice. For instance, if a taxpayer fails to keep the required documents, they may be charged a penalty under Section 210 of the TAA, and they may also be charged an understatement penalty on the same taxable amount if their estimate is lower than the estimate determined by SARS. This underscores the importance of taxpayers keeping accurate records and providing all necessary information to SARS to avoid penalties. In the event of disputes, taxpayers may object or appeal SARS' decision on penalties under Chapter 9 of the TAA.

[81] Section 223 (2) of the Tax Administration Act, 28 of 2011
[82] Section 223 (3) of the Tax Administration Act, 28 of 2011
[83] Section 224 of the Tax Administration Act, 28 of 2011

3.4. Fairness, Equity, and Effectiveness of RSA's Tax administration penalty regime.

The old penalty regime was governed by Section 75 of the Income Tax Act, 58 of 1962. Section 75 stated that any taxpayer, whether an individual or entity, who fails to provide required returns or documents, refuses to provide information, neglects to disclose relevant facts, obstructs officers, fails to retain relevant records, or submits false certificates or statements under Section 73 of the Act, shall be guilty of an offense. Upon conviction, the taxpayer may be fined, imprisoned for up to twenty-four months, or both[84].

The prior penalty provisions were not aligned with SARS's primary objective of fostering voluntary compliance and discouraging non-compliance. These provisions failed to effectively deter rational taxpayers as they would assess the potential benefits of evading compliance against the perceived costs of detection. Consequently, some taxpayers may have opted to take the risk of non-compliance. Furthermore, the absence of clear guidelines for imposing penalties led to SARS relying on its discretion, which resulted in inconsistencies and unfairness in penalty enforcement.

The revised penalty regime effectively tackles these limitations by establishing explicit guidelines for the application of non-compliance penalties as outlined in Section 211 of the Tax Administration Act, 28 of 2011. These guidelines are readily accessible and transparent to taxpayers and the general public, ensuring fairness and uniformity in the imposition of penalties. The updated regime is in line with SARS's objective of fostering voluntary compliance and deterring non-compliance. The Tax Administration Act came into effect on 1 October 2012, superseding the penalty provisions previously introduced in the Income Tax Act of 2009. The Act now encompasses provisions relating to penalties for various types of non-compliance, categorized into three main groups based on different circumstances and the severity of the infractions. Under the Tax Administration Act, the Commissioner has the authority to impose two types of penalties: the "fixed amount penalty" and the "percentage-based penalty." The issuance of a Public Notice, as mandated by Section 210(2) of the Tax Administration Act, holds significant importance as it ensures that taxpayers are treated consistently for similar offenses, thereby establishing a fair, equitable, and comparable platform for all individuals.

In accordance with the Memorandum on the Objects of the Tax Administration Bill of 2011, the primary objective of the Tax Administration Act was to modernise and align the outdated framework of the Income Tax Act with the current business environment. A key aim of the Tax Administration Act is to alleviate the burden of tax administration for taxpayers by

[84] Section 75 (1) of the Income Tax Act 58 of 1962

reducing costs. Additionally, the Tax Administration Act seeks to strike a balance between the powers and responsibilities of the Commissioner and the rights and obligations of taxpayers. The Tax Administration Act also aims to establish a transparent relationship between the Commissioner and taxpayers. Consistent treatment of taxpayers in similar circumstances is crucial for achieving administrative justice. The Tax Administration Act endeavours to protect administrative fairness and taxpayers' rights by providing more effective remedies and specific procedural rights. During the drafting of the Tax Administration Act, international best practices in tax administration were considered, focusing on principles such as equity and fairness to promote compliance, certainty and simplicity to ensure transparency, efficiency to minimize costs associated with compliance and administration, and effectiveness in collecting the appropriate amount of tax and reducing non-compliance, while adapting to technological and commercial advancements.

The previous penalty provisions lacked clarity on the procedures for taxpayers to apply for remittance, as well as how to object or appeal against the imposition of a penalty. This lack of guidance left taxpayers unsure of how to proceed when faced with a penalty. In contrast, the new penalty regime provides clear guidelines on how to apply for remittance under specific sections, including what information must be included in the remittance request[85]. In addition, aggrieved taxpayers may object or appeal against the penalty under Sections 222(1) and (2) of the Tax Administration Act, 28 of 2011. Section 76 of the Income Tax Act, 58 of 1962, which is from the previous penalty regime, contained the following provisions:

If a taxpayer fails to submit a tax return for a specific assessment year, they will be required to pay an additional amount equal to twice the tax chargeable on their taxable income for that year. Similarly, if the taxpayer omits any amount that should have been included in their return, they will be liable to pay 200% of the difference between the tax calculated based on the taxable income stated in their return and the correct tax amount based on the taxable income including the omitted amount[86].

Furthermore, if the taxpayer furnishes an incorrect statement and or a document in their tax return that leads to taxpayer owing a lower normal tax than what should have been levied, then the taxpayer will be liable to pay up to 200% of the difference between the tax assessed based on the incorrect tax return and the tax amount that should have been properly levied[87].

The previous penalty provisions lacked clarity and fairness as they imposed a flat rate penalty of up to 200% on taxpayers regardless of the severity of the offense. Additionally,

[85] From Section 65 of the Tax Administration Act, 28 of 2011
[86] Section 76 of the Income Tax Act 58 of 1962
[87] Ibid.

there were no clear guidelines on how the penalty should be imposed, which gave SARS wide discretion and led to inconsistencies. However, the new penalty regime introduced in Section 223 of the Tax Administration Act, 28 of 2011, provides clear guidance on how penalties should be imposed. The new regime is designed to encourage voluntary compliance by making it easier for SARS to manage and measure taxpayers' behaviour. The severity of the offense determines the level of the penalty, with harsher penalties imposed for more serious offenses.

Moreover, the new penalty regime allows for remittance of penalties and provides clear guidelines on how to apply for remittance, which was not the case in the previous regime. In case a taxpayer is aggrieved by the penalty, they can object or appeal under Sections 222(1) and (2) of the Tax Administration Act, 28 of 2011. Overall, the new penalty regime aims to deter non-compliance by increasing the cost of non-compliance and promoting compliance.

3.5. Conclusion

In summary, the new RSA penalty regime has proven to be clear for SARS to administer effectively and efficiently to achieve fairness and equitable administrative penalty imposition and to promote voluntary compliance. The nine strategic objectives that SARS employ to measuring and improve their performance suggest the understanding that penalties are necessary to enforce compliance by those taxpayers who would rather refuse to meet their obligations as citizens of the Republic and however, SARS seem to have little understanding of the dangers of using this mechanism widely, hence the understatement penalty can get to 200%. It is suggested that taxation is the means to an end and not the end to the means, so the unnecessarily harsh enforcement regime such as this one, seem to detract from the main government objective of raising funds for the public good. The harshness can reduce the voluntary willingness to comply with tax obligations by the citizens (James and Alley 2009).

However, the new regime is still falling short on some provisions, it does not stipulate the actual percentage that must be levied by SARS under “Imposition of percentage-based penalty”, Section 213 of the Tax Administration Act, 28 of 2011, SARS is left to use their discretion. Taxpayer may be levied a penalty twice from the same amount under the non-compliance provisions and also under the understatement provisions, which might be seen as excessive and unfair by the taxpayers and the public. The next chapter is discussing the corrective actions implemented by the Australian and United States tax revenue authorities to encourage taxpayers to comply with tax obligations and pay taxes.

Chapter 4: Corrective actions implemented by the Australian and United States tax revenue authorities to encourage taxpayers to comply with tax obligations and pay taxes

4.1. Introduction

This chapter provides an in-depth analysis of the different strategies used by tax revenue authorities in the Australia and the USA to encourage compliance and ensure tax payments. It specifically focuses on the Tax Administration Act 1953, Sections 8B to 8W, and U.S. Code 6651, Title 26, Subtitle F, Chapters 61 and 68, Subchapter A, Part I, as well as relevant case laws. By reviewing and analysing these provisions, this chapter aims to provide a comprehensive understanding of the various corrective actions available to tax revenue authorities and how they are applied in practice to promote taxpayer compliance.

4.2. Corrective actions employed by the Commonwealth of Australia.

When drafting the TAA, the Republic of South Africa looked to countries with long-term experience in tax administration, including the Commonwealth of Australia. The Australian Tax Administration Act 1953 provides for non-compliance penalties to be levied based on either a statutory formula or a penalty unit table. The minimum penalty starts at 1 penalty unit, which is equivalent to AUD222, while the maximum is 75 penalty units, or AUD16 650. Some councils may even choose to impose penalties beyond 75 penalty units (Penalty units 2022). The penalty value is calculated by multiplying the penalty unit by its value, and then rounding down to the nearest dollar (Penalty units 2022).

The penalty unit is the basis for determining the penalty value associated with offences under most country legislations, local government legislations and penalty infringement notices issued under these legislations (VPU). According to the Penalties and Sentences Act 1992 (PS), there is a legislative mechanism for annual indexation that increases to the value of a penalty unit. The value of the penalty unit increases every year and get effective every 1 July according to PS (VPU).

Table 3: **The penalty unit value in terms of the Australian tax authorities is based on when the offence occurred, and it also changes see penalty table below (ATO (d)):**

When transgression occurred	Penalty unit amount (AUD)
1 July 2020 to 31 December 2022	222
1 July 2017 to 30 June 2020	210
31 July 2015 to 30 June 2017	180
28 December 2012 to 30 July 2015	170
Up to 27 December 2012	110

The penalties in the Commonwealth of Australia are imposed by the court, where the court can consider all the evidence and decide on the suitable penalty based on the offence[88]. The Commissioner is responsible for the administration and enforcement of the provisions of the Australian tax laws. The Australian Taxation Office (ATO) is a revenue collection agency and the custodian of the Tax Administration Act 1953.

The primary objective of imposing penalty according to ATO is to encourage all individuals and entities to take reasonable care in complying with their tax obligations. In terms of Section 8C of the Tax administration Act 1953, any taxpayer who failed to comply with the requirements under taxation law commits an offence. The circumstances under which a taxpayer can be found to have committed an offence under Section 8C are as follows: a person who, when required by the provisions of a tax legislation:

- refuses or fails to provide the Commissioner or another authorized person with the necessary information or documents;
- fails to provide information to the Commissioner in the specified manner as required by the taxation law, neglects to lodge an instrument for assessment with the Commissioner or another authorised person;
- fails to notify the Commissioner or another authorised person of a matter or thing, fails to produce books, papers, records, or other documents to the Commissioner or another authorised person;
- fails to attend before the Commissioner or another authorised person, fails to comply with a superannuation guarantee education direction as outlined in Subsection 384-17(1) of Schedule 1;

[88] Section 8E of the Tax Administration Act 1953

- does not submit application to register or cancel the registration under the 'A New Tax System Act 1999';
- does not comply with Subsection 45A(2) of the 'Product Grants and Benefits Administration Act 2000', or does not comply with Subsection 82-10F(4) of the 'Income Tax (Transitional Provisions) Act 1997'.

The person who perpetrate one or more of these offences will be liable for ‘absolute liability’ in terms of Section 6.2 of the Criminal Code. however, it will not apply in the case where a person is not able to comply with the relevant taxation law or paragraph[89]. ‘Absolute liability’ means that there is no need for the prosecutor to prove intention, knowledge, recklessness, negligence, or any other variety of fault[90]. Section 6.2 of the Criminal Code grant the Australian prosecutor an authority to find taxpayer liable of an absolute liability before the taxpayer can prove capability to comply with the offences stipulated in Section 8C, taxpayers might find this confusing, contradictory, and unfair.

According to Section 8D of the Tax Administration Act 1953, in the case where a person fails to respond to the questions before the Commissioner, the person commits an offence and will be liable for ‘strict liability’ under Section 6.1 of Criminal Code. This does not apply in the case where a person is incapable of complying with the relevant taxation law or paragraph. ‘Strict liability’ the meaning is the same as ‘absolute liability’ except that the defence of reasonable mistake under Section 9.2 is available[91].

Section 8E of the Tax Administration Act 1953 outlines the penalties that are to be levied should a person fail to comply with a requirement under taxation law (Non-compliance penalty). According to Subsection 8E (1) of the Tax Administration Act 1953, and offence against Section 8C or Subsection 8D (1) or (2) is punishable on conviction by fine not exceeding 20 penalty units, subject to Subsection 8E (2) and (3). According to Subsection 8E (2), where a person has been found guilty of an offence against Section 8C or Subsection 8D (1) or (2); and the court before which the person is charged is pleased that the person has previously been charged of a similar offence; the penalty that the court may levy in respect of the first-mentioned offence is a fine not exceeding 40 penalty units.

[89] Section 8C of the Tax Administration Act 1953

[90] Section 6.2 (1) of Criminal Code; “If a law that creates an offence provides that the offence is an offence of absolute liability: (a) there are no fault elements for any of the physical elements of the offence; and (b) the defence of mistake of fact under Section 9.2 is unavailable.” Section 6.2 (2) of the Criminal Code; “If a law that creates an offence provides that absolute liability applies to a particular physical element of the offence: (a) there are no fault elements for that physical elements; and (b) the defence of mistake of fact under Section 9.2 is unavailable in relation to that physical element.”.

[91] Ibid.

According to Subsection 8E (3), where a person is convicted of an offence against Section 8C or Subsection 8D (1) or (2); in a situation where a person is a natural person that Commissioner has elected under Subsection 8F (1) to treat the offence different than as a stipulated taxation offence; and the court in which the person is charged is satisfied that the person has previously been charged of two or more similar offences; the penalty that the court may levy in respect of the first-mentioned offence is a fine not exceeding 50 penalty units or imprisonment for a period not exceeding 12 months, or both.

Under Section 8F of the Tax Administration Act 1953, the Commissioner may elect to treat an offence otherwise than as a prescribed taxation offence and file the copy of the election in the court where the prosecution is instituted. According to Section 8G of the Tax administration Act 1953, the court may order a person who has been convicted of an offence under Section 8C or Subsection 8D (1) or (2), in addition to the penalty imposed, to comply with the requirements of the taxation law. Failure to comply with the order of court may lead to a fine not exceeding 50 penalty units and that will be an offence of a 'strict liability' under Section 6.1 of the Criminal Code.

According to Section 8HA of the Tax Administration Act 1953, the court may order a payment of an amount in addition to the penalty, where a person who have been convicted on non-compliance under Sections 8C, 8D or 8H and the court is satisfied that the intentions for non-compliance were to facilitate the avoidance of an amount of tax liability, not exceeding 300% of that amount or in any other cases the amount not exceeding 200% of that amount.

Making false or misleading statements[92] and or incorrect keeping of records[93], are the non-compliance offences which are punishable by penalties under penalty units and or imprisonment[94]. Recklessly making false or misleading statement[95], and or recklessly incorrectly keeping records[96], are non-compliance offences which are punishable by penalties under penalty units and or imprisonment[97]. The Commissioner may elect to treat an offences state in the sections preceding this section different to the prescribed taxation offence[98]. Incorrect keeping records with intention of deceiving or misleading[99], and or falsifying or concealing identity with intention of deceiving or misleading[100], these offences are regarded

[92] Section 8K of the Tax Administration Act 1953
[93] Section 8L of the Tax Administration Act 1953
[94] Section 8M of the Tax Administration Act 1953
[95] Section 8N of the Tax Administration Act 1953
[96] Section 8Q of the Tax Administration Act 1953
[97] Section 8R of the Tax Administration Act 1953
[98] Section 8S of the Tax Administration Act 1953
[99] Section 8T of the Tax Administration Act 1953
[100] Section 8U of the Tax Administration Act 1953

as serious non-compliance offences and are punishable by penalty under penalty units and or imprisonment[101].

Table 4: **The summary of the other penalties imposed to non-compliance according to ATO (a):**

Tax obligation	Penalty for non-compliance
Records must be kept or retained as required	20 penalty units
Declaration must be retained and/or produced as required	20 penalty units
Authorised tax officer must be granted access and reasonable facilities	20 penalty units
Application for or cancellation of goods and services tax registration when required	20 penalty units
Issuing a required tax invoice or adjustment note	20 penalty units
Both principal and agent cannot issue tax invoice or adjustment note for the same taxable supply or adjustment event	20 penalty units
Required to register as a pay as you go (PAYG) withholder	5 penalty units
Required to Submit an electronic activity statement	5 penalty units
Required to pay an amount electronically	5 penalty units

In terms of the understatement penalties in the Tax Administration Act 1953, which is also based on taxpayers' behaviour that led to understatement. The Australian authorities impose a base rate penalty which is the percentage of the understatement ranging from 25% to up to the maximum of 75% (ATO (c)).

[101] Section 8V of the Tax Administration Act 1953

Table 5: **Base rate penalty and behaviour leading to an understatement (ATO (c)):**

Behaviour	Base rate percentage
Refuse or neglect to take reasonable care.[102] Where a taxpayer fails to take reasonable care that a reasonable person in the same circumstances would have done.	25% of an understatement
Recklessness[103] Where a taxpayer is recklessly making false submissions that would not have been done by a reasonable person in the same circumstances as the taxpayer knowing that there was a risk of understating the tax amount.	50% of an understatement
Intentional disregard[104] Where a taxpayer intentionally disregard the legislation and he/she is aware of a tax obligation, and the taxpayer is disregarding the obligations with the intention of bringing about certain results (underpaying tax or over-claiming an entitlement). Taxpayer is intentionally evading tax in this scenario.	75% of an understatement

The penalty regime in terms of Tax Administration Act 1953 is in detail and covered a wide range of non-compliance, however, lack fairness and transparency in the provisions where the Commissioner may elect to change an offence to that of prescribed taxation offences and that might lead to ineffective administration of the penalty regime. The level of uncertainty and lack of understanding on the taxpayers' side is seen the Commissioner of Taxation v White (No 2) (2010) case where the taxpayer believed to be correct and even went as far as cross appealing the case, the court ruled in favour of the Commissioner of Taxation and the taxpayer was charged 50% penalty for recklessness. The Australian penalty regime has some other administration penalties for specific circumstances, such as penalty for 'failure to withhold' pay as you go (PAYG) which is imposed to companies and company directors (ATO (b)).

[102] Section 8K of the Tax Administration Act 1953
[103] Sections 8N and 8Q of the Tax Administration Act 1953
[104] Sections 8C and 8K of the Tax Administration Act 1953

4.3. Corrective actions employed by the USA

In the United States of America, the corrective actions against non-compliance are covered under Chapter 68 of the Internal Revenue Service Code 6651 to 6658, Subchapter A. The Internal Revenue Service was established to carry out the responsibilities of the secretary of the Treasury under Section 7801 of the Internal Revenue Code. The secretary has authority to administer and enforce the internal revenue regulations and has powers to delegate the enforcement of these regulations.

The following are the actions that give rise to non-compliance and that require the corrective actions in terms of penalties are imposed, as stated in the Subchapter A of Chapter 68 of the Internal Revenue Code:

- Does not file tax returns (Section 6651)
- Does not file certain information returns (Section 6652)
- Does not pay tax (Section 6653)
- Where Individuals fail to pay estimated income tax (Section 6654)
- Where Entities fail to pay estimated income tax (Section 6655)
- Does not make deposit of taxes (Section 6656)
- Submit Bad cheques (Section 6657)
- Additional tax in case of jeopardy (Section 6658).

In addition to the tax amount chargeable, the taxpayers may pay an additional amount due to actions that lead to non-compliance. In the case of a failure to file tax returns as required under Subchapter A of Chapter 61, there shall be an addition of 5% of the amount of tax required to show on the tax return. The additional 5% will be imposed for each month or a fraction of a month. The taxpayer remains non-compliant up to the maximum of 25% in aggregate[105]. The penalty shall be imposed on the net amount due, that means the tax amount that is required to be shown on the tax return is reduced by any tax amount already paid or any tax credit relevant to the specific return[106]. This section does not apply to the failure to file the declaration of estimated tax required under Section 6015 or 6016[107].

[105] Section 6651 (a) of the Internal Revenue Code, Chapter 68, Subchapter A, Title 26, Subtitle F.
[106] Section 6651 (b) of the Internal Revenue Code, Chapter 68, Subchapter A, Title 26, Subtitle F.
[107] Section 6651 (c) of the Internal Revenue Code, Chapter 68, Subchapter A, Title 26, Subtitle F.

The treasury's secretary or his or her delegate may issue notice and demand a penalty of USD1 (limited to USD1 000 per calendar year) for each statement not filed as required under the provision of Section 6041 which is relating to information at source, Section 6042 which is relating to payments of corporate dividends, Section 6044 which is relating to patronage dividends, Section 6045 which is relating to returns of brokers, or Section 6051 (d) which is relating to information returns with respect to income tax withheld, unless the is reasonable cause that is communicated and not a wilful or negligent on the side of the taxpayer[108].

For any part of any underpayment of tax as required under authority if subtitle A, due to negligence however with no intentions to evade tax, there shall be a penalty addition of 5% of underpayment. However, if the intentions are to evade tax, then a penalty of 50% of the underpayment shall be added to the tax amount due[109]. If the penalty of 50% is imposed where taxpayer's intentions were to evade tax, then the penalty on failure to pay tax should not be imposed[110].

An amount calculated at the rate of 6% per annum, of the underpayment amount, shall be added to the tax amount, where an individual failed to pay estimated income tax[111]. An amount determined at the rate of 6% per annum, of the underpayment amount, shall be added to the tax amount, where a corporation failed to pay estimated tax[112]. In the case of any person required by Title 26 or the provisions of the Secretary or delegate of the secretary under Title 26 to deposit on the date prescribed therefor any amount of tax imposed by Title 26 in such government depositary as is required under Section 6302 (c) to receive such deposit, unless it is shown that such failure is due to reasonable cause and not due to wilful neglect. There shall be a charge of 1% penalty of the underpayment amount if the failure is not more than a month upon that person, with an additional 1% for each month after or fraction thereof during which such failure continues, however not exceeding 6% in aggregate.

In the case of any cheque or money order in payment of any amount receivable under Title 26 is not duly paid, in addition to any other penalties provided by the statute, there shall be paid as a penalty by the person who tendered that check, upon notice and demand by the Secretary of Treasury or his delegate, in the same manner as tax, an amount equal to 1% of the amount of such check, except where the amount of such check is less than USD500, then the penalty

[108] Section 6652 (a) of the Internal Revenue Code, Chapter 68, Subchapter A, Title 26, Subtitle F.
[109] Section 6653 (a) and (b) of the Internal Revenue Code, Chapter 68, Subchapter A, Title 26, Subtitle F.
[110] Section 6653 (d) and (b) of the Internal Revenue Code, Chapter 68, Subchapter A, Title 26, Subtitle F.
[111] Section 6654 (a) to (e) of the Internal Revenue Code, Chapter 68, Subchapter A, Title 26, Subtitle F.
[112] Section 6655 (a) to (f) of the Internal Revenue Code, Chapter 68, Subchapter A, Title 26, Subtitle F.

shall be USD5 or the amount of such check, whichever one is lesser. This penalty shall not apply if the person tendered such check in good faith and with reasonable cause to believe that it will be duly paid[113].

In the situation where a taxpayer contravenes or attempts to contravene Section 6851 of the Internal Revenue Code in relation to the termination of taxable year, there shall be in addition to all other penalties, be added as part of the tax 25% of the total amount of the tax or deficiency in the tax.

4.4. Conclusion

The Australian penalty regime seems to be based around the following taxpayers' behaviours: failure to take reasonable care, recklessness, and intention to disregard tax obligations, in which the regulations clearly stipulate the actual penalty associated with these in the Australian Tax Administration Act 1953. The USA's penalty regime has also considered negligence or intention to disregard the regulations, substantial understatement and the repeating offender and harsh penalties are imposed should a taxpayer been found to have been non-compliant and the non-compliance fall within the above stated behaviours. With CIC Services, LLC v IRS (No19/930) (2020), where taxpayer challenges the notice of issued by the IRS for the taxpayer and advisors to provide certain information, the courts suggested that the notice was correct, and it was aligned to the tax penalty provisions of the IRS and even the supreme court agreed to the full court. This case proves or shows that there is and will always be a level of uncertainty to understand the tax obligations unless the tax authorities spend time to educate taxpayers. Taxpayers always seek opportunities to avoid taxes and try to use other regulations to just to avoid compliance with tax obligations.

In summary, in the Commonwealth of Australia and the United States of America, corrective actions are more subjective and specifically aligned to the type of offence committed. They consider the duplication where the offence overlaps to multiple provisions. The next chapter is discussing the comparison of the enforcement of South Africa's penalty regime, as outlined in Chapters 15 and 16 of the Tax Administration Act 28 of 2011, to the administrative penalty regimes of the USA and Australia.

[113] Section 6657 of the Internal Revenue Code, Chapter 68, Subchapter A, Title 26, Subtitle F.

Chapter 5: A comparison of the enforcement of South Africa's penalty regime, as outlined in Chapters 15 and 16 of the Tax Administration Act 28 of 2011, to the administrative penalty regimes of the Commonwealth of Australia and the USA

5.1. Introduction

This chapter compares South Africa's penalty regime with those of the Commonwealth of Australia and the United States of America in terms of non-compliance and failure to pay tax. The purpose of this comparison is to determine whether South Africa's penalty regime is in alignment with international best practices and to identify areas for improvement. This chapter compares Chapter 15 of the South African TAA with Sections 8B to 8HA of the Australian Tax Administration Act and Chapters 61 and 68 of Subchapter A of the U.S. Code 6651, as these provisions are similar in terms of offenses, and compare Chapter 16 of the South African TAA with Sections 8J to 8W of the Australian TAA and Chapter 68 of Subchapter A of the U.S. Code 6651.

5.2. Comparison of the enforcement of South Africa's penalty regime to the administrative penalty regime of the Commonwealth of Australia

The South African non-compliance penalty regime has elements similar to the Australian non-compliance penalty regime. Both countries have scalable fixed amount penalties that increases based on the severity of the offence. Australian tax authorities enforce the penalty unit table, whereas 1 penalty unit is equivalent to AUD222 up to 75 penalty units, which are equivalent to AUD16 650 (Penalty unit 2022). The South African authorities enforce a fixed amount penalty table, whereas the penalty range from ZAR250 for assessed loss or taxable income between ZAR0 and ZAR250 000. The principle is that both countries use a scalable mechanism for transparency purposes in terms of these penalties, where the taxpayers can clearly see how the penalty is determined based on the offence.

The difference on these tables between the two countries is the fact that the penalty unit table changes year by year, whereas the fixed amount penalty table has never changed since 2012. The Australian penalty regime has some specific administration penalties for specific offences which the South African penalty regime does not, such as penalty on failure to withhold "pay as you go" which is mainly applicable to business (ATO (b)). Businesses are liable to a penalty equal to the amount that should have been withheld (ATO (b)).

The obligations covered in Sections 8C, 8D, 8K and 8L of the Australian Tax Administration Act 1953 are substantially similar to the obligations stipulated in Sections 22 to 29 in Chapters 3 and 4 of the South African Tax Administration Act. Both countries' penalty regimes have similar exemption provisions in the circumstance where the offence was not deliberate, or the taxpayer was in capable of complying with the tax law. Australian Tax Administration Act is covering this exemption in each section in Division 2 subdivision A and B, where the taxpayer is found guilty. In both countries' tax regime the onus is on the taxpayer to prove that the offence was not intentional.

There are differences. According to the Australian Tax Administration Act, penalties are imposed where the taxpayers provide false or misleading statements even when there is no direct tax loss to the Australian government (ATO (c)). The South African Tax Administration Act does not have such provisions. In terms of Section 223 (1) of the South African Tax Administration Act, the maximum penalty that can be imposed to the understatement amount is 200%, whereas in the Australian Tax Administration Act the maximum is 75%.

5.3. Comparison of the enforcement of South Africa's penalty regime to the administrative penalty regime of the United States of America

The South African non-compliance penalty regime has elements similar to that of the United States of American non-compliance penalty regime. In both regimes, the taxpayers are liable for penalties when they fail to submit tax returns[114], failure to pay taxes also covered in both regimes[115], failure to file supporting documents as required[116], failure to pay estimated income tax is also covered in both regimes[117].

One significant difference lies in the penalties imposed for non-compliance under each of these systems. In the South African penalty regime, failure to submit returns, pay taxes, or provide supporting documents incurs penalties based on a fixed amount penalty table. For instance, if the offense results in an assessed loss or taxable income ranging from ZAR0 to ZAR250,000, the penalty starts at ZAR250. The maximum penalty is ZAR16,000 for taxable incomes exceeding ZAR50,000,000.

[114] Section 6651 of the Internal Revenue Code, Chapter 68, Subchapter A, Title 26, Subtitle F. Section 25 of the Tax Administration Act 28 of 2011
[115] Section 6653 of the Internal Revenue Code, Chapter 68, Subchapter A, Title 26, Subtitle F. Section 151 of the Tax Administration Act 28 of 2011
[116] Section 6652 of the Internal Revenue Code, Chapter 68, Subchapter A, Title 26, Subtitle F. Sections 25 and 28 of the Tax Administration Act 28 of 2011
[117] Section 6654 of the Internal Revenue Code, Chapter 68, Subchapter A, Title 26, Subtitle F. Section 95 of the Tax Administration Act 28 of 2011

On the other hand, the USA penalty regime applies different percentages for various non-compliance scenarios. For example, if a taxpayer fails to submit a return, a 5% penalty is imposed, with an additional 5% penalty for each subsequent period of non-compliance, up to a maximum of 25% of the tax amount owed.

One significant difference is that the USA penalty regime applies a percentage to the amount of tax owed, while the South African penalty regime imposes a fixed amount based on assessed losses or taxable amounts. The USA regime is designed to systematically punish non-compliance by increasing the percentages as the offense continues, particularly targeting significant offenses with higher percentages. Both countries have exemptions for cases where non-compliance is due to the taxpayer's incapability or can be proven as a genuine mistake.

The USA penalty regime includes specific penalties that are not present in the South African regime, such as penalties for failure to make tax deposits[118] or submitting bad checks[119]. However, the South African regime may cover these non-compliances under Section 223 of the Tax Administration Act 28 of 2011. Another difference is that penalties in the South African regime can reach up to 200%, while in the USA regime, penalties can go up to 50% when the taxpayer's intent is to evade taxes.

The USA penalty regime also addresses situations where an offense overlaps with other penalty provisions, with the higher penalty being applied[120]. However, the South African penalty regime lacks clear stipulations in the Tax Administration Act (TAA), which may result in the risk of a taxpayer being subjected to penalties for the same offense under different provisions of the TAA. For instance, a taxpayer could face penalties for both failure to pay taxes (Section 211 of TAA) and understatement penalties (Section 223 of TAA). Tables 6 and 7 below provide a comparative summary of the penalties imposed in these three countries, but it is important to note that the administration of these penalties may vary between countries.

[118] Section 6656 of the Internal Revenue Code, Chapter 68, Subchapter A, Title 26, Subtitle F.
[119] Section 6657 of the Internal Revenue Code, Chapter 68, ubchapter A, Title 26, Subtitle F.
[120] Sections 6653 (b) and (d) of the Internal Revenue Code, Chapter 68, Subchapter A, Title 26, Subtitle F.

Table 6: **Non-Compliance comparison**

Countries					
Taxpayer behaviour	**Republic of South Africa[1]**	**Commonwealth of Australia**		**United States of America**	
	ZAR	**AUD**	**AUD Converted to ZAR on 31/05/2023 (rounded down)**	**USD**	**USD Converted to ZAR on 31/05/2023 (rounded down)**
Intentional non-compliance	250 - 16,000	222 - 16,650	2,850 - 213,786	1 - 1,000	18 - 18,000
Gross negligence	250 - 16,000	222 - 16,650	2,850 - 213,786	1 - 1,000	18 - 18,000
No reasonable care taken	250 - 16,000	222 - 16,650	2,850 - 213,786	1 - 1,000	18 - 18,000
Relevant legislation	Section 211 of TAA	Sections 8C to 8W of AU TAA and ATO (a)		Sections 6651, 6652, 6653, 6654, 6655, 6656, 6657, 6658 of the IRS code	
Note 1: Failure to disclose "reportable arrangement" either ZAR50 000 or ZAR100 000 for every month up to 12 months					

Table 6 shows that all three countries consider the taxpayers behaviour that led to non-compliance and imposed penalties based on that severity of the offences, the comparison indicates that all three countries consider if were there any extenuating circumstances that would result into non-compliance intentions for non-compliance or understatement a pure tax evasion. The Commonwealth of Australia has the harshest penalty of UAD16 650 (ZAR213 786) in terms of non-compliance, and this can be explained by the yearly increase in the value of the penalty unit, and this indicates the seriousness to deal with the behaviour of non-compliance. The United States of America charges the lowest penalty USD1 000 (ZAR18 000) from the three countries, when it comes to non-compliance, however the USA regime is more detailed and clearer in terms of the specific penalty for a specific offence whereas the Republic regime is based on a fixed amount penalty table.

Table 7: **Understatement comparison**

	Countries		
Taxpayer behaviour	**Republic of South Africa**	**Commonwealth of Australia**	**United States of America**
Intentional non-compliance	75% - 200%	75%	50%
Gross negligence	50% - 125%	50%	5% - 25%
No reasonable care taken	25% - 100%	25%	1% - 25%
Relevant legislation	Section 223 of TAA	Sections 8C, 8K and 8N of AU TAA and ATO	Sections 6651 - 6658 of the IRS code

Table 7 shows that the Republic can levy up to penalty 200% on understatement and followed by the Commonwealth of Australia imposing up to 75% and USA has the lowest at maximum of 50%, this is explained by the high rate of non-compliance in the Republic as indicated in Chapter 2. All three countries consider the following behaviours, the substantial understatement and impact to the government fund if the understatement was not detected, the reasonable care taken in completing a tax return, whether there were no reasonable grounds for the 'tax position' taken, was there a gross negligence and whether the taxpayers' intentions was to evade tax.

5.4. Conclusion

All three countries, South African, the Commonwealth of Australia and the United States of America, have similar administrative penalties and all countries have shared similar objectives of driving voluntary compliance and deter harshly the intentional non-compliance. The South African penalty regime has the second highest penalty in terms of non-compliance, which also shows that in both these countries, the level of non-compliance could be high.

According to the underpayment comparison table South Africa has the highest penalty at 200% and followed by the Commonwealth of Australia. Lombard (2008) believes that the 200% should not be decreased because South Africa is still a developing state in which tax evasion remains common and should appropriately be addressed, where the submission was done against the opinion from South African Institute of Tax Practitioners (SAIT).

The South African penalty regime is clearly comparable to the two countries and since the South African regime is young compared to the two in terms of tax administration system, there will always be an opportunity to improve in terms of fairness, impartiality, and effectiveness of the tax administration. The new South African regime is clearer than the previous regime (see Chapter 3). The South African TAA is more standardised and has given clear guidance on how SARS should implement, specifically Chapters 15 and 16. The TAA is broadly aligned in nature with the comparable international regimes and general international best practice in that it identifies the non-compliance and understatement and applies the penalties as state in the legislation. The non-compliance penalties still require some improvements in terms of Section 213 (see Chapter 3).

It was also found that the TAA still levied the highest in terms of understatement penalty which is up to 200% and the discussion from articles from tax commentators suggested that the harshness of the penalty can be seen as deviating from the main purpose of raising public funds and demotivating willing taxpayers to voluntarily contribute to the government fund.

It was found that all three countries value and promote the voluntary compliance, however the understanding of tax legislation is still a challenge, hence SARS established the nine strategic objectives to assist in taxpayers’ education and awareness (see Chapter 3). Taxpayers seem to behave the same way across, hence the similarities in the behaviour that is considered by the three countries. The next chapter will be focusing on whether the South African penalty regime is aligned with the international best practice and highlight any elements that require improvements.

Chapter 6: Conclusion and recommendations

6.1 Introduction

The South African penalty regime in the Tax Administration Act 28 of 2011 has been reviewed in this report, specifically sections covered in Chapters 15 and 16 of this Act and compared with the penalty regime of the countries that have a long history in the administration of penalties. This chapter provides an overview of the findings of the report and makes recommendations for improving South Africa's penalty regime. The chapter assesses whether South Africa's penalty regime is aligned with international best practice and highlights areas where improvement can be made. The chapter concludes with a summary of the report's main findings and recommendations.

6.2. Findings overview

The report reviewed the following elements: the reasons for non-compliance with tax laws and failure to pay taxes and found that the non-compliance did not start from the recent past. However, it is as old as the origin of the taxes, and it continues to this day. The main contributing factor for non-compliance is found to exist where taxpayers do not see the value in what they are paying for, and the government employs the deterrence method to discourage non-compliance. It is also found in Chapter Two that there are other taxpayers who understand that they must contribute to their fair share in the running of the government.

The report also reviewed the measures that are implemented by the Republic to incentivise taxpayers to comply with tax obligations and pay taxes. The report finds that SARS has been working hard to promote voluntary compliance by developing nine strategic objectives that seek to improve administration of tax legislations to achieve fairness and equitable administrative penalty imposition and promote compliance. SARS have come up with several measures that detect the behaviour of taxpayer with the aim of harshly deterring non-compliance.

The new penalty regime is still falling short on some provisions, such as it does not stipulate the actual percentage that must be levied by SARS under "Imposition of percentage-based penalty".[121]SARS is left to use their discretion. Overall, the new South African penalty regime has proven to be more clear and fair in terms of detailing and giving guidance to SARS on how to impose the penalties. Provided the taxpayers the provisions to object and apply for remittance of penalties and provided procedures and what is required and in what form so that it is clear to the taxpayers.

[121] Section 213 of the Tax Administration Act 28 of 2011.

The report has also reviewed the corrective actions implemented by the Commonwealth of Australia and the United States of America. The report found that the corrective actions of these two countries are more subjective and specifically aligned to the specific types of offences committed. The legislation for these two countries considers where the offences overlap to other penalty provisions and makes mention in the legislation that it is clear to the tax authorities to administer.

The comparison in terms of penalty regime between the Republic, the Commonwealth of Australia and the United States of America. The report found that in terms of legislation, the South African penalty regime is more aligned with these two countries. However, with few specific penalties that are not in South Africa's penalty regime, such as penalties that are imposed by the Australian authorities when the business fail withholds Pay-as-you-go (PAYG) and failure to make a deposit of taxes and bad checks in terms of USA. It is also found that South Africa has the highest penalty in terms of understatement, which is up to 200% and Australia has the highest penalty in terms of non-compliance, which is AUD16 650, equivalent to ZAR215 000.

The South African penalty regime in terms of the TAA is much clearer when compared to the Australian TAA, however that of the USA is clearer than that of South Africa as it stipulates a specific penalty for a specific offence which make it easier for the tax authorities to administer and implement.

6.3. Recommendations

The penalty regime comparison performed between South Africa, Australia and the USA in some provisions of the three legislations from three jurisdictions there are similarities and more clarity and guidance showed by Australia and the USA in the event where a clear indication of a specific penalty for a specific offence and that prove to be another reason why the USA penalties are lower than in South Africa. The following recommendations to the Republic penalty regime were discussed:

- Section 213 "Imposition of percentage-based penalty": the percentage to be imposed must be stipulated in the Act and clearly described how it must be levied by SARS, to remove any level of uncertainty.
- To clearly allocate a specific penalty to a specific offence and integrating that into the TAA to be clearly aligned with IRS of the USA, for instance, Section 22 of the TAA should clearly indicate the actual penalty if the taxpayer failed to register and accommodate extenuating circumstances.

- To clearly indicate in each provision that, if there is an overlap in terms of penalty the other one will be disregarded for instance where a taxpayer failed to submit a return the non-compliance penalty and understatement penalty can be both levied, however IRS of the USA includes the specific provisions that indicate which one offence take precedents.
- The behaviour change is required from the SARS perspective in terms of why the penalties are charged with the understanding that they are not meant to punish non-compliance, rather to promote compliance (James and Alley (2009).
- The South Africa's penalty regime does not consider the repeat offender and apply harsh penalties on them like the IRS of the USA does, this must be incorporated into the TAA in each obligation that can be repeated, for instance, if the taxpayer failed to submit tax return for one tax assessment and submitted later after the penalty was levied and the following year the taxpayer does the same, the TAA must clearly stipulate harsh penalties, in this way TAA will be seen to me correcting negligence or recklessness.
- The above recommendation has to consider the situation where the taxpayer failed to submit the tax return for more than one tax assessment and not duplicate the penalties, however that might not be encouraging compliance, rather to raise funds for the state and discourage taxpayers. Which will not be fair and not aligned to the bill of rights with the constitution of the Republic of South Africa.

Overall, the South African penalty regime must consider aligning more to the USA penalty regime in terms of clearly outlining the specific penalty for a specific offence and consider offences that overlap into other provisions. In this way, it will be easier for SARS to implement and will encourage taxpayers to comply.

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