An analysis of the term "reasonable care not taken in completing the return” in the context of tax penalties

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ABSTRACT

The Tax Administration Act (28 of 2011) (TA Act) came into effect on 1 October 2012; this act was introduced to the tax system in order to maximize compliance and consistency throughout all tax types. Prior to the enactment of the TA Act, penalties were governed by Section 76 of the Income Tax Act (58 of 1962) (IT Act) and Section 60 of the Value-Added Tax Act (89 of 1991) (VAT Act). These sections were difficult to administer and the penalty percentage was considerably too high. An excessive amount of power was granted to the SARS officials, yet no proper ground rules were set out. In the event of an understatement, a taxpayer would have to provide mitigating reasons why these penalties should be remitted; this almost never resulted in favour of the taxpayer. Chapter 16 of the TA Act governs the application of understatement penalties in Sections 221-223. These penalties are imposed when a taxpayer has an understatement on his return and a particular behaviour as per Section 223 has to be applied. Guidance has been provided in the Short Guide to the TA Act for use by taxpayers, tax practitioners and SARS officials.

This study gives specific focus to “reasonable care not taken in completing the return”. This behaviour has a wide meaning and there have been difficulties in practice interpreting what it actually means. It is therefore important that this section be applied correctly, and it is recommended that the application be based on predetermined criteria to avoid incorrect penalties being levied, thus affecting taxpayers who continuously put in an effort to remain compliant.

The study is aimed at firstly establishing the importance of penalty provisions in South Africa, and thereafter seeking to find the meaning of “reasonable care not taken in completing the return” in terms of Section 223 of the TA Act. It has been found that penalties are an important tool in managing tax compliance. Penalties act as a deterrent to non-compliance and if taxpayers feel that a revenue authority cannot be trusted due to factors such as unfair practice, these penalties may not be as effective as they are purported to be. Secondly, “reasonable care not taken in completing the return” has been found to be a taxpayer putting the same amount of care and effort into completing a return, just as any other reasonable person would do.

The study also considers the provisions of other tax authorities, such as the United States of America (USA), Australia and the United Kingdom (UK), regarding understatement penalties that have a similar behaviour to “reasonable care not taken in completing the return”. This is done in order to find guidance for future application of Section 223 of the TA Act. These tax jurisdictions will assist us in possibly providing guidance in the compilation of criteria to be met when applying “reasonable care not taken when completing the return”. 
It has been found that reasonable care is ensuring that all information used to compile the return is kept. In terms of the TA Act; every taxpayer must keep their records for a period of five years; it must also be ensured that the return is in the same position that it would be, had it been completed by someone else. Each taxpayer is different and there may be different complexities. Even if this were the case, the preparation of the return should ensure that all information has been gathered; if handed over to a tax practitioner, it should be ensured that reasonable steps have been taken to ensure that the return is accurate, complete and there are no misrepresentations. A recommended definition and a list of criteria were compiled in the study.

Keywords: Reasonable Care, Revenue Authority, South African Revenue Service, Tax Administration Act, Tax Administration Laws Amendment Bill, Taxpayers, Tax Penalties, Understatement, Understatement Penalties
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<table>
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<th>Meaning</th>
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<tr>
<td>AICPA</td>
<td>American Institute of Certified Public Accountants</td>
</tr>
<tr>
<td>ATO</td>
<td>Australian Tax Office</td>
</tr>
<tr>
<td>AU TAA</td>
<td>Australian Taxation Administration Act (1 of 1953)</td>
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<tr>
<td>EM</td>
<td>Explanatory Memorandum</td>
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<tr>
<td>HMRC</td>
<td>Her Majesty Revenue and Customs</td>
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<td>IRC</td>
<td>Internal Revenue Code</td>
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<td>ITAA</td>
<td>Income Tax Assessment Acts</td>
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<td>IT Act</td>
<td>Income Tax Act (58 of 1962)</td>
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<tr>
<td>OECD</td>
<td>Organization for Economic Co-operation and Development</td>
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<td>PAJA Act</td>
<td>Promotion Administration Justice Act</td>
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<tr>
<td>PSLA 2012/5</td>
<td>Practice Statement Law Administration 2012/5</td>
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<td>SARS</td>
<td>South African Revenue Service</td>
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<tr>
<td>TA Act</td>
<td>Tax Administration Act (28 of 2011)</td>
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<tr>
<td>UK</td>
<td>United Kingdom</td>
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<tr>
<td>US Code</td>
<td>The Code</td>
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<tr>
<td>USA</td>
<td>United States of America</td>
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<td>VAT Act</td>
<td>Value-Added Tax Act (89 of 1991)</td>
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CHAPTER 1: INTRODUCTION

1.1 Background

According to the South African Revenue Service (2014:4-5), tax education of taxpayers has increasingly been on the rise over the past 15 years. This step to educate taxpayers was initiated because it came to light that when taxpayers are educated about their duty as a citizen of the Republic of South Africa to pay over tax to the SARS, the majority of taxpayers are most likely to accept this duty. There are also those taxpayers who are not motivated by the idea of paying taxes, but due to the repercussions that follow if taxes are not paid – penalties, in this instance – they would then comply. It has also been found that there is a minority of taxpayers who are not concerned about the consequences of not paying over their taxes; they evade tax in the hope that they will never be found out. Currently there has been an increase in tax compliance and this could be associated to the fact that taxpayers are now informed about the consequences of not complying with tax laws. If taxpayers do not comply with tax laws, this action may ultimately result in a poor tax compliance status, meaning that the taxpayer will incur penalties and interest, and not be allowed to do business with the government, amongst other things (SARS, 2014:4-5).

According to Torgler (2003) taxpayers who reside in countries where they know the chances of being audited or incurring penalties as a result of misconduct are low will most likely evade tax. Some taxpayers comply when they know that there are certain rules that they have to follow, which have been in place for a certain period of time and produce the desired results.

Walsh (2012:454) is of the opinion that the reason taxpayers comply is because of their moral compass – simply wanting to do the “right thing”. More often than not, although individuals have their own values and behavioural norms to which they abide, it has been found that people have the desire to conform to society and its norms. If the perception that the benefits of being compliant do not exceed those of being a non-compliant taxpayer is held by the majority of society, it is likely to influence a taxpayer’s behaviour (Walsh, 2012:454).

The conduct of a revenue authority is an important factor that influences compliance. When a revenue authority is trustworthy and reliable, taxpayers are most likely to comply. Trust can be shown by the fair application of rules, especially to compliant and honest taxpayers (Murphy, 2004: 5).

The Tax Administration Act (28 of 2011) (TA Act), which came into effect on 1 October 2012, was published in order to align and balance the power and duties of SARS and the obligations of the taxpayers, and to ensure that there is harmony and transparency in the relationship
between the two parties, which will contribute to equity and fairness of the tax administration (SARS, 2013:4). It has been observed that taxpayers are likely to comply when they believe that the administration of the tax law is fair and not left to the discretion of the revenue authority (SARS, 2013:4).

In ITC 1980 1331 (43 SATC 76), interest and penalties are levied in order to minimize false submissions and act as a deterrent to taxpayers who may have the intention to submit false or incorrect returns. It is also unfortunate that taxpayers who make honest mistakes are not exempted from being punished (Kriel, 2012).

Tax penalties are enacted by the TA Act and there are more than just one penalty provision contained in the TA Act, namely: Administrative Non-Compliance Penalties set out in Chapter 15, which includes fixed and percentage-based penalties. There is also Understatement Penalties in Chapter 16, which are levied based on the behaviour displayed upon completion of the return. In this study, the focus will mainly be on Understatement Penalties, with special reference to the behaviour of “reasonable care not taken in completing the return”. An understatement penalty is based on the behaviour displayed when completing the return and each behaviour has a certain percentage attached to it. All of the behaviours have been neatly defined or explained, except for “reasonable care not taken in completing the return” as noted in the Short Guide to the TA Act (SARS, 2013:80).

The understatement penalty in Chapter 16 of the TA Act replaced penalties by means of additional tax in Section 76 of the Income Tax Act (58 of 1962) (IT Act). According to Feuth (2013), it was a concern that there were no guidelines in the previous additional tax system. Due to the lack of guidelines, the TA Act was introduced in order to address those concerns and areas which were not addressed.

The new regime clearly defines that an understatement penalty will only be applicable if there is an understatement as defined in Section 1 of the TA Act, for one of the following reasons: if a taxpayer did not file a return; if a taxpayer filed a return but omitted an item in the return; or if the taxpayer filed a return but an incorrect statement was made in the return (SARS, 2013:78). Van der Zwan (2013a) is of the opinion that during the old additional tax regime, a taxpayer was afforded the opportunity to question and enquire about any additional tax that was imposed upon conclusion of the audit. In this quest of trying to question the tax imposed, it was rather difficult to determine the exact amount to be paid. This exercise always ended in an unsuccessful legal battle – thus the taxpayer not being able to manage the tax risk. It is still very relevant that taxpayers should take a high degree of care in completing returns in order to mitigate any tax risks (Van der Zwan, 2013a).
In order to ensure harmony in the administration of taxes there should be a level of consistency that needs to be adhered to, and it is the responsibility of the Commissioner to ensure that the penalties levied are indeed correct (Croome, 2013). Establishing the meaning of this term could mean the difference between someone paying a penalty for well-stated and understood reasons, or paying a penalty and still being uncertain that the penalty indeed had to be paid.

As “reasonable care” is not defined in the TA Act, the meaning thereof would have to be considered in general terms from other sources. The Free Dictionary (Farlex, 2016) defines reasonable care as “the degree of caution and concern for the safety of himself/herself and others an ordinarily prudent and rational person would use in the circumstances. This is a subjective test of determining if a person is negligent, meaning he/she did not exercise reasonable care”. The Law.com Dictionary (1995) defines reasonable care as “a measure or a standard of caution and awareness for the safety of self and others that the average prudent person would use under the circumstances”.

It was held by the court that: “To determine negligence the courts employ the classic three-part test as formulated in Kruger v Coetzee (1966):

- Would a reasonable person, in the same circumstances as the defendant, have foreseen the possibility of harm to the plaintiff;

- Would a reasonable person have taken steps to guard against that possibility; and

- Did the defendant fail to take steps which he or she should have taken to guard against it?

If each part is confirmed, then the defendant is said to have failed to measure up to the standard of a reasonable person, and is consequently negligent”.

Feuth (2013:27) stated that in the context of the TA Act, a penalty can only be imposed if the return submitted by the taxpayer and the behaviour displayed are not of the same standard or care than is expected from a taxpayer in similar circumstances. Hall (2013:55) also supports this view and states that a taxpayer is required to take the same reasonable care when completing a return that any other ordinary person would have taken.

The above-mentioned definitions express the fact that “reasonable care” is attained when a certain degree of caution is exercised that any other ordinary person would exercise in the same circumstances and it is not an exercise of negligence. For tax purposes, this would mean that a taxpayer would do everything that any other ordinary taxpayer would be expected to do when completing a return.
1.2 Literature review

SARS issued a guide, Short guide to the Tax Administration Act, 2011, as a means to give guidelines on how this behaviour of “reasonable care” should be addressed in practice. This guide does not provide clear guidance on what is expected from a taxpayer, but merely states that although reasonable care is not defined, a taxpayer must take a “degree of care that a reasonable, ordinary person in the circumstances of the taxpayer would take to fulfil his or her tax obligations” (SARS, 2013:80). Van der Walt (2013) is of the opinion that it also does not mean that the return should be perfect, but it refers to the effort. De Villiers (2015) is of the impression that the TA Act may not be clear in defining the understatement penalty behaviours as the TA Act is still relatively new.

According to Bell (2014), it should be seen that reasonable care was taken when a taxpayer obtains a tax opinion from a registered tax practitioner in terms of section 241(2)(c) of the TA Act. The relief provided to substantial understatements should be applied consistently where the behaviour for “reasonable care not taken in completing the return” is concerned.

In the case of Z v The Commissioner for the South African Revenue Service (2014) the taxpayer had sold his shares and incorrectly calculated the tax liability for capital gains tax purposes. The shares were sold in 2008 for R841 million, but due to a claim arising from a transaction that took place in 2003 amounting to R925 million, the taxpayer decided to pay the claim up to an amount of R700 million and reduce the proceeds with that claim. The South African Revenue Service disagreed with the calculation and the Commissioner added back what was claimed against proceeds. The proceeds, in terms of par. 35 of the 8th schedule, were back to the original amount of R841 million and the Commissioner levied an understatement penalty for “no reasonable care taken in completing the return”. It was later concluded by the court that it had been a substantial understatement and that it could not have been “reasonable care not taken” as the taxpayer had received advice from a professional expert (Lewis, 2014).

Kamdar (2015) stated that since reasonable care is not defined in the act, it bears more meaning than “the mere sending of all relevant information to the tax professional, than the mere attachment by a taxpayer of a signed disclaimer that all documents are true and valid, and the mere acceptance of documents at face value”. He mentioned that it is better to gain the opinion of a tax expert (Kamdar, 2015).

As can be seen from the above, obtaining tax advice from a tax professional is more likely to be seen as taking reasonable care than if no advice is obtained at all.
1.3 Motivation of topic actuality

The TA Act defines “understatement” in Section 221 as follows: “understatement’ means any prejudice to SARS or the fiscus as a result of:

(a) A default in rendering a return;
(b) An omission from a return;
(c) An incorrect statement in a return; or
(d) If no return is required, the failure to pay the correct amount of ‘tax’.

When a taxpayer meets the above-mentioned definition of an understatement, then “reasonable care not taken in completing the return” is one of the behaviours that may be allocated to the taxpayer.

It is no secret that this behaviour, as indicated in Section 223 of the TA Act in particular, is difficult to comprehend. “Reasonable care” is very subjective and what may be reasonable to one person is not reasonable to the next. “Reasonable” in this context has not been defined in the TA Act and therefore the application is not consistent (SARS, 2013:80). SARS has different senior officials based in different offices. Although in theory the application should be standard, in practice it is different.

The TA Act was published in order to create one piece of legislation due to the duplication of provisions in the different tax acts (National Treasury, 2005:98). The TA Act is currently used as a means to assist SARS to collect revenue effectively and efficiently. In order for this to happen, the provisions in the TA Act must be clear and leave no room for interpretation.

The importance of this research will be to assist taxpayers, professionals and SARS officials in distinguishing the meaning of the term “reasonable care not taken in completing the return”. The short guide to the TA Act states that SARS must determine whether the taxpayer disclosed voluntarily, the taxpayer was obstructive during engagement with the auditor, whether it is a repeat case or it is not defined, therefore being a standard case. It can therefore be deduced that the onus rests with SARS officials in providing reasons why a particular behaviour should be applied to a specific case (SARS, 2013:79). Instead of the official using a subjective approach to the case, a pre-determined list or criteria could then be followed.

The SARS audit division had a target of 11% audit cases to complete from the total returns submitted in the 2015 year of assessment. A total of 1.9 million audit cases were completed, which is over and above the target (SARS, 2015:32). Due to the high number of cases being
audited, if a 25% understatement penalty for reasonable care not taken in completing the return (standard case) were levied on all of the audited cases, yet there is an inconsistency in the application of the TA Act, it would result in low taxpayer confidence in SARS. When taxpayers have no confidence in the tax system, a taxpayer could get involved in aggressive tax planning or make plans to shift profits to other countries in order to evade tax (OECD, 2010:5-6).

According to Zerbst (2013), taxpayers must always know their taxpayer rights; this might enable them to either contest or accept what is being presented. When the auditor and taxpayer are in agreement, there would be no reason for taxpayers to feel prejudiced.

Klopper (2015) is of the opinion that the TA Act is not easy to understand and it is questionable whether it can be said that it lessens the administrative burden on taxpayers. The term “reasonable care not taken in completing the return” has to be determined in order to make it easier for taxpayers to want to comply, rather than them feeling that the goal post is moved every time they try and reach.

It can be concluded that it is of the utmost importance to ensure that every section in the Act is clear in order to minimize errors in the application of a relevant section. It provides certainty on how taxpayers should act and possibly increases the confidence that taxpayers might have in SARS. The effort in trying to add meaning to this term will also make it easier for SARS officials to recommend this behaviour to the relevant committee and to lessen the chances of objections relating to understatement penalties.

1.4 Problem statement

“Reasonable care not taken in completing the return” has not been defined in the TA Act and no guidelines exist to assist tax officials and taxpayers in the correct application of this behaviour as identified in Section 222 and 223 of the TA Act.

The research question that needs to be answered is therefore: What does “reasonable care not taken in completing the return” mean?

1.5 Research objectives

The purpose of this study is to analyse, refine and propose key considerations to be taken into account when applying this penalty provision in Section 222 and 223 of the TA Act.
1.5.1 Main objective

The main objective of this study is to consider a meaning for “reasonable care” and compile a list of criteria to be met when considering the application of reasonable care not taken in completing the return.

1.5.2 Secondary objectives

The main objective will be addressed by the following secondary objectives:

1. To consider the importance of penalty provisions applicable to taxation in South Africa and consider the meaning of “reasonable care not taken in completing the return” in terms of Section 223 of the TA Act. This objective will be addressed in chapter two.

2. To consider the provisions of other tax authorities (the United States of America, Australia and the United Kingdom) regarding understatements which may result in a similar behaviour to reasonable care in completing the return in order find possible guidance for future application. This objective will be addressed in chapter three.

3. To provide recommendations and improvements on the meaning of “reasonable care not taken in completing the return”. This objective will be addressed in chapter four.

1.6 Research paradigm, design and methodology

1.6.1 Research paradigm

A research paradigm has been defined as “a framework that guides how research should be conducted, based on people’s philosophies and their assumptions about the world and the nature of knowledge” (Collis & Hussey, 2009).

The interpretivism paradigm will be used to conduct this research. Interpretivism assumes that social reality is subjective, that it is in our minds and it is shaped by our perceptions. It is impossible to separate what exists in the social world from what is in the mind of the researcher (Collis & Hussey, 2009).

This paradigm has been selected because this study is aimed at analysing the meaning of “reasonable care not taken in completing the return”.

7
1.6.2 Research design

The study will be a non-empirical research study, as it focuses on a literature review. A literature review could be defined as “a systematic, explicit and reproducible design for identifying, evaluating and interpreting the existing body of recorded documents” (Fink, 1998: 205).

A literature review is selecting available articles on a specified topic that have certain expressed views and ideas on the particular topic; this is done for effective evaluation of these available resources (Hart, 1998:13).

The review will include journal articles, books, guides, internet articles, eBooks and South African and foreign tax legislation.

The United States of America (USA), Australia and the United Kingdom (UK) were selected for the comparison, based on the fact they are all members of the Organization for Economic Cooperation and Development (OECD) English-speaking countries, and they contribute to the research which is used by other countries. The understatement penalties have successfully been implemented in the above-mentioned countries and can therefore be used as a guide in determining the meaning of “reasonable care not taken in completing the return” (De Villiers, 2015:5).

1.6.3 Research assumptions

1.6.3.1 Ontological assumptions

“Reality is subjective and multiple, as seen by the participants” (Collis & Hussey, 2009). Scotland (2012:11) is of the opinion that realities are subjective because they differ from one person to the next and our realities are influenced by our senses. Human experiences and the world would have no meaning without consciousness (Scotland, 2012:11).

1.6.3.2 Epistemological assumptions

“Research interacts with that being researched” (Collis & Hussey, 2009). According to Scotland (2012:11), knowledge or meaning is constructed by different people in different ways. It is only understood from their point of view.

1.6.3.3 Methodological assumptions

“Findings are accurate and reliable through verification” (Collis & Hussey, 2009). A phenomenon is better understood from an individual’s perspective because they have a better understanding of their social realities (Scotland, 2012:12).
All information that is necessary to complete this study will be combined through in-depth literature review. Taxpayers are aware of their duty to comply with the TA Act. It is also assumed that the countries used as a benchmark have similar procedures and provisions relating to understatement penalties.

1.7 Delineations and inherent research limitation

1.7.1 Delineations

The study addresses the term “reasonable care not taken in completing the return” in the TA Act and there is limited use of information from other tax jurisdictions such as the USA, Australia and the UK. These countries have been selected for the comparison based on the fact they are all members of the Organization for Economic Cooperation and Development (OECD) English-speaking countries, and they contribute to the research used by other countries. The understatement penalties have successfully been implemented in the above-mentioned countries and can therefore be used as a guide in determining the meaning of “reasonable care not taken in completing the return” (De Villiers, 2015:5).

1.7.2 Inherent research limitations

The use of the South African Revenue Service’s internal guides for the provisions relating to the TA Act has been identified as a limitation in defining and interpreting the behaviours in Section 223 of the TA Act. Only publicly available sources can be utilized to complete this study. The use of provisions relating to “reasonable care not taken in completing the return” from countries such as the USA, Australia and the UK has also been identified as a limitation because their penalty provisions are already established and these countries have been able to manage and implement the required procedures upon understatement.

1.8 Overview of chapters

Chapter One: Introduction

This chapter presents the background, problem statement, research objectives, paradigm and design relating to the study.

Chapter Two: Understanding the current meaning of the term “reasonable care not taken in completing the return” and learning the importance of levying penalties

The importance of levying penalties in any revenue authority will be considered to obtain an understanding thereof. The meaning or understanding of the understatement penalty behaviour “reasonable care not taken in completing the return” in Section 223 of the TA Act, read along
with the other behaviours, will furthermore be considered. This chapter will address the first secondary objective as identified in par. 1.5.2(1).

Chapter Three: Overview of international tax administration practice, taking special regard to behaviour similar to “reasonable care not taken in completing the return”

This chapter will provide an overview of how the USA, Australia and the UK deal with understatement penalties, especially “reasonable care not taken in completing the return” in comparison to South Africa. This chapter will address the second secondary objective as identified in par. 1.5.2(2).

Chapter Four: Conclusion and recommendations

This chapter will summarize the key findings and the conclusions from chapter two and three. This chapter will provide a list of recommendations relating to “reasonable care not taken in completing the return”. This chapter will address the third secondary objective as identified in par. 1.5.2(3).

Compliance by taxpayers has been found to be partly linked to the efforts taken by a revenue authority to ensure consistent and fair application of rules, while remaining reliable and trustworthy. In order for revenue authorities to impose penalties, it is important to determine the importance of levying these penalties. In the next Chapter, the meaning of reasonable care not taken in completing the return will be considered, together with the importance of levying penalties.
CHAPTER 2: UNDERSTANDING THE CURRENT MEANING OF THE TERM “REASONABLE CARE NOT TAKEN IN COMPLETING THE RETURN” AND LEARNING THE IMPORTANCE OF LEVYING PENALTIES

2.1 Introduction

This chapter seeks to provide an understanding of why penalties are so important where tax is concerned. It also seeks to introduce the current status quo of the tax penalties prevalent in the TA Act. The objective of this chapter will be to provide the current understanding of the understatement penalty behaviour “reasonable care not taken in completing the return” by persons who are frequently confronted by these circumstances or those who may find themselves in a position of potentially incurring understatement penalties revolving around this behaviour in particular.

This will be accomplished by also evaluating the current understatement penalty behaviours in Section 223 of the TA Act in order to eliminate those furthest from having a similar meaning to “reasonable care” in order to possibly obtain more clarity with regards to the meaning thereof.

This chapter will address the secondary research objective as identified in par. 1.5.2 (1).

2.2 Role and importance of tax penalties

In terms of the English Oxford Dictionary (2016) a “penalty” is defined as a “liability to be punished or penalized, esp. in the event of failure to comply with a command, law, condition, etc.; risk of suffering punishment or loss”.

It may be deduced from the above-mentioned definition that a penalty could be levied on a taxpayer’s assessment when he/she fails to comply with a specific regulation included in any of the tax acts that governs how the taxable income should be determined.

Penalties for tax purposes are defined in the TA Act. In terms of Section 208 of the TA Act, an “administrative non-compliance penalty” or a “penalty” is defined as “a ‘penalty’ imposed by SARS in accordance with this Chapter (Chapter 15) or a tax Act other than this Act, and excludes an understatement penalty referred to in Chapter 16” (Tax Administration Act 28 of 2011). An understatement penalty is defined in Section 222 of the TA Act. This definition of an understatement penalty in terms of the TA Act will be explored further in this chapter.
Tax penalties are utilized to encourage voluntary compliance by taxpayers. In order for penalties to achieve their primary goal, which is to promote good conduct, taxpayers must feel that penalties are fair and do not inherently punish the innocent. Penalties that are vaguely defined and are not administered in a fair manner usually do not promote voluntary compliance (AICPA, 2013:1). Kirchler et al. (2008:95) also reiterated that when taxpayers are assured that their respective revenue authority trusts them; they are likely to voluntarily comply.

Doran (2009:1) indicated that there are competing models that answer the question of whether tax penalties are in place in order to promote tax compliance. In the standard deterrence model, it is held that taxpayers firstly weigh the cost of complying against that of not complying. If the penalties outweigh the cost of not complying, they will comply. In the norms model, taxpayers comply because it is what they want to do.

Tax penalties have been put in place to act as a boundary, especially to taxpayers who complete self-assessments. Although one of the functions of tax penalties is to promote tax compliance, penalties also have the function of defining tax compliance. The conduct that qualifies a taxpayer as being compliant should be determined prior to tax penalties acting as an agent to promote of tax compliance (Doran, 2009).

It can be seen from the above information that penalties act as an agent to promote tax compliance when the conduct for tax compliance has been defined. It must be borne in mind that there are different types of taxpayers: those who will comply because of behavioural norms and past practices, and those who will take chances, regardless of any penalty provisions in place. In order for tax penalties to be effective, the revenue authority must be honest and treat taxpayers with fairness.

2.3 Tax penalties

The TA Act contains the following two penalty provisions: Administrative non-compliance penalty (Chapter 15) and understatement penalties (Chapter 16). This study will focus on understatement penalties only, which are dealt with in Section 222 of the TA Act.

Prior to the enactment of the understatement penalties in the TA Act, Section 76 of the IT Act and Section 60 of the Value-Added Tax Act (89 of 1991) (VAT Act) governed how penalties should be applied upon understatement or tax evasion.

According to the repealed provisions in the IT Act, when a taxpayer defaulted in rendering a return, the taxpayer would have been required to pay an amount equal to twice the tax chargeable to the taxable income. If the taxpayer omitted an amount on his return, the taxpayer would have paid an amount equal to twice the difference between the tax as per the taxable
income and tax properly chargeable, after including the amount that was excluded. Lastly, if an incorrect statement was made in the return, and it resulted in the tax chargeable to be less than what it should have been, an amount equal to twice the difference between the tax as per the taxable income and tax properly chargeable, after including the amount excluded, would have been payable to the taxpayer (Section 76, Income Tax Act (58 of 1962)). Therefore it seems that in general a taxpayer would have paid double the taxes that were due, had the taxpayer committed any of the above violations.

In terms of the repealed provisions from the VAT Act, when a vendor intentionally failed to perform his duty as instructed by the VAT Act, in order to evade tax or to create a VAT refund by excessively claiming inputs, an additional tax not exceeding an amount equal to double the amount of tax would have been payable for the amount evaded or the excess thereof (Section 60, Value-Added Tax Act (89 of 1991)).

According to De Villiers (2015), these sections were difficult to administer and gave SARS officials too much power and discretion. Taxpayers were not able to defend their position for understating and were unable to provide sufficient mitigating reasons that would allow the remittance of these penalties. Surtees & Ross (2014:25) also alluded to the fact that there was no specific criterion that SARS followed on application of these penalties.

De Villiers (2015) is of the opinion that due to the difficulty of administering these provisions, a change in the legislation was necessary. In terms of the Short Guide to the Tax Administration Act (SARS, 2013), the TA Act was introduced in order to assist in the achievement of SARS’s objective, which is the efficient and effective collection of revenue. The TA Act was also put in place to eliminate duplicate provisions and ensure that all the acts are governed by one administration, which ensures harmony and rids of any inconsistencies (SARS, 2013:4).

The Promotion of Administration Justice Act (the PAJA Act) (3 of 2000) must always be borne in mind when penalties are being levied on taxpayer's assessments. Section 5 of the PAJA Act gives taxpayers the right to request reasons for any decision that might be taken on an assessment.

The previous penalty provisions relating to understatements have been replaced by the new understatement penalties in Chapter 16 of the TA Act. As was seen in par. 2.2, the TA Act now defines penalties for tax purposes and in Section 208 the definition of penalties specifically excludes understatement penalties, which is now defined in Section 222 of the TA Act.

The TA Act firstly defines in Section 221 an “understatement” as “any prejudice to SARS or the fiscus as a result of”
(a) A default in rendering a return;

(b) An omission from a return;

(c) An incorrect statement in a return; or

(d) If no return is required, the failure to pay the correct amount of 'tax'.

Section 222 continues to define an understatement penalty: In the event of an understatement, a taxpayer must pay an understatement penalty in addition to the tax payable, unless it can be determined that the understatement is due to an inadvertent bona fide error. The understatement penalty is calculated by multiplying the understatement with the highest applicable understatement penalty percentage as per the table in Section 223 (TA Act).

An understatement occurs when the fiscus is disadvantaged due to a shortfall. This will arise when a taxpayer does not declare the correct amount on their return, and the tax properly chargeable is as a result of the declaration less than what is should have been (SARS, 2013:78).

A shortfall is defined in the IT Act as the sum of the difference between the tax currently chargeable and the tax that would have been charged had the return been correct; the amount that is refundable and what would have been refunded from the return submitted, and the tax attributed to the loss and what the tax on the loss would have been (Section 1, IT Act).

Understatement penalties are levied at different rates based on the behaviour displayed, in terms of Section 223 of the TA Act and is illustrated as follows in Table 2-1:
Table 2-1: Understatement penalty percentage table

<table>
<thead>
<tr>
<th>Item</th>
<th>Behaviour</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i)</td>
<td>'Substantial Under statement'</td>
<td>10%</td>
<td>20%</td>
<td>5%</td>
<td>0%</td>
</tr>
<tr>
<td>(ii)</td>
<td>Reasonable care not taken in completing return</td>
<td>25%</td>
<td>50%</td>
<td>15%</td>
<td>0%</td>
</tr>
<tr>
<td>(iii)</td>
<td>No reasonable grounds for 'tax position' taken</td>
<td>50%</td>
<td>75%</td>
<td>25%</td>
<td>0%</td>
</tr>
<tr>
<td>(iv)</td>
<td>Gross negligence</td>
<td>100%</td>
<td>125%</td>
<td>50%</td>
<td>5%</td>
</tr>
<tr>
<td>(v)</td>
<td>Intentional tax evasion</td>
<td>150%</td>
<td>200%</td>
<td>75%</td>
<td>10%</td>
</tr>
</tbody>
</table>

Source: Understatement penalty percentage table (Section 223, TA Act)

From the above table it can be seen that once it has been determined that an understatement has taken place, prior to the SARS official selecting a behaviour, it has to be determined whether this is a standard case; if a taxpayer was obstructive or a repeat case; if the taxpayer voluntarily disclosed during the audit; or the taxpayer voluntarily disclosed prior to the commencement of the audit. Once this has been determined, the SARS official may select a behaviour from which percentages range from 0% to 200%.

In terms of Section 102(2) of the TA Act, the onus rests with the SARS official to provide reasons why a particular behaviour is applicable (TA Act). Once a particular understatement penalty has been imposed, it will be subject to the objection, appeal and dispute resolution procedures (Hofmeyer, 2011:1).

As previously indicated, this study will focus on the behaviour “reasonable care not taken in completing the return” only. This behaviour has been selected because it has not been defined in the TA Act and there are no guidelines on the application thereof, and may therefore be open to interpretation, which could cause uncertainty for taxpayers as well as SARS officials.

According to Lumsden (2013), in practice there has been a lot of concern regarding the application of this behaviour. It is said that even when a taxpayer uses the services of a tax practitioner and the practitioner does not take reasonable care, the taxpayer will still be liable for
the understatement penalty. Van Zyl (2014:914) argues that the guidance on what is expected is very limited in the Short Guide to the TA Act.

With the current uncertainty in the application of this particular penalty behaviour, taxpayers should always keep abreast with the reasons why certain sanctions are imposed against them. It can be concluded from Section 5 of the PAJA Act that when taxpayers have sufficient information on hand it reduces possibilities of future actions from SARS or unnecessary prolonged audits.

The meaning of this behaviour would therefore have to be explored further in order to try to determine a possible indicator of how to apply it to reduce uncertainty for both taxpayers and SARS officials.

2.4 Reasonable care not taken in completing the return

As set out in chapter one, “reasonable care” is described as the amount of care or caution that an ordinary person would take in the circumstances.

“Reasonable care” is not defined in the TA Act and according to the Short Guide to Tax Administration Act (SARS, 2013), the ordinary meaning of “reasonable care” applies. It further suggests that reasonable care means that a degree of caution is required, as a reasonable person in similar circumstances would take to fulfil their obligation. “Reasonable care” does not mean perfection, but the effort taken. It does not matter whether a taxpayer uses a tax practitioner – if no care is exercised by the tax practitioner, this behaviour will still be applicable (Bell, 2014).

According to Feuth (2013), a taxpayer must keep their records and supply correct and accurate records to SARS, as would any ordinary person. A liability is most likely to happen when the conduct of a taxpayer differs from that of any reasonable person in similar circumstances. Prior to taxpayers finding themselves in a position that will likely result in possible penalties, taxpayers should always ask themselves what is required or not required in order not to fall in a position that will attract this particular behaviour (Feuth, 2013).

Croome (2015) is of the opinion that when taxpayers obtain opinions or advice from registered professional tax practitioners, it may reduce the risk of attracting any understatement penalties, and because the taxpayer requested advice, it may be seen as the taxpayer acting reasonably.

According to Maritz (2016), the Short Guide to the Tax Administration Act mentions the “man on the Clapham omnibus test” – meaning a reasonable, educated and intelligent person whose
conduct can be measured against. A taxpayer must be evaluated according to their individual circumstance.

Kriel (2012) is of the opinion that, the SARS officials apply the behaviour of “reasonable care not taken in completing the return” as a default penalty provision for all additional assessments. Kriel (2012) furthermore argues that it seems that SARS is not lenient and all mistakes are punished, making this behaviour the default behaviour by SARS upon finding an error.

When SARS applies this approach to all cases that may result in an error, this may put SARS in an unfavourable position, which may result in scrutiny and objections, to name but a few (Van Zyl, 2014).

Cliffe Dekker Hofmeyr (2013) noted that despite there being no definition, the Short Guide refers to “reasonable care” as not perfection, but a reasonable person taking a reasonable amount of effort in the particular circumstances at hand. Cliffe Dekker Hofmeyr (2013) stated that this is the same as restating the Clapham omnibus test.

Van der Zwan (2013a:8-13) submitted that it is possible for taxpayers to avoid this particular behaviour by ensuring that all the necessary controls and procedures over the information and completion of the return are up to standard. Feuth (2013) supported this view by suggesting that this behaviour means trying by all means to ensure that the return filed is correct.

Botha (2014) mentioned that the conduct of a taxpayer must be tested against the conduct of a reasonable person. This principle was laid down by the Kruger v Coetzee 1966 (2) SA 428 (A) case. The conduct will be regarded as negligent or no care was taken if the behaviour does not match that of one in a similar situation.

It can be deduced from the above that “reasonable care not taken in completing the return” means taking caution. It does not deliberate exactly what a “reasonable person in a similar positions” means. Further guidance will be explored in the other penalty behaviours contained in Section 223 of the TA Act. This will be done in order to rule out any possibility of the other behaviours possibly including what reasonable care means or any explanation close to what it may mean.

2.5 Refining other understatement penalty behaviours

This section seeks to determine the meaning and application of all the understatement penalty behaviours contained in Chapter 16 in order to find the closest meaning to reasonable care. When a taxpayer makes an understatement, an understatement penalty must be levied in terms of Section 222 based on the behaviour displayed upon completion of the return as per
Section 223. There are five different behaviours listed in this provision associated with taxpayers to determine the penalty to be awarded to a taxpayer. The other four behaviours will therefore now be further explored in order to possibly determine or rule out what reasonable care could mean or not mean.

2.5.1 Substantial understatement

In terms of Section 221 of the TA Act, substantial understatement means if a prejudice or disadvantage to SARS exceeds the greater of five per cent of the tax chargeable or refundable for a relevant year of assessment or R1 000 000 (TA Act). This behaviour is only applicable when all the other behaviours do not apply and there is a substantial understatement (SARS, 2013). Van der Zwan (2013a) stated that the understatement is more concerned with the amount of the understatement rather than the behaviour.

This behaviour does not make any mention to reasonable care and can therefore not be considered in the quest to possibly finding the meaning of reasonable care as it mostly applies to the amount of the offence.

2.5.2 Gross negligence

In terms of the Short Guide to Tax Administration Act (SARS, 2013), gross negligence is said to be when a taxpayer pays little tax or their tax refund is overstated. Gross negligence is when something is done and the consequences that follow are highly or completely disregarded. Gross negligence is tested objectively and the test is based on whether a reasonable person foresees a high risk of a tax loss by their conduct. Gross negligence is said to involve recklessness, but does not require an element of wrongful intent as compared to evasion, which does.

In the case of Jameson’s Minors v CSAR (1908), the term “negligence” is described as follows: “The term negligence as used in our courts, simply means a failure to exercise that degree of diligence which the law requires under the circumstances of each case ... Whether the person whose conduct is under investigation is a specialist or an ordinary person, the fact remains that the diligence required of him is what reasonable specialists or reasonable men would exercise under similar circumstances.”

In the case of Transnet Ltd t/a Portnet v The Owners of the MV “Stella Tingas” & Another (2002), it was held that “gross negligence” involves the “extreme departure from the standard of a reasonable person to such an extent that it may properly be categorized as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care”. 

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This particular behaviour indicates that a taxpayer does not behave in a manner that any reasonable person or practitioner would. In all instances the taxpayer is reckless, of no care and deliberate in their conduct. This behaviour can therefore be considered in the quest to find the meaning of reasonable care as it seems to be the exact opposite thereof.

2.5.3 No reasonable grounds for tax position taken

Feuth (2013) is of the opinion that the Revised Explanatory Memorandum (2 of 2000) (EM) on the Income Tax Assessment Acts (27 of 1936) (ITAA) states that the test taken to ensure that there was reasonable grounds on the tax position taken is that the a taxpayer does not necessarily have to be in a better position to argue their point as compared to the Commissioner, but should be more likely correct than incorrect.

According to the Short Guide to the Tax Administration Act (SARS, 2013), an understatement penalty will be levied when the taxpayer does not have a reasonable arguable position and the understatement is because the taxpayer incorrectly applied the law in the tax Act. This penalty is levied if the application of the law is based on unreasonable grounds. The purpose is to levy a penalty when a position is assumed unreasonable, not when SARS disagrees with a position taken.

Van der Zwan (2013b) is of the opinion that although the TA Act does not indicate that this behaviour is not applicable when a tax opinion is in place, it should be held that an opinion provides a taxpayer with reasonable grounds for a tax position taken and SARS will find it difficult to prove that there were no reasonable grounds for the tax position taken.

It can be concluded that this behaviour deals with technical issues that relate to the interpretation of the law. It is does not relate to how a return is completed but decisions that were taken prior to completing the return. This behaviour can therefore not be considered in the quest to possibly finding the meaning of reasonable care, although by obtaining a tax opinion it is also an indication of reasonable care taken by the taxpayer.

2.5.4 Intentional tax evasion

In terms of the Short Guide to the Tax Administration Act (SARS, 2013), intentional tax evasion is when a taxpayer acts with an intent to evade tax. According to Van Der Walt (2013b), in the Miscellaneous Taxation Ruling 2008/1 it was held that “intentional” is more than just reckless disregard of a provision in the provision of the act.
This behaviour therefor could also mean the exact opposite of reasonable care taken, as the taxpayer intentionally compiles information wrongfully and completes the return in order to evade tax.

In Table 2-2 below the findings with regard to the different behaviours are illustrated in order to point out where it could assist in determining the meaning of reasonable care not taken in completing the return by ruling out what it is not.

**Table 2-2: Summary of understatement penalty behaviours**

<table>
<thead>
<tr>
<th>Findings</th>
<th>Substantial Understatement</th>
<th>Gross Negligence</th>
<th>No reasonable Grounds for Tax Position Taken</th>
<th>Intentional Tax Evasion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prejudice to SARS &gt; 5% of tax refundable/payable or R1 000 000.</td>
<td>Little tax is paid or refund is overstated.</td>
<td>A taxpayer does not have to be in a better position than SARS but more likely to be correct than incorrect.</td>
<td>Act with intention to evade tax.</td>
<td></td>
</tr>
<tr>
<td>Applies when all the other behaviours are not applicable.</td>
<td>Consequences of actions are highly or completely disregarded.</td>
<td>Incorrect application of the law in tax act.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Concerned more about the understated amount rather than behaviour.</td>
<td>Objective Test: based on whether reasonable person foresees a high risk of a tax loss by their conduct.</td>
<td>Penalty levied: application of the law based on unreasonable grounds and position assumed is unreasonable.</td>
<td>This behaviour is when a taxpayer intentionally evades tax. Act of total disregard of the consequences and will not assist in determining what reasonable care is.</td>
<td></td>
</tr>
<tr>
<td>This behaviour will not assist in determining what reasonable care is as it is concerned more about the amount rather than the behaviour.</td>
<td>It is recklessness but does not require element of wrongful intent.</td>
<td>Obtaining a tax opinion may be regarded that the taxpayer has taken reasonable grounds in the tax position taken.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Failure to exercise degree of diligence irrespective of who completed return.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Extreme departure from the standard of a reasonable person.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Categorised as extreme.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Substantial Understatement</td>
<td>Gross Negligence</td>
<td>No reasonable Grounds for Tax Position Taken</td>
<td>Intentional Tax Evasion</td>
<td></td>
</tr>
<tr>
<td>---------------------------</td>
<td>------------------</td>
<td>---------------------------------------------</td>
<td>------------------------</td>
<td></td>
</tr>
<tr>
<td>Conscious risk-taking; complete obtuseness of mind.</td>
<td>No conscious risk-taking; total failure to take care.</td>
<td>This behaviour is the total opposite of reasonable care as it is when a taxpayer completely fails to take care.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

By analysing the other four behaviours presented in the understatement penalty provision, it was attempted to possibly determine what behaviour should be ruled out in determining the meaning of “reasonable care not taken in completing the return”. As could be seen in Table 2-2 above, it was found that some of the behaviours could mean the exact opposite of this behaviour, but none of the other behaviours contained in Section 223 of the TA Act make reference to “reasonable care”. It does, however, rule out what it could not be.

2.6 Guidelines to assess if reasonable care was taken in completing the return

In this study specific focus is given to the behaviour of “reasonable care not taken in completing the return” and it was found that there still seems to be great uncertainty in the application thereof as it is very subjective to test. It was attempted to propose guidelines based on the findings of this part of the study that could be used by taxpayers and SARS to determine whether reasonable care was taken in completing the return. The guidelines are presented as follows:

- Amount of care or caution that an ordinary person would take in the circumstances.
- Degree of caution required, that a reasonable person who has similar circumstances would take to fulfil their obligation.
- Reasonable care does not mean perfection but the effort taken.
- Irrespective of who completed the return, if no care is taken, this behaviour will still be applicable.
- A taxpayer must keep his records and supply correct and accurate records to SARS.
• Obtaining an opinion or advice from registered professional tax practitioners may reduce the risk of attracting any understatement penalties as it may be seen as the taxpayer acting reasonably.

• A taxpayer must be evaluated according to his individual circumstances.

• The “Clapham omnibus test” could be performed, meaning a reasonable, educated and intelligent person whose conduct can be measured against.

• This behaviour can be avoided by ensuring that all the necessary controls and procedures over the information and completion of the return are up to standard.

• The conduct will be regarded as though no care was taken or negligent if the behaviour does not match that of one in a similar situation.

It can be seen from above that discrepancies and uncertainties relating to this behaviour may still be prevalent as each individual would form their own perception of what is reasonable.

2.7 Conclusion

The definition of reasonable care suggests that it is a standard measure of caution taken prior to completing the return in order to safeguard oneself to prevent any repercussions that may follow if the standard procedures are not followed. It may be deduced from the findings in this chapter that “reasonable care not taken in completing the return” is regarded in practice as when a taxpayer gathers and keeps all the information necessary to complete the return. The return is completed with care; this could be done by obtaining a tax opinion. The return should be completed in such a manner that a person with similar circumstances would also complete their return.

It can be concluded from the above consideration in chapter two that penalties are important in regulating the behaviour of taxpayers as penalties could act as a deterring agent. Tax penalties are dealt with in the TA Act, as explained, which replaced the previous penalty provisions from the IT Act as well as the VAT Act, as it was found to be inconsistent.

The other four behaviours, as listed in Section 223, have been considered and presented in Table 2-2 and since it does not mention anything relating to reasonable care, it could be used to determine what does not constitute reasonable care. Reasonable care is not the following: recklessness or intention to evade tax; extreme departure from the standard; conscious or unconscious risk-taking; incorrect application of the law; and reckless disregard of provisions in the Acts.
The first secondary objective has thus partially been addressed, but further guidance will be explored in the following chapter in order to get to the meaning of reasonable care not taken in completing the return.
CHAPTER 3: OVERVIEW OF INTERNATIONAL TAX ADMINISTRATION PRACTICE TAKING SPECIAL REGARD TO BEHAVIOUR SIMILAR TO “REASONABLE CARE NOT TAKEN IN COMPLETING THE RETURN”

3.1 Introduction

In this chapter, an overview will be done of the penalty provisions in South Africa contained in Section 221 to 223 and other international countries with similar legislation. The USA, Australia and the UK were selected because they form part of the OECD English-speaking countries that contribute to the research and development. This comparison will focus particularly on the behaviour “reasonable care not taken in completing the return” in order to address the research objective as identified in par. 1.5(2). These countries have been selected because the penalty provisions in their respective countries are already established. These countries have been able to manage and implement the required procedures to be effected when an understatement takes place (Feuth, 2013).

The objective of this chapter is to possibly find the meaning of “reasonable care not taken in completing the return” contained in Section 223 of the TA Act when international provisions similar to those in South Africa are applied in the South African context.

As was seen in chapter two, the shift from additional tax in Section 76 of the IT Act and Section 60 of the VAT Act was motivated by the fact that there were inconsistencies in the application of these sections by the SARS officials. The penalties were rather harsh and could not be avoided in the event of an understatement, because the penalty remained 200% despite the difference in the taxpayer’s behaviour, regardless of the magnitude of the understatement. South Africa has taken a similar direction in the application of the current understatement penalties to some other tax jurisdictions internationally (Feuth, 2013).

This information on how penalties are levied has been made public by the Australian Tax Office (ATO) for transparency purposes; in order for members of the public to be aware of their duty to declare rightfully and that if care is not taken upon completion of the return, consequences will most likely follow (ATO, 2004).

Feuth (2013) is of the opinion that the penalty provisions for the USA, Australia and the UK together with the new TA Act are fair and very considerate of the taxpayers.
The provisions that relate to the behaviour "reasonable care not taken in completing the return" in the USA, Australia and the UK will therefore now be considered in order to possibly find guidance for South Africa in applying this penalty behaviour.

### 3.2 Overview of the USA provisions relating to reasonable care

This section of the study seeks to explain how an understatement penalty similar to "reasonable care not taken in completing the return" may apply to a taxpayer in the USA who understates their tax liability.

The Internal Revenue Service (IRS) imposes an accuracy related penalty of 20% in terms of Section 6662(a) of the US Code when an understatement is applicable. An understatement takes place when there is a difference between the tax required to be payable and the amount of tax payable that is currently on the return (Godfrey, 2012). There is a number of underpayment penalties referred to in the US Code (the Code). Penalties for underpayment due to negligence or the disregarding of rules and regulations as stipulated in Section 6662(b)(1). Penalties for any substantial understatement of income as stipulated in Section 6662(b)(2). Penalties for any substantial valuation misstatement under Chapter 1 as stipulated in Section 6662(b)(3). Penalties for any substantial overstatement of pension liabilities as stipulated in Section 6662(b)(4) and any substantial estate or gift tax valuation understatement as stipulated in Section 6662(b)(5). The accuracy related penalty will not apply if the taxpayer acted in good faith and there is a reasonable cause for the underpayment as stipulated in section 6664(c) (Alvin Brown and Associates, 2004).

According to Podraza (2013), accuracy-related penalties are triggered by conduct or are triggered by mechanical triggers. Conduct includes negligence or disregard of rules and regulations and mechanical related penalties only arise when the understatement of the tax payable exceeds 10% of the tax payable that should have been reported.

The focus of this study will be on Section 6662(b)(1) relating to negligence or disregarding of rules and regulations because the conduct of the taxpayer is very important to determine in order to classify a taxpayer as being negligent. Podraza (2013) submits that a taxpayer's conduct for reasonableness must always be determined.

In terms of Section 6662(c), "negligence" is defined as "any failure to make a reasonable attempt to comply with the provisions of this title", and "disregard" in turn includes "any careless, reckless, or intentional disregard". According to IRS (2008), "negligence" means "failing to make a reasonable amount of effort in complying with the rules and regulations set out in the Code". This means the unreasonable and out of the ordinary preparation of completion of the return and the taxpayer not keeping all the supporting documents to support the claim. This is often
supported by reckless, intentional or careless disregard to the rules and regulations of the Code. Negligence is taking little effort to ensure that what is declared is correct with minimal errors (IRS, 2008).

According to the American Bar Association tax section (2012), this penalty will not apply where there is a reasonable cause for the manner in which the return is submitted. The relief is provided when the taxpayer exercises due care and is cautious in the completion of the return, yet still finds themselves in a position of incurring penalties. The use of words such as “forgetfulness”, “mistake” or “ignorance of the law” is not sufficient in order for the relief to be afforded. Every case is treated differently because the facts and circumstances differ (Rettig, 2011:3). The onus is upon the unsophisticated taxpayer to prove that there was a reasonable cause for the position taken (Drumbl, 2013:147). In terms of the IRC, Treasury Regulations, the IRS’s Penalty Handbook contained in the IRM (IRM 20.1), and case law, the following reasons would grant relief of not incurring this penalty:

(a) “Death, serious illness, or unavoidable absence.

(b) Fire, casualty, natural disaster, or other disturbance.

(c) Inability to obtain records.

(d) Erroneous advice or reliance.

(e) Ignorance of the law in conjunction with other facts and circumstances.

(f) Misfeasance by employee or agent leaving taxpayer ‘incapacitated’ or ‘disabled’.

(g) Financial hardship” (ABA tax section, 2012).

According to Stark (2001), “negligence” and “disregard” question a taxpayer’s prudence and are closely linked to a taxpayer obtaining a tax consultation from a registered tax professional; this may act as a defence in being charged with this penalty. Reliance on the tax professional will stand ground if the taxpayer has provided sufficient and correct information to the preparer (Larkin, 2012). Rettig (2011) also alluded to the fact that reliance on advice from a tax professional may be considered a reasonable cause, provided the taxpayer relied on advice provided per request; the relief will only apply to the period in which advice was requested and this also includes oral advice obtained.

It can therefore be concluded from the above-mentioned information that the following can be used as a guideline in considering the meaning of “reasonable care”: a taxpayer is not negligent if:
(a) The taxpayer keeps all the records used to file the return;

(b) The completion of the return is consistent with previous years;

(c) The return is extraordinary and fairly reasonable; and

(d) The submission complies with the laws set out in the Internal Revenue Code (Internal Revenue Code).

If a penalty has already been levied, these penalties may be waived if the taxpayer can prove that it is due to death, natural disaster, incorrect advice obtained from a tax professional or tax official, disability, and financial difficulty.

3.3 Overview of the Australian provisions relating to reasonable care

According to Maritz (2016), the South African TA Act was hugely influenced by the Australian tax law when it was drafted. This can be supported by the similar words and phrases found in both the administration acts of these two countries.

The Taxation Administration Act 1953 deals with shortfall penalties set out in Section 284-75 and this section has been effective from 1 July 2000 (ATO, 2008).

In the event of an understatement on a return as a result of a false or misleading statement, the Practice Statement Law Administration 2012/5 (PSLA 2012/5) (Guidance by ATO) provides the different conditions that exist, on how a taxpayer may incur tax penalties (ATO, 2012). In terms of the ATO (2004), a shortfall penalty may be imposed in terms of Section 284-75 of the Australian Taxation Administration Act (1 of 1953), (AU TAA), if blame is found in the following circumstances:

- A taxpayer makes a false or misleading statement in a return or omits income, over-claims a deduction or incorrectly claiming deductions that are not permitted.

- Failure to provide supporting documentation to permit the calculation of the tax liability.

- Incorrectly applying the income tax law with no reasonable argument (tax shortfall must be greater than $10 000 or 1% of the tax payable by the taxpayer).

- The disregard of a private ruling.

- Involvement in a tax avoidance scheme or being in possession of a transfer pricing adjustment.
Penalties are usually imposed due to the behaviour displayed by a taxpayer and the behaviour displayed is usually the reason why there is a shortfall. Penalties are calculated using the shortfall multiplied by the penalty percentage. The following table contains the penalty percentages attributable to a particular behaviour.

Table 3-1: Australian shortfall penalty table

<table>
<thead>
<tr>
<th>Cause of shortfall</th>
<th>Base penalty amount (% of shortfall)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intentional disregard of a taxation law by taxpayer or tax agent and failure to provide documentary proof necessary for the Commissioner to determine the tax liability (Section 248-75(3)).</td>
<td>75</td>
</tr>
<tr>
<td>Recklessness</td>
<td>50</td>
</tr>
<tr>
<td>Lack of reasonable care taken, no reasonable grounds for position taken for trusts (Section 284-75(30)) and partnerships (Section 284-75(35)).</td>
<td>25</td>
</tr>
</tbody>
</table>

Source: Section 244-90 AU TAA (1 of 1953)

Particular focus will be given to “lack of reasonable care” as the objective of this chapter is to possibly find alternatives to the meaning of “reasonable care” using provisions already established in other countries that relate to this behaviour.

The term “reasonable care” has not been defined in the AU TA Act and is only defined in general terms. The definition of “reasonable care” is provided in Miscellaneous Taxation Ruling MT 2008/1 (MTR 2008/1) (guidance by ATO) as making “a reasonable and genuine attempt to comply with obligations imposed under a taxation law” (ATO, 2008:8). The Explanatory Memorandum to A New Tax System, Tax Administration Bill (2 of 2000) has provided guidance on what “reasonable care” could possibly mean. The points below are some of the guidance provided:

- Under similar circumstances, “reasonable care” means arriving at the same conclusion that would be reasonable for any other person.

- If there is uncertainty in the manner in which a tax-related matter is handled, taking reasonable care would mean making reasonable effort to resolve the enquiry. Reasonable enquiry includes consulting or seeking previous material or communication published by the ATO in order to ensure the correct treatment of the matter at hand. If the taxpayer consulted someone, the taxpayer must have reasonable grounds to believe that what has been reflected is accurate and true. Misinterpretation of clear and unambiguous provisions is an indication that reasonable care was not taken. The ultimate decider would be the honest
efforts of the taxpayer in the particular circumstances to ensure that the tax position is correct.

- If a taxpayer takes on a position regarding a tax matter that is petty or has no reasonable basis, it will be an indication of lack of reasonable care.

- When a taxpayer prepares their own tax return, it would be seen as exercising reasonable care if he relies on the advice or opinion of a tax practitioner, accountant, lawyer or any other person who may have the expertise and is competent enough to provide the advice. The taxpayer would be regarded as have exercised reasonable care, if the advice obtained is followed.

- If a taxpayer relies on the wrong advice, when the taxpayer is capable of or expected to have known that the advice is wrong, the taxpayer will be penalised. Similarly, if a taxpayer carelessly presents all the facts to an advisor, and the facts materially affect the advice, the taxpayer will incur a penalty.

- When the services of a tax practitioner are used in order to prepare the return, the taxpayer will be liable for any penalties caused by the practitioner, if the statement results in a shortfall. A higher standard is expected from tax practitioners.

- If a taxpayer relies on information received from a third party (e.g. the bank) in order to prepare the return, and there is a possible material error which would likely land the taxpayer in a penalty position (because the taxpayer is entitled to rely on the information provided), no penalty should be imposed unless the taxpayer knew that the information is incorrect or the taxpayer is expected to have known that the information is incorrect.

- Arithmetic errors are an indication that reasonable care has not been taken. This is not conclusive because in business, the preparers would rely on systems in place that detect errors. The frequency, size and nature of the error are factors taken into consideration upon concluding that reasonable care was taken (The Explanatory Memorandum to A New Tax System, Tax Administration Bill (2 of 2000)).

The Australian Tax Ruling 94/4 (1994) provides additional guidance on the meaning of reasonable care. Only provisions that have not been mentioned above will be supplied. This information has been made public to increase transparency between the ATO and the public (ATO, 1994):

- Where a tax official does not have all the facts and relevant information, the tax official must make a judgment on the facts available. The official may conclude that given the time
provided to the taxpayer to provide the information and the taxpayer still does not respond to
the request; the official may decide that the reasonable care has not been exercised.

• If a taxpayer omits an amount on the return and provides the reason for omission as
because they forgot (in the absence of factors such as age, skill, experience and education),
it will not be accepted as having taken reasonable care.

• Failure to maintain adequate records.

• When a taxpayer is uncertain about the correct application, a taxpayer may request for a
private ruling on condition they apply it; if it is not applied, the lack of reasonable care will
apply. If a private ruling is requested after submission of the return, the penalty will not
apply.

• If there is a public ruling in place and the taxpayer does not make use of this ruling, if the
taxpayer can substantiate reasons why it was not used or why it is not applicable to these
circumstances, then the penalty will not apply. This penalty will also not be applied if the
taxpayer did not know that the Public ruling existed (ATO, 1994).

Smailes and McDermott (2013) are of the opinion that if a taxpayer has doubts about certain
information at hand, a reasonable person would be expected to follow up and resolve the
matter, prior to finalizing the return.

If a taxpayer and tax professional exercised caution in completing the return, no penalty will be
levied. When a tax professional completes a false and misleading return on behalf of the
taxpayer, the taxpayer will be liable for the penalty because the taxpayer is ultimately
responsible for their tax affairs (Smailes & McDermott, 2013:226).

Cliffe Dekker Hofmeyer (2013) is of the opinion that the reasonable care standard is not a “one
size fits all” because circumstances differ from case to case. A lower standard of care is
required from a person who just entered the tax system, who has little or no knowledge of how a
tax system works, but a higher standard of care is expected from a person who has advanced
knowledge of how a tax system works.

It can therefore be concluded from the above-mentioned information relating to Australia that
the following can be used as a guideline in considering the meaning of “reasonable care”:

• If a taxpayer is uncertain about the application of a particular matter, the taxpayer is
expected to consult either from a ruling published by the ATO or a tax practitioner. If the
taxpayer completes his own tax return, the taxpayer will be regarded as having taken
“reasonable care” if he consults a person who has the knowledge and expertise. The
taxpayer is expected not to rely on advice provided by a tax practitioner if the taxpayer knows that the advice is not reliable. Any penalties caused by the tax practitioner will accrue to the taxpayer.

- No penalties will be incurred from information obtained from third parties unless the taxpayer knows that the information is incorrect and arithmetic errors will be treated as though no care has been taken. When a taxpayer fails to provide sufficient information to a tax official within the prescribed time, the official will use the information on hand to come to a conclusion and will also conclude that reasonable care was not taken upon completion of the return.

If a taxpayer fails to keep adequate records and attributes omitting an amount on the return to forgetfulness, in the absence of old age, illness etc. the penalty will apply.

3.4 Overview of the UK provisions relating to reasonable care

In April 2010, a new penalty system was established in the UK in order to administer all the personal tax types, including pay-as-you-earn, value-added tax and income tax. This new system was established for returns submitted from 1 April 2009. These penalties have been put in place in order to ensure compliance amongst other things (Deloitte, 2008)

The UK Finance Act (2007) deals with the penalty provisions. In terms of paragraph 1 of the 24th Schedule of the UK Finance Act (2007), a person is liable for a penalty when:

- A person provides the Her Majesty Revenue and Customs (HMRC) with documents listed in the 24th Schedule and the following two conditions are satisfied:
  1. Documents provided are inaccurate and result in the following:
     - The tax liability is understated.
     - The loss is overstated.
     - Inflated refund.
  2. Careless Inaccuracy or inaccuracy is deliberate.

- In the event where there is more than one inaccuracy, each one will be penalized (UK, 2007)

The degree of inaccuracies is further described in par. 3 of the 24th Schedule of the UK Finance Act (2007) as follows:
An inaccuracy is:

(a) “Careless” if the inaccuracy is deliberate by the taxpayer, thus failing to take reasonable care;

(b) “Deliberate but not concealed” if the taxpayer causes a deliberate inaccuracy yet does not try to conceal it; and

(c) “Deliberate and concealed” if the taxpayer causes a deliberate inaccuracy and tries to conceal it, penalties are imposed based on the reason for the inaccuracy. The following table illustrates the different penalty percentages imposed based on the nature of the inaccuracy.

<table>
<thead>
<tr>
<th>Nature of offence prompted</th>
<th>Max %</th>
<th>Min unprompted</th>
<th>Min</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reasonable care</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>Careless action</td>
<td>30%</td>
<td>10%</td>
<td>15%</td>
</tr>
<tr>
<td>Deliberate no concealment</td>
<td>70%</td>
<td>20%</td>
<td>35%</td>
</tr>
<tr>
<td>Deliberate with concealment</td>
<td>100%</td>
<td>30%</td>
<td>50%</td>
</tr>
</tbody>
</table>


Particular focus will be given to “reasonable care” in order to be able to meet the objective of this chapter. “Reasonable care” is not defined in the Finance Act and therefore includes any omission that is excluded from carelessness (Nixonwilliams, 2011).

According to the HMRC (2016b), “carelessness” means that insufficient reasonable care was taken. Reasonable care differs from person to person. The amount of reasonable care taken will depend on each taxpayer’s ability and circumstances; for example, if the taxpayer’s health were preventing him from taking reasonable care, this could be regarded as a circumstance. It is said that “reasonable care” is to ensure that all the information is correct prior to any errors being found on the return. It is keeping accurate records on hand so that when the time arises for submission, the submission is also accurate. Reasonable care is demonstrated when a taxpayer seeks insight from HMRC or a tax practitioner if a provision is unclear and this is done in order to ensure proper treatment (HMRC, 2012). A high expectation is placed upon cases where the matters are large and complex; therefore a greater degree of care should be applied (HMRC, 2010).
The HMRC (2016b) requires that the taxpayer keep sufficient documentation to ensure accuracy in the return completed. According to HMRC (2016c), when a taxpayer completes a return and an understatement still occurs, the following causes of the understatement will be excused:

- A reasonable view of why the return was treated in the manner it was treated;
- An immaterial arithmetic error that makes little or no difference to the tax payable;
- Incorrect advice was provided by the HMRC and later on to find out that it is incorrect; and
- Information received from another person to use in the completion of the return, where it is impossible to verify that the information is accurate and complete.

The onus is on the taxpayer to prove that reasonable care was taken to avoid any errors by the tax agent. Consideration should be taken in the mitigating steps taken to ensure that no errors occur (HMRC, 2016a).

In the case of Morrisroe UK Ltd v HMRC (2015), Morrisroe UK Ltd appointed Mr Nair as their tax agent to submit returns on their behalf. A payment was submitted late by Mr Nair due to issues experienced by Mr Nair. The HMRC contended that the mere fact that reliance was placed upon Mr Nair was not reason enough not to levy the penalty. The crux of the matter is that Mr Nair, on the day of the payment, was preoccupied at home with personal circumstances that could not have been mitigated. It was agreed by the tribunal that reliance on third party information is not a reasonable cause unless unforeseen events happened to that third party. It was agreed that it was reasonable for Morrisroe to rely on Mr Nair and Mr Nair had had a reasonable cause for the late payment.

It can therefore be concluded from the above-mentioned information from the UK that the following could be used as a guideline in considering the meaning of “reasonable care”:

When a taxpayer does not take “reasonable care”, this is said to be carelessness. A taxpayer must ensure that all records are correct prior to finding any errors on the return. Reasonable care is ensuring that all the records are accurate so that the return is also an accurate reflection. It is seeking clarity on a particular provision from which the taxpayer is uncertain. Taxpayers with the required knowledge and complex cases are expected to place a high degree of care in comparison to cases where the matter is not as complex.

In the event that that the taxpayer incurs a penalty for no reasonable care taken, the following conditions will exempt the penalty from applying:
• The taxpayer must provide a reasonable view of why the return was treated in the manner it was treated.

• If the taxpayer makes an immaterial arithmetic error that makes little or no difference to the tax payable.

• The penalty will not apply in the event where incorrect advice was provided by the HMRC and the taxpayer later on discovers that the information is actually incorrect.

• When information is received from another person to use in the completion of the return and it is impossible to verify that the information is accurate and complete.

• It will be seen as though reasonable care was taken if reliance is placed on a tax advisor and the onus rests upon the taxpayer to ensure that the information provided is accurate and complete.

In Table 3-3 below a compilation was made of the guidelines available from South Africa, the US, Australia and the UK in order to illustrate what each country considers to be “reasonable care”.

34
<table>
<thead>
<tr>
<th>South Africa</th>
<th>USA</th>
<th>Australia</th>
<th>UK</th>
</tr>
</thead>
</table>
| “Reasonable care” is the standard measure of caution taken prior to completing the return. | A taxpayer is not negligent (exercised reasonable care) if the taxpayer:  
- Keeps all the records used to file the return.  
- The completion of the return is consistent with previous years.  
- The submission complies with the laws set out in the Internal Revenue Code. | If a taxpayer fails to keep adequate records and attributes omitting an amount on the return to forgetfulness, in the absence of old age, illness etc., the penalty will apply; it will be concluded that no reasonable care was taken. | A taxpayer must ensure that all records are correct prior to finding any errors on the return. “Reasonable care” is ensuring that all the records are accurate so that the return is also an accurate reflection. |
<p>| “Reasonable care not taken in completing the return” is regarded in practice as when a taxpayer gathers and keeps all the information necessary to complete the return. | If the taxpayer completes his own tax return, the taxpayer will be regarded as having taken “reasonable care” if they consult a person who has the expertise. | When a taxpayer does not take “reasonable care”, this is said to be carelessness. |
| It is when the return is completed with care; this could be done by obtaining a tax advice from a qualified tax professional. | The taxpayer is expected not to rely on advice provided by a tax practitioner if the taxpayer knows that the advice is not reliable. Any penalties caused by the tax practitioner will accrue to the taxpayer. | Taxpayers with the required knowledge and complex cases are expected to place a high degree of care in comparison to cases where the matter is not as complex. |
| | | It will be seen as though reasonable care was taken if reliance is placed on a tax advisor and the onus rests upon the taxpayer to ensure that the information provided is accurate and complete. |</p>
<table>
<thead>
<tr>
<th>South Africa</th>
<th>USA</th>
<th>Australia</th>
<th>UK</th>
</tr>
</thead>
<tbody>
<tr>
<td>The return should be completed in such a manner that a person with similar circumstances would also complete their return.</td>
<td>Penalties may be waived if the taxpayer can prove that the understatement is due to death, natural disaster, incorrect advice obtained from a tax professional or tax official, disability and financial difficulty.</td>
<td>No penalties will be incurred from information obtained from third parties unless the taxpayer knows that the information is incorrect.</td>
<td>In the event that the taxpayer incurs a penalty for no reasonable care taken, the following conditions will exempt the penalty from applying:</td>
</tr>
<tr>
<td>Reasonable care is not: recklessness, intention to evade tax, extreme departure from the standard, conscious or unconscious risk-taking, incorrect application of the law and reckless disregard of provisions in the Acts.</td>
<td>Arithmetic errors will be treated as though no care has been taken.</td>
<td>If a taxpayer is uncertain about the application of a particular matter, the taxpayer is expected to consult either from a ruling published by the ATO or a tax practitioner.</td>
<td>- The taxpayer must provide a reasonable view of why the return was treated in the manner it was treated.</td>
</tr>
<tr>
<td></td>
<td>When a taxpayer fails to provide sufficient information to a tax official within the prescribed time, the official will use the information on hand to come to a conclusion and will also conclude that reasonable care was not taken upon completion of the return.</td>
<td></td>
<td>- If an immaterial arithmetic error that makes little or no difference to the tax payable.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- In the event where incorrect advice was provided by the HMRC and later on the taxpayer finds out that the information is incorrect.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- Where it is impossible to verify that the information is accurate and complete if the information received is from another person to use in the completion of the return.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- It is seeking clarity on a particular provision from which the taxpayer is uncertain.</td>
</tr>
</tbody>
</table>
3.5 Conclusion

The research objective addressed in this chapter, as identified in par. 1.5(2), was to consider the meaning of "reasonable care not taken in completing the return", considering guidance from similar provisions of international tax jurisdictions. It is clear from this chapter that the behaviours displayed in the selected countries' respective penalty provisions are accompanied by much-needed guidance.

It is seen that there are similar interpretations for "reasonable care" for all of these countries, such as keeping accurate records and, in the event where the taxpayer is uncertain of the application of a provision in the act, the taxpayer seeking advice from a person who has the expertise, or a ruling by the revenue authority.

Although the answers are not conclusive, there is an exhaustive amount of information available from the selected countries of what is expected from taxpayers. These findings will be compiled in the next chapter, combined with the findings from the previous chapter in order to provide guidance to address the application of "reasonable care not taken in completing the return".
CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

4.1 Introduction

The TA Act was enacted in order to balance the powers and duties of SARS and to ensure harmony and transparency between the two parties. Chapter 16 of the TA Act is responsible for administering tax penalties and particular focus was placed on the behaviour of "reasonable care not taken in completing the return" contained in Section 223 as there has been much uncertainty in the application of this behaviour (Klopper, 2015).

4.2 Summary of research objectives

The main purpose of this study was to consider the meaning of "reasonable care not taken in completing the return", therefore ensuring that the TA Act is not ambiguous in the meaning of this behaviour. The following research objectives were used to address the ambiguous meaning of "reasonable care not taken in completing the return": The first secondary research objective was to consider the importance of penalty provisions applicable to taxation in South Africa and consider the meaning of "reasonable care not taken in completing the return" in terms of Section 223 of the TA Act. This objective was addressed in chapter two. The second secondary research objective was to consider the provisions of other tax authorities (the USA, Australia and the UK) regarding understatements which may result in a similar behaviour to reasonable care in completing the return in order find possible guidance for future application. This objective was addressed in chapter three.

A conclusion is deduced from the above-mentioned research objectives and recommendations will be provided to address the problem statement in par. 1.4 in order to address the problem of there being no clear definition for the term "reasonable care not taken in completing the return" in the tax acts.

This study was thus undertaken because this behaviour of "reasonable care not taken in completing the return" is not defined in Section 223 of the TA Act and there are no clear guidelines that exist to assist taxpayers and tax officials in the correct application of this behaviour. In order to achieve the research objectives as stated in par. 1.5, a literature review was undertaken in order to gain an in-depth understanding of the role and importance of tax penalties in South Africa; to gain understanding of the current meaning of "reasonable care not taken in completing the return"; and to consider the provisions from other countries such as the USA, Australia and the UK with behaviours similar to "reasonable care not taken in completing the return". In order to ensure that the main problem statement is resolved, the individual research objectives need to be met.
The first research objective was to consider the importance of penalty provisions applicable to taxation in South Africa and consider the meaning of "reasonable care not taken in completing the return" in terms of Section 223 of the TA Act:

- In chapter two, according to AICPA (2013), it can be concluded that penalties are important because it encourages voluntary compliance and promote good conduct, but taxpayers must feel that the penalties are fair and do not unnecessarily punish the innocent. When penalties are vague and are not administered with fairness, there will be no promotion of voluntary compliance. Kirchler et al. (2008:95) are of the opinion in order for taxpayers to comply, there has to be a relationship of trust between the two parties. Tax penalties act as deterrence to bad conduct but taxpayers always weigh the cost of complying versus the cost of not complying (Doran, 2009).

- In terms of the chapter two, it may be seen that the meaning of reasonable care is still unclear, yet some guidance was found from the literature review and the refining of the other four understatement penalty behaviours to determine what does not constitute reasonable care not taken in completing the return. It was found that the definition of "reasonable care" suggests that it is a standard measure of caution taken prior to completing the return in order to safeguard oneself, to prevent any repercussions that may follow if the standard procedures are not followed. It is also regarded in practice as when a taxpayer gathers and keeps all the information necessary to complete the return. It is when a return is completed with care; this could be done by obtaining a tax opinion or advice from a tax professional. The return should be completed in such a manner that a person with similar circumstances would also complete their return.

- The other four behaviours, as listed in Section 223, have been considered and presented in Table 2-2. These behaviours do not mention anything relating to reasonable care, and were used to determine what does not constitute reasonable care. Reasonable care was found not to be the following: recklessness or intention to evade tax, extreme departure from the standard, conscious or unconscious risk-taking, incorrect application of the law and reckless disregard of provisions in the Acts.

The second secondary research objective was to consider the provisions of other tax authorities (the USA, Australia and the UK) regarding understatements which may result in a similar behaviour to "reasonable care in completing the return" in order find possible guidance for future application, as was compiled in Table 3-3, and the following was found:
• It was found that the main aim of the tax penalties in the USA, Australia, and the UK is to positively influence the taxpayers' behaviour. Penalties have been instated to protect honest taxpayers, but to also punish taxpayers who have intentions not to comply.

• The study revealed that in the USA, a taxpayer is not negligent if: the taxpayer keeps all the records used to file the return; the completion of the return is consistent with previous years; the return is extraordinary and fairly reasonable; and the submission complies with the laws set out in the IRC. If a penalty has already been levied, these penalties may be waived if the taxpayer can prove that it is due to death, natural disaster, incorrect advice obtained from a tax professional or tax official, disability, and financial difficulty.

• The study revealed that in Australia, if a taxpayer is uncertain about the application of a particular matter, the taxpayer is expected to consult either from a ruling published by the ATO or a tax practitioner. If the taxpayer completes his own tax return, the taxpayer will be regarded as having taken “reasonable care” if they consult a person who has the expertise. The taxpayer is expected not to rely on advice provided by a tax practitioner if the taxpayer knows that the advice is not reliable. Any penalties caused by the tax practitioner will accrue to the taxpayer. No penalties will be incurred from information obtained from third parties unless the taxpayer knows that the information is incorrect and arithmetic errors will be treated as though no care has been taken. When a taxpayer fails to provide sufficient information to a tax official within the prescribed time, the official will use the information on hand to come to a conclusion and will also conclude that reasonable care was not taken upon completion of the return. If a taxpayer fails to keep adequate records and attributes omitting an amount on the return to forgetfulness, in the absence of old age, illness etc., the penalty will apply.

• The study revealed that in the UK, when a taxpayer does not take "reasonable care", this is said to be carelessness. A taxpayer must ensure that all records are correct prior to finding any errors on the return. Reasonable care is ensuring that all the records are accurate so that the return is also an accurate reflection. It is seeking clarity on a particular provision from which the taxpayer is uncertain. Taxpayers with the required knowledge and complex cases are expected to place a high degree of care in comparison to cases where the matter is not as complex. It will be seen as though reasonable care was taken if reliance is placed on a tax advisor and the onus rests upon the taxpayer to ensure that the information provided is accurate and complete.

• In the event that that the taxpayer incurs a penalty for no reasonable care taken, the following conditions will exempt the penalty from applying: the taxpayer must provide a reasonable view of why the return was treated in the manner it was treated; if the taxpayer
makes an immaterial arithmetic error that makes little or no difference to the tax payable; the penalty will not apply in the event where incorrect advice was provided by the HMRC and the taxpayer later on discovers that the information is actually incorrect; and when information is received from another person to use in the completion of the return and it is impossible to verify that the information is accurate and complete.

Based on the conclusions from each chapter, the main objective to develop a meaning for "reasonable care" and to compile a list of criteria to be met when considering the application of reasonable care not taken in completing the return has been achieved and problem statement therefore sufficiently addressed. The recommendations compiled from the findings in this dissertation are therefore as follows:

4.3 Recommendations

In order to address issues relating to the meaning of reasonable care in Section 223 of the TA Act, the National Treasury should consider the following:

- Defining the meaning of "reasonable care" in the TA Act. This should be done in line with the provisions of other countries that have similar provisions.

- A recommended definition is as follows: "Reasonable care" may be defined as taking the necessary amount of care that any other ordinary person, who has similar circumstances, would take to complete the return. It is not defined by perfection, but the return should be consistent with the previous years of assessment. It is ensuring that all records are accurate and complete. "Reasonable care" is not an intention to evade tax; the extreme departure from the standard; conscious or unconscious risk-taking; incorrect application of the law; and reckless disregard of provisions in the Acts.

- Providing pre-determined criteria in the application of Section 223, specifically for "reasonable care not taken in completing the return". The pre-determined criteria recommended may be as follows:

  - The taxpayer must keep all the records used to file the return. When a taxpayer fails to provide sufficient information to a tax official within the prescribed time, the official will use the information on hand to come to a conclusion and will also conclude that reasonable care was not taken upon completion of the return.

  - If a taxpayer fails to keep adequate records and attributes omitting an amount on the return to forgetfulness, in the absence of old age, illness etc., the penalty will apply; it will be concluded that no reasonable care was taken.
• Penalties may be waived if the taxpayer can prove that the understatement is due to death, natural disaster, incorrect advice obtained from a tax professional or tax official, disability and financial difficulty.

• If the taxpayer completes their own tax return, the taxpayer will be regarded as having taken “reasonable care” if they consult a person who has the expertise.

• The taxpayer is expected not to rely on advice provided by a tax practitioner if the taxpayer knows that the advice is not reliable. Any penalties caused by the tax practitioner will accrue to the taxpayer.

• No penalties will be incurred from information obtained from third parties unless the taxpayer knows that the information is incorrect.

• Arithmetic errors will be treated as though no care has been taken.

• If a taxpayer is uncertain about the application of a particular matter, the taxpayer is expected to consult either from a ruling published by SARS or a tax practitioner.

• SARS should consider drawing up a guide to be used listing the conditions to be met when levying reasonable care.

4.4 Suggestions for possible further studies

The following topics have been identified for possible future research:

• The different penalty provisions in South African compared to those in other countries

• A future study would be to consider the meaning of “standard case” and “repeat case” in relation to section 223 of the Tax Administration Act

• Refining the meaning of bona fide inadvertent error and the criteria to be met to qualify for this behaviour

4.5 Conclusion

The focus of this study was to develop a meaning for “reasonable care” and compile a list of criteria to be met when considering the application of “reasonable care not taken in completing the return”. It was found that there is an urgent need to define “reasonable care” in Section 223 of the TA Act and that guidelines must be provided by SARS on how this new provision should be applied. There is great uncertainty in practice when this particular section would apply. The
amendment to this provision will increase fairness to the tax system and will be very much welcomed by practice.

In the same space of defining this new term, Treasury should ensure that the defining of this provision increases compliance and does not give taxpayers reason to not comply.
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