

Why Sars can't have the 'money and the box'

 By [Graeme Palmer](#)

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'Money or the Box' is a game where a contestant must choose between the money or an undisclosed prize in a box. In *Lance Dickson Construction CC v CSARS*, a full bench of the Western Cape High Court said, in the context of understatement penalties, Sars is not entitled to ask for both the money and the box.



Image source: Karolina Grabowska from [Pexels](#)

The taxpayer was appealing against a 25% understatement penalty imposed by the tax court for failing to account for capital gains tax. Where there is an understatement of tax, a three-phase process is contemplated. First Sars must decide whether the 'understatement' meets the requirements of the definition in section 221 of the Tax Administration Act (TAA). If it meets these requirements, Sars must consider whether the understatement results from a "*bona fide* inadvertent error". If the understatement was a result of a *bona fide* error, no penalty may be levied. If there is no error, Sars must identify the appropriate behavioural category in section 223 of the TAA under which the taxpayer's conduct falls.

In the present case, Sars chose the category "reasonable care not taken in completing a return" which carries a 25% penalty. Sars has the onus of proving the facts to justify the imposition of such a penalty. However, the evidence of the Sars witness was that the behavioural category "no reasonable grounds for tax position taken", which carries a 50% penalty, was a more appropriate behavioural category.



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The court held that once Sars elected to impose the 25% penalty, it was required to prove the factual basis for such penalty. It was common cause that it did not do so, with the Sars witness stating that a 50% penalty should have been payable. Having chosen in its assessment to impose a 25% penalty, Sars could not seek to advance a factual basis for a

50% penalty without revising its assessment. The reason for this is that the taxpayer must be given an opportunity to reconsider its position before embarking on its tax appeal. Sars cannot ask the Court for the money and the box.

There is no strict liability when it comes to understatement penalties; the mere establishment of a tax understatement does not give Sars a right to impose a penalty - Sars must still comply with the TAA. Once Sars failed to discharge its onus in proving the 25% penalty, that was the end of its case. Therefore, the taxpayer succeeded with its appeal against the 25% penalty.

ABOUT GRAEME PALMER

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