

Proposed extension of existing prescription periods (section 99 of the Tax Administration Act)



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Section 99 of the Tax Administration Act, No 28 of 2011 (TAA) prescribes the period of limitations (ie prescription) for the issuance of assessments.

Section 99 currently states that the South African Revenue Service (SARS) may not make an assessment in terms of Chapter 8 of the TAA, inter alia:

- three years after the date of assessment of an original assessment by SARS;
- (in the case of self-assessment for which a return is required) five years after the date of assessment of an original assessment by way of self-assessment by the taxpayer or, if no return is received, by SARS; or
- (in the case of a self-assessment for which no return is required) after the expiration of five years from either the date of the last payment of the tax for the tax period or the effective date, if no payment was made in respect of the tax for the tax period.

As s99 of the TAA currently reads, the above periods do not

apply to the extent that:

- (in the case of assessment by SARS) the full amount of tax chargeable was not assessed due to fraud, misrepresentation or non-disclosure of material facts; or
- (in the case of self-assessment) the full amount of tax chargeable was not assessed due to fraud, intentional or negligent misrepresentation, intentional or negligent non-disclosure of material facts or the failure to submit a return or, if no return is required, the failure to make the required payment of tax.

The Tax Administration Laws Amendment Bill, 2015 (TALAB 2015) proposes to extend the aforementioned time periods by introducing a new ss(3) and ss(4) to s99 of the TAA. In terms of the new ss(3) the Commissioner for SARS may, by prior notice of at least 30 days to the taxpayer, extend any of the aforementioned periods or an extended period under s99, before the expiry thereof, by a period approximate to a delay arising from either:

- a failure by a taxpayer to provide all relevant material requested under s46 of the TAA; or
- resolving an information entitlement dispute, including legal proceedings.

The new proposed ss(4) provides that the Commissioner for SARS may, by prior notice of at least 60 days to the taxpayer, extend any of the aforementioned periods, before expiry thereof, by three years in the case of an assessment by SARS or two years in the case of self-assessment, where an audit or investigation under Chapter 5 of the TAA relates to:

- the application of the doctrine of substance over form;
- the application of Part IIA of Chapter III of the Income Tax Act, No. 58 of 1962 (ITA) (the general anti-avoidance rule (GAAR)), s73 of the Value-Added Tax Act,

- No 89 of 1991 or any other general anti-avoidance provision under a tax Act;
- the taxation of hybrid entities or hybrid instruments; or
- s31 of the ITA (the transfer pricing provisions contained in the ITA).

According to the Memorandum on the Objects of the TALAB 2015 (Memorandum), too many of SARS' resources are spent on information entitlement disputes which result in insufficient time for SARS to ensure that it has all relevant information at its disposal to make a correct assessment. The Memorandum states that the failure by taxpayers to provide information or information entitlement disputes is often tactical or vexatious, given that taxpayers are aware of the period within which SARS must finalise the audit and issue additional assessments. It is further said that information entitlement disputes are often based on convoluted or strained interpretations of the relevant provisions of the TAA and some matters subject to audit may be so complex that it is impossible to meet the prescription deadline, particularly in the context of audits requiring SARS to consider the application of the GAAR or transfer pricing audits.

The proposed amendments to s99 of the TAA seek to address these issues by providing for an extension of the existing prescription period before the existing prescription period comes to an end. This is to allow the taxpayer an opportunity to make representations as to why the existing prescription period should not be extended.

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