Tax Prescription – when does it apply?

Authors: Peter Dachs and Bernard Du Plessis of ENSafirica

Many taxpayers are generally aware that there is a prescription provision contained in our tax law. However it is not always understood that the prescription provisions apply only if certain statutory requirements are met. In this regard it is not uncommon for SARS to assess taxpayers beyond the prescription period of three years. It is therefore necessary for taxpayers to understand the circumstances in which prescription will apply and also the relevant statutory provisions dealing with prescription.

Section 79 of the Income Tax Act contained the prescription provisions prior to the enactment of the Tax Administration Act. These provisions are now contained in section 99 of the Tax Administration Act.

There is some debate about when the new prescription provisions apply. It seems that the new provisions pertaining to prescription as contained in section 79 of the Income Tax Act should apply where the relevant years of assessment have been concluded and the taxpayer’s tax return submitted prior to the date that the Tax Administration Act came into effect, namely, 1 October 2012. However, it should be noted that in certain circumstances SARS is applying the prescription provisions contained in the Tax Administration Act to years of assessment which ended prior to the enactment of the Tax Administration Act.

In terms of the proviso to section 79(1) of the Income Tax Act, the Commissioner may only issue revised assessments after the expiry of the three year period, where the Commissioner is satisfied that the fact that the amount which should have been
assessed to tax was not so assessed was due to fraud or misrepresentation or non-disclosure of material facts.

In order for the Commissioner to raise additional assessments in terms of section 79(1) of the Income Tax Act, there are two elements in respect of which the Commissioner must be satisfied. Firstly, he must be satisfied that there was fraud, misrepresentation or non-disclosure of material facts. If he is so satisfied, then secondly, he must also be satisfied that the fact that the full amount of tax chargeable was not assessed, was due to such fraud, misrepresentation or non-disclosure of material facts.

“Misrepresentation”

The Dictionary of Legal Words and Phrases states that a misrepresentation is:

“a false statement of fact made by one party to another before a contract is entered. Such a statement may be innocent or fraudulent…”

The meaning of the term “misrepresentation” therefore refers to an expression of facts as opposed to a mere expression of opinion or interpretation of law, ie it requires a positive statement to have been made by the taxpayer which is false.

Non-disclosure of material facts

In the case of SIR V Trow 43 SATC 189, the Appellate Division had to consider whether the prescription period in section 79 applied to an additional assessment issued by the Secretary to the taxpayer in circumstances where the taxpayer had, in reply to the question in his tax return whether he had sold any property during the tax year in question, answered no, when in fact he had realised a capital profit upon the sale of certain land.

The court stated that:
“It follows, in the circumstances of this case, that the additional assessment could only have been raised if the Commissioner were to have satisfied himself (1) that there had been a non-disclosure of material facts by the taxpayer, and (2) that the fact that the profit in question was not assessed to tax prior to the expiration of the relevant period of three years was due to such non-disclosure, ie, that the non-assessment was causally related to the non-disclosure of material facts.”

In terms of this case, not only must the Commissioner be satisfied that there was non-disclosure but such non-disclosure must have caused the Commissioner not to assess that amount.

In other words, there must be a causal link between the non-disclosure by the taxpayer and the non-assessment of that amount by the Commissioner.

It should be noted that the court in *ITC 1459 51 SATC 142*, dealing with the issue of the disclosure of material facts, stated that the question to be considered is whether the Commissioner had all the material facts when he issued all the original assessments. This is an important point since taxpayers are often subject to a tax audit by SARS after the relevant tax returns have been assessed. Any disclosures made during the course of the tax audit may therefore not be relevant in determining whether prescription applies.

**Section 99 of the Tax Administration Act**

Section 99(1) of the Tax Administration Act provides that:

> “SARS may not make an assessment in terms of this Chapter —

(a)three years after the date of assessment of an original assessment by SARS...”
In terms of section 99(2)(a) of the Tax Administration Act, section 99(1) of the Tax Administration Act does not apply to the extent that:

“in the case of assessment by SARS, the fact that the full amount of tax chargeable was not assessed, was due to –

(i) fraud;

(ii) misrepresentation; or

(iii) non-disclosure of material facts…”

However, in terms of section 99(2) of the Tax Administration Act, the Commissioner may issue revised assessments after the expiry of the three year period, where the fact that the full amount of tax chargeable was not assessed was due to fraud or misrepresentation or non-disclosure of material facts.

In light of the above, the test pertaining to prescription as contained in the Income Tax Act remains largely unchanged subsequent to the introduction of the Tax Administration Act. The most significant amendment being that the test as to whether the presence of the elements listed in section 99(2)(a) caused the non-assessment of the taxpayer, now requires an objective consideration and does not have regard to the subjective satisfaction of the Commissioner.

Therefore, in order for the Commissioner to raise additional assessments in terms of section 99(1), the presence of two elements must objectively be determined. Firstly, the presence of fraud, misrepresentation or a non-disclosure of material facts must be demonstrated. Secondly, it must, in accordance with an objective fact based approach, be evidenced that the fact that the full amount of tax chargeable was not assessed was due to such fraud, misrepresentation or non-disclosure of material facts.