

# How many assessments could you face?

**T**HE taxman has powers to raise another assessment whenever he is satisfied that any amount which should be assessed to tax has not been so assessed, whether or not that amount was previously included in an assessment and subsequently discharged.

The proviso to Section 79 of the Income Tax Act materially limits the circumstances in which the provision may be invoked. The commissioner can only reopen assessments within three years from the date of the original assessment (unless there has been fraud, misrepresentation or nondisclosure of material facts).

The policy considerations behind this proviso are that a taxpayer should be entitled to some finality in the matter of assessments and that he should not be subject to harassment by the commissioner as he would be if the receiver were given the power to “rip up” what he has deliberately done in the past.

An interesting situation arises where a taxpayer is for example assessed in year one, and in year three an additional (“revised”) assessment is issued by the commissioner disallowing certain rental deductions claimed by the taxpayer in its original return for the first year. In year five, the commissioner raises a fur-

ther assessment in which he disallows certain wage expenses that were claimed by the taxpayer as a deduction in year one.

The question arises whether or not the proviso to Section 79 prevents the commissioner from disallowing the wage deductions as the three-year period has expired or whether the revised assessment issued in year three in fact interrupts the three-year period.

There is existing authority that an additional assessment replaces the original one. If this logic is followed, it would mean the initial prescription period would be interrupted and starts running anew pursuant to the issuing of the additional assessment.

Practically, this would mean the commissioner could assess a person in year one, issue a revised assessment in year three, and then issue a further revised assessment in year five (although the revised assessment in the final year does not even deal with matters raised in the additional assessment in year three).

From a taxpayer’s perspective, reliance on the aforementioned interpretation would certainly produce unwarranted results. The three-year prescription period would effectively be rendered useless and the com-

missioner would be able to circumvent its application by issuing revised assessments in a piecemeal manner. The commissioner could issue additional assessments relating to one issue and then issuing another revised assessment relating to a totally different issue and successfully argue that the first additional assessment interrupted the prescription period relating to the second issue and the three a year limitation is not relevant at all.

**C**ONVERSELY, some tax advisors believe the proviso to Section 79 should be strictly interpreted as meaning that prescription starts running at the date at which the specific amount should have been assessed, and is only interrupted if the additional assessment deals with that specific amount.

Applying this logic to the facts above will have the following result: an additional assessment cannot be raised in year five disallowing the wage deductions claimed.

The additional assessment raised in year three never pertained to (or queried) the wage deduction and cannot be said to have interrupted the run of the three-year period insofar as the wage deduction previ-

ously claimed.

The run of the three-year period is at most interrupted insofar as it relates to the rental deductions previously claimed. The additional assessment merely incorporates the original assessment as far as it relates to the rental deductions and does not concern the wage deduction claimed in any way.

It is only possible for the commissioner to raise an additional assessment (in year five) relating to the rental deductions, unless off course the commissioner can prove fraud, misrepresentation or nondisclosure on the taxpayer’s part.

The ethics and code of conduct for the receiver says that a South African Revenue Service (SARS) employee, in the performance of his function, “strives to achieve the objectives of SARS cost-effectively without compromising the legitimate expectations of the public”. Additionally, the constitution enshrines a person’s right to procedurally fair administrative action where their rights or legitimate expectations are threatened.

Allowing the commissioner to issue additional assessments in a piecemeal manner, as and when it pleases, would go against the public’s legitimate expectation of ob-

taining certainty in relation to their tax affairs in a timely manner.

It would therefore be inappropriate to allow any interpretation suggesting that an additional assessment incorporates and replaces the whole original assessment as it would be directly contrary to a taxpayer’s expectation that after three years from the date of obtaining an assessment, such an assessment is final (subject of course to certain exceptions).

It remains to be seen how courts will interpret Section 79, specifically in the context illustrated above. Until then, taxpayers should not necessarily take comfort in the three-year period prescribing for the original assessment, as it may be held that an additional assessment issued by SARS has in fact replaced the original assessment in its entirety, giving the commissioner another three years to scrutinise that assessment even further.

Then again, SARS would argue that if you act honestly and disclose all material facts (the meaning thereof being debatable), you can rest assured and need not concern yourself with any time periods.

**Ian Wiese**

Edward Nathan Sonnenbergs