

**AN ANALYSIS OF THE PROVISIONS GOVERNING THE PRESCRIPTION OF  
ASSESSMENTS IN SOUTH AFRICAN FISCAL LEGISLATION**

Mmangaliso Nzimande	Student number: 11369796	E-mail: mnzimande@ensafrica.com
Department:	Mercantile Law	
Supervisor:	Adv Cornelius Louw	

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## CHAPTER 1

### Introduction

The general rule in South Africa in respect of prescription in fiscal legislation is that the South African Revenue Service (“SARS”) is prohibited from raising an assessment more than three years after the date of issue thereof. The purpose of this limitation is to achieve finality so that, as was stated by the Supreme Court of Appeal in *C: SARS v Brummeria Renaissance Proprietary Limited*,<sup>1</sup> the dispute should come to an end as this is in the public interest; and as it would be unfair to an honest taxpayer if the Commissioner were to be allowed to continue to change the basis upon which the taxpayer was assessed until the Commissioner got it right<sup>2</sup>.

Memories fade; witnesses become unavailable and documents are. That is why section 79(1) seeks to achieve a balance, it allows the Commissioner three years to collect the tax, which the legislature regarded as a fair period of time but it does not protect a taxpayer who is guilty of fraud, misrepresentation or non-disclosure<sup>3</sup>.

Prior to the introduction of the Tax Administration Act<sup>4</sup> this issue was governed by section 79 of the Income Tax Act.<sup>5</sup> In terms of section 79(1) of the TAA, the Commissioner was entitled to raise an additional assessment if he was satisfied that, *inter alia*, any amount which was subject to tax and should have been assessed to tax had not been assessed. However, only in limited circumstances was the Commissioner empowered to issue an additional assessment after the expiry of three years from the date of the original assessment.

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1 2007 (6) SA 601 (SCA).

2 Ernest Mazansky, TaxTalk “Prescription of Assessments” (Jan 2013): <http://www.thesait.org.za/news/116516/Prescription-of-Assessments.htm>

3 Ernest Mazansky, TaxTalk “Prescription of Assessments” (Jan 2013): <http://www.thesait.org.za/news/116516/Prescription-of-Assessments.htm>

4 28 of 2011 (hereafter TAA).

5 58 of 1962 (hereafter ITA).

The Commissioner was able to raise an additional assessment outside the three-year prescription period if he was satisfied that the full amount of tax had not been assessed “due to fraud, misrepresentation or non-disclosure of material facts”. Furthermore, the Commissioner and the taxpayer could agree to extend the prescription period.

While generally a taxpayer has the onus to prove the non-taxability of income or the deductibility of expenses, there are certain circumstances where the Commissioner bears an onus. One of those circumstances relates to prescription. Under the proviso to section 79(1) of the ITA there were, in effect, two things in respect of which the Commissioner bore an onus<sup>6</sup>:

- (a) firstly, that there was indeed fraud, misrepresentation or non-disclosure of material facts; and
- (b) secondly, that the Commissioner was satisfied that the fraud, etcetera, resulted in the non-assessment of tax.

Section 79 of the ITA was repealed and prescription is now governed by section 99 of the TAA. Subsection (1)(a) provides that SARS may not make an assessment three years after the date of assessment of an original assessment. Subsection (2)(a) further provides that subsection (1) (that is, the prescription) does not apply to the extent that the full amount of tax chargeable was not assessed due to fraud, misrepresentation or non-disclosure of material facts.

It will be noted that the above provisions are very similar to those contained in section 79 of the ITA, save that now there is no longer the requirement that the Commissioner must be satisfied. Nevertheless, it is submitted that nothing much<sup>7</sup> has really changed in this regard.

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<sup>6</sup> Ernest Mazansky, TaxTalk “*Prescription of Assessments*” (Jan 2013): <http://www.thesait.org.za/news/116516/Prescription-of-Assessments.htm>

<sup>7</sup> Ernest Mazansky, TaxTalk “*Prescription of Assessments*” (Jan 2013): <http://www.thesait.org.za/news/116516/Prescription-of-Assessments.htm>

Section 99(2)(a) clearly states that prescription does not occur if the non-assessment was due to fraud, etcetera. It is thus clear that there must be a clear causal connection between the failure to assess the proper amount and the fraud, misrepresentation or non-disclosure of material facts.

The Commissioner therefore still bears the onus of proving, first, that there was fraud or misrepresentation or non-disclosure of material facts; and, secondly, that it was this fraud, etcetera, that resulted in the non-assessment of tax<sup>8</sup>. These two issues are addressed in this research.

## Problem statement

The problem statement of this research is best set out in the words of Cloete JA in *C: SARS v Brummeria Renaissance Proprietary Limited*:<sup>9</sup>

“It is obviously in the public interest that the Commissioner should collect tax that is payable by a taxpayer. But it is also in the public interest that disputes should come to an end — interest reipublicae ut sit finis litium; and it would be unfair to an honest taxpayer if the Commissioner were to be allowed to continue to change the basis upon which the taxpayer were assessed until the Commissioner got it right — memories fade; witnesses become unavailable; documents are lost. That is why section 79(1) seeks to achieve a balance: it allows the Commissioner three years to collect the tax, which the legislature regarded as a fair period of time; but it does not protect a taxpayer guilty of fraud, misrepresentation or non-disclosure. If either of the Commissioner’s arguments were to be upheld, this balance would be unfairly tilted against the honest taxpayer.”

It is against this background that the approach by local courts towards achieving a balance between the two public interests is evaluated and commented upon.

## Objectives of the study

The major objective of this study is to conduct an investigation into the recent approaches by the courts and the legislature towards striking a balance

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<sup>8</sup> Ernest Mazansky, TaxTalk “*Prescription of Assessments*” (Jan 2013): <http://www.thesait.org.za/news/116516/Prescription-of-Assessments.htm>

<sup>9</sup> 69 SATC 205 at para 26.

between the public interest that the Commissioner must collect tax that is payable, and the public interest that disputes should be finalised.

## Significance of the research

The aim of this study is to determine whether the prescription provisions of South African fiscal legislation adequately protect the rights of taxpayers. Do they bring finality to disputes or are these provisions unfairly tilted in favour of the Commissioner? Certainty is an important requirement for an environment that is conducive to economic activity and growth which in turn creates jobs. This is a central issue in South Africa.

## Methodology

The methodology adopted in this study consists of the identification, evaluation and discussion of the decisions of various courts.

The views and interpretation of experts on the subject of prescription are stated and evaluated and, where required, commented upon.

## Limitations of the study

This study is limited to the examination of the provisions of the ITA and the TAA in respect of prescription.

Due to the fact that section 99 of the TAA is relatively new and that the courts therefore have not yet had an opportunity to pronounce on it, this study is limited to decisions under the repealed section 79 of the ITA.

The provisions of the Prescription Act<sup>10</sup> are not considered herein.

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10 68 of 1969.

## Conclusions

The author discusses his conclusions drawn from the analysis of case law and relates them back to the problem statement. Various proposals are made in respect of what the legislator should do to achieve a balance between the two public interests that come into play in this regard.

## CHAPTER 2

### APPLICABLE LEGISLATION

#### Introduction

Prior to the enactment on 1 October 2012 of the TAA, the prescription of assessments was regulated by section 79 of the ITA.

In terms of section 272(1) thereof, the TAA came into operation on a date determined by the President. Section 272(2) further authorises the President to determine different dates for the provisions of the TAA to come into operation.

The President proclaimed that the TAA came into operation on 1 October 2012.<sup>11</sup> Section 271 of the TAA furthermore provides that the particular sections of the ITA listed in Schedule 1 to the TAA are amended to the extent set out in that Schedule. This includes the repeal of sections 76 and 79 of the ITA.

Although very similar in wording, section 79 of the ITA was replaced by section 99 of the TAA.

There is some debate as to the question when the new prescription provisions would apply. It seems that the new provisions pertaining to prescription contained in section 79 of the ITA would apply where the relevant years of assessment have been concluded and the taxpayer's tax return was submitted prior to the date on which the TAA 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 TAA to years of assessment which ended prior to the enactment of the TAA.<sup>12</sup>

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<sup>11</sup> Proc 51 of 2012 in *Government Gazette* No 35687 of 14 September 2012.

<sup>12</sup> Dachs and Du Plessis *South African Tax Guide: Tax Prescription – when does it apply?* (20 May 2014)

## Presumption against retrospective legislation

There is a presumption that a person is not deprived of an existing right. This presumption has been articulated in a number of cases such as *Fedlife Assurance Ltd v Wolfaardt*,<sup>13</sup> *Mohamed NO v Union Government*,<sup>14</sup> *Principal Immigration v Purshotam*<sup>15</sup> and *Curtis v Johannesburg Municipality*.<sup>16</sup>

In *Curtis v Johannesburg Municipality* (above) the court had to decide whether, on the facts, the appellant's suit was barred by the operation of a statute. The facts were that the appellant had sued the respondent for damages in respect of injuries sustained in an accident alleged to have been caused by the negligence of the respondent's employees on the 23<sup>rd</sup> of January 1904. However the appellant did not institute action until after 27 July 2905, and meanwhile on the 17<sup>th</sup> of August 1904 an Ordinance had come into force providing that all actions against the council must be brought within six months of the time when the causes of such action arose. The defendant pleaded that the plaintiff's action had prescribed because of the Ordinance and the plea was upheld by the lower court.

In deciding the matter on appeal the court stated that the general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation.<sup>17</sup>

The presumption against the deprivation by a statute of a vested right is fortified by the judgment of Chaskalson P in the Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa and Another: In Re Ex Parte President of the Republic of South Africa and Others*,<sup>18</sup> where

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13 2002 (1) SA 49 (SCA).

14 1911 AD 1.

15 1928 AD 435.

16 1906 TS 308.

17 1906 TS at page 311.

18 2000 (2) SA 674 (CC).

the issue was the Judicial review of public power and constitutional validity of the conduct of the President, Chaskalson P referred to a statement by De Smith *et al*<sup>19</sup> that the rule of law embraces some internal qualities of all public law, that it should be certain, ascertainable in advance so as to be predictable and not retrospective in its operation

There is no provision in the TAA to the effect that a taxpayer's right to finality in terms of section 79 of the ITA is affected by the enactment of the TAA. To deprive a taxpayer of a right to finality in terms of section 79, simply by introducing new legislation, would be contrary to the presumption against the deprivation of existing rights referred to above. In addition, it would result in substantial unfairness to the taxpayer and, if provisions are open to two interpretations, one of which would result in substantial unfairness, while the other would not, the interpretation which would not result in unfairness must be presumed to be the correct one.

Furthermore, section 268(5) of the TAA provides a right or entitlement enjoyed by, or obligation imposed on, a person under the repealed or amended provisions of a tax Act, that had not been exercised or complied with before the commencement date of this Act, is a valid right or entitlement of, or obligation imposed on, that person in terms of any comparable provision of this Act, as from the date that the right, entitlement or obligation first arose, subject to the provisions of this Act.

## Conclusion

Having regard to the above cases that dealt with the presumption against the deprivation by a statute of a vested right, the reference in section 272(1) of the TAA coming into operation on a date determined by the president by proclamation in the *Government Gazette* (1 October 2012) must, in relation to the application of the provisions of section 99 of the TAA, be interpreted in

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19 De Smith, Woolf and Jowell *Judicial Review of Administrative Action* (1995) 15.

a manner which does not involve taking away the right to finality in terms of section 79 of the ITA.

## CHAPTER 3

### PRESCRIPTION UNDER SECTION 79(1) OF THE ITA

Once a taxpayer has submitted a tax return and received an assessment from the Commissioner of SARS (“the Commissioner”), that taxpayer is entitled to finality under the rules contained in section 79 of the ITA.

Section 79(1) of the ITA, provides that:

If at any time the Commissioner is *satisfied*—

- (a) that any amount which was subject to tax and should have been assessed to tax under this Act has not been assessed to tax; or
- (b) that any amount of tax which was chargeable and should have been assessed under this Act has not been assessed; or
- (c) that, as respects any tax which is chargeable and has become payable under this Act otherwise than under an assessment, such tax has not been paid in respect of any amount upon which such tax is chargeable or an amount is owing in respect of such tax,

he *shall raise an assessment* or assessments in respect of the said amount or amounts, notwithstanding that an assessment or assessments may have been made upon the person concerned in respect of the year or years of assessment in respect of which the amount or amounts in question is or are assessable, and notwithstanding the provisions of sections 81(5), 83(18) and 83A(12): Provided that the Commissioner *shall not raise an assessment* under this subsection—

- (i) *after the expiration of three years from the date of the assessment* (if any) in terms of which any amount which should have been assessed to tax under such assessment was not so assessed or in terms of which the amount of tax assessed was less than the amount of such tax which was properly chargeable, unless—

- (aa) the Commissioner is *satisfied* that the fact that the amount which should have been assessed to tax was not so assessed or the fact that the full amount of tax chargeable was not assessed, was due to *fraud or misrepresentation or non-disclosure of material facts*; or
- (bb) the Commissioner and the taxpayer agree otherwise prior to the expiry of that three year period; or...

Provided further that where the Commissioner has in respect of any year of assessment made an assessment upon any company for normal tax purposes, he or she *shall not after the expiration of three years from the date of the said assessment (or, where more than one such assessment has been made, from the date of the latest of such assessments), or such longer period as the company and the Commissioner may agree prior to the expiry of that three-year period, make any assessment in respect of any amount of secondary tax on companies payable by the company in respect of any dividend declared during that year, unless the Commissioner is satisfied that the fact that an assessment in respect of the said amount was not previously made was due to fraud or misrepresentation or non-disclosure of material facts* (own emphasis).

In terms of section 79 of the ITA, the Commissioner may not raise an assessment (“the additional assessment”) in respect of normal or secondary tax on companies unless he is satisfied that any amount which was subject to tax or any amount of tax which was chargeable and should have been assessed to tax under the ITA, has not been assessed (“the non-assessment”).

The Commissioner can, however, only raise the additional assessment for either normal tax or STC after the expiry of three years from the date of the original assessment if he is satisfied that the non-assessment of an amount of tax was due to fraud, misrepresentation or non-disclosure of material facts.

In terms of section 79(1) the Commissioner bears the onus of proof for the reopening of prescribed assessments and has to be satisfied that the qualifying circumstances are present. The basis on which the Commissioner intends reopening the prescribed assessments must be communicated to the taxpayer.

In *Natal Estates Ltd v SIR*,<sup>20</sup> the Appellate Division whilst dealing with the issue whether the Commissioner was precluded by section 79(1)(a) from reopening the original assessment after the expiration of three years, the court found that the Commissioner must be satisfied that an amount was not previously assessed because of fraud or misrepresentation or non-disclosure of material facts and there must be some evidence that he was so satisfied, otherwise there is no displacement of the immunity conferred on the taxpayer by the proviso to section 79(1) and the opening words of paragraph (a) thereof.

The court stated that once it is recognised that there should be some evidence of the Secretary's satisfaction, the taxpayer should be informed of it plainly, and the particular conduct in respect of which he is satisfied, for example, fraud, misrepresentation or non-disclosure or the particular form of dereliction of duty to which it relates. The court further stated that in particular, the taxpayer should not be left to infer from mere receipt of an additional assessment, after the expiration of three years from the date of the original assessment, that the Secretary, after applying his mind to the matter, is satisfied that the taxpayer's fraud or misrepresentation or material non-disclosure caused the assessment as the taxpayer is entitled to know whether fraudulent conduct is being held against him.

This *dictum* was referred to and confirmed by the Appellate Division in *SIR v Trow*,<sup>21</sup> The court emphasised that there should be a direct nexus between the conduct of the taxpayer and the non-assessment of an amount, and the taxpayer needs to be informed of this fact.

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20 1975 (4) SA 177 (A) 208.

21 1981 (4) SA 821 (A).

The facts in *SIR v Trow* were that the Commissioner, in a letter addressed to the taxpayer's representative, advised the taxpayer that he was satisfied that there was non-disclosure of a material fact in the taxpayer's return as regards the sale of property and that it was on this basis that the revised assessment was issued. The Court found that of crucial importance is an analysis of the contents of the letter and that all the Commissioner says in the letter is that he is satisfied that there was non-disclosure in the 1971 return and, therefore, the disputed assessment was raised. The court found that the Commissioner did not say in the letter whether he is satisfied that it was the non-disclosure which caused him not to assess the profit to tax in the original and revised assessments. The court stated that it was only the respondent's satisfaction on this latter score that could have displaced the immunity conferred on the appellant by the proviso in question. The respondent's satisfaction as to the fact of the non-disclosure was not enough. The court found that the satisfaction he expressed was that referred to in the opening sentence of section 79(1), not the required satisfaction referred to in the proviso and therefore the Commissioner failed to displace the immunity conferred on the taxpayer by the proviso in section 79.<sup>22</sup>

In a judgment of the Western Cape High Court, *ABC v the Commissioner for the South African Revenue Service*,<sup>23</sup> Allie J, relying on the judgment in *Natal Estates v SIR* (above), held that the onus of proving that the Commissioner is satisfied to the extent required by section 79(1) before issuing the additional assessment, rests upon the Commissioner. In this case, the Commissioner contended that he was entitled to issue additional assessments in accordance with section 79 of the Act, subsequent to the expiration of the three-year period from the due date of the relevant assessments, since there was misrepresentation or non-disclosure of material facts.

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22 De Koker & Williams (eds) *Silke on South African Income Tax* (2012) Chapter 18 General provisions, para 18.127 Assessments — additional assessments under the now-repealed provisions of the Income Tax Act.

23 Case nos 12760, 12828 and 12756 of 14 September 2011.

The Court stated that it was not sufficient for that the Commissioner was satisfied that there was fraud, misrepresentation or non-disclosure of material facts, but that he must have been satisfied that the fact that the amount which should have been assessed to tax was not so assessed due to such fraud, misrepresentation or non-disclosure of material facts.<sup>24</sup>

Also, in *ITC 1470*,<sup>25</sup> the court confirmed that the fact of the effluxion of time will constitute a complete defence to any claim for additional tax, unless and until it is shown that the Commissioner has expressed his satisfaction that the amount has not been assessed because of fraud, misrepresentation or non-disclosure of material facts and communicated the decision to the taxpayer. The court further stated that when the Commissioner expresses that satisfaction, he exercises an administrative power vested in him to make a decision on the basis of the facts known to him following his investigation. The very fact that he has to be 'satisfied' implies the performance of an act from which certain legal consequences flow.

It is accordingly submitted that, where the Commissioner is satisfied, based on the assessment of relevant facts following an investigation, that fraud, misrepresentation or non-disclosure resulted in the non-assessment of an amount of tax, and SARS communicates this to the taxpayer, the taxpayer would have the onus to disprove such contention.

## **PRESCRIPTION UNDER SECTION 99 OF THE TAA**

Section 99 of the TAA 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 TAA, section 99(1) 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

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<sup>24</sup> Case nos 12760, 12828 and 12756 of 14 September 2011.

<sup>25</sup> (1989) 52 SATC 88 (T).

due to - (i) fraud; (ii) misrepresentation; or (iii) non-disclosure of material facts”.

However, in terms of section 99(2) of the TAA, 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, it is submitted that the test pertaining to prescription as contained in the ITA remains largely unchanged subsequent to the introduction of the TAA. The most significant amendment is that the test as to whether the presence of the elements listed in section 99(2)(a) of the TAA caused the non-assessment of the taxpayer, now requires an objective consideration and does not have regard to the subjective satisfaction of the Commissioner.

It is therefore submitted that, in order for the Commissioner to raise additional assessments in terms of section 99(1) of the TAA, the presence of two elements must objectively be determined. Firstly, the presence of fraud, misrepresentation or a non-disclosure of material facts must be proved. Secondly, it must, in accordance with an objective fact-based approach, be shown 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.<sup>26</sup>

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26 *South African Tax Guide: Tax Prescription – when does it apply?* Peter Dachs and Bernard Du Plessis of ENSafrica, 20 May 2014

## CHAPTER 4

### FRAUD, MISREPRESENTATION OR NON-DISCLOSURE

#### Fraud

Fraud is defined as consisting of unlawfully making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.<sup>27</sup>

Fraud is the crime of the liar, cheat or confidence trickster. It seeks to punish those who use deceit to obtain property or some other advantage from another.<sup>28</sup>

Although misrepresentation may be false, it is a crime only when prejudice or potential prejudice is caused (and note, the prejudice need not only be monetary). In *Rex v Heyne*<sup>29</sup> the court stated that the false statement must involve some risk of harm, which need not be financial or proprietary, though it must not be too remote or fanciful, to some person and not necessarily the person to whom it is addressed.

It is submitted that section 99 rightly empowers the Commissioner to reopen assessments where an amount chargeable was not assessed due to fraud.

#### Misrepresentation and non-disclosure of material facts

Non-disclosure of material facts may in some instances amount to misrepresentation<sup>30</sup> and I accordingly deal with both misrepresentation and non-disclosure in this part.

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<sup>27</sup> Burchell *Principles of Criminal Law* (2005) 833.

<sup>28</sup> Burchell *Principles of Criminal Law* (2005) 833.

<sup>29</sup> *Rex v Heyne* 1956 (3) SA 604 (A).

<sup>30</sup> See Christie and Bradfield *The Law of Contract in South Africa* (2011) on misrepresentation by silence.

Neither section 79(1) of the ITA nor section 99 of the ITA defines misrepresentation. Therefore, based on the South African doctrine of precedent, regard should be had to the definitions ascribed to this term in the case law. In addition, regard may be had to the ordinary meaning of the word. As noted in *R v Peters*,<sup>31</sup> “it is a well-known rule of courts of law that words should be taken to be used in their ordinary sense”.

In this regard, as noted by Du Plessis,<sup>32</sup> “[d]ictionaries may be consulted in order to determine the ordinary meaning of words and expressions”.

Legal dictionaries define a misrepresentation as follows:

“a *false statement* of fact made by one party to another before a contract is entered. Such a statement may be *innocent or fraudulent*”<sup>33</sup> (own emphasis; see also *Natal Estates* above);

and

“[t]he act or an instance of making a false or misleading assertion about something, usually with intent to deceive. The word denotes not just written or spoken words but also any other conduct that amounts to a false assertion.”<sup>34</sup>

Also, representation has been judicially defined as a statement or assertion made by one party to the other before or at the time of the contract of some matter or circumstance relating to it.<sup>35</sup>

From the above it can be concluded that a misrepresentation is a *false statement of fact* which is made before or at a specific time. It is submitted that in the context of section 79 of the ITA (or section 99 of the TAA), the false statement of fact would need to be made before or at the time of the relevant original assessment.

In his consideration of the term “non-disclosure of material facts”, Moosa<sup>36</sup> states that the expression “non-disclosure of material facts” in section

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31 (1886) 16 QBD 636 641.

32 Du Plessis *Re-Interpretation of Statutes* Butterworths (2002), pp. 200.

33 *The Dictionary of Legal Words and Phrases* (screen version).

34 *Black’s Law Dictionary* (2014) pp. 1152

35 See *Behr v Burness* 8 LT 207 and *Wright v Pandell* 1949 (2) SA 279 (C) 285.

79(1)(i) may be defined as the wrongful and wilful (intentional) failure (omission) by a taxpayer to disclose facts of a material nature in his or her tax return of income. In discussing the elements of wrongfulness and wilfulness Moosa submits that the expression 'non-disclosure of material facts' presupposes the existence of an obligation to disclose certain facts, the non-disclosure of which would cause a loss of revenue to the fiscus. He further states that failure to disclose information in contravention of a legal obligation to do so is, in the absence of a valid legal justification, wrongful. Consequently, according to Moosa, there can be no question of non-disclosure unless a court is satisfied that, objectively considered, there was a duty to disclose the facts concerned and that the taxpayer failed to do so without good cause. Moosa also points out the assistance provided to the Commissioner by section 76(1), read with subsections 76(5) and (6) of the Act in that it deems there to be an omission by the taxpayer to disclose certain amounts that he or she was otherwise obliged to include in the tax return.

I concur with Moosa that there can be no question of non-disclosure unless a court is satisfied that, objectively considered, there was a duty to disclose the facts concerned and that the taxpayer failed to do so without good cause.

It is accordingly submitted that, for purposes of section 79(1) the misrepresentation or non-disclosure of material facts must:

- (a) be prevalent at the time of the original assessment; and
- (b) such misrepresentation or non-disclosure of material facts must have been the cause of an amount of tax not being assessed, that is, there must be a causal link between the misrepresentation or non-disclosure of material facts and the amount of tax not assessed.

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36 "Interpretation of Non-Disclosure of Material Facts in Section 79 of the Income Tax Act 58 of 1962" 2001 *SA Merc LJ* 186 191.

It is submitted that in order to assess whether there was misrepresentation of material facts at the time of the assessment, and based on case law, the following questions need to be considered:

- (a) What information was required by the Commissioner at the time of the original assessment to have enabled him to assess the taxpayer on the correct amount of tax?
- (b) What information had been provided, or assertions made, by the taxpayer to the Commissioner prior to the date of assessment? (The information in this regard must not be limited to information provided in a tax return but could also include other information disclosed to, or made available to the Commissioner in writing or otherwise.)
- (c) Had any information required by the Commissioner for purposes of assessment, that was not provided at the time of assessment, directly resulted in the non-assessment of any amount of tax?

In order to establish what information is required by the Commissioner for purposes of assessment, an analysis of the relevant case law dealing with the following themes must be considered:

- (a) the minimum level of information required for purposes of assessment;
- (b) the duty of taxpayers when submitting tax returns and supporting documentation to SARS;
- (c) the duty of the Commissioner when assessing tax returns; and
- (d) the distinction between a taxpayer's opinion as opposed to facts regarding information contained in a tax return.

## **The minimum level of information required for purposes of assessment**

In *ITC 1685*,<sup>37</sup> the Commissioner made a mistake on an assessment and argued that the mistake had occurred as a result of misrepresentation or non-disclosure of material facts by the taxpayer. The court rejected this attempt by SARS to shift the blame<sup>38</sup>.

The court found that the Commissioner had at all times been aware of the true state of affairs and that there had been no misrepresentation or non-disclosure of material facts by the taxpayer – more especially, in view of the full explanation provided in the taxpayer’s return which motivated a deduction of the loss, the Commissioner was at all material times aware of the circumstances surrounding the loss claimed by the taxpayer, and could therefore not have been misled. In the premises, the Commissioner had no right to issue additional assessments after the expiry of three years since the original assessment.<sup>39</sup>

It is submitted that the decision of the court in this case was correct as it would be unfair for the Commissioner to be entitled to reopen assessments after the three-year prescription period where the Commissioner was aware of the taxpayer’s state of affairs and was provided with explanations in the return.

## **The duty of taxpayers when submitting tax returns and supporting information to SARS**

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<sup>37</sup> 62 SATC 424.

<sup>38</sup> Deneys Reitz “Commissioner fails to shift the blame”, June 2001 SAICA, [www.saica.co.za](http://www.saica.co.za).

<sup>39</sup> Deneys Reitz “Commissioner fails to shift the blame”, June 2001 SAICA, [www.saica.co.za](http://www.saica.co.za).

In *ITC 1254*<sup>40</sup> the taxpayer in its tax return under the heading “Live Stock and Products sold” included income from “debt” and “diesel truck”. Assuming the latter amounts to be of a capital nature, the Commissioner did not include these amounts in the taxpayer’s gross income, but later raised additional assessments.

At the hearing of the matter before the Special Court, it was common cause that the taxpayer erected apartments which he sold at a profit, and that the two amounts, though bearing the designations “debt” and “diesel truck”, were actually proceeds from the sale of the apartments. These amounts were clearly of a revenue nature and taxable. The taxpayer nevertheless argued that the Commissioner should have sought clarification from him before assuming the amounts to be of a capital nature.

The court ruled that it was the taxpayer’s duty to submit an accurate and complete return (which is not vague and misleading) on which the Commissioner can assess him – the taxpayer cannot transfer this duty to the Commissioner. The court held that the taxpayer’s return was “incomplete and misleading” and amounted to “misrepresentation or non-disclosure of material facts”, even if innocent. As a result the taxpayer lost the immunity accorded him by section 79(1)(i) of the ITA.

It is submitted that in this case the court correctly held that the Commissioner was entitled to reopen the assessments as taxpayers have a duty to submit complete returns.

It is important to note that in *ITC 1582*<sup>41</sup> the court placed a higher onus of disclosure on the taxpayer where a scheme or arrangement that could result in tax avoidance was involved.

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40 (1976) 39 SATC 24 (N).

41 57 SATC 27.

Although many commentators regard the judgment as incorrect on this point,<sup>42</sup> cognisance must be taken of the judgment.

The Commissioner in *ITC 1582* had issued revised assessments for years of assessment more than three years after the issue of the original assessments. The Commissioner had stated in letter referring to the revised assessments that the fact that amounts in question were not assessed to tax was due to misrepresentation and/or non-disclosure of material facts by the taxpayer. The taxpayer argued that in terms of section 79 of the Act the Commissioner had not entitled to issue the revised assessments and had not applied in his mind properly in the exercise of his discretion in section 79(1)(i).

The court held that the Commissioner had communicated to the taxpayers his satisfaction that the amounts had not been assessed to tax due to misrepresentation and/or non-disclosure of material facts and that on the facts before the court there was no basis for finding that Commissioner had not given proper attention to the matter in the exercise of his discretion in terms of proviso (i) to section 79(1) of the Act and the fact that taxpayers had properly filled their returns and that those returns had been accompanied by proper full financial statements drawn up according to generally accepted accounting practice did not help the taxpayers.

The court further stated that the proviso in section 79(i) does not require that the Commissioner must be satisfied that the return has not been properly completed or was not accompanied by required documentation but only that the relevant material facts have not been disclosed and as a result thereof an amount of tax has not been assessed.<sup>43</sup>

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42 A.P. De Koker & G.A Urquhart, *Income tax in South Africa* (Looseleaf).

This case clearly demonstrates that, especially where perceived tax avoidance elements are present, the test is not whether the tax return has been completed correctly with the minimum requisite information provided, but whether the Commissioner was provided with sufficient facts and information in order to enable him to assess the correct amount of tax.

In *ITC 1459*<sup>44</sup> the court dealing with the issue of whether information should have been disclosed in the return or supporting documents held that nothing in all the documentation that was provided by the taxpayer to the Commissioner would convey to the reasonable reader the impression that the loss claimed referred to or included any loss sustained in the production of exempt income.

The court further stated that it is no answer to say that the Commissioner should have been alerted by what he saw, or was able to see, in the return and accompanying documents. The question, according to the court, is whether he had all the material facts when he issued all the original assessments. If not, whatever the reason, then *cadit quaestio*. It does not matter if his ignorance was partly due to a failure to make enquiries before issuing the assessments. Having regard to the information furnished subsequent to the Commissioner's enquiries regarding the present transaction and comparing that information with the paucity of detail in the returns read with their supporting documents, it is manifest that the Commissioner or his officer did not have all the material facts. Clearly it was the absence of those facts which led to the issue of the original assessments. Assuming a lack of diligence on the part of the relevant assessor, that consideration is irrelevant. :<sup>45</sup>

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44 51 SATC 142.

45 51 SATC 142 at 151.

Moosa<sup>46</sup> criticises the above approach as being unduly harsh on taxpayers and feels that it creates the perception that our courts require a greater degree of diligence from taxpayers in the completion of tax returns than is required of the Commissioner's representatives in the assessment thereof. However, this strict approach was accepted by the court in *ITC 1430*<sup>47</sup> where the taxpayer had contended that the his bookkeeper, who had died during the investigation, was responsible for the non-disclosure of income in the accounts, the court held that even if the taxpayer left the preparation of his annual accounts to his bookkeeper, there was no evidence that the taxpayer was unintelligent, or unversed in the preparation of simple statements of income and expenditure. The scale of his business activities suggests that he was a successful businessman. Furthermore the accounts for each year were signed by both the taxpayer and his bookkeeper.<sup>48</sup>

The court further stated that the courts are aware are of the difficulties of the Commissioner, who has woefully insufficient staff to investigate the affairs of more than a very small percentage of taxpayers. If a taxpayer fails honestly and accurately to render a full and accurate return, he cannot shelter behind the failure of the Commissioner immediately to detect his dishonesty or inaccuracy and held that the Commissioner is entitled to rely on the taxpayer's certificate that 'all the information furnished in this return or in the supporting accounts and statements, is true and correct.

It is submitted that the test for whether sufficient information was provided extends beyond the return itself and also includes information and other assertions made by the taxpayer to SARS. The onus of disclosure on the taxpayer may therefore extend beyond the mere completion of the tax return.

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46 2001 SA Merc LJ 186 192.

47 50 SATC 51.

48 50 SATC 51 at 57.

## The duty of the Commissioner when assessing tax returns

The case law regarding the level of duty and care expected from the Commissioner or a SARS official is somewhat divided.

On the one hand, the court held in *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk*<sup>49</sup> that where a taxpayer disclosed an amount of capital in his return, the SARS representative should have enquired or directly assessed the amount if he wasn't convinced by the return. The court went on to say that if the SARS representative didn't clarify something which was unclear to him by way of enquiry, such neglect cannot be attributed to the taxpayer as a non-disclosure of facts. Van der Walt J remarked:<sup>50</sup>

“Die bepalings van artikel 82 van die Inkomstebelastingwet wat die bewyslas ten aansien van die nie-belasbaarheid van 'n bedrag op die belastingpligtige plaas is ook ter sprake. As die appellant se verteenwoordiger nie deur die stellings in respondent se opgaaf oortuig was nie, moes hy óf navraag gedoen het óf die bedrag direk aangeslaan het. 'n Gebrek aan navraag oor die bedrag en die doen van 'n aanslag ten aansien van die opgaaf, dui daarop dat dit as bewese aanvaar is dat die bedrag 'n kapitaalontvangste was en nie belasbaar was nie.

As die appellant se verteenwoordiger iets wat vir hom onduidelik was nie by wyse van 'n navraag opgeklaar het nie, kan daardie versuim nie aan respondent as 'n verswyging van wesentlike feite gewyt word nie.

Tot by en selfs ten tye van die verhoor van hierdie appèl het appellant nie aangedui nie in welke opsig en watter wesentlike feite respondent verswyg het.”

Many commentators including Moosa<sup>51</sup> submit that the reopening of assessments in terms of section 79(1)(i) of the ITA should not be allowed, especially in circumstances where the non-assessment cannot be attributed to an act or omission by the

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49 [1985] 4 All SA 107 (T).

50 [1985] 4 All SA 107 (T).at 117.

51 2001 SA Merc LJ 186.

taxpayer, but rather to the negligence, oversight or improper administration of the ITA on the part of the Commissioner.

Moosa argues that the above approach is in line with the legislature's intention to ensure the finality of assessments in the interest of both the *fiscus* and the taxpayer and to allow a displacement of the statutory immunity (as envisaged in section 79 of the ITA) from taxation in exceptional circumstances only, namely, when there has been wrong-doing by the taxpayer in the form of fraud, misrepresentation or non-disclosure of material facts.

In a Zimbabwean case, *ITC 1691*,<sup>52</sup> the revenue authorities made an error in processing the taxpayer's return resulting in the omission of some of the taxpayer's income. The Commissioner issued amended assessments more three years after the original assessment and contended that he was correcting an obvious error which must have been apparent to the taxpayer and that the taxpayer wilfully withheld from the Commissioner the fact that a significant portion of his income had not been subjected to assessment for tax and, therefore, the Commissioner was entitled to issue the amended assessment.

The court held that the legislature recognises that typing errors and other mistakes will be made, even in the best of circles and therefore the legislature gives the Commissioner a period of grace to correct the mistakes and that period is three years, what is not discovered within that period cannot be remedied, unless it was induced by fraud, misrepresentation or wilful non-disclosure of material facts.

The judgment in *ITC 1691* could assist a taxpayer to come to grips with his actions – or rather, the lack of any action – when being

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52 (2002) 62 SATC 504.

troubled by a moral obligation to pay the correct amount of tax for which he is liable. Yet there are bound to be some taxpayers who will still not be convinced that to remain silent on the error in their favour is the correct position to adopt<sup>53</sup> and correctly so. Reporting conventions for tax purposes are notoriously dense and while the only realistic expectation is that the Commissioner must accommodate himself to such conventions and ask the necessary questions in order to unravel the finer detail of the taxpayer's affairs,<sup>54</sup> South African courts have generally been loath to expect of assessors such a degree of diligence.

In *ITC 1454*,<sup>55</sup> for instance, the court confirmed that it would not avail a taxpayer to argue that a more alert or able assessor would not have been misled by the non-disclosure. Further in *ITC 1290*,<sup>56</sup> it did not avail the taxpayer to argue that the local Receiver was aware of certain facts and therefore that he did not need to disclose certain information. In this case the taxpayer had failed to declare the income derived by a trust as his, even though the Commissioner had previously taken the decision that the taxpayer should be taxed. The taxpayer contended that the additional assessment issued by the Commissioner was invalid on the basis that the local Receiver was aware of the trust and the facts relating thereto and that it was not necessary, in effect, for the taxpayer to disclose the amount earned by the trust in his own return. The court held that the taxpayer had not disclosed the amount of income in question, and therefore, the Commissioner was entitled to disregard the finality of the assessment under section 79 of the ITA.

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53 Mitchell "Zip the Lip" *Tax Planning Corporate and Personal* Vol 15 No 4 August 2001.

54 De Koker & Williams Chapter 18 General provisions, para 18.127 Assessments — additional assessments under the now-repealed provisions of the Income Tax Act.

55 51 SATC 107.

56 (1979) 41 SATC 153.

The level of duty of care of the Commissioner (as opposed to the duty of taxpayers when submitting their returns) remains a factual enquiry and is best set out in *ITC 1594*.<sup>57</sup> In this case, the appellant company lodged an objection against an additional assessment issued by the Commissioner, on the grounds, *inter alia*, that three years had elapsed since the original assessment and that the Commissioner's authority was thus limited by the provisions of section 79(1)(i) of the ITA. In deciding the question of full and adequate disclosure, Melamet JP, delivering the judgment, raised several important issues. He stated that there was no suggestion of fraud or misrepresentation on the part of the taxpayer in this instance. The Commissioner, however, contended that to claim a deduction of a certain amount for "consulting fees" relating to "running of the factory" is not a disclosure of the material facts in connection therewith, as required by section 79(1) of the Act.

In this regard the court held that an obligation rests upon a taxpayer to render an accurate and full return on which he can be assessed and not do so in a vague or ambiguous manner casting the onus upon the Revenue authorities to elicit the complete picture by a series of queries. The court further held that It is only in cases where the taxpayer makes an accurate and full disclosure in his returns and certain facts are not clear or understood, that it is incumbent on the Commissioner to exercise his powers to obtain further clarification

The description "consulting fees in the running of the factory", the court held, did not set out the circumstances and/or salient features of the transaction between the parties. The Commissioner could consequently not make a proper determination of the tax liability for the deduction that the appellant sought. Therefore, the

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57 57 SATC 259.

court held that there had indeed been non-disclosure of all the material facts. This non-disclosure led to the allowance of the deduction in question. For this reason, the Commissioner was not precluded from re-opening the assessment.<sup>58</sup>

### **The distinction between a taxpayer's opinion as opposed to the facts with regard to the information contained in a tax return**

In a number of decisions it has been held that a statement of opinion (as opposed to fact) does not amount to a misrepresentation. In particular, in *Feinstein v Niggli and Another*<sup>59</sup> it was held that “a representation, in order to found a cause of rescinding a contract for fraud, must relate to a matter of *present or past fact*” (own emphasis).

In *Cobert v Harris*<sup>60</sup> it was held that the statement or assertion must be in respect of an ascertainable fact as distinct from the mere expression of an opinion.

Also in in *Small v Smith*<sup>61</sup> Claassen J held that: “Statements of commendations or puffing have no binding effect. The same applies to expressions of opinion or estimations as to quantity or quality.”

Halsbury's *Laws of England*<sup>62</sup> furthermore defines a representation as “a statement made by a representor to a representee and relating by way of affirmation, denial, description or otherwise to a matter of fact”, while in *Pollock on Contracts*<sup>63</sup> it is stated that: “Statements of fact must be carefully distinguished

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58 Deloitte and Touche “Full and Adequate Disclosure” June 1998 [www.saica.co.za](http://www.saica.co.za).

59 [1981] 2 All SA 92 (A); 1981 2 SA 284 (A).

60 1914 CPD 535.

61 1954 (3) SA 434 (SWA).

62 Vol 26 para 1515.

63 13<sup>th</sup> Edition, pp. 426.

from expressions of opinion. A man is safe in giving his honest opinion, as an opinion, for what it may be worth.”

Even if an expression of opinion turns out to be mistaken, the courts have held that it is not a misrepresentation.<sup>64</sup>

In light of the above, the meaning ordinarily and judicially attached to the term “misrepresentation”, refers to the expression of ascertainable facts as opposed to a mere expression of opinion or interpretation of law.

However, all this presupposes that the opinion is honestly held, because the question of whether one does or does not hold a particular opinion is a question of fact which can be the subject of representation and therefore a misrepresentation.<sup>65</sup>

From the above it can be concluded that where the taxpayer held an honest opinion regarding a certain set of facts and asserted that opinion, the taxpayer can never be held to have misrepresented any fact, even in the event of his opinion being proved wrong.

## Conclusion

From the above analysis of case law the following principles can be formulated.

Taxpayers have a duty to submit an accurate and complete return (which is not vague and misleading) on which the Commissioner can assess them.

Taxpayers must submit documentation and explanations enabling the Commissioner to properly assess them. The information required

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64 *Lamb v Walters* 1926 AD 358 and *Feinstein v Niggli* (above).

65 See Christie and Bradfield *The Law of Contract in South Africa* (2011) 285.

extends beyond a minimum compliance with information requested in the return. It is no defence to say that the Commissioner should have been alerted to what he saw in the return and disclosure schedules. The question is whether he had all the material facts when he issued the assessment, and it is irrelevant if his ignorance is partly due to a failure to make enquiries before making the assessment. It is also irrelevant if the non-disclosure of material facts was unintentional.<sup>66</sup>

Where the Commissioner was at all material times aware of the true circumstances or state of affairs, he should have no right to issue additional assessments after the expiry of three years.

A taxpayer's opinion cannot amount to a misrepresentation where he holds an honest opinion that his affairs are correctly reflected in his tax returns and supporting documentation, even if SARS holds a different opinion. It submitted that where the taxpayer has complied with his duty to submit an accurate and complete return with supporting documentation which enabled the Commissioner to properly assess the returns, the Commissioner should have no right to issue additional assessments after the expiry of three years.

Some commentators have suggested that non-disclosure requires the element of wilfulness and as such requires the necessary *mens rea* and intention and that direct intent is not required as the criminal law concept of *dolus eventualis* will suffice.<sup>67</sup> It is submitted that the case law does not support such a strict interpretation and application of the criminal law concept of *dolus eventualis* to "non-disclosure". According to according to South African law, intent in the form of *dolus eventualis* means that it is enough to find someone guilty of a crime if the perpetrator objectively foresees the possibility of his or her act and persists therewith regardless of the consequences.

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<sup>66</sup> See also *ITC 1518 54 SATC 113*.

<sup>67</sup> *Moosa 2001 SA Merc LJ 186 193*.

It is submitted that a taxpayer does not have to intentionally fail to disclose something in a tax return in order for non-disclosure to exist for purposes of section 79 of the ITA and section 99 of the TAA. It is submitted that unintentional non-disclosure will also suffice.

It is further submitted that to elevate non-disclosure to include the criminal law principles of *dolus directus* and *dolus eventualis* would be unfair and very onerous on the Commissioner as these principles require a much higher standard of proof.

## CHAPTER 4

### INTERNATIONAL CONSIDERATIONS

#### CANADA

##### Normal reassessment period

In Canada the general time limitation applicable to reassessments in terms of the Income Tax Act<sup>68</sup> (“the Canadian ITA”) is that a reassessment must be made by the Minister of National Revenue (“the Minister”) within “the normal reassessment period” for the taxpayer in respect of the year.<sup>69</sup> “Normal reassessment period” is defined as the period that ends three years after the day of sending of the notice of an original assessment in respect of the taxpayer for the year or the day of mailing of a notification that no tax is payable by the taxpayer for the year.<sup>70</sup> In computing this period, the date of the original notice of assessment is not counted.<sup>71</sup> However, in terms of section 152(3.1)(a), if the taxpayer is, at the end of the year, a mutual fund trust or a corporation other than a Canadian-controlled private corporation, the normal reassessment period is the period that ends four years after the day of sending of the notice referred to above.<sup>72</sup>

##### Extended reassessment period

One exception to the normal reassessment period in which the Minister may reassess is contained in section 152(4)(b), which permits reassessments before the day that is three years after the

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68 RSC 1985 c 1 (5th Supplement).

69 S 152(4) of the **Canadian ITA**.

70 S 152(3.1)(b).

71 *Brunette v The Queen* (1999), [2001] CTC 2008, 2000 DTC 1783 (TCC).

72 *Campbell Administration of Income Tax* (2013) Chapter 9 – Assessments and Reassessments 401.

expiry of the taxpayer's normal reassessment period in respect of the year. Accordingly, reassessment may be made within six years from the date of mailing of the original assessment (seven years if the taxpayer is a mutual fund trust or a corporation which is not a Canadian-controlled private corporation) in the general case where the conditions of section 152(4)(b) are met, such as where a reassessment is required as a consequence of a deduction listed in section 152(6) carried back from a subsequent tax year.<sup>73</sup>

## Misrepresentation or fraud

Campbell<sup>74</sup> states that there are two important exceptions to the three- (or four-) year normal reassessment period during which the Minister is permitted<sup>75</sup> to make reassessments in section 152(4)(a), which provides that the Minister may reassess at any time if the taxpayer or person filing the return

- (a) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under the Act; or
- (b) has filed with the Minister a waiver in the prescribed form within the normal reassessment period for the taxpayer in respect of the year.

Campbell further states that when the Minister issues a reassessment or additional assessment beyond the normal or extended reassessment period, and the taxpayer has not filed a

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73 Campbell *Administration of Income Tax* (2013) Chapter 9 – Assessments and Reassessments 402.

74 Chapter 9 – Assessments and Reassessment, 410.

75 In *Bakhan & Associates Inc v Canada (Attorney General)* [2008] 2 CTC 1, 2008 DC 2028 (Eng) (FC), the court found that the Minister's exercise of a discretion not to reassess under s 152(2) was subject to judicial review (where the taxpayer allegedly had deliberately overstated its income and requested the Minister to reassess).

waiver, the burden of proof is on the Minister to establish misrepresentation that is attributable to neglect, carelessness or wilful default.<sup>76</sup> If the taxpayer appeals from the reassessment and the Minister does not discharge this burden, the appeal will be allowed.<sup>77</sup> These rules were described as follows by Bowman TCJ:<sup>78</sup>

“(a) Where a taxpayer wishes to attack an assessment as having been made beyond the normal reassessment period ... the basis of challenge should be pleaded and it is for the taxpayer to establish prima facie that the reassessment as indeed been made beyond that period, unless the date of the original assessment is obvious from the material before the Court;

(b) if the taxpayer has, in a return of income, made a representation that is attributable to neglect, carelessness, or wilful default or has committed a fraud in filing the return the Minister is entitled under section 152(4) of the Income Tax Act to assess beyond the normal reassessment period. The Minister’s entitlement to reassess beyond the normal reassessment period must be established by proving the existence of any of the elements set out in subparagraph 152(4)(a)(i). It is up to the Minister to do so;

(c) if those elements are established the onus shifts back to the taxpayer under paragraph 152(5)(b) to establish that a failure to include in the return an amount included in a reassessment beyond the normal reassessment period did not result from any misrepresentation that is attributable to negligence, carelessness or wilful default.

In each case the shifting onus is a civil one and may be satisfied by making out a prima facie case which, if unrefuted by the opposing party, stands.”

A number of cases have considered whether reassessments that are outside the normal reassessment period or extended reassessment period are in time by virtue of section 152(4)(a)(i).<sup>79</sup>

In *MD Glazier Ltd v MNR*,<sup>80</sup> the corporate taxpayer was held to have made a mistake on its return. The Board held that the mistake did not amount to a misrepresentation and that there was insufficient neglect

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76 *MNR v Taylor* [1961] CTC 211, 61 DTC 1139 (Ex Ct) and *Markakis v MNR* [1986] 1 CTC 2318, 86 DTC 1237 (TCC).

77 See eg *Grain Belt Farm Equipment v MNR* [1970] Tax ABC 1265, 71 DTC 1.

78 *Sarraf v The Queen* [1994] 1 CTC 2519 2522, 94 DTC 1506 1607-1608.

79 *Campbell Administration of Income Tax* (2013) Chapter 9 – Assessments and Reassessments 411.

80 [1983] CTC 2061, 83 DTC 48 (TRB).

or carelessness to allow the Minister to reassess outside of the normal reassessment period.<sup>81</sup>

In *Poulin v MNR*,<sup>82</sup> the taxpayer failed to include certain amounts in income because he had delegated his financial affairs to his wife and was not aware that amounts had been deposited in his account. Although the court found that the taxpayer had been negligent and careless, there was no misrepresentation because the taxpayer had not been aware of the amounts deposited by his wife. Accordingly, the reassessments were statute-barred.<sup>83</sup>

In *Prevost Inc v MNR*<sup>84</sup> Archambault J stated that he agrees with Judge Tremblay who stated that a taxpayer cannot be reproached for having made a misrepresentation when that error results from a mischaracterization of the income or a misrepresentation of a provision of the Act. However, Archambault added that the error must be made in good faith.

In contrast, the taxpayer in *Venne v The Queen* was found to have made misrepresentations attributable to neglect or carelessness. The standard of conduct to which a taxpayer should be held was discussed by Strayer J when he stated that it is sufficient for the Minister, in order to invoke the power under subparagraph 152(4)(a)(i) of the Act [the Canadian equivalent of section 99 of the TAA] to show that, with respect to any one or more aspects of his income tax return for a given year, a taxpayer has been negligent. He further stated that such negligence is established if it is shown that the taxpayer has not exercised reasonable care and that his is surely what the words 'misrepresentation that is attributable to neglect' must mean, particularly when combined with other grounds such as 'carelessness' or 'wilful default' which refer to a higher degree of negligence or to intentional misconduct. He expressed the view that unless these

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81 Campbell *Administration of Income Tax* (2013) Chapter 9 – Assessments and Reassessments 412.

82 [1987] CTC 2171, 87 DTC 112 (TCC).

83 Campbell *Administration of Income Tax* (2013) Chapter 9 – Assessments and Reassessments 412.

84 [1996] 1 CTC 2701 (TCC).

words are superfluous in the section, which he was not able to assume, the term ‘neglect’ involves a lesser standard of deficiency akin to that used in other fields of law such as the law of tort.

Campbell<sup>85</sup> also states that the question of what constituted such misrepresentation was considered in *Nesbitt v The Queen*<sup>86</sup> where the taxpayer’s return contained a significant arithmetic error in the calculation of capital gain, made by his accountant and overlooked by the taxpayer. The court first found that a “misrepresentation” for these purposes included any statement which was incorrect and was not restricted to a fraudulent misrepresentation. Accordingly, the court found that the arithmetic miscalculations were clearly misrepresentations. Although the errors resulted from the carelessness of the taxpayer’s accountant, the court found that the taxpayer did not exercise reasonable care in reviewing the return before signing it, particularly in view of the magnitude of the error. Accordingly, the court found that the assessment was valid under section 152(4)(a)(1).

Campbell<sup>87</sup> states that fraud is generally considered to be established when it is shown that a false representation has been made, knowingly, or without belief in its truth, or recklessly, or without care as to whether it is true or false.<sup>88</sup>

## AUSTRALIA

### Time limits

The Australian Commissioner’s power to amend an assessment is generally subject to a limited amendment period in section 170 of

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85 Campbell *Administration of Income Tax* (2013) Chapter 9 – Assessments and Reassessments 413.

86 [1996] 1 CTC 282, 96 DTC 6045 (FCTD).

87 Campbell *Administration of Income Tax* (2013) Chapter 9 – Assessments and Reassessments 414.

88 *Derry v Peek* (1889) 14 App Cas 374 (HL).

the Income Tax Assessment Act.<sup>89</sup> A standard two-year amendment period applies to most individuals and small business entities. However, a four-year amendment period applies to large business taxpayers, taxpayers with complex tax affairs, certain “high risk taxpayers” and where the Commissioner relies on an anti-avoidance provision. GST assessments are also subject to the four-year amendment period in terms of section 155-35(1) Schedule 1 of the TAA.<sup>90</sup> In some situations the time limit is extended, for example to give effect to a private ruling or court order. An unlimited amendment period applies if there is fraud or evasion or in other specified circumstances.<sup>91</sup>

The amendment period commences when the Commissioner gives, or is deemed to give, a notice of assessment to the taxpayer. The time limit for amending an assessment is generally the same regardless of whether the taxpayer’s liability is increased or reduced, and matches the time limit for objecting to an assessment.<sup>92</sup>

For assessments for income years before 2004-2005, a four-year time limit for amending assessments generally applied. However, a two-year limit applied to those known as “SPOR taxpayers”, a six-year limit applied in scheme cases and there was no time limit for fraud or evasion.

Nil assessments are subject to the same amendment period as assessments with a positive liability. For pre-2004-2005 income years, a “nil assessment” was not treated as an assessment.<sup>93</sup> As a consequence, there were no restrictions on when the Commissioner could issue an original assessment to the taxpayer.

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89 Of 1936.

90 Tax Administration Act, 1953.

91 Deutch *et al Australian Tax Handbook* (2014) 1687.

92 Deutch *et al Australian Tax Handbook* (2014) 1688.

93 *FCT v Ryan* (2000) 43 ATR 694.

However, transitional rules<sup>94</sup> place time limits on issuing an original assessment for a pre-2004-2005 income year (to ensure that nil liability returns do not remain open to amendment indefinitely). These time limits do not apply if there is fraud or evasion, or in other cases where legislation provides for an unlimited amendment period.

## Fraud and evasion

For *all* taxpayers (individuals, companies, etcetera), the Commissioner may amend an assessment at any time if there has been an avoidance of tax that, in the Commissioner's opinion, is due to fraud or evasion in terms of section 170(1).<sup>95</sup>

Fraud can be described as the making of a statement (in this context relevant to the taxpayer's liability to tax) which the maker knows or believes to be false, or is recklessly careless whether it is true or false.<sup>96</sup> Evasion contemplates some blameworthy act or omission on the part of the taxpayer. The question of whether there is fraud or evasion should be assessed on the basis of the facts and circumstances existing at the time of the alleged fraud or evasion (for example, when the relevant tax return was lodged).<sup>97</sup>

The fraud or evasion need not be committed by the taxpayer personally. The unlimited amendment period may also apply where fraud or evasion is committed by someone else on behalf of the taxpayer (whether with or without the taxpayer's knowledge),

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94 In s 171A.

95 Deutch *et al Australian Tax Handbook* (2014) 1690.

96 See *Kajewski v FCT* (2003) 52 ATR 455 and Practice Statement PS LA 2008/6.

97 *Re Mano and FCT* (2010) 78 ATR 981.

for example by the taxpayer's agent when preparing the taxpayer's income return.<sup>98</sup>

*Deutch et al*<sup>99</sup> provide the following examples of fraud or evasion that allow the Commissioner to issue amended assessments at any time.<sup>100</sup> Further examples of fraud and evasion are contained in Practice Statement PS LA 2008/6 and the Tax Office's Corporate Management Practice Statement on its fraud control and prosecution processes.<sup>101</sup>

In *Re Taxpayer and FCT*,<sup>102</sup> the Commissioner was entitled to issue amended assessments on the basis of fraud or evasion, after becoming aware of new evidence, despite earlier agreeing to consent orders by the AAT in the taxpayer's favour. However, in *Fitzroy Services (Pty) Ltd v FCT*,<sup>103</sup> the Federal Court held that the Commissioner failed to properly make out the argument for fraud or evasion in a case involving tax avoidance but no sham transactions.<sup>104</sup>

## Conclusion

To some extent, the prescription provisions in both Canada and Australia are very similar to the provisions of section 79 of the ITA and section 99 of the TAA. Although they differ in respect of time periods, they are both clearly intended to provide taxpayers with certainty.

It is interesting to note that the Canadian provisions allow the revenue authorities to issue additional assessments where there has been misrepresentation or fraud by the taxpayer while the Australian provisions

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98 See *Kajewski* 484 and *Re Applicant and FCT* (2006) 62 ATR 1111.

99 *Deutch et al Australian Tax Handbook* (2014) 1690.

100 See *Re Taxpayer and FCT* (2005) 59 ATR 1178 and *Weyers & Ors v FCT* (2006) 63 ATR 268.

101 Available on the Tax Office website. What is the URL? - www.....

102 (2006) 64 ATR 1268.

103 [2013] FCA 471.

104 *Deutch et al Australian Tax Handbook* (2014) 1691.

allow the Commissioner to amend assessments beyond the two- or four-year period where there has been an avoidance of tax that in the opinion of the Commissioner is due to fraud or evasion.

It is submitted that even though the Canadian prescription provisions do not specifically include the concept of “non-disclosure” as one of the exceptions in terms of which the Minister may amend an assessment after the normal reassessment period, in the Canadian case law a non-disclosure by a taxpayer is considered to constitute a misrepresentation that is attributable to neglect.

The Australian provisions allow the Commissioner to amend assessments beyond the two- or four-year period where there has been an avoidance of tax that in the opinion of the Commissioner is due to fraud or evasion. Australian case law considers fraud as the making of a statement which the maker knows or believes to be false and evasion is considered to contemplate some blameworthy act or omission on the part of the taxpayer.

It is submitted that in Australia the concept of evasion as contemplated in the prescription provisions includes misrepresentation or non-disclosure of material facts by taxpayers.

## CHAPTER 6

### CONCLUSION

#### Introduction

This chapter concludes the study, summarises the findings and explains how answers to research problems and the objectives of the study were reached. The chapter indicates how the courts in South Africa, Canada and Australia have analysed the application of the prescription provisions. It also shows how the courts have sought to strike a balance between the public interest that the Revenue Authorities must collect tax that is due and the public interest that taxpayers should have certainty in respect of the finality of assessments.

#### Summary of findings and conclusion

The purpose of the study was to conduct an investigation into the recent approaches by courts and the legislature towards striking a balance between the public interest that the Commissioner must collect tax that is payable and the public interest that disputes should reach finality. To achieve the main purpose of the study, a review of the case law and literature was conducted to research the background of prescription in fiscal legislation. The review of the literature and case law included an examination of the importance of the finality of assessments.

The study then aimed to research specifically the applicable fiscal legislation and case law relating to retrospective legislation in light of the SARS practice to apply the new section 99 of the ITA to years of assessment which became prescribed before the enactment of the TAA.

Thereafter, the study aimed to research case law in respect of the interpretation and application of the concept of “fraud, misrepresentation or non-disclosure” in section 79 of the ITA and section 99 of the TAA. The analysis of the case law illustrated clearly the duty of taxpayers to submit an

accurate and complete return (which is not vague and misleading) on which the Commissioner can assess them; the minimum level of information required for purposes of assessment; the duty of taxpayers when submitting tax returns and supporting documentation to SARS and the duty of the Commissioner when assessing tax returns. The study demonstrated how the courts determined whether non-assessment was a result of misrepresentation or non-disclosure of material facts.

Finally the study analysed the case law and commentary of the leading writers in the tax field in Australia and Canada as a comparative study of how legislation and courts in these countries have dealt with the issue of prescription and the reopening of assessments after they have prescribed. The inclusion of this international perspective emphasised the challenge of the courts and legislature in addressing the issue of finality of assessments. Although the prescription provisions in these countries differ in respect of periods, they are very similar as they both allow the revenue authorities to reopen assessment where there has been fraud or misrepresentation on the part of the taxpayer.

It is clear from the discussion above that the courts have done a recommendable job in striking a balance between safe-guarding the public interest that the Commissioner must collect tax that is payable, and the public interest that disputes should come to an end to ensure certainty for taxpayers.

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