When SARS Goes Back in Time: Section 46 Requests, Section 27(1), Prescription and the Reopening of Closed Years

Introduction

Tax practitioners are increasingly encountering a practical and legally significant problem: SARS is going back in time and requesting documentation for old years of assessment. In some cases, the request relates to a year that appears to have already prescribed.

The issue is not merely administrative. A broad request for documents in respect of an old year may have serious consequences. SARS may request invoices, bank statements, source documents, ledgers, lease agreements, schedules and working papers. SARS may then review those documents with the benefit of hindsight and identify what it regards as an error. The question then arises whether SARS can use that error to reopen an assessment that should already be final.

The answer is not automatic. SARS has information-gathering powers, but those powers are not the same as the power to issue an additional assessment. Once an assessment has prescribed, SARS must bring itself within a statutory exception before it may raise an additional assessment.

This distinction is critical. Prescription is not a technical loophole. It is a statutory protection that gives finality to assessments. If SARS could simply request "all documentation" for old years and then reopen any prescribed year where an error is found, prescription would be substantially weakened.

This article considers the position where SARS issues a request under section 46 of the Tax Administration Act, 2011 ("TAA") for documentation relating to a prescribed year, and then seeks to rely on the material obtained to raise an additional assessment.

The starting point: SARS may request relevant material

Section 46 of the TAA gives SARS the power to require a taxpayer, or another person, to submit relevant material within a reasonable period for purposes of the administration of a tax Act.

The term "relevant material" is broad. It includes information, documents or things that SARS considers foreseeably relevant for the administration of a tax Act. In practice, this may include invoices, contracts, bank statements, accounting records, reconciliations, schedules and explanations.

However, the power is not unlimited.

Section 46 is not a general licence to ask for everything. SARS must identify the material required with reasonable specificity. This requirement is important because the

taxpayer must be able to understand what SARS wants, what issue SARS is considering, and how to respond properly.

A request for "all documentation" for a particular year may therefore be problematic. It may be too broad, particularly where SARS does not identify the tax risk, the transaction, the deduction, the source of income, or the issue under enquiry.

The requirement of reasonable specificity is not a mere technicality. It is a safeguard against broad fishing expeditions. A taxpayer should not be left guessing what SARS wants or why SARS wants it.

Section 46 is not the same as section 27(1)

It is also important to distinguish section 46 from section 27(1) of the TAA.

Section 46 deals with requests for relevant material. It is aimed at information, documents and things that SARS considers foreseeably relevant to the administration of a tax Act.

Section 27(1), by contrast, deals with a requirement to submit a further, fuller or more detailed return. It allows a senior SARS official to require a person, whether or not that person has submitted a return, to submit a further or more detailed return regarding any matter for which a return is required or prescribed by a tax Act.

The distinction matters.

If SARS wants source documents, bank statements, invoices, ledgers or supporting schedules, the request should be tested under section 46. SARS must identify the relevant material with reasonable specificity.

If SARS is in substance requiring the taxpayer to reconstruct, supplement or resubmit a return, SARS should identify whether it is acting under section 27(1). In that case, the requirement should come from a senior SARS official.

This distinction becomes particularly important in prescribed-year cases. SARS should not be permitted to avoid the procedural requirements of section 27(1) by disguising a demand for a further, fuller or more detailed return as a broad section 46 request for "all documentation".

When is a senior SARS official required?

A common misconception is that every section 46 request must be authorised by a senior SARS official. That is not necessarily correct.

An ordinary section 46 request for relevant material may be issued by SARS. However, the TAA refers to a senior SARS official in particular circumstances. These include, for example, certain requests involving objectively identifiable classes of taxpayers,

directions that material be provided under oath or solemn declaration, and particular categories of information-gathering powers.

By contrast, section 27(1) expressly refers to a senior SARS official when requiring a further, fuller or more detailed return.

Therefore, when SARS issues a broad historical request, the practitioner should ask a practical question: what is SARS really asking for?

If SARS is asking for specific documents, the request must comply with section 46 and must identify the material with reasonable specificity.

If SARS is requiring the taxpayer to provide a further, fuller or more detailed return, SARS should state that it is acting under section 27(1), and the involvement of a senior SARS official becomes central.

Prescription: the separate and decisive issue

Even if SARS has a valid information-gathering power, that does not answer the prescription question.

Section 46 is an information-gathering provision. It does not, by itself, override prescription. It does not give SARS an automatic right to raise an additional assessment for a year that has already prescribed.

Prescription is dealt with under section 99 of the TAA. For income tax, the ordinary prescription period is generally three years from the date of assessment. For self-assessment taxes, such as VAT and PAYE, the ordinary period is generally five years, subject to the specific facts and provisions.

Once prescription applies, SARS's ability to raise an additional assessment is limited.

SARS must show that the case falls within a statutory exception. The most important exceptions are where the full amount of tax chargeable was not assessed because of fraud, misrepresentation or non-disclosure of material facts.

This means that the practitioner must separate two questions:

1. Is SARS entitled to request relevant material?
2. Is SARS entitled to raise an additional assessment for a prescribed year?

The answer to the first question does not automatically answer the second.

Finding an error is not enough

The fact that SARS finds an error after reviewing old documents does not automatically defeat prescription.

A taxpayer may have made an ordinary mistake. A deduction may have been claimed incorrectly. An expense may not have been apportioned correctly. Depreciation may have been overclaimed. A transaction may have been treated as capital when SARS later contends that it should have been revenue.

Those issues may be relevant in an open year. But in a prescribed year, SARS must do more than identify an error.

SARS must show that the full amount of tax was not assessed because of fraud, misrepresentation or non-disclosure of material facts.

This is the key point. Prescription is not lifted merely because SARS later disagrees with the taxpayer's treatment. SARS must identify the statutory basis on which prescription does not apply and must connect that basis to the under-assessment.

Ordinary error versus non-disclosure

The difference between an ordinary error and non-disclosure is often decisive.

Assume a taxpayer claimed rent as a deduction in a year that has now prescribed. SARS later requests the lease, invoices and supporting documents. SARS then says that part of the premises was used privately or by another entity and that the rental deduction should have been apportioned.

The immediate question is not merely whether the deduction was technically correct. The immediate question is whether SARS is legally entitled to reopen the prescribed year.

If the taxpayer disclosed the rental expense and the relevant facts were available from the return, financial statements, tax computation or supporting schedules, SARS may simply have identified a tax treatment issue. If the assessment has prescribed, that should not be enough to reopen the year.

However, if the taxpayer knew that part of the premises was not used for its trade and failed to disclose that fact, SARS may argue that the full amount of tax was not assessed because of non-disclosure of material facts.

The distinction is therefore between a wrong tax treatment and a failure to disclose material facts. A wrong tax treatment does not automatically amount to non-disclosure.

Misrepresentation and fraud

Misrepresentation usually involves an incorrect or misleading statement of fact. It is not the same as a wrong legal opinion.

There is a difference between a taxpayer saying:

"We believed the expense was deductible,"

and a taxpayer saying:

“The expense was wholly incurred in trade,”

when the taxpayer knew that part of the expense was private or related to another entity.

The first may be a bona fide tax dispute. The second may support an allegation of misrepresentation.

Fraud is more serious. It generally involves dishonesty or intentional deception. Examples may include fabricated invoices, false supporting documents, deliberate omission of income, concealed transactions, or knowingly false answers to SARS.

If SARS alleges fraud, misrepresentation or non-disclosure, the taxpayer should require SARS to identify the specific facts relied upon. A vague allegation should not be accepted as sufficient to defeat prescription.

The problem with a request for “all documentation”

A request for “all documentation” for a prescribed year raises two immediate concerns.

First, it may not comply with section 46 because the material requested may not be identified with reasonable specificity.

Second, it may allow SARS to conduct an open-ended review of a closed year without first identifying why prescription does not apply.

This is especially problematic where SARS does not identify the issue under enquiry. For example, SARS should clarify whether it is enquiring into a particular deduction, income item, transaction, apportionment, source code, asset, loan account, VAT input claim, PAYE issue, or other specific matter.

A taxpayer should not be required to produce every document for a historical year without SARS identifying what it requires and why it is relevant.

The correct response is not necessarily to refuse. The correct response is to require SARS to particularise the request and to place prescription squarely in issue.

Practical response where the year has prescribed

Where SARS requests relevant material for a year that appears to have prescribed, the practitioner should first establish the facts.

The practitioner should check:

1. the tax type;
2. the year of assessment;
3. the date of the original assessment;

4. the date on which prescription occurred;
5. the wording of SARS's request;
6. whether SARS has identified the material required with reasonable specificity;
7. whether SARS is requesting documents under section 46 or a further, fuller or more detailed return under section 27(1);
8. whether SARS has alleged fraud, misrepresentation or non-disclosure;
9. whether SARS has identified the facts supporting any such allegation.

The response to SARS should be firm, but not obstructive. The taxpayer should not ignore SARS. But the taxpayer should also not respond as though the prescribed year is automatically open.

The taxpayer should record that the assessment appears to have prescribed and should ask SARS to identify the statutory exception relied upon if SARS contends that prescription does not apply.

The taxpayer should also ask SARS to particularise the request so that it complies with section 46. Where the request appears to require a further, fuller or more detailed return, SARS should be asked whether it relies on section 27(1) and, if so, whether the requirement has been made by a senior SARS official.

Suggested response to SARS

A practitioner may consider wording along the following lines:

"We refer to SARS's request for relevant material in respect of the [year] year of assessment.

The assessment for this year appears to have prescribed under section 99 of the Tax Administration Act. The taxpayer does not accept that SARS is entitled to raise an additional assessment for this year unless SARS identifies the statutory basis on which prescription is alleged not to apply.

SARS is requested to confirm whether it alleges fraud, misrepresentation or non-disclosure of material facts. If so, SARS is requested to identify the specific facts relied upon and to explain how those facts caused the full amount of tax chargeable not to be assessed.

SARS is further requested to confirm that the request complies with section 46 of the TAA, including the requirement that the relevant material must be referred to with reasonable specificity. A general request for 'all documentation' does not enable the taxpayer to identify the precise material required or the issue under enquiry.

SARS is also requested to clarify whether the request is a request for relevant material under section 46, or whether SARS is in substance requiring the taxpayer to submit a further, fuller or more detailed return as contemplated in section 27(1). If SARS relies on section 27(1), SARS is requested to confirm that the requirement has been made by a senior SARS official.

The taxpayer reserves all rights, including the right to dispute the validity and scope of the request, the right to contend that the assessment has prescribed, and the right to object to any additional assessment issued contrary to section 99 of the TAA.

Any material provided by the taxpayer is provided strictly under reservation of rights and without any admission that SARS is entitled to reopen a prescribed assessment."

If SARS raises an additional assessment

If SARS nevertheless raises an additional assessment for a prescribed year, the taxpayer should object.

The objection should not merely dispute the technical tax issue. It should raise prescription as a separate and primary ground of objection.

The objection should deal with:

1. the date of the original assessment;
2. the date on which the assessment prescribed;
3. the applicable prescription period;
4. SARS's request for relevant material;
5. whether the request complied with section 46;
6. whether SARS improperly sought a further, fuller or more detailed return without complying with section 27(1);
7. the statutory exception SARS appears to rely upon;
8. why there was no fraud;
9. why there was no misrepresentation;
10. why there was no non-disclosure of material facts;
11. why the alleged error is an ordinary error or difference of interpretation;
12. what facts were disclosed to SARS at the time.

If SARS has not given adequate reasons, the taxpayer should consider requesting reasons before objecting. The taxpayer must understand whether SARS relies on fraud,

misrepresentation or non-disclosure. Without that information, the taxpayer may not be able to formulate a proper objection.

The danger of hindsight

One of the dangers in these cases is hindsight.

SARS may look at old documents years later and conclude that a deduction should not have been allowed, or that an apportionment should have been made, or that a transaction should have been treated differently.

That does not automatically mean that the taxpayer misrepresented facts or failed to disclose material facts at the time.

A taxpayer may have adopted a tax position that SARS later disputes. That is not the same as fraud. A taxpayer may have made an error. That is not necessarily misrepresentation. A taxpayer may have failed to anticipate a later SARS interpretation. That is not automatically non-disclosure.

Prescription would have little practical value if every later disagreement could be converted into an allegation of misrepresentation or non-disclosure.

Conclusion

SARS is increasingly requesting documentation for old years of assessment. Practitioners should treat these requests with caution, especially where the year appears to have prescribed.

Section 46 gives SARS a wide power to request relevant material, but the power has limits. The material requested must be relevant, must be required for the administration of a tax Act, and must be identified with reasonable specificity. A request for “all documentation” may not satisfy that requirement.

Section 27(1) must also be considered where SARS is in substance requiring the taxpayer to provide a further, fuller or more detailed return. That is not the same as a request for relevant material under section 46, and it expressly involves a senior SARS official.

Most importantly, neither section 46 nor section 27(1) automatically overrides prescription. If SARS wants to raise an additional assessment for a prescribed year, SARS must identify and substantiate the statutory exception relied upon.

The discovery of an error is not enough. SARS must show fraud, misrepresentation or non-disclosure of material facts, and must connect that conduct to the failure to assess the full amount of tax.

Practitioners should not ignore SARS requests. But they should also not allow SARS to treat a prescribed year as open merely because SARS has issued a broad historical

request for documents. The correct approach is to require specificity, place prescription in issue, distinguish section 46 from section 27(1), reserve the taxpayer's rights, and object comprehensively if SARS nevertheless raises an additional assessment.