

JUDGE'S CORNER

2017 is turning out to be even busier than anticipated and so far, it has been a productive period for the Office of the Tax Ombud, especially in improving our responsiveness to the needs of our stakeholders.

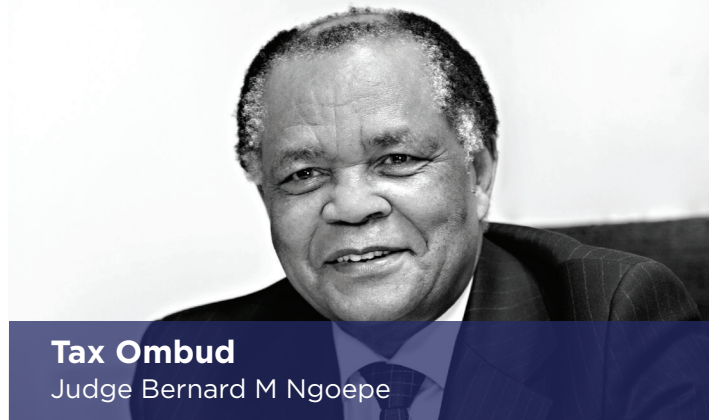
We have set ourselves ambitious targets for dealing with taxpayers' complaints against SARS, raising public awareness about our work and doing everything in our power to increase satisfaction levels among our stakeholders. At the same time, we are mindful of the broader context in which we operate and the political, social and economic challenges of our country. It is up to all of us, citizens, business and government, to help make South Africa a prosperous country that we can all be proud of and that is safe to live in and full of opportunities for everyone.

The existence of a fair, just and efficient tax administration system is an important part of that ideal, and this Office is grateful to be in the position to contribute to that. Good news is that there have been many positive developments concerning the Office since the last issue of *Fair Play*.

POSITIVE DEVELOPMENTS

These developments include amendments to the Tax Administration Act (TAA) that we have been asking for in relation to this Office and which have now been promulgated. The term of office of the Tax Ombud, recruitment of employees and management of our budget have all been amended in the Act, as per our proposal.

The amendments also paved the way for the Tax Ombud to conduct a review of an alleged systematic and emerging matter related to our mandate. This section of the amendment is being put to the test. Following renewed and increased complaints by taxpayers and industry bodies about the alleged withholding of tax refunds by SARS, I wrote a letter to the Finance Minister, in line with requirements of section 16(1) of the Tax Administration Act 28 of 2011, requesting approval to investigate these complaints. It is pleasing to note that the Minister has granted the Office of the Tax Ombud permission to investigate the claims and I'm optimistic that after the investigation we will revert back to you with our outcome in the matter. We are looking forward to ensuring that these changes are tested in full as we continue to call for more amendments to the TAA.



By implementing changes enabled through legislative amendments, and with your support, we can make a significant difference in how individual taxpayers and businesses view and respond to their tax obligations, as well as how those responsible for collecting and managing revenue on behalf of the country's people, safeguard it.

OUR STRATEGIC INTENT

Moving into the new financial year, 2017/18, we have a clear view of what we wish to achieve and what our priorities are. These objectives and priorities are detailed in our Annual Performance Plan for 2017/18 and our Strategic Plan for 2017-2022, both of which were tabled in parliament on 9 March 2017. The plans and goals in these documents are more demanding than those of the previous years and are a reflection of our commitment to pursue excellence in assisting taxpayers to resolve their complaints against SARS.

Our Strategic Plan also deals with the fact that the Office lacks a footprint outside Gauteng, the ever-increasing demand for our services and the budget constraints that limit our ability to recruit the necessary resources.

WORKING TOGETHER WITH OUR STAKEHOLDERS

Our stakeholders play a vital role in supporting us to provide a better service and in holding us accountable where we falter. The importance of your contribution cannot be overemphasised and we thank you most sincerely for your willingness to engage and collaborate with us. The coming year will see many more opportunities for engagement and collaboration, and we look forward to them with anticipation and excitement.

Judge Bernard Ngoepe
Tax Ombud

UNDERSTANDING THE DISPUTE RESOLUTION PROCESS

The OTO receives a large number of complaints about the dispute resolution procedure when a taxpayer has a disagreement with SARS. It must be noted from the outset that this Office cannot get involved in the merits of a dispute and can only assist where there is an administrative or procedural issue. In other words the OTO cannot make a determination that SARS was wrong in raising the assessment, which is what taxpayers often expect based on the complaints received. Where SARS does not attend to the dispute correctly in terms of the procedure, however, the OTO does have the authority to assist. In some complaints received, SARS is clearly at fault while in others taxpayers are the authors of their own misfortune. In many of the latter kind of cases, the frustration taxpayers experienced could have been avoided if they had been familiar with the steps in the procedure.

For this reason the OTO would like to try and assist by discussing the dispute resolution procedure in a series of articles in this newsletter, covering the various aspects and specific steps. The first instalment in this series covers what should be done when Notice of Assessment is received from SARS and the periods within which the taxpayer must act when lodging an objection. All references to “days” in the dispute resolution procedure mean business days, which exclude Saturdays, Sundays, public holidays and the period between 16 December and 15 January.

REQUESTS FOR REASONS AND THE PERIODS FOR LODGING OBJECTIONS

When taxpayers do not agree with assessments raised by SARS they can dispute it by following the dispute resolution procedure, which is contained in the Tax Administration Act (the TAA) and the Dispute Resolution Rules (the Rules). It is of the utmost importance for taxpayers and tax practitioners to familiarise themselves with this procedure properly before starting the dispute. Failing to comply with the requirements and timeframes prescribed may result in the dispute being invalidated by SARS or in the taxpayer effectively being disqualified from disputing the assessment further. Non-compliance may also result in the assessments being confirmed by the Tax Court which would make them final and conclusive.

REASONS FOR THE ASSESSMENT

When an assessment is received, the taxpayer must understand why the assessment was raised and decide whether or not he/she agrees with it. If the notice of assessment issued by SARS does not contain enough information to make this decision, the taxpayer may request reasons for the assessment. The request for reasons must be delivered to SARS within 30 days from the date on which the assessment is issued by SARS. Once this request has been filed the period within which to lodge the objection is suspended until SARS responds to the



Gert van Heerden

Senior Legal Manager: Office of the Tax Ombud

request. If a taxpayer is not able to file a request for reasons within 30 days from the date of assessment, they may request an extension of another 45 days. The taxpayer will have to convince SARS that he/she has reasonable grounds for not meeting the deadline and is not simply using delaying tactics.

Once SARS receives the request, it must establish if the notice of assessment provided enough reasons to enable the taxpayer to formulate an objection. If it did, SARS must inform the taxpayer as such and refer him/her to the document in which the reasons were provided within 30 days after delivery of the request. If it did not provide sufficient reasons it must do so within 45 days after delivery of the request. SARS may extend the period they have to provide reasons by no longer than another 45 days, but only if it notified the taxpayer of such extension before expiry of the initial 45 days.

On a side note, whenever documents are delivered to SARS it is extremely important for taxpayers to ensure they obtain proof that the documents were indeed delivered to avoid disagreements later on. If documents are filed through eFiling the electronic record of submission must be kept. If physical documents are delivered at a SARS branch or enforcement centre, taxpayers should insist that SARS confirms receipt by stamping copies of the documents delivered.

PERIODS FOR LODGING OBJECTIONS

The periods within which to lodge objections are extremely important. Not complying with the prescribed timeframes may

have significant implications for a taxpayer and may include wasted time and costs for lodging requests for condonation and parallel objections; or even being effectively disqualified from disputing the assessment.

AN OBJECTION MUST BE LODGED WITHIN 30 DAYS FROM:

- the date on which the assessment was issued by SARS if reasons for the assessment were not requested, or
- the day on which SARS delivers the reasons for the assessment if requested.

SARS may grant an extension of this 30-day period but it must be made clear that this extension is not guaranteed and the option should not be relied on as a given. It is up to the taxpayer to advance reasons why he/she cannot or was not able to meet the deadline. If the taxpayer does not advance these reasons, SARS is not in a position to apply its mind and exercise discretion, and therefore the objection will simply be invalidated. It is not SARS' responsibility to look for reasons why the objection is late.

If the objection is filed less than 21 days late, the taxpayer will have to convince SARS that the reasons for late filing are "reasonable". If it is filed more than 21 days late, the taxpayer will have to convince SARS that the reasons for late filing are "exceptional". There are no set criteria for the late filing to be condoned; however the general rule is that late filing would be reasonable if it was caused by circumstances out of the taxpayer's control. Exceptional circumstances refer to something that is unusual or out of the norm and would in general be things like accidents or natural disasters. While SARS does take a taxpayer's prospects of success into account when making the decision to condone late filing, it is not a deciding factor and the mere fact that a taxpayer has a strong case would not guarantee that a late objection will be entertained.

"If the objection is filed less than 21 days late, the taxpayer will have to convince SARS that the reasons for late filing are reasonable."

There is a general prescription period of three years for lodging objections. Where no objection is lodged within three years after the date on which the assessment was issued, that assessment becomes final and conclusive. This

means that the assessment cannot be disputed by operation of law. This works in a similar fashion to the prescription of civil claims and is not a legal principle that is unique to tax. In these cases SARS does not have discretion to condone late filing, and no decision is made by a senior SARS official. In other words, where more than three years have passed since the assessment was issued, it would be advisable for the taxpayer to obtain proper legal counsel as the only recourse available will most likely include litigation.

In this regard it is important to note that a taxpayer's decision to use a tax practitioner or other representative does not absolve him/her from the obligations prescribed by tax legislation. It is therefore doubtful that a tax practitioner's failure to file an objection on time can be regarded as reasonable or exceptional circumstances for the delay in filing objections. Tax practitioners who do not have mechanisms in place to ensure compliance with the dispute resolution procedure risk the possibility of civil claims should they fail to lodge an objection on time and be unsuccessful in obtaining an extension from SARS.

Where a taxpayer provides reasons for late filing of an objection and SARS does not regard those reasons as reasonable/exceptional, that decision by SARS is also subject to objection and appeal. This means that the taxpayer is able to object to the decision not to condone. This objection is a new procedure that is separate from the initial objection and SARS will only address the reasons for late filing and the decision made not to condone. If the objection is allowed at this stage, the initial objection will be reinstated and only then will SARS address the merits of the dispute.

Therefore not filing an objection in time creates an administrative burden for the taxpayer and has serious implications if he/she cannot convince SARS that the delay was reasonable or due to exceptional circumstances.

In the next issue we will look at how to go about lodging an objection and also discuss the differences between an objection that is invalidated and one that is disallowed.

Gert van Heerden is the Senior Legal Manager at the Office of the Tax Ombud whose academic background includes the following: BCom, LLB and LLM (International Trade), all obtained from the North-West University. He joined the Office of the Tax Ombud in May 2015 where his role includes assisting the Office's internal and external stakeholders with all legal issues, from interpreting legislation to drafting and vetting legal documents.

EXPERT'S CORNER

THE TAX DEBATE: SERVING TWO MASTERS

By Ragiema Thokan-Mahomed, Senior Legal, Ethics & Compliance Manager, South African Institute of Professional Accountants (SAIPA) - with a notable contribution by Aysha Naino, SAIPA Membership Compliance Officer

What I perceive as fair and just may not equate to the strict standards of someone more conservative. Our personal values have been influenced by where we grew up, the principles instilled by our parents and ultimately what we conscientise to be our personal moral compass.

In an attempt to realign due north, it was thought best that commonality be at the centre of it all, and so was born the idea of “do unto others as you would have them do unto you” which has become a hallmark phrase in any discussion on religion and ethics. We are taught to respect each other's differences, but what happens when there are different duties of care governing the same relationship?

Clients exercise personal ethics in their relationship with you. Their requests in respect of tax refunds are justified by their need for heavier pockets and depending on their tax assessment received from SARS, you are either the cat's whiskers or not-the-sharpest-tool-in-the-box! The contradiction though is you are relied upon for professional guidance and you will be tested based on your professional ethics. You will agree that you act in the best interest of your client, so I put it to you, how do you serve two masters?

Tax professionals understand there are many ways to skin a cat and more than one way to complete taxable transactions. Tax planning provides clients with tax options that affect the manner in which they conduct business. The effect may result in a reduction or elimination of their tax liability.

It may seem like a matter of semantics, but tax avoidance and tax evasion are profoundly different. Tax avoidance lowers your client's tax bill through structured transactions so the client may be rewarded with greater tax benefits. Tax avoidance is completely legal, but can turn into evasion through shrewd planning and a change of intention. So, if the result yields an attempt to reduce tax liability by trickery, deception or disguise, it becomes tax evasion and this is a crime.

I have been told on various occasions that accounting and tax are different disciplines and yes prima facie the argument may stand, but upon closer inspection it is more like the chicken and the egg debate – who came first and does it matter?

Undoubtedly, tax and accounting are related. They may be second cousins twice removed but at the heart of it, it's a service that involves numbers and calculations and if you don't know the rules, you will end up paying for your mistakes. I know I've taken the scenic route, but I assure you there is a



point to my ramblings – a tax professional not only satisfies the needs of their client but is expected to act in the best interest of the public too.

If we consider the fundamental principles as outlined in the International Federation of Accountants (IFAC) IESBA Code of Ethics for Professional Accountants, we find core values – integrity, objectivity, professional competence and due care, confidentiality and professional behaviour – that should be adopted by tax professionals to guide their professional compass.

As a tax professional you do not have the luxury of adjusting your moral compass to soothe your conscience because professional ethics is based on a set of acceptable standards as determined by regulation or laws.

What happens in the case of your “shoebox clients”? You know, the loyal entrepreneurs with small and medium size concerns who use the most faithful filing system, a shoebox filled to the brim with receipts, invoices and bank statements. How do you, in good conscience, guestimate for work that often has no paper trail. Perhaps you know the client's routine so well that it's a walk in the park. When filing a return, it is imperative you still conduct yourself with the due diligence required as if you were providing tax services for a JSE-listed company. There is no exception.

Are there tell-tale signs that keep an ethical tax professional astute to the implications of their tax advice? Yes and no; remember to never ignore specific parts of the law in order to satisfy a client as this will surely lead to a compromise on your good morals and integrity. It is for this reason the Tax Administration Act does not support the charging of contingency fees.

“Remember to never ignore specific parts of the law in order to satisfy a client as this will surely lead to a compromise on your good morals and integrity.”

To provide further clarity, consistency and certainty, SARS has created a specialist unit to deal with advance tax rulings (ATR). This service offers tax professionals guidance on the interpretation of tax laws. It comes at a cost, but the information is invaluable; for more information, see <http://www.sars.gov.za/Legal/Interpretation-Rulings/Pages/Advance-Tax-Rulings-ATR.aspx>.

Some basic ethics rules of engagement between yourself and your clients:

1. Impose business ethics as part of the values of the firm; creating an ethical culture in the professional firm will make it easy to live by those values.
2. Ask yourself if the reasonable tax professional would act in the same or similar manner?
3. Consider whether the decision can be defended with confidence and transparency.

Often it takes the law some time to catch up with ethical practices. Fortunately the guess work has been taken out of “doing the right thing” with the evolution of the Tax Administration Act, in particular chapters 15-17. Tax professionals are held accountable for the service they provide. Fines or prison sentences of two years await the tax professional that insists on involving themselves in practices that defraud SARS.

Let us not forget the SARS Recognised Controlling Bodies who now act as big brother - always watching. Tax professionals are required to affiliate to a body with a disciplinary code if they intend being tax practitioners. These professional codes of conduct ensure the reasonable tax professional will at all times be an ambassador for ethical conduct in affairs that affect the public treasury. Apprehension to being a law-abiding citizen will expose you to dire consequences with the authorities and may risk you losing your designation with your professional body should you veer off the path of righteousness.

So, I implore you in the wise words of Martin Luther King Jr, to remember that “the time is always right to do the right thing”.

About Ragiema Thokan-Mahomed – SAIPA Senior Legal, Ethics & Compliance Manager

Ragiema currently serves on the ABP as a board member, and is part of the Executive Management Team at the South African Institute of Professional Accountants (SAIPA) taking care of Legal, Ethics and Compliance at the Institute. She holds both BCom (Law) and LLB degrees from UJ, is an admitted attorney and Certified Ethics Officer. She is a passionate facilitator, skilled negotiator and her moral compass never waivers.



AN OPPORTUNITY TO ADD YOUR VOICE TO THE TAX SPHERE DISCUSSION

The Office of the Tax Ombud sees **Fair Play** as a platform for professionals in the tax sphere and for taxpayers to share their opinions on various tax-related matters and participate in important tax discussions by contributing news articles, letters

to the editor and opinion pieces. Those interested can email PSeopela@taxombud.gov.za for more information. We look forward to receiving your opinion and inputs on tax issues.

USING EVERY OPPORTUNITY TO ENGAGE

Closer engagement with a wider variety of stakeholders is a priority for the Office of the Tax Ombud.

Since the start of 2017, the leadership of the Office of the Tax Ombud has engaged several stakeholders through presentation opportunities. These organisations include the South African Institute of Tax Professionals (SAIT), Institute of Accounting and Commerce (IAC), B-Square Financial, and auditing firm KPMG.

Accounting and auditing firms, from small to large, are among

the organisations with which the Office of the Tax Ombud plans to nurture partnerships. The Office has already made presentations to Deloitte in Cape Town and Johannesburg, and to KPMG in Johannesburg and Cape Town. Next, the Office is targeting stakeholders in Durban and Port Elizabeth.

Plans are also in the pipeline to engage more Recognised Controlling Bodies (RCBs), with the goal of cultivating mutually beneficial partnerships that will benefit taxpayers and contribute towards improving the country's tax administration system.



OTO and KPMG leadership together with invited stakeholders during engagements in Johannesburg and Cape Town



OTO, AN IMPORTANT VOICE IN THE INTERNATIONAL TAX ARENA

OTO CEO Advocate Eric Mkhawane shared the stage with global leaders in the tax sphere at the 2nd International Conference on Taxpayer Rights held in Vienna, Austria, March 13-14.

Advocate Mkhawane was part of a high-profile international panel consisting of inspectors general, advocates and Ombuds, who participated in series of Fire Side Chats (FSC) discussing "Challenges of Scrutineering Entities". The panel discussion and conference were held at the Institute for Austrian and International Tax Law at WU (Vienna University of Economics and Business), and sponsored by the National Taxpayer Advocate of the United States Internal Revenue Service. Mkhawane said the engagement entailed a candid discussion

with overseers of tax agencies on the tension between agency and scrutineers. The discussion also looked at access to agency information and how to enhance overseer independence via appointment and funding protections – whether administratively or through legislation. Most of the audience members were WU staff and researchers, and participants in related conference events. There was also a virtual audience of between 100 and 200 from all over the globe. Both groups were able to submit their questions.

Holding South Africa's name high

"The conference is a very important event in the global tax arena and brings together the best minds in the subject to share ideas and come up with new ways of dealing with tax

challenges and improving tax administration systems in the different countries. I feel honoured to have been invited to the conference and to make inputs on such an important subject. The invitation is further proof that the OTO is not only growing in stature in our country as a force in the tax sphere, but is also making a mark in the international arena,” the CEO said.

“Our recognition and the respect we enjoy amongst peer organisations and other stakeholders is the result of collective efforts of our colleagues who often go beyond the call of duty to ensure that we deliver on our mandate by helping resolve taxpayers’ complaints against SARS and contributing towards the betterment of the country’s tax administration system.” Other members of the panel included the Swedish Tax Ombud Anders Bengtsson; Mexico’s Taxpayer Advocate Diana Bernal; Australian Inspector-General of Taxation Ali Noroozi; United States National Taxpayer Advocate Nina E. Olson; and Canadian Ombudsman Sherra Profit. It was chaired by Prof Jeffrey Owen of Vienna University of Economics and Business. Some of the issues that the panel tackled were the changing environments in which tax administration and oversight bodies operate; taxpayers’ rights; getting the right balance and looking over the next five years, and exploring what type



of changes would be helpful to a constructive relationship between taxpayers and tax administrations.

Other important subjects discussed during the conference included Building Trust 1: Transforming Cultures of Tax Agencies and Taxpayers; the Role of Intergovernmental Actors in Furthering and Protecting Taxpayer Rights: A Conversation, and Penalties and General Anti-Avoidance Rules.

CASE STUDIES

THE OFFICE OF THE TAX OMBUD IS ONLY ALLOWED TO ACCEPT CASES THAT FALL IN ITS MANDATE. THE TWO TAX COMPLAINTS BELOW THAT HAD BEEN REJECTED BY THE OTO ARE USED TO ILLUSTRATE THE THIN LINE THE OTO SOMETIMES HAS TO NEGOTIATE TO DETERMINE IF A MATTER FALLS WITHIN THIS MANDATE.

CASE 1

FACTS

SARS initiated an investigation into suspicious activities by the taxpayer. This investigation resulted in the taxpayer’s bank accounts being placed on hold by its bank and the funds therein being subjected to a preservation order and later forfeited to the state. The taxpayer lodged a complaint with the OTO requesting assistance to have the money that was forfeited to be restored to it.

REASON FOR REJECTION

There are three key role players in this scenario all acting in terms of different pieces of legislation. First you have SARS who initiated the investigation in terms of the Tax Administration Act (TAA). Then you have the bank that placed a hold on the account in terms of the Financial Intelligence Centre Act (FICA). Lastly you have the National Prosecuting

Authority who obtained two High Court orders in terms of the Prevention of Organised Crime Act (POCA).

The hold on the bank account, as well as the preservation and forfeiture orders, are all actions that are incidental to the initial investigation by SARS. The decisions to take those steps however, were made by the bank and the NPA in the application of FICA and POCA respectively. Therefore the complaint does not fall within the OTO mandate as it does not relate to the application of tax legislation by SARS.

As a side note, even if the matter did fall within the OTO mandate, the fact that it relates directly to Court orders would also make it impossible for the OTO to attend to it as OTO does not have any authority to overrule decisions made by any Court. Any party cited in a Court order must follow the normal legal remedies to challenge if aggrieved thereby.

CASE 2

FACTS

SARS issued a tax directive resulting in a tax liability where a taxpayer was under the impression that the pension fund transaction would be exempt from tax. SARS refused to change the directive and indicated it had applied the legislation correctly based on the information provided to it from the taxpayer's pension fund. SARS also indicated that the taxpayer should request the fund to cancel the directive and send a new request. The fund refused to cancel the directive as it stated the information provided to SARS was in fact based on the instruction by the taxpayer and it did not make a mistake.

The taxpayer lodged a complaint with the OTO requesting assistance to force SARS to change the directive to exempt the transaction from tax. It transpired that the taxpayer's broker provided the incorrect information to the taxpayer which placed him/her under the impression that the chosen transaction would be exempt from tax.

REASON FOR REJECTION

When it comes to tax directives on pension transactions in general, SARS acts purely on the information provided by the pension fund. If the information provided differs from the instruction given by the taxpayer, the complaint relates to the action of either the fund or the broker who did not ensure that the correct instruction from their client was implemented.

In this specific matter, the broker is at fault as he/she gave the taxpayer incorrect advice which resulted in a tax liability. Thus any remedies at the taxpayer's disposal should be directed at the broker and not at SARS.

Therefore the complaint did not fall within the OTO mandate as it did not relate to the application of tax legislation by SARS, but to incorrect advice provided by the broker.

NOTICE

This is a quarterly newsletter that will be published every three months. We urge our readers and stakeholders to contribute (in the form of articles, important announcements, opinion pieces or letters to the editor) on any matter concerning this Office or tax issues. Your contributions should be emailed to PSeopela@taxombud.gov.za or InternalCommunications@taxombud.gov.za.

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