

JUDGE'S CORNER

Welcome to the second half of the 2016/17 financial year. It seems like it was only yesterday that we entered the new fiscal period and committed ourselves to new strategic objectives and goals – but time has been passing swiftly and we have already reached the halfway mark. This is an important opportunity to assess the progress we have made towards achieving our objectives, consider how effectively we have met the challenges that surfaced in the first half, and identify areas where we have excelled.

TERM OF OFFICE EXTENDED

My initial period as the Tax Ombud came to an end on 30 September 2016, which was exactly three years after Finance Minister Pravin Gordhan appointed me as South Africa's first Tax Ombud. I am pleased to state that the Minister has reappointed me for a further three years effective from 1 October 2016. It is encouraging to see that the Minister has confidence in me by allowing me to continue heading this important institution. Announcing the extension of my contract to the media, the National Treasury said: "The Tax Ombud plays a critical role in South Africa's tax system and, in particular, in ensuring fairness and procedural correctness. Judge Ngoepe has led the Office with great distinction and integrity over the past three years. His impartiality and effectiveness has inspired confidence and trust in our tax system."

I am grateful for these kind words of support, as well as many other messages have come from my former colleagues in the judiciary, those in the tax sphere and the general public. Thank you very much for your support during the past three years. I look forward to engaging with you for the next three years on issues that might arise as we pursue our goal of helping improve the country's tax administration system.

INTERESTING AND PRODUCTIVE PERIOD

When the Minister bestowed this responsibility on me three years ago, I was honoured to be given the opportunity to lead an institution mandated to help protect the rights of our citizens. The journey has not been very long, but the path travelled in the formative years of the institution has had its fair share of challenges – some of which we have conquered, and some we are still trying to address. We have also had a good number of successes, having established, from scratch, a functioning and effective institution capacitated with competent and hardworking teams. Despite being a relatively new organisation, we are already making a difference in the



Judge Bernard Ngoepe - Tax Ombud

lives of taxpayers and helping to improve the country's tax administration system.

We have built mutually beneficial partnerships with many stakeholders in the tax sphere, including the South African Revenue Service (SARS), over which we have as it were, some oversight powers in certain respects. Our constructive engagements with taxpayers, the general public and the media have helped increase awareness about our Office and services offered, and thus more than doubled the number of people approaching our Office seeking assistance with their complaints against SARS. Complaints lodged, and falling within our mandate, have increased ten-fold in the past three years.

In the light of these achievements, I have no doubt that the pursuit of excellence in all aspects of our business will continue to be the driving force of this Office. It is clear that I alone would not have been able to make a significant impact in the tax sphere and I am grateful for the support I have received, especially from the CEO Advocate Eric Mkhawane and his leadership team, as well as all OTO employees who have made the Office what it is today. I would like to extend my gratitude to them and other stakeholders for working with me to make a valuable contribution towards improving the country's tax administration system.

Annual Report tabled

We have just tabled our 2015/16 Annual Report, which provides a comprehensive view of the Office's operational and financial activities, as well as performance against predetermined objectives, for the 2015/16 financial year.

The report details our endeavours as an independent and impartial avenue assisting in resolving tax-related disputes between SARS and taxpayers. Our efforts have been bearing fruit, providing proof that the Office of the Tax Ombud is a necessity for balancing the obligations and rights of taxpayers with the powers of SARS. Once again, a majority of tax complaints received were resolved in favour of taxpayers.

There has also been significant growth in the number of complaints received which must be matched by also the growth needs to be aligned with concomitant growth in personnel and in the size of our geographical footprint. During 2015/16, the staff complement of the Office almost doubled: in accordance with the Annual Performance Plan (APP) 2016/17 and Strategic Plan 2016–2021, 16 approved positions were advertised and filled. These included the management posts of Senior Manager Office Enablement, Manager Operations and HR Business Partner. Currently the OTO has approximately 27 members of staff but there is a need for more people to join the organisation to ensure that the influx of cases is adequately and timeously addressed without compromising the quality of our service.

We have made good progress in reaching out to stakeholders. During 2015/16, we hosted and participated in 70 outreach, communication and educational activities, and engaged and collaborated with more than 50 key stakeholders.

In addition, we reviewed the OTO's brand identity, developed our corporate identity manual and re-launched our website, creating a more informative and user-friendly platform to engage our stakeholders.

We also built mutually beneficial partnerships with important stakeholders such as the South African Institute of Chartered Accountants (SAICA), South African Institute of Professional Accountants (SAIPA), South African Institute of Tax Professionals (SAIT), Chartered Secretaries Southern Africa (CSSA), Fiduciary Institute of Southern Africa (FISA), American Chamber of Commerce (AmCham SA) and Edward Nathan Sonneberg Africa (ENSA).

More progress came when we entered the social media space with the launch of Twitter, Facebook and Instagram accounts, enabling the Office to reach stakeholders we would not have been able to engage with the traditional communications and marketing channels.

Further details on our performance are in our Annual Report, which is available on our website at www.taxombud.gov.za.

CALLING FOR A SERVICE CHARTER AND TAXPAYER BILL OF RIGHTS

In the interests of fair treatment of taxpayers, it is imperative to have a clear understanding of the rights

and responsibilities of taxpayers in relation to the powers of SARS. Having studied the situation in countries such as Canada and the United States, on which South Africa's Tax Ombud system is modelled, we have observed the important role of mechanisms such as a Taxpayer Bill of Rights and a Service Charter. Generally, the purpose of a Taxpayer Bill of Rights is to articulate the fundamental rights that all taxpayers should be aware of when interacting with their country's tax collection agency. A Service Charter, on the other hand, is generally used to ensure that the tax authority meets certain service standards when dealing with taxpayers.

The necessity of introducing a Taxpayer Bill of Rights and a tax Service Charter for South Africa is a topic I raise consistently at every meeting with the Commissioner of SARS. While progress on these matters has been slower than my Office would like, I am cautiously optimistic that a draft service charter will see the light of day in the relatively near future, and that progress will also be forthcoming on taxpayer rights. I believe it would be appropriate to give taxpayers and recognised tax bodies the opportunity to influence these documents, and hope that SARS will provide opportunities for public input.

INDEPENDENCE OF THE OFFICE OF THE TAX OMBUD

Ensuring the full independence of the Office from SARS is a top priority for us. Currently, amendments to the Tax Administration Act that would bolster our operational independence are being finalised, paving the way for the Office to take full control of our own staff recruitment processes and finances. It seems likely that the amended Bill will be tabled in Parliament towards the end of 2016 or early in 2017.

Most of the issues of concern are addressed in the amendments. For example, we will no longer be required to appoint staff in consultation with the Commissioner of SARS, or for SARS to control our funds. The term of office of the Tax Ombud is also to be extended from three to five years, greatly improving the likelihood of being able to attract suitably qualified candidates.

Even with these amendments, however, the Office will not rest in its efforts to ensure its independence. As the institution tasked with resolving disputes between SARS and taxpayers, we have to be seen to be independent, which means that operational independence is not enough. Structural independence is a necessity. Thus, we are going to work hard to continue making this a very independent and substantive institution.

AN INFLUENTIAL VOICE IN THE TAX SPHERE

It has always been part of our strategy to influence the discussion agenda in the tax sphere - involving taxpayers, the media, tax bodies and tax practitioners. In the past six months, there has been a significant increase in the number of stakeholders interested in hearing what the Office of the Tax Ombud has to say about numerous pertinent issues in the tax sphere. Our leadership, including myself, have been invited as guest speakers at important tax events. Our independence,

obligation to the constitution of the country, commitment to resolving taxpayers' complaints against SARS and our ability to speak truth to power, have placed us in a better position to influence discussions in this space, and be trusted.

I recently delivered the keynote address at the FISA Annual Conference and also chaired a panel discussion at the 2016 Tax Indaba at the Vodaworld Convention Centre - an event which over 1000 decision makers in the tax, finance and legal sphere attended. At both these events I reiterated our support of the country's tax laws and encouraged individual taxpayers and businesses to fulfil their tax responsibilities.

Without being alarmist, we have also warned of the danger that the country faces with angry taxpayers who feel their taxes are not being spent correctly or are being used to irregularly enrich the politically connected. I have stated many times, both in the media and to our stakeholders, that abuse of taxpayers' money

by the state is a recipe for disaster. I've also stated that organs entrusted with collecting taxes should do so in a fair and transparent manner. Bullying, whether real or perceived, is not acceptable in any form, worse if it is by the state against its people. My views on these matters are further explained in another article in this newsletter.

Pushing ahead

We have identified pertinent issues that we need to focus on for the remainder of the fiscal year and we are confident that by March 2017, we will close the year having done what we set out to do. Once again I call on our stakeholders to give us feedback on our performance, as well as inputs on how we can better serve taxpayers and contribute towards building a better tax administration system.

Judge Bernard M Ngoepe

Tax Ombud

ETHICAL BEHAVIOUR BY TAXPAYER AND TAX COLLECTOR

"Corrupt use of public funds, or their improper use, lessens the feeling of guilt on the part of evasive taxpayers, because they give all these ills as an excuse not to pay," says Tax Ombud Judge Bernard Ngoepe.

He was speaking at the annual conference of the Fiduciary Institute of Southern Africa (FISA) held at the Sandton Convention Centre in Johannesburg on 25 August, where he addressed delegates on "Ethical behaviour by taxpayer and tax collector".

"It has been argued, and I think correctly, that one of the sources of a positive disposition on the part of taxpayers is the force of good ethics."

The 2016 event, attended by more than 250 of the country's top legal minds, financial experts and representatives of big corporations, provided a platform for important discussions and presentations on legal, tax and financial issues in the country.

Judge Ngoepe, who has openly criticised multinationals that transfer their profits offshore and public officials who defend hopeless cases in court at taxpayers' cost, says while ethical behaviour by both the taxpayer and tax authority has long been a subject of interest, it was "rare to find maximum co-operation between these two role players.

"Given the fact that maximum tax must be collected, the question arises how best to extract it from the taxpayer.



Tax Ombud Judge Bernard Ngoepe addressing delegates attending the Fiduciary Institute of Southern Africa (FISA) annual conference at the Sandton Convention Centre

The tax authority can employ various methods; drastic and highhanded methods, or a stick and carrot approach; we don't have to go into that. What we do know is that taxpayers need to be motivated to pay tax, in a manner that would achieve maximum compliance," he said, adding that most people accept that they should pay but challenges arise regarding the extent to which they are prepared to pay what is actually due.

"It has been argued, and I think correctly, that one of the sources of a positive disposition on the part of taxpayers is the force of good ethics.

“Taxpayers should have recourse if their sense of civic and moral duty is being exploited or abused.”

“An integral part of good ethics is honesty, and a sense of civic duty. From some of the reports received, there is a woeful lack of honesty on the part of not only individual taxpayers, but especially multinational corporations operating in Africa. Sophisticated schemes are devised to evade tax – an ethical issue. For example, while expatriating profits to evade tax may not necessarily be illegal, it raises serious ethical questions whose implications are often underestimated, and which give rise to all sorts of problems such as labour unrest; couple that with obscene remunerations to executive staff,” he said.

Morality and voluntary compliance

On the other hand, tax morality promotes voluntary compliance, said Judge Ngoepe, who has repeatedly stated that part of the OTO’s goal is to promote

confidence in South Africa’s tax administration system. He says it is a positive development to see a paradigm shift among large accounting and auditing firms, which are moving away from seeking to create the biggest tax benefits for their clients while hiding behind the fact that the schemes fall within the confines of the law. “This is welcomed as it shows that tax practice in South Africa is intent on leading the way towards creating a culture of tax morality, which promotes voluntary compliance.”

Judge Ngoepe added that he is pleased SARS has gone to great lengths to show how taxpayers’ taxes have been used to benefit society, which heightens a sense of civic and moral duty.

“If tax morality increases, perceived imbalances between taxpayer rights and the powers of a tax authority, as well as frustrations experienced by all parties in the equation, would decrease... Finally, where does all this leave the Office of the Tax Ombud? It is important for taxpayers to know that there is a third impartial and independent institution to take their complaints to against the tax authority; that is where the OTO comes in. Taxpayers should have recourse if their sense of civic and moral duty is being exploited or abused,” he concluded.



From left: OTO Chief Executive Officer Advocate Eric Mkhawane, Tax Ombud Judge Bernard Ngoepe, and FISA Vice Chairperson Dr Eben Nel at the 2016 Annual FISA Conference

INFLUENCING THE TAX DISCOURSE



OTO leadership (from left) Mmamela Malakalaka, Senior Manager - Office Enablement; Advocate Eric Mkhawane, Chief Executive Officer; Pearl Seopela, Senior Manager - Communications and Outreach; Talitha Muade, Senior Manager - Operations; and Gert van Heerden, Senior Manager - Legal, at the 2016 Tax Indaba

The Office of the Tax Ombud continues to grow in stature and as an influential voice in the tax recourse and administration sphere.

Tax Ombud Judge Bernard Ngoepe, Chief Executive Officer Advocate Eric Mkhawane and other members of the senior leadership team have participated in some of the country's most important tax events and debates, delivering keynote addresses or chairing discussion panels.

The Tax Indaba 2016 from 5 to 9 September was one event where the prominence of the OTO and its growing influence in the tax sphere was displayed. The annual event is the premier tax conference in Southern Africa and brings together the entire tax community under one roof - practitioners, professionals, academics, SARS officials and government.

At the conference, Judge Ngoepe chaired a high-profile discussion panel on "Balancing government enforcement against taxpayer rights". The panel included respected leaders in their fields of expertise, including Ettiene Retief from FTR Services, Patricia Williams from Bowman Gilfillan and Mmangaliso Nzimande from SARS, among others.

Advocate Eric Mkhawane delivered the closing address at the event, providing a bird's eye view of the work the OTO has done in the past three years, from establishment to a fully functioning institution making a difference in the lives of taxpayers.

Adv Mkhawane said: "When a taxpayer has a complaint against SARS, it is necessary to have an independent verification of what happened. You cannot have SARS investigating itself - as was the case with SSMO (SARS Service Monitoring Office). If SARS does that, there would be no checks and balances and no way to refute suspicions of bias, or cover-up," he said, underlining the key role of the OTO as a fair and impartial channel for taxpayers.

He added that there had been strong growth in the utilisation of the OTO's services, with the number of complaints rising from 156 in the 2013/14 financial year to 1 227 a year later, and 2 133 in the financial year ended March 2016. The most common tax matters dealt with were delays in the payment of refunds, incorrect allocation of payments, delays in issuing tax clearance certificates, and non-adherence by SARS to dispute resolution regulations. The latter included missed deadlines and incorrectly invalidated objections.

Voice of reason

Advocate Mkhawane said it was important for the Office of the Tax Ombud to be the voice of authority in the tax sphere.

"The Judge is a highly respected man of integrity and the respect he commands from his peers, representatives of professional tax bodies and the general public is immense and bodes well for the Office. He is not shy to speak



A taxpayer (left) getting assistance from an OTO Operations Specialist (right) at the 2016 Tax Indaba at Vodaworld in Midrand

truth to power about a variety of matters, including those concerning the Office and tax issues in general. As a result the OTO has been able to influence the agenda on tax matters. The leadership of the institution has been invited and presented to members of various tax and financial professional bodies; this is another indication that they (tax professionals) want to hear what we have to say and value our inputs,” said Mkhawane.

He added that the leadership of the organisation will continue to make contributions on various matters concerning tax and recourse. “It is important that we are part of discussions on pertinent tax matters, including tax recourse, so as to make desired inputs in the improvement of the country’s tax system.”

On the right path

Judge Ngoepe said it was encouraging that the views of the OTO were solicited on matters concerning tax and taxpayers’ rights. “We are confident that this Office is on the right path when it comes to improving the country’s tax system and we are satisfied that important role players in this sphere and the country as a whole have realised that. We will continue to engage stakeholders on numerous matters and we are open to providing inputs

on matters that will not only promote the work we do but also contribute to the overall goal of contributing to the betterment of the country’s tax administration system.”

Other prominent role players who attended the Tax Indaba were SARS Commissioner Tom Moyane, Head of the Davis Tax Committee Judge Dennis Davis and representatives of leading tax and financial bodies including the Law Society of Southern Africa, Chartered Institute of Management Accountants, Southern African Institute of Professional Accountants, SAIS and SAICA.

“It is important that we are part of discussions on pertinent tax matters, including tax recourse, so as to make desired inputs in the improvement of the country’s tax system.”

WE CONTINUE TO SERVE WITH EXCELLENCE

As a service to readers, Fair Play reports on three recent case studies involving taxpayer complaints against SARS and the steps taken to resolve these.

CASE 1

Facts

The taxpayer, a company, lodged an objection for the VAT period 01/2016 and also requested suspension of payment on 12 April 2016. SARS did not issue the outcome for the objection and suspension of payment, however, and continued with the collection processes, deducting an amount of R172 000.00.

On 14 July 2016, the taxpayer lodged a complaint with the SARS Complaints Management Office, complaining about the amount deducted and pointing out that they had objected and submitted the suspension of payment. SARS rejected the complaint and only sent the outcome letter of the objection.

Our intervention

Our investigation revealed that SARS issued the outcome of the objection on 25 July 2016 and, according to our records, there was no indication that SARS had made a decision regarding a request for suspension of payment; subsequent to that they continued with the collection steps.

The recommended remedy was that SARS should refund the VAT amount which was deducted, as no outcome of the application for suspension of payment was issued.

Lessons learnt

By wrongly issuing the third party appointment, SARS adversely affected the company financially, deducting R172 000.00 from the taxpayer's bank account and then taking too long to release the refund.

The ADR meeting was held on 8 June 2016 and it was agreed that once the penalty committee had dealt with penalties, the taxpayer would have to withdraw the appeal.

The SARS penalty committee remitted the penalties on 15 June 2016 as requested, and the taxpayer withdrew the appeal on 25 July 2016.

Lessons learnt

SARS should stick to the prescribed timeframe for finalising the ADR2 and the complaint.

CASE 3

Facts

The complainant submitted the 2014 income tax return together with the 2014 IRP5 certificate. SARS revised the 2014 assessment on 19 September 2014 to exclude the tax credit for the outstanding 2014 IRP5 certificate. This resulted in the cancellation of a refund of R6 300.00. The taxpayer's employer submitted the 2014 IRP5 certificate to SARS without the taxpayer's identity number and tax reference number, which made it difficult for SARS to locate the certificate on the PAYE system.

Our intervention

Our investigation revealed that the taxpayer submitted the 2014 income tax return with supporting documents on 21 August 2014. The taxpayer's employer reconciled the taxpayer's 2014 IRP5 certificate. However, SARS was unable to locate it on the PAYE data system. The complainant submitted the IRP5 from the employer and it was rejected by SARS. The complainant followed up numerous times with SARS. We noticed that the IRP5 submitted by the taxpayer and employer to SARS did not have an ID number, passport number and tax reference number, meaning that the IRP5 certificate could not be linked with the taxpayer concerned. However, we managed to locate the 2014 IRP5 certificate on the PAYE data system. We are of the view that this case raises a service issue since SARS did not check the IRP5 certificate on the system using a valid certificate number, which was in fact on the certificate submitted by the taxpayer.

Lessons learnt

SARS did not apply its mind when searching for the 2014 IRP5 certificate on the PAYE data system.

CASE 2

Facts

The taxpayer requested an appeal meeting with SARS for the VAT periods 2010/03, 2010/05 and 2010/09.

After submitting an appeal (ADR2) on 6 May 2015, the taxpayer requested feedback from SARS and on 26 January 2016 lodged a complaint, which was escalated together with the ADR2 to the coordinator for Alternative Dispute Resolution. We noticed that the 21 business days for SARS to finalise the complaint had lapsed.

Our intervention

We accepted the complaint and recommended that SARS gave the taxpayer feedback about the complaint sent on 26 January 2016 or facilitate the meeting on the ADR2.

Notice

This is a quarterly newsletter that is published every three months. The next issue will be out in the next quarter. We urge our readers and stakeholders to make inputs on any matter concerning this Office or tax issues. Your inputs could be in the form of comments or letters to the editor, and should be emailed to PSeopela@taxombud.gov.za or to InternalCommunications@taxombud.gov.za.

Copyright notice and disclaimer

The information provided in this document is protected by applicable intellectual property laws and may not be copied, distributed or modified for any purpose without the explicit consent of the Tax Ombud.

The information was correct at the time of publication but may have subsequently changed. This newsletter is for information purposes only and cannot be considered to be a legal reference. The use of this information by any person shall be entirely at that person's discretion. The Office of the Tax Ombud does not expressly or by implication represent, recommend or propose that services referred to in this document are appropriate to the needs of any particular person. The Tax Ombud does not accept any liability due to any loss, damages, costs and expenses, which may be sustained or incurred directly or indirectly as a result of any error or omission contained in this newsletter. The information does not supersede any legislation and readers who are in doubt regarding any aspect of the information displayed in the newsletter should refer to the relevant legislation, or seek a formal opinion from a suitably qualified individual.

 Contact Centre 0800 662 837  www.taxombud.gov.za  Office of the Tax Ombud

 @TaxOmbud  complaints@taxombud.gov.za