COMPLIANCE BEFORE COMPLAINTS
JUDGE’S CORNER

TAX OMBUD ANNUAL REPORT TABLED AND LAUNCHED

The Tax Ombud’s 2016/17 Annual Report has been tabled in Parliament and successfully launched in front of more than 200 stakeholders, including some of the sharpest tax brains in the country.

The launch, at the University of South Africa (Unisa) in Pretoria, was an opportunity to engage extensively with taxpayers, tax practitioners, Recognised Controlling Bodies (RCB), the South African Revenue Service (SARS) and other stakeholders. This “unpacking” and discussion of the report has become an annual event because it gives the Office a platform to offer our stakeholders insight into some of the pertinent issues covered. It also enables us to elicit important feedback on our performance and how we can make a more meaningful contribution to improving the country’s tax administration system, and thus improve taxpayers’ confidence in it.

This was the fourth report since the establishment of this institution and is quite large and detailed compared to the first three reports. This is not only because we have included our report on the investigation we made into delays in the payment of tax refunds, but also because we are doing much more now than we were doing in the past. It is a natural progression that as the organisation grows, both in size and number of people and matters dealt with, there is more to report on.

SIGNIFICANT PROGRESS DESPITE CHALLENGES

Despite facing some challenges in the execution of our mandate due to well-documented financial, legislative and systems constraints, we made significant progress in addressing several issues that we were unable to deal with in the past (through no fault of our own). This success is also recognised by our stakeholders, especially the taxpayers whom we assist on a daily basis, SARS and the Minister of Finance to whom I report.

In his foreword to the report, Minister Malusi Gigaba recognises the important role that the Office plays in the tax administration system, stating that the OTO “continued to fulfil its important role of affording thousands of our people an opportunity to be fairly heard on occasions where they have complaints against the South African Revenue Service (SARS). This will strengthen the confidence of taxpayers in our country’s tax system.” He added that he was also satisfied with the level of cooperation and the working relationship that existed between our institution and SARS.

I have said many times that the Office of the Tax Ombud is not an adversary of SARS but an arm of government established to assist SARS improve its services to taxpayers. Cooperation between the two institutions (although independent of each other), is paramount if we are to provide a service that taxpayers and the general public can trust and be proud of. Remember we are neither for SARS nor for taxpayers; we look at facts and make an impartial decision.

HIGHLIGHTS IN 2016/17

There were a number of objectives we set ourselves at the beginning of the 2016/17 financial year and I’m very pleased with what we achieved. We attended to three times the number of enquiries as in the previous year, travelled far and wide educating and engaging taxpayers and other stakeholders about what we do, and most importantly we facilitated several changes to the Tax Administration Act (TAA). These changes helped strengthen both our independence and mandate, enabling the Office to investigate systemic and emerging issues (with prior approval by the Minister); this is something that both the OTO and stakeholders have been calling for since our establishment.

FIRST HALF OF 2017/18

The first half of the current financial year ended on the last day of September, and when you think of it, 31 March 2018, when our fiscal ends, is not that far away. As we have done in the past, we started the year full of energy and driven by a desire to surpass the achievements of the previous year, and have managed to sustain that momentum. The highlight of the first half of the year was the review we conducted on alleged delays in the payment of tax refunds, which has been a major concern for taxpayers and tax practitioners since the inception of this Office. The Office thoroughly investigated the matter and produced a comprehensive report within a relatively short period of time.

INVESTIGATION INTO DELAYS IN THE PAYMENT OF TAX REFUNDS

The investigation was conducted in terms of section 16(1) (b) of the Tax Administration Act and the report was released to the public on 4 September 2017. The report, which is now an annexure to our recently tabled Annual Report, is a culmination of several extensive investigations and engagements with stakeholders (including Recognised Controlling Bodies and SARS). In the report, we reached
WE ARE HOPEFUL AND OPTIMISTIC

We are confident and optimistic that the remaining five months of the year will see us reaching a few more milestones in the work we do, ending the year with fulfilled objectives and even surpassing some of the goals set in our Annual Performance Plan (APP) 2017/18. In closing, I would like to thank all our stakeholders who participated in the many engagements we have had so far, as well as in the investigation into delays in the payment of tax refunds by SARS.

We also thank SARS Commissioner and his team for the continued operational support they are giving our Office, as with the resolution of taxpayers’ complaints.

TAX OMBUD
Judge Bernard Ngoepe

TAX OMBUD LAUNCHES THE 2016/17 ANNUAL REPORT

Tax Ombud Judge Bernard Ngoepe engaged some of the key players in the country’s tax sphere during the launch of the 2016/17 Annual Report at the University of South Africa (Unisa).

Judge Ngoepe, assisted by Chief Executive Officer Advocate Eric Mkhawane, gave an overview of the highlights and challenges as contained in the report. Advisor to Unisa Principal, Dr Somadoda Fikeni, then facilitated a high-level panel discussion. The participants were Advocate Eric Mkhawane, Chief Executive Officer in the Office of the Tax Ombud; Werner Uys, Unisa College of Accounting Sciences Senior Lecturer; Pieter Faber, Senior Executive Tax and Legislation at the South African Institute of Chartered Accountants (SAICA); Keith Engel, Chief Executive Officer of South African Institute of Tax Professionals (SAIT), and Mark Kingon, SARS Group Executive: Relationship Management.

Judge Ngoepe said the OTO had done reasonably well with limited resources (both financial and human) despite a substantial increase in demand for its services - with contacts to the Office increasing from 3 771 in the 2015/16 financial year to 12 470 in the 2016/17 year. He added that another outstanding achievement for the OTO was the investigation and the release of the report into delays in the payment of tax refunds by SARS.

The report showed that in many instances SARS’ reasons for withholding tax refunds were not justified. It should also be noted that the financial hardship to taxpayers caused by the delayed payment of refunds has been drastic in some instances, but what is also important is that the percentage of tax refunds not paid timeously, no matter how small it is, should never be used to justify unwarranted delays.

IN OTHER COMMENTS MADE DURING THE LAUNCH, JUDGE NGOEPE:

• Remarked that South Africa is ‘very lucky’ to have an Office of the Tax Ombud, which provides much-needed services to taxpayers and is an important component of the country’s tax administration system;
• Encouraged taxpayers to fulfil their tax obligations, and voiced his concerns over a growing trend in aggressive tax evasion practices;
• Urged SARS not to use a “skop and donner” approach but to be fair when dealing with taxpayers; and
• Voiced optimism that more amendments to the Tax Administration Act (in relation to the OTO) could be made in the near future.

“I would like to thank the university (Unisa), not just for providing us with a suitable platform to launch the Annual Report and engage our stakeholders, but for going the proverbial extra mile to assist us in the planning of the event and availing personnel and other resources to ensure the success of the event. The panellists who led the discussions are highly respected individuals with sharp minds and made the event intellectually stimulating; they helped address pertinent questions that our guests had, and I thank them very much for taking off time from their busy schedules to be part of this event,” - Judge Ngoepe

He commented that the Annual Report launch had given the OTO valuable insight into how it was performing and what needed improvement. “We know we are providing an important service for the country, not just because of the number of taxpayers approaching our office for assistance, but also from the direct engagements we have with taxpayers and stakeholders, such as those we had at this launch.”
JUDGE NGOEPE UNPACKS HIS TAX REFUNDS REPORT

Tax Ombud Judge Bernard Ngoepe used the recent Tax Indaba 2017 conference to unpack and discuss, with tax practitioners, accountants and other important role players in the tax sphere, his much talked-about report into delays in tax refund payments by the South African Revenue Service (SARS).

Together with his senior leadership team, including Chief Executive Officer Eric Mkhawane, Senior Manager: Legal Services Gert van Heerden and his Operations counterpart, Talitha Muade, Judge Ngoepe held a panel discussion and a question-and-answer session before dozens of stakeholders. Titled “Unpacking the Tax Ombud’s Report”, the discussion focused on the “Tax Ombud’s report on the investigation in terms of section 16(1)(b) of the Tax Administration Act 28 of 2011 into alleged delayed payment of refunds as a systemic and emerging issue”.

The discussion took place in front of more than 100 stakeholders attending the Tax Indaba 2017 at the Sandton Convention Centre in Johannesburg - an annual imbizo organised by the South African Institute of Tax Practitioners (SAIT) and aimed at bridging the gap between tax practitioners, corporate tax advisors and regulators.

Judge Ngoepe expressed serious concerns about SARS’ conduct, concluding that delays in the payment of tax refunds by the revenue collector were in the most not justified and that the system did not “sufficiently protect taxpayers”. He reiterated his dissatisfaction with this as well as with attempts to justify delayed payments, stating that he believed “SARS could have acquitted themselves better”. He added that the financial hardships caused to taxpayers by delays in the payment of refunds was serious, even “drastic”, and that the problem had become “systemic”, a conclusion SARS disagreed with and described as “unfortunate”. On the other hand, Judge Ngoepe acknowledged that SARS had a serious challenge in dealing with fraud; however, this was not a legitimate reason for withholding verified refunds.

The report came about seven months after amendments to the tax legislation gave Judge Ngoepe powers (with prior approval by the Minister of Finance) to investigate systemic and emerging matters. The request to the Minister was prompted by numerous complaints from taxpayers and tax practitioners that the revenue collector was intentionally delaying paying tax refunds. This was, according to the complaints, allegedly done to help SARS meet its collection targets, a claim the revenue collector denied.

Complaints about delays in the payment of tax refunds peaked during the latter part of 2016 to March 2017; however, they have consistently been amongst the top types of complaints received by the Office since its establishment.

SOME OF THE FINAL REMARKS MADE BY THE TAX OMBUD IN THE REPORT INCLUDE:

- A number of complaints about undue delays in the payments of refunds were justified; the refunds could and should have been paid earlier. In such instances, no satisfactory explanations were given by SARS for the delays;
- Some of the mechanisms employed by SARS have justifiably given taxpayers the impression that SARS’ intention is, at least in some instances, to avoid parting with the money it should pay out;
- The financial hardship to taxpayers caused by the delayed payment of refunds has been drastic in some instances; how much the amount is does not matter;
- It is accepted that SARS is confronted with the problem of fraudulent refund claims. Some of the measures it puts in place should be understood in this context;
- Notwithstanding this, once verification/audit of the refund is completed, there should be no undue delay; yet illustrative cases show that this has been happening;
- It was commendable to pay out as many refunds as possible to taxpayers, as SARS says it did; however, that would be of no comfort to a taxpayer whose refund remains unpaid, and who may be enduring financial hardships; and
- The residual (non-paid) taxpayers may be of very high value, as indicated in the Report, whose payments, once made, would reduce the amount of tax collected over that particular period. It is therefore imperative that they be paid out timeously.

NB: FOR THE FULL REPORT, VISIT WWW.TAXOMBUD.GOV.ZA.
PART 3: DISPUTE RESOLUTION PROCEDURE

Gert van Heerden
Senior Legal Manager: Office of the Tax Ombud

REQUESTS FOR SUBSTANTIATING DOCUMENTS AND DECISIONS ON OBJECTIONS

In the previous issue we looked at how objections must be lodged, and discussed the difference between the validation of objections and decisions on them. In this issue we will address requests from SARS for substantiating documents and its decisions on objections.

REQUEST FOR SUBSTANTIATING DOCUMENTATION

If SARS finds that it needs more documents in order to apply its mind properly and make the correct decision, it may request further substantiating documents from the taxpayer. This request must be made within 30 days after the objection was delivered to SARS. The Rules do not make provision for a unilateral extension of this period, so if SARS does not make this request within 30 days it forfeits its right to request further documents. SARS may, however, before expiry of the initial 30-day period, request the taxpayer to grant an extension by agreement. If the taxpayer refuses, SARS may approach the tax court for an order granting it an extension.

The taxpayer must deliver the requested documents to SARS within 30 days after the request was delivered, but it can request SARS for an extension of a further period of 20 days if there are reasonable circumstances to do so. If SARS refuses the extension, the taxpayer also has the option to approach the tax court for an order granting an extension.

DECISION ON A VALID OBJECTION

THERE ARE THREE POSSIBLE DECISIONS THAT SARS CAN MAKE ON A VALID OBJECTION. IT CAN:

- Allow the objection, in which case the additional assessment will be revised in total to revert back to the original assessment;
- Disallow the objection, in which case the additional assessment remains as is and would then become subject to appeal; or
- Partially allow the objection, in which case the portion of the additional assessment that is allowed will be revised to revert back to the original assessment, while the portion disallowed will remain the same and be subject to appeal should the taxpayer still not agree with the result.

If SARS did not request further substantiating information as discussed above, it must notify the taxpayer of its decision within 60 days after a valid objection has been delivered. If SARS did request this information, however, it must notify the taxpayer of its decision within a set timeframe. This is 45 days after the delivery of the requested documents, or if the taxpayer ignored the request, 45 days after the day on which the period within which the documents should have been submitted lapsed.

SARS may unilaterally extend the period for making a decision by a maximum of 45 days, but only if it informs the taxpayer of that extension before the initial period lapses.

Once a taxpayer has lodged an objection that complies with the requirements set out in the Dispute Resolution Rules (the Rules) promulgated in terms of section 103 of the Tax Administration Act (the Act), the objection must be regarded as valid and SARS must attend to it.
WHAT IS NOT PERMISSIBLE
A COUPLE OF IMPORTANT OBSERVATIONS CAN BE MADE IN RELATION TO THE ABOVE AND WHICH THE OTO HAS COME ACROSS IN THE PAST, EITHER IN FORMAL COMPLAINTS OR IN GENERAL COMMENTS FROM TAX PRACTITIONERS:

a) Under the Rules, SARS is not allowed to use a request for substantiating documents as a delaying tactic. As an example, where the relevant SARS official realises that he/she is not going to be able to finalise an objection within 60 days after it has been submitted, he/she is not allowed to (on day 59) send a request for extension to the taxpayer purely to avoid being out of time. The SARS official will first have to reach an agreement with the taxpayer that the request can be made late, and then reach a second agreement for the extension to be granted. Otherwise the decision must be made based on the documents and information available or it will be out of time.

b) An extension to the period within which to make a decision on an objection cannot be used to remedy non-compliance with the Rules. If a SARS official is already out of time for finalising the objection, for instance, he/she is not allowed to simply send a notice of extension because that notice must have been sent before the period expired. Furthermore, if a SARS official has a backlog of objections, he/she cannot simply send an open-ended notice of extension to buy time to work through the backlog. The maximum extension possible is 45 days.

In the next edition we will briefly discuss the Notice of Appeal and Appeal Timeframes.

KNOW YOUR RIGHTS AS A SOUTH AFRICAN TAXPAYER

Below is a list (not comprehensive) of taxpayers’ rights and obligations that all taxpayers need to know, especially during the tax filing season. This will ensure that they do not fall foul of SARS and that they know when their rights as taxpayers are being trampled on.

1  THE RIGHT TO PRIVACY

The Constitution ensures the dignity of South African citizens and their right to live without undue invasion by the government or others. As a taxpayer, you have the right to expect any SARS inquiry, audit or enforcement action to comply with the privacy laws that protect all citizens.

2  THE RIGHT TO ACCESS INFORMATION

Every South African has the right to access any information held by the government. Discover the procedures you must follow to secure the information you need to exercise or protect your rights as a taxpayer.

3  THE RIGHT TO ADMINISTRATIVE JUSTICE

When SARS makes a decision about an administrative action that affects your tax affairs, you are entitled to insist on proper reasons for that decision. This allows you to make an informed decision on whether to pursue the tax matter or not.

4  THE RIGHT TO REMAIN SILENT

If you choose not to comply with the tax laws of the country, you may face criminal prosecution. SARS has extensive powers to gather information from taxpayers to ensure tax compliance.

5  THE RIGHT OF ACCESS TO COURTS

The Constitution grants everyone the right to have a dispute fairly resolved before a court of law. Prohibitive legal costs often prevent aggrieved taxpayers from exercising this right. Explore what alternative methods you can use to have a fair hearing on tax matters.

6  TAXPAYERS’ OBLIGATIONS

With the privilege of taxpayers’ rights comes certain obligations that taxpayers must fulfil. Failure to comply with your responsibilities as a taxpayer can result in financial penalties or a possible criminal conviction. Knowing your taxpayer obligations is as important as knowing your rights as a taxpayer.

This information was extracted from STREET SMART TAXPAYERS: A Practical Guide to Your Rights in South Africa 1st ed (Publisher Juta & Company (Pty) Ltd). www.juta.co.za
OTO WELCOMES NEW SYSTEMIC INVESTIGATOR SPECIALIST

We are pleased to introduce our newly appointed Systemic Investigator Specialist, Mr Sibusiso Thungo who joined us in October 2017. His new role includes identifying and investigating of systemic and emerging issues in terms of the Tax Administration Act (TAA), developing and implementing a practice that builds service delivery excellence and provides exceptional services to stakeholders and provides authoritative, specialist expertise and advice to both internal and external stakeholders.

Mr Thungo brings a wealth of tax industry experience to his new role, having worked in SARS where he held various positions over a nine-year period, including as Team Leader Audit within Enforcement Audit and Specialist Resource Development responsible for the Eastern Cape and KwaZulu-Natal. In 2015, He left SARS and joined the South African Institute of Professional Accountants (SAIPA) as a Tax Manager responsible for the institution’s Centre of Excellence. His responsibilities included being a managing editor for SAIPA Tax Professional Magazine, and contributing articles and opinion pieces on tax which were published in various media platforms. He also served as a Tax Facilitator for SAIPA’s FASSET funded Project Achiever Programme for aspiring Professional Accountants. He holds a Bachelor of Accounting degree (UKZN), Higher Diploma in Taxation (North-West University) and Master’s in Business Administration (MBA) from University of Bedfordshire (UK). In addition he holds the designation of Master Tax Practitioner (MTP) SA obtained from the South African Institute of Tax Professionals; he is currently busy with his PhD in Leadership.

CASE STUDIES

THE OFFICE OF THE TAX OMBUD CONTINUES TO EDUCATE TAXPAYERS AND TAX PRACTITIONERS ABOUT ITS MANDATE AND SERVICES, AND OFTEN USES EXAMPLES TO ILLUSTRATE THE TYPE OF COMPLAINTS RECEIVED AND HOW THEY ARE DEALT WITH AND RESOLVED. BELOW ARE TWO CASES RECEIVED AND RESOLVED AS THEY FALL WITHIN THE OTO MANDATE.

TAXPAYER COMPLAINT

The taxpayer lodged a complaint requesting SARS to release the income tax refund for the 2016 year of assessment.

REASON FOR ACCEPTING A COMPLAINT BY THE TAX OMBUD

An investigation by the OTO revealed that the income tax return was submitted to SARS on 22 November 2016. The revenue collector did not select the return for verification and thus there was no request for submission of supporting documents. The taxpayer visited a SARS branch on 29 December 2016 to update the banking details. SARS delayed paying the refund to the taxpayer without any communication or notice. A complaint was lodged with the Complaints Management Office (CMO) on 13 March 2017 but SARS CMO also failed to resolve the refund issue within the prescribed 21 business days. The taxpayer lodged a complaint with the Office of the Tax Ombud and an investigation revealed that the reason for the refund not being paid to the taxpayer was due to a “special stopper indicator set”. The complaint was accepted in terms of Section 18(4) as the taxpayer had exhausted the SARS internal complaints process.

RECOMMENDATION TO SARS

The Tax Ombud recommendation was forwarded to SARS for action on 20 July 2017, stating that the revenue collector should release the refund into the taxpayer’s bank account or communicate the reasons for not paying the refund.

RESOLUTION

SARS released a refund of R8 304.06 into the taxpayer’s bank account on 2 August 2017.
TAXPAYER COMPLAINT

The taxpayer lodged a complaint with regards to the objection lodged for the 2016 tax period and which was invalidated by SARS. Upon reviewing the complaint, it was established that the tax return for the 2016 period was selected for review. Thereafter, SARS added interest income that they allegedly received from third party data (bank A), creating a debt of R30 268.10 for the taxpayer. The taxpayer does not have any investments with Bank A but only a loan account, and interest accrued by bank A on the loan account was assessed by SARS as income to the taxpayer. The taxpayer then objected to the additional assessment as she did not receive or accrue any interest income in the 2016 tax period. SARS invalidated the objection, stating that: “The assessment has been checked and found to be correct. Code 3605 is correctly captured as per IRPS provided, code 4201 interest is as follows: First Rand Bank account xxxxxxxxxxx R27 / account xxxxxxxxxxx R18 732, African Bank account xxxxxxxxxxxx R84 377. Penalties are raised due to provisional status which is as a result of the interest captured.”

REASON FOR ACCEPTING THE COMPLAINT BY THE TAX OMBUD

The dispute resolution Rules promulgated under section 103 of the Tax Administration Act, 2011 clearly state instances where SARS can consider an objection as invalid, and these are under rule 7(2). Any invalidation that is made based on reasons other than those listed under Rule 7(2) is considered an incorrect invalidation. It also appears as if SARS looked into the merit of the matter and was therefore supposed to make a decision and not invalidate the objection.

The OTO accepted the complaint in terms of Section 18(5) of the Tax Administration Act, as an identified systemic issue. SARS incorrectly invalidated the objection (based on reasons other than those stated under Rule 7(2)).

RECOMMENDATION TO SARS

SARS was requested to withdraw a letter informing the taxpayer of the invalidation, make a decision on the objection and communicate the outcome to the taxpayer. This was done in order to allow the taxpayer to move to the next step in the dispute resolution process if necessary.

RESOLUTION

Upon receipt of our complaint and all the documents proving that the taxpayer never received or accrued interest income, SARS issued a revised assessment and excluded the interest income previously assessed. As result the prior assessed debit of R28 560.89 was reduced by R28 560.96 to a new credit of R0.07.

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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The OTO has a unique type of following, which includes tax practitioners, accountants, tax experts and journalists who use the platform to engage with the organisation on numerous tax-related matters. Follow the OTO on @TaxOmbud and be part of an important dialogue in the country on tax matters.