Keeping you up to date with the latest news

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JUDGE’S CORNER

WELCOME BACK
Best wishes for 2018. On behalf of the Office of the Tax Ombud, I would like to welcome you back after the break, hopefully feeling fully revitalised and ready to continue excelling.

THE FINAL PUSH
The 2017/18 financial year is almost over and there are just two months left for our organisation to complete the work outlined in our Annual Performance Plan 2017/18 and Strategic Plan 2017–2022. We are confident that by the end of March 2018 we shall be celebrating another successful year for the Office, having achieved and surpassed many of our goals.

We are also cognisant that the many successes we have enjoyed over the past 10 months were achieved with the support of our stakeholders. Thank you for the encouragement you have given us and for keeping us on our toes, thus enabling us to provide a service that makes a difference in the lives of taxpayers and improves the country’s tax administration system.

HUGE IMPACT IN PAST FEW YEARS
In the same vein, it should also be acknowledged that we are no longer a new institution as in just nine months’ time (1 October), we will be celebrating the fifth anniversary of our existence. The journey has not been easy but we are proud of the significant impact that we have made in the country’s tax administration system in just under five years, and confident of a brighter future in the country’s tax recourse sphere.

YOUR SUPPORT AND GUIDANCE
As we continue to strengthen our organisation and deal with the increasing demand for our services, we are very mindful that challenges will come our way, and we will then call on your continued support. Where we lag behind regarding our mandate, you will be there to vocally remind us of our duties and provide constructive criticism to put us back on track.

LET’S MAKE A DIFFERENCE TOGETHER
As we are all aware, the past few months have been socially and politically challenging for the country, and it will take extra effort from all of us to provide some much-needed relief to the poor and most vulnerable in our society. As the Office of the Tax Ombud, we will continue to do our utmost to protect the rights of taxpayers and maintain the balance between SARS’ powers and duties, and taxpayers’ rights and obligations. Let us all commit to playing an active role in improving our country and the quality of life of its people. I wish you all the best for 2018.

TAX OMBUD
Judge Bernard Ngoepe
EXHAUSTING SARS’ COMPLAINTS PROCESS

MPHO MASWANGANYE
Operations Specialist, Office of the Tax Ombud

A CHALLENGE FOR THE OTO

Many taxpayers are lodging complaints with the Office of Tax Ombud (OTO) without exhausting the South African Revenue Service (SARS) complaints processes in terms of section 18(4) of the Tax Administration Act 28 of 2011. SARS operates a complaints channel via its Complaints Management Office (CMO), which taxpayers may utilise to lodge a complaint if they are not happy with the way it dealt with their matters.

Exhausting SARS’s complaints processes means that the taxpayer or taxpayer representative must first have lodged a complaint with the SARS CMO before approaching the OTO. The main purpose of exhausting SARS’s complaints processes is to afford SARS an opportunity to resolve a complaint before approaching an external body (OTO) to assist in resolving the matter.

UNDER WHAT CIRCUMSTANCES MAY A TAXPAYER LODGE A COMPLAINT WITH THE CMO?

A taxpayer may lodge a complaint with the SARS CMO where there is an existing case within SARS that the revenue collector is failing to resolve. The complaint may be lodged via e-filing, the SARS contact centre or at any SARS branch, and the taxpayer will be issued with the case number.

Once a complaint has been lodged, the CMO has 21 business days to finalise it. Should the CMO fail to finalise the complaint within 21 days, the taxpayer may lodge a complaint with the OTO.

There are instances where the CMO may finalise the complaint lodged with them without resolving the matter, alternatively without resolving the matter to a taxpayer’s satisfaction, and under those circumstances the taxpayer may approach the OTO. When the CMO case is finalised, SARS must inform the taxpayer about the outcome in writing.

WHAT IF THE TAXPAYER IS STILL NOT HAPPY WITH THE CMO OUTCOME?

When the taxpayer or taxpayer representative is not satisfied with the CMO outcome, the OTO is the next available option. However, before taking the matter to the OTO, the taxpayer or representative will need to take into account any advice provided by SARS when finalising the matter.

For example, there are instances where the CMO will advise a taxpayer to update banking details so that SARS can release a refund. The taxpayer should then visit the nearest SARS branch and update the banking details as advised. Approaching OTO without acting on SARS’ advice will often not remedy the situation as the OTO will still advise the taxpayer to visit SARS and update banking details if this is necessary.

LODGING A COMPLAINT DIRECTLY WITH THE OTO

Taxpayers or their representatives are able to lodge a complaint directly with the OTO when there are compelling circumstances as provided by Section (18) (5) of the Tax Administration Act. There are three kinds of compelling circumstances.

a) Systemic matters
b) When exhausting the internal SARS complaints resolution mechanism will cause undue hardship; and

Below are examples of compelling circumstances:

- Delays in paying out tax refunds under circumstances listed in the Tax Ombud’s Annual Report 2016/17;
- Failure by SARS to adhere to dispute resolution rules;
- Taxpayers affected by employers’ noncompliance with legislation relating to IRPS certificates;
- Inconsistency by SARS in giving taxpayers timelines for finalisation of audits/verifications;
- Victims of identity theft being held liable for tax debts;
- Non-adherence by SARS to dispute resolution turnaround times;
- SARS’s failure to take information at its disposal into account;
- SARS taking collection steps when legally barred from doing so;
- Refunds paid into the wrong bank accounts;
- eFiling profile hijacking;
- Contradictory information contained in SARS’s standardised Dispute Resolution letters;
- Inability on the part of SARS to confirm correspondence was sent;
- Incorrect correspondence relating to the condonation of late filing of objections; and
- Raising assessments to offset tax credits, without a valid reason.

For more examples check the Tax Ombud Annual Report 2016/17 on www.taxombud.gov.za

ABOUT THE AUTHOR

Mpho Maswanganye is an Operational Specialist Complaints Resolution in the Office of the Tax Ombud and her academic qualifications include: B Juris degree (University of Johannesburg), LLB (University of South Africa), and is currently doing Practical Legal Studies with the University of Pretoria. She joined the Office of the Tax Ombud in April 2015 where her duties include analysing and investigating taxpayers’ tax complaints against SARS. Prior to joining the OTO, she worked for SARS for 11 years in different business units.
THE VERIFICATION OR AUDIT OF A TAXPAYER

There is a lot of confusion over what documents the South African Revenue Service (SARS) may request from taxpayers, and how many years it can go back in requesting such documents. This analysis provides an insight on SARS’ entitlement to request certain documents from taxpayers, as well as bridging the gap to fairness by empowering readers with knowledge of what can be considered as fair and unfair requests from SARS.

Following the submission during October 2017 of a return of income (the ITR12), a taxpayer received the request from SARS:

“Please furnish Retirement Annuity Fund contributions certificates from 2000 to 2016 tax years.”

The taxpayer of course felt that this request was unfair, because the taxpayer was under the impression that documents relevant to a return submitted should only be kept for a period of five years after the date of submission of the relevant return. This however raises an interesting aspect of tax administration and it is important that one takes notice of the law in this regard.

The first point is that SARS is, in terms of the Tax Administration Act, entitled to select a person for inspection or audit. SARS can select the person on the basis of any consideration relevant for the proper administration of a tax Act and this can include a random or a risk-assessment basis. This request was therefore a valid one and was issued by SARS as part of the review of the 2017 return of income.

In this instance the taxpayer made contributions to the retirement annuity fund in all of these years that exceeded the allowed limits and the excess was carried forward by SARS and duly reflected as such on the 2017 assessment issued to the taxpayer. Owing to a change in the legislation, when the limit increased to 27.5% of taxable income, the taxpayer was entitled to deduct a substantial part of the excess contributions made over the period to the fund in the 2017 year of assessment.

The request by SARS was therefore related to a deduction made by the taxpayer. The Tax Administration Act allows SARS to require the taxpayer to, within a reasonable period, submit relevant material (whether orally or in writing) that SARS requires. In terms of the definition in the Act, “relevant material” means any information, document or thing that in the opinion of SARS is foreseeably relevant for the administration of a tax Act.

Thus, SARS is entitled to request these documents and the taxpayer will have to respond. The taxpayer can of course indicate in the response that, due to the lapse of the five-year period, the taxpayer is no longer keeping these documents. It is also true that the taxpayer will have provided SARS with some of these documents in previous years.

What is important is that SARS must of course use the information to complete the review or, put differently, decide whether the taxpayer was entitled to make the deduction. If a SARS official determines that the deduction was incorrectly made, an additional assessment must be issued.

Where an audit identified potential adjustments of a material nature, SARS must provide the taxpayer with a document that includes the grounds for the proposed assessment. Unfortunately, the Act does not deal with the process to be followed by SARS where an additional assessment is to be issued following a review of the taxpayer. The taxpayer must therefore regularly check on the SARS e-filing system to see what happens after the submission of the relevant material. If an additional assessment was issued, the dispute process must be initiated.

Of course, as Judge Ponnan pointed out in the Pretoria East case, the “raising of an additional assessment must be based on proper grounds for believing that there is undeclared income or a claim for a deduction or allowance that is unjustified. It is only in this way that SARS can engage the taxpayer in an administratively fair manner, as it is obliged to do.”

And this is the important point. Taxpayers often find that SARS issued additional assessments that the taxpayer received no notice of. This, in my view, is administratively unfair and may well be a complaint that can be lodged with the office of the Tax Ombud.
PART 4
DISPUTE RESOLUTION

FUNDISWA NGQELENI
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NOTICE OF APPEAL AND APPEAL TIMEFRAMES
IN THE PREVIOUS ISSUE, WE LOOKED AT REQUESTS FROM SARS FOR SUBSTANTIATING DOCUMENTS AND DECISIONS ON OBJECTIONS. IN THIS ISSUE, WE WILL ADDRESS APPEALS AND APPEAL TIMEFRAMES.

As indicated in our previous issue, there are three possible decisions that SARS can make on a valid objection. These are:

• Allow the objection, in which case the additional assessment will be revised in total to revert back to the original assessment;
• 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 be in agreement with the decision; or
• Disallow the objection, in which case the additional assessment remains as is and would then become subject to appeal.

Once a decision is made:

• SARS must then notify the taxpayer of the decision;
• Provide a basis for the decision; and
• Provide the taxpayer with a summary of the procedures for appeal.

It is important to note that the rules do not require SARS to provide substantial reasons for the decision but only the basis for it. The rules also do not provide that a taxpayer may request substantial reasons. Where a partial allowance is given, it would be reasonable to expect SARS, at the very least, to specify which portion of the objection had been disallowed in order to provide the taxpayer with enough information to decide whether or not to appeal and exactly what to appeal against.

NOTICE OF APPEAL
The taxpayer may appeal against the decision to disallow or to partially allow an objection but may not appeal an objection that is allowed in full as that appeal would be invalid.

An appeal that does not comply with the form, manner and prescribed period is invalid.
The notice of appeal must:
• Be in the prescribed form;
• Specify the address at which the taxpayer will accept delivery of documents if the taxpayer is an e-filer;
• Specify in detail:
  — Which of the grounds of objection the taxpayer is appealing;
  — The grounds for disputing the decision on the objection;
  — Any new ground on which the taxpayer is appealing, but the new grounds may not constitute a new objection.
• Be signed by the taxpayer or its duly authorised representative; and
• Indicate whether or not the taxpayer wants to make use of the Alternative Dispute Resolution (ADR) procedure.

Different forms have been prescribed for different tax types. It is therefore of the utmost importance for the taxpayer to use the correct form, thus avoiding the appeal being invalidated. This is especially important in light of the limited period within which appeals may be submitted.

APPEAL TIMEFRAMES

The Notice of Appeal must be submitted within 30 days after the Notice of Partial Allowance/Disallowance was delivered to the taxpayer. The 30-day period may be extended by no more than:

21
DAYS IF REASONABLE CIRCUMSTANCES EXIST FOR THE DELAY; AND

45
DAYS IF EXCEPTIONAL CIRCUMSTANCES EXIST FOR THE DELAY.

To put it simply, SARS does not have discretion to entertain an appeal submitted more than 75 days after delivery of the Notice of Partial Allowance/Disallowance. Any appeal submitted after this timeframe is invalid.

However, the taxpayer may apply to the Tax Court for an order extending the period within which an appeal must be lodged.

It has been noted from the complaints lodged with the Office of the Tax Ombud that taxpayers and some tax practitioners do not understand or are not aware of the appeal timeframes or the fact that SARS does not have discretion to exercise after the expiry of 75 days. Furthermore, this Office cannot compel SARS to revise an assessment where a decision was made on objection and no appeal was filed by the taxpayer within the prescribed timeframes.

This Office may also not compel SARS to accept condonation reasons for late filing if SARS has considered those reasons and does not consider them to be either reasonable or exceptional depending on the number of days involved.

It is thus very important for taxpayers/tax practitioners to be mindful of the appeal timeframes as non-adherence to these may have dire financial implications. If it becomes clear that it will not be possible to meet the 30-day submission deadline for whatever reason, one can submit an application for an extension in terms of the Tax Administration Act and the Dispute Resolution Rules, prior to the expiry of the 30 days.

In our next issue, we will look at types of appeal forums, namely:
• Alternative Dispute Resolution (ADR);
• Tax Board; or
• Tax Court.

ABOUT THE AUTHOR

Fundiswa Ngqeleni is the Specialist: Legal at the Office of the Tax Ombud and her academic background includes the following: LLB (Walter Sisulu University of Technology), Higher Diploma in Tax Law (University of Johannesburg), Certificate in Mining Tax Law (University of Witwatersrand), Certificate in Business Rescue (University of South Africa), and a South African Customs Compliance Certificate (Skills Development Specialist). She Joined the Office of the Tax Ombud in October 2015 where her role includes providing specialist legal knowledge, advice and support on matters affecting business internally and externally. Previously she worked as a Legal Advisor for the South African Revenue Service (SARS), and Candidate Attorney for Legal Aid South Africa. Ngqeleni is also an Amakhwezi recipient, the prestigious employee reward and recognition programme of SARS.
TAXPAYER COMPLAINT

The complaint related to the 2017 income tax refund that was not paid out by SARS.

REASON FOR ACCEPTING A COMPLAINT

Taxpayer has not exhausted SARS’ internal complaints mechanisms but compelling circumstances exist.

The Office of Tax Ombud assessed the complaint and the following was established:

• The complaint is a procedural matter in relation to application of the tax Act by SARS.
• The 2017 return was selected for verification on 4 September 2017.
• The taxpayer submitted the supporting documents for verification on 10 October 2017.
• The verification case has not been allocated to an auditor and more than 30 business days have lapsed since the date when supporting documents were submitted.

In light of the above, the matter falls within the mandate of the Tax Ombud.

It was further established that the taxpayer had not exhausted the SARS internal complaints mechanisms but there were compelling circumstances as the matter raised systemic issues in terms of Section 18(5) of the Tax Administration Act. The identified systemic matter was SARS’ failure to allocate verification cases to auditors within the set timeframes.

Therefore, due to these compelling circumstances, the OTO accepted the matter.

RECOMMENDATION TO SARS

SARS should allocate the case to an auditor, finalise the verification and release the refunds if applicable.

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 complaint related to the taxpayer’s request for SARS to remit the penalties on the 2013 to 2015 years of assessment due to non-submission of the returns.

REASON FOR REJECTION

The matter is subject to an Objection and Appeal.

The OTO assessed the complaint and the following was established:

• The complaint was an administrative issue in relation to the application of a tax Act by SARS.
• The taxpayer was disputing the 2012 assessment, which was finalised on 6 September 2016.
• The returns for 2013 to 2015 were then submitted on 30 September 2016.
• The taxpayer indicated that the other returns could not be submitted until the 2012 return was finalised.
• A request for remission was made by the taxpayer and SARS granted this for 2011 and 2012; however, the request for 2013 to 2015 was disallowed.
• An objection against the SARS decision not to allow the remittance of the penalty was made on 27 November 2017, and SARS disallowed this request on 30 November 2017. A letter was issued, advising the taxpayer that he can lodge an appeal if not in agreement. The taxpayer has not done so.
In light of the above, the matter falls within the mandate of the Tax Ombud. In addition, the taxpayer was found not to have exhausted the SARS internal complaints mechanisms and there were no compelling circumstances for not doing so. Further, as the matter was subject to objection and appeal, the Tax Ombud did not have the authority to look into it.

RECOMMENDATION TO SARS

There were no recommendations to SARS since the OTO had rejected the matter. However, the taxpayer was advised to appeal against SARS’ decision to disallow the remittance of the penalties (as SARS had previously advised).