

FAIR PLAY

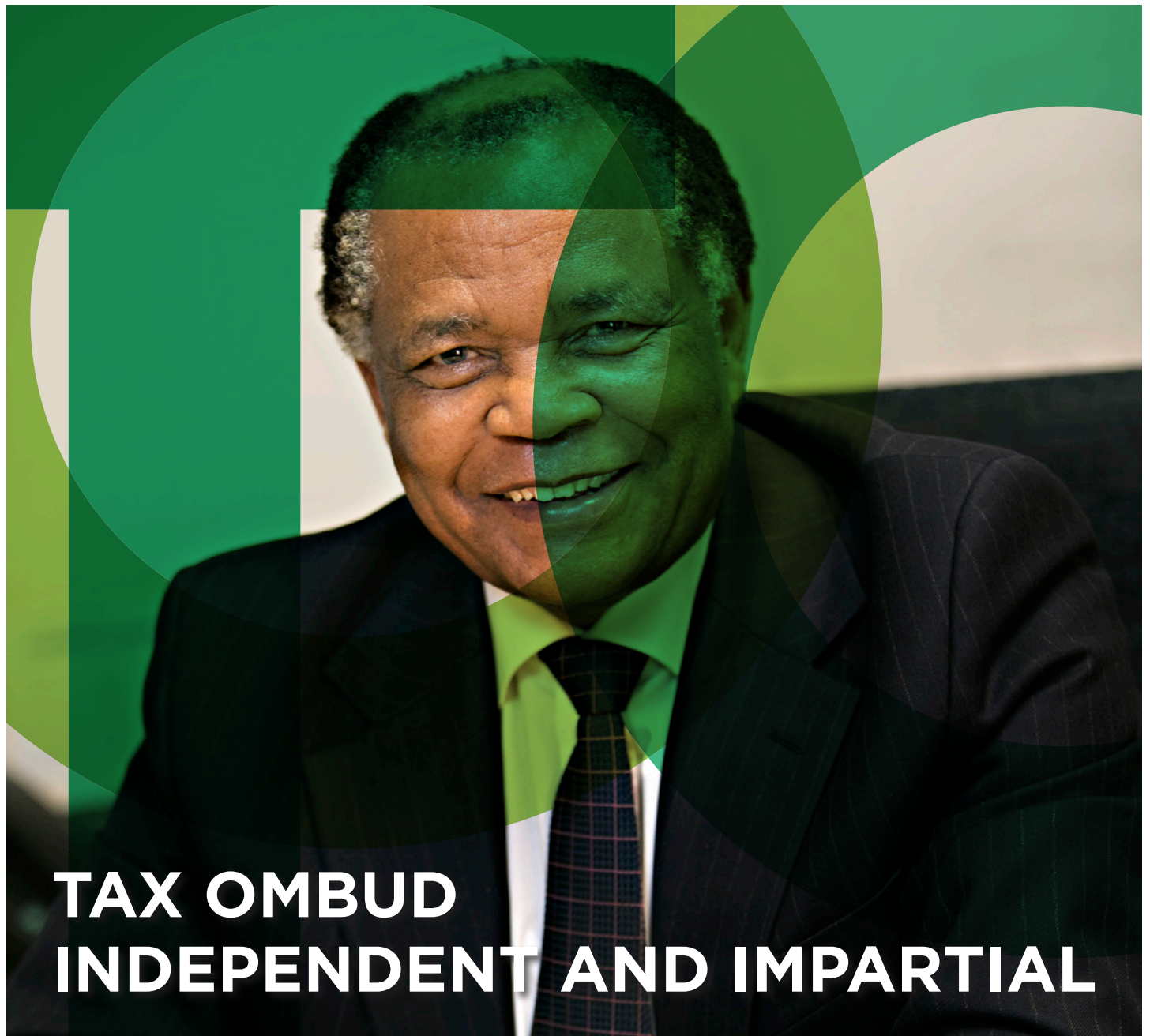
Keeping you up to date with the latest news ISSUE 8 - 2018



OFFICE OF THE
TAX OMBUD

Ensuring fairness

5 YEARS
OF FAIRNESS
2013 - 2018



TAX OMBUD INDEPENDENT AND IMPARTIAL

Page 1
JUDGE'S CORNER

Page 2
**FOCUS ON SYSTEMIC
INVESTIGATIONS**

Page 4
**TAXPAYER SURVEY
SET TO BEGIN**

Page 5
**PART 5: DISPUTE
RESOLUTION**

JUDGE'S CORNER

FIVE YEARS OF FAIRNESS

October 2018 will mark five years since the Office of the Tax Ombud was established and mandated to help resolve taxpayers' complaints against the South African Revenue Service (SARS). It is indeed a milestone as we celebrate five years of fairness and the pursuit of excellence, as well as triumphing over many challenges faced. We can no longer be described as a new organisation, although we are still a relatively young institution in the tax recourse sphere compared to the long-established Ombud offices of countries like Canada, Australia and the United States, on which our Office was benchmarked. We hope our achievements since our establishment could help motivate and provide direction to other countries on our continent to create similar institutions.

Although taxpayers and tax practitioners are the ultimate judges of our performance, we are proud to have made a contribution towards strengthening the country's tax administration system and to have had a positive influence on the process of amending the Tax Administration Act. We have planned a few activities that will mark the celebration of five years of making a difference in the lives of taxpayers and are also preparing to reveal plans to continue providing an independent, impartial and free avenue for resolving taxpayers' complaints against SARS.

MORE AMBITIOUS GOALS SET FOR 2018/19

How we plan to continue to be an influential voice in the tax recourse sphere and tax dialogue, is detailed in our Annual Performance Plan 2018/19 and Strategic Plan 2018-2023. These documents, which were recently tabled in Parliament, provide insights into our ambitious plans for the organisation and thus the impact we can have in promoting taxpayers' trust in tax administration. An important objective going forward is to continue strengthening the independence of the Office from SARS. Since our establishment, Recognised Controlling Bodies (RCBs), taxpayers and tax practitioners have repeatedly been calling for our institution to be fully independent of the revenue collector and to have our mandate strengthened. Now, members of Parliament, too, have joined the call for more independence for the OTO, and the recommendations of the Davis Tax Committee also state that we should have more powers and a strengthened mandate. While the latter is to be welcomed, some of the recommendations made, especially calling for our Office to represent taxpayers in court in their disputes with SARS, might compromise our impartiality as we are neither for SARS nor for taxpayers. We look at facts and base our recommendations on those; we do not take sides.

A SUITABLE INSTITUTIONAL MODEL

We have enlisted the Government Technical Advisory Centre (GTAC) to assist the Office to develop a business case for a cost-effective and independent organisational model. The project has three distinct phases, the first of which includes a feasibility study. This will focus on a situational analysis of the Office, an institutional options analysis, service delivery model and recommendations on a preferred option. The second phase will entail developing a business case with cost implications and a human resource model for the preferred option. The last phase will include the implementation plan and close-out report. This project is an important step towards building a fully independent Office of the Tax Ombud.

NEW TARGETS AND OBJECTIVES

It is important to note that we have revised our objectives in line with envisaged growth and demand for services and incorporated these into our Annual Performance Plan 2018/19 and Strategic Plan 2018-2023. Our human capital will be a crucial element of the Office's ability to meet escalating demands. For this reason, we have just completed an internal employee engagement survey that will provide insight into how engaged OTO employees are, as well as help the organisation to understand employees' perceptions about issues such as the overall work environment, individual performance recognition, management engagement, performance management and training opportunities. Our employees are very important and we will keep on engaging them to ensure that they are happy and work in a conducive environment so that they can continue to provide taxpayers with an excellent service.

We have also commenced a Complaints Time and Motion Study to evaluate the time aspect of investigating complaints received by the Office. This will entail determining how long it takes to perform each task of the process and setting standards against which to measure performance. This study will assist the Office to determine whether it is well capacitated to carry on its mandate. The study and many other important targets set in our performance and strategic plans are aimed at improving the efficiency of the Office to contribute towards improving the country's tax administration system.

I would like to take this opportunity to thank all stakeholders for the contributions made to the Office in the financial year that has just ended, and call for your continued support. Lastly we urge all citizens to demand excellence and accountability from our office, and to do the same with all organs of State and private businesses.

TAX OMBUD

Judge Bernard Ngoepe



FOCUS ON SYSTEMIC INVESTIGATIONS

FRANCOIS VILJOEN

Systemic Investigator: Office of the Tax Ombud



FRANCOIS VILJOEN

Specialist: Systemic Investigator

WHAT IS A SYSTEMIC INVESTIGATION?

In 2017, the Office of the Tax Ombud conducted its first-ever systemic investigation and issued a comprehensive report (*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 South African Revenue Service (SARS) was found wanting in many aspects regarding delays in the payment of tax refunds. While the report is quite comprehensive, many taxpayers are still in the dark as to what a systemic investigation is, and why it is so important that the Tax Ombud now has powers (with approval from the Minister of Finance) to initiate such investigations.

Section 16(1) of the Tax Administration Act spells out the Ombud's mandate as being to:

- a) Review and address any complaint by a taxpayer regarding a service matter or a procedural or administrative matter arising from the application of the provisions of a tax Act by SARS; and
- b) Review, at the request of the Minister or at the initiative of the Tax Ombud with the approval of the Minister, any systemic and emerging issue related to a service matter or the application of the provisions of the Tax Administration Act or procedural or administrative provisions of a tax Act.

At the moment there is no definition of a systemic investigation in terms of any of the South African tax Acts; however, a definition by S Baqwa (Public Protector 1995 – 2002) will be borrowed. He defined a systemic investigation as an investigation conducted as a result

of a sequence or spate of complaints against a particular office or authority which may be on more than one topic and embrace many or most of its activities. In addition, Australia's Telecommunications Industry Ombudsman and Financial Ombudsman Service define a systemic matter as a concern about a system, process or practice of a provider or providers that may or does affect a significant number or particular type of consumers" and "...an issue that will have an effect on people beyond the parties to a dispute", respectively. In light of these definitions, the following can be concluded: "A systemic issue for purposes of the Tax Ombud is any issue that can be regarded as the underlying cause for a complaint, which will affect a number of taxpayers in the tax system."

An example of a systemic investigation was the investigation that South Africa's Tax Ombud, Judge Bernard Ngoepe, conducted on alleged delayed payment of refunds by SARS.

After considering representations made by taxpayers, industry bodies and SARS, a final report pertaining to this investigation was released on 4 September 2017. This report identified 12 systemic issues that cause delays in the payment of refunds and made recommendations on how to resolve the underlying issues causing the delays. It is important to note that the issues identified in this report are very specific. Taxpayers' complaints about delayed refunds must fall within one of those categories to be regarded as systemic.

SYSTEMIC ISSUES IDENTIFIED BY THE OTO

In addition to delays in payment of refunds, other systemic issues previously identified by the OTO based on complaints received include:

1. Refunds paid into the wrong bank accounts;
2. Non-adherence by SARS to dispute resolution turnaround times;
3. Taxpayers being affected by employers' non-compliance with legislation relating to IRP5 reconciliations;
4. SARS escalations and complaint management procedures confusing taxpayers and SARS staff failing to inform taxpayers of the correct procedure for lodging complaints (also called "numerous follow-ups"). This systemic issue excludes situations where taxpayers are represented by tax professionals;
5. Dispute resolution eFiling/system issues, such as system errors that block the taxpayer from amending the amounts in dispute;
6. Dispute resolution objection issues, involving problems with source codes or system issues/problems;
7. Special investigations, where no updates or communication is provided to taxpayers;
8. Contradictory information contained in SARS's standardised letters;
9. Incorrect invalidation of objections;
10. Inability of SARS to confirm correspondence was sent;
11. Incorrect correspondence relating to condonation of late filing of objections;
12. Taking collection steps without taking into account a request for suspension of payment;
13. Raising assessments to set off tax credits, without a valid reason;
14. Non-adherence to legislative requirements in respect of a Final Demand/Third Party Appointment in terms of section 179(5) of the Tax Administration Act;
15. Delays in eFiling profile transfer between tax practitioners due to system errors (for example, SARS advised a taxpayer that it was waiting for the system developer to fix a system); and
16. Failure to allocate cases referred for an audit to auditors within the turnaround time.

SYSTEMIC ISSUES AND COMPELLING CIRCUMSTANCES

In reviewing a complaint, the Office of the Tax Ombud should consider if there are compelling circumstances. In terms of section 18(5)(a) of the Act, one of these considerations should be if the request raises a systemic issue.

If the request raises a systemic issue, there is no need for a taxpayer

to lodge a complaint with the SARS Complaints Management Office (CMO); however, it is still a requirement for the taxpayer to approach SARS to resolve the matter. The OTO will therefore review the complaint to ensure that it falls within one of the systemic categories listed above.

EXPERT'S CORNER

PATRICIA WILLIAMS

TAX DISPUTE RESOLUTION EXPERT, BOWMAN

SARS CANNOT COLLECT IF IT FOLLOWED IMPROPER PROCESS

There is trepidation about the “pay now, argue later” rule if SARS has assessed you without following proper processes. This article provides insight on taxpayers’ obligations as well as SARS’s powers and duties.

COMPLIANCE WITH PROPER PROCESSES

It is very important to know your obligations as a taxpayer. For one thing, if one does not follow the proper processes, it is quite possible to lose one’s rights. For example, if you use the wrong form, or are late in submitting your objection, it is possible that you might lose your right to object.

However, SARS is also obliged to follow the proper processes, and in certain circumstances, a court may find for the taxpayer, on grounds of SARS not following due process. When it comes to assessments, SARS is supposed to:

- Let you know if you are being audited.
- Give you a “letter of findings” and a chance to respond before issuing an assessment. (This is in terms of section 42 of the Tax Administration Act, but is also required in terms of section 3 of the Promotion of Administrative Justice Act.)
- Issue you with a proper notice of assessment, including explaining the grounds for the assessment.

If SARS does not comply with these processes, either SARS’s assessments may be set aside entirely, or SARS may find itself unable to collect until the merits of the matter have been properly attended to.

‘PAY NOW, ARGUE LATER’ RULE

Most of us are aware of the “pay now, argue later” rule. This provides that taxpayers must generally pay the assessed taxes, even if the taxpayer disputes that it owes the amount in question. This is subject to the right of a taxpayer to apply for a so-called “suspension” of the obligation to make payment, in terms of section 164 of the Tax Administration Act.

CONCLUSION

If SARS does not follow proper process when issuing an assessment, you should generally still object in the normal manner, and apply for a “suspension”. In your suspension application, you should explain how SARS failed to follow proper process, together with your

submission that SARS should not be allowed to collect the taxes improperly assessed. Then, reference the above three cases, so that SARS properly understands the legal basis for its inability to collect the disputed tax that has been improperly assessed.



PATRICIA WILLIAMS

Tax Dispute Resolution Expert, Bowman

While section 164 sets out important factors that should be included in the application for a suspension, any non-compliance by SARS with proper processes is a further critical factor that should be set out in your suspension application.

REFERENCE THESE CASES IN YOUR SUSPENSION APPLICATION

The following three cases relate to the court’s conclusion that SARS cannot take collection steps where it has not followed proper processes in issuing an assessment:

- In a recent tax case, *IT13726*, the entire assessment was reversed by the court because SARS did not meet the requirements of section 42 of the Tax Administration Act. SARS had failed to inform the taxpayer that he was subject to audit, and had failed to give the taxpayer a letter of findings and a chance to respond before issuing the assessment.
- *In A Way To Explore v C: SARS*, SARS issued an assessment as part of a verification process, without issuing a letter of findings and giving the taxpayer a chance to respond in accordance with section 42 of the Tax Administration Act. SARS then purported to apply set-off in order to satisfy the VAT owing by the taxpayer in terms of this assessment. The court barred this, as SARS’s attempt to collect the debt before the taxpayer’s lodged objection had been processed and answered was contrary to legislation and the Constitution. The court concluded that SARS cannot collect on debts if it has not performed properly in raising the relevant assessments.
- *In Nondabula v C: SARS*, SARS issued an assessment without explaining the grounds for the assessment (as required by section 96 of the Tax Administration Act). The court found that SARS’s action was contrary to both the relevant tax legislation and the values enshrined in the Constitution. As a result, SARS was not entitled to enforce payment based on this unlawfully issued assessment.

TAXPAYER SURVEY SET TO BEGIN

A new survey is in the pipeline to determine the levels of awareness about the Office of the Tax Ombud among South African taxpayers and tax practitioners, as well as their perceptions of the OTO.

The Office has appointed a service provider, Consulta, to conduct the survey, with the main objectives of determining levels of awareness of the OTO as a whole, understanding the public's perceptions of its role and understanding awareness around the scope of services offered. The survey will also seek to establish the brand persona of the Tax Ombud, referring to how approachable the organisation is seen to be, the positioning of the Tax Ombud's "brand" within the minds of the public, and specific brand associations.

OTO Senior Manager Communications and Outreach Ms Pearl Seopela said: "The Office receives informal feedback on its services on an ad hoc basis. A taxpayers' awareness survey will enable us to gain a more accurate sense of how best to engage our target market, and what channels would give us the most reach. The results will enable us to gauge levels of brand recognition among taxpayers and indicate to the best way to improve our service."



PEARL SEOPELA
Senior Manager: Communications and Outreach

ENGAGEMENTS WITH STAKEHOLDERS INTENSIFY

The Office of the Tax Ombud is intensifying its outreach campaign by engaging with stakeholders from different industries and seeking out opportunities to raise awareness about its services among taxpayers and the public.

In addition to engaging with health professionals at six hospitals in Limpopo and Gauteng in March, the OTO has also used several events in Gauteng to help educate taxpayers about the free and impartial services offered.



Office of the Tax Ombud taking its services to the health professionals at hospitals in Lebowakgomo, Pholongsong and Groblersdal.

PART 5

DISPUTE RESOLUTION



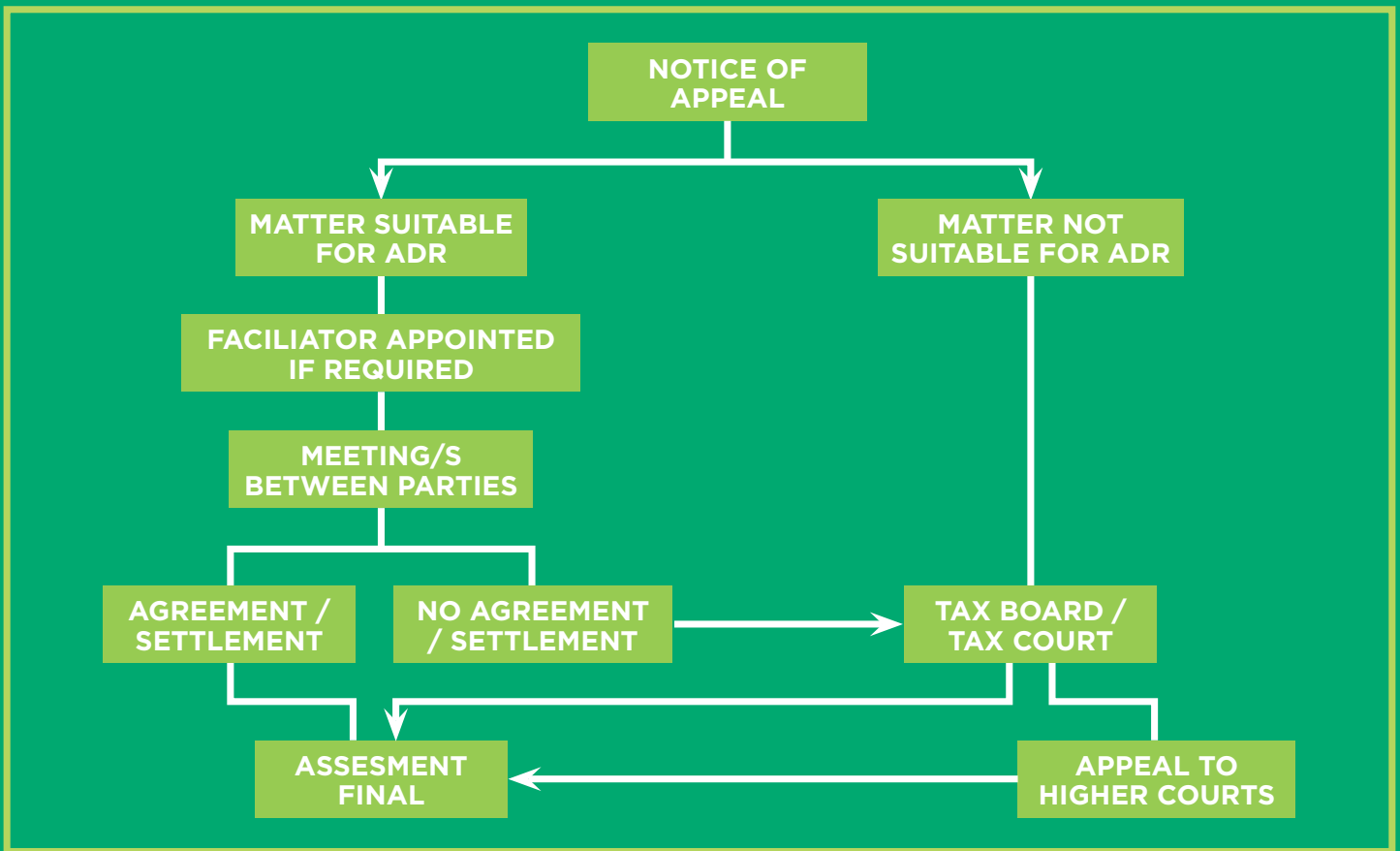
BY FUNDISWA NGQELENI

IN THE PREVIOUS ISSUE, WE ADDRESSED APPEALS AND APPEAL TIMEFRAMES. IN THIS ISSUE, WE ADDRESS TYPES OF APPEAL FORUMS.

Appeals and appeal forums are a crucial part of dispute resolution between a taxpayer and SARS.

TYPES OF APPEAL FORUMS

The alternative dispute resolution (ADR) process as per the SARS Dispute Resolution Guide can be summarised as follows:



If a taxpayer is unhappy with the decision made on the objection, a taxpayer may note an appeal and that appeal can be referred to:

- Alternative Dispute Resolution (ADR);
- Tax Board; or
- Tax Court.

ADR

Instead of referring the matter to the Tax Court, the taxpayer may decide to refer the matter to ADR, which often results in the matter being resolved. The purpose of ADR is to reach an agreement without spending money and time on formal court proceedings.

A senior SARS official must set up a list of ADR facilitators and a person included on the list may be a SARS official. The facilitator must act independently and facilitate settlement discussions between

the parties. The facilitator must consult with the taxpayer and SARS within 20 days of appointment and determine a place, date and time for the hearing. In instances where no facilitator is appointed, the taxpayer and SARS must, within 30 days, determine a place, date and time at which the parties are to convene the ADR meeting.

A facilitator can make a recommendation but has no authority to make binding findings. Any recommendation made by the facilitator is not admissible in any subsequent court proceedings unless required by the Tax Court for determination of an award of costs. Where a SARS official is the facilitator, they should not have any prior involvement in the matter. The discussions in the ADR meeting cannot be used in subsequent Tax Board or Tax Court proceedings, as the taxpayer who makes use of ADR does so with full reservation of their respective rights.

An appeal can only be referred to ADR by agreement between the parties. SARS is obliged to notify the taxpayer within 30 days after receipt of the Notice of Appeal/ADR2 (types of forms taxpayers complete to note an appeal) whether or not the matter is suitable for ADR. Where the taxpayer elects to use the ADR proceedings, they are regarded as having accepted the terms of ADR. If the taxpayer did not elect ADR on the NOA/ADR2 form, the taxpayer must, within 30 days after receipt of the notice that the matter is suitable for ADR, notify SARS that they agree.

SARS must finalise the ADR within 90 days of the date on which the agreement to refer the matter to ADR has been communicated to the taxpayer. The 90-day period may be extended before expiry of an agreement between the parties.

The facilitator may instantly terminate the ADR proceedings if a party fails to attend the ADR meeting; if a party fails to furnish information requested by the other party; or if the facilitator is of the opinion that the matter cannot be resolved through the ADR proceedings. If the 90-day period is not extended, the ADR will automatically be terminated on the day after lapse, or for any other appropriate reason. After the ADR proceedings have terminated the taxpayer must, if the appeal is to the Tax Board, within 20 days after termination request the clerk of the Tax Board to set the matter down. Where the appeal is to the Tax Court, the taxpayer must give notice to SARS that they want to refer the matter to the Tax Court.

“In the event that the taxpayer does not notify SARS of their intention to proceed to the Tax Board or Tax Court, SARS can only finalise the appeal by obtaining a default judgement against the taxpayer.”

TAX BOARD

After receiving the request from the taxpayer to proceed with the matter to the Tax Board, the clerk must set down the matter for hearing within 30 days of receiving the request from the taxpayer. The clerk must then provide at least 20 days' written notice of the date, time and place of the hearing. The Chairperson of the Tax Board is an independent person appointed by SARS. If either the taxpayer or SARS requires a person to attend the proceedings, or where the Tax Board directs, a subpoena may be issued by the clerk requiring a person to attend the hearing to either give evidence or to produce a document which that person either possesses or has under their control and which is relevant to the matter.

The clerk must prepare and deliver a dossier to the Chairperson and the parties at least 10 days before the matter is heard or as otherwise agreed by the parties. Both parties must present their cases to the Chairperson who will then make a binding finding. The clerk must then deliver a copy of the Tax Board's decision to both parties within 10 days of receipt of the decision. Where the decision was in the taxpayer's favour and does not proceed to the Tax Court, SARS is obliged to issue an assessment to give effect to the decision of the

Tax Board within a period of 45 days after delivery of a copy of the Tax Board's decision by the clerk. In an instance where the matter is being referred to the Tax Court, the party that wishes to have the matter referred to the Tax Court must file a notice with the clerk requesting a referral and a copy must be delivered to the other party. This notice must be delivered within 21 days or the period extended, should the application for an extension have been granted.

TAX COURT

It is a formal court sitting where a presiding officer is an independent person. SARS is obliged to file a statement containing its grounds of assessment. The statement has to set out the grounds of the disputed assessment, as well as which facts or legal grounds in the taxpayer's notice of appeal SARS admits and which are opposed. Once the taxpayer has received the statement, the taxpayer has to deliver a statement of grounds of appeal within 45 days after delivery of SARS's statement or after the discovery of documents by SARS. The taxpayer must also detail their grounds of appeal, and state which facts or legal grounds are admitted or which are opposed. The taxpayer is prohibited from introducing new grounds of appeal that constitute a new ground of objection. In the same way, SARS is prohibited from introducing a ground which constitutes a novation of the whole or factual legal basis of the disputed assessment, or which requires the issue of a revised assessment. The parties are then required to make discovery of documents. Once the documents have been delivered, the production or inspection of the documents must take place at a venue and in a manner to which the parties agree. If a document is not disclosed in the discovery affidavit, it may not be used in the appeal by the party who failed to discover the document, unless the Tax Court orders otherwise.

After the discovery of documents, a pre-trial conference has to take place. The taxpayer is required to apply to the Registrar of the Tax Court for a date of hearing of the appeal by the Tax Court within 30 days of delivery of the statement of grounds of appeal. Should the taxpayer not apply for the court date within the time allowed, SARS must then apply for a hearing date within 30 days after the period referred to above elapses. The Registrar of the Tax Court then sets the matter down for a hearing by the Tax Court. The Registrar must supply a notice 80 days before the date on which the matter is to be heard. This notice must indicate the time and place of hearing of the matter. SARS, in turn, must collate a dossier for the Tax Court and submit it 30 days before the hearing.

During the hearing, both parties present their cases to the Presiding Officer who makes a binding finding in the form of a judgment. The Registrar must by notice deliver the written judgment of the Tax Court to the parties within 21 days of delivery of the judgment.

It is important to note that these two forums are governed by their own procedures and there are remedies available to a taxpayer if SARS does not comply and therefore OTO does not have the mandate to attend to complaints relating thereto.

This article is drafted in accordance with the Rules as promulgated under section 103 of the Tax Administration Act, No 28 of 2011.

OTO CASE STUDIES

BACKGROUND

The complainant is an income taxpayer for whom an original assessment was issued that resulted in a tax debt. The debt was not paid in time and SARS issued a final demand. Shortly after being issued with the final demand, SARS raised an additional assessment that increased the tax debt. The complainant paid the full outstanding tax debt, including the amount raised on the additional assessment, which reduced the tax account to zero. After receipt of the payment, SARS issued a Third Party Appointment (TPA) to the complainant's bank

instructing it to pay all funds available in the complainant's bank account over to SARS in satisfaction of the tax debt. SARS specified the amount of the tax debt on the TPA as the total amount inclusive of the additional assessment raised. The bank obliged and paid a large amount over to SARS, leaving very little funds in the account for the complainant to utilise. The complaint was lodged on urgent basis with the OTO.

FINDINGS

SARS erred in the following ways:

- It instituted collection steps on an account where there was no tax debt;
- It included an amount in the TPA for which no final demand had been issued as required by s179 of the Tax Administration Act; and
- It included an amount in the TPA that was not due and payable yet.

RESOLUTION

Based on the recommendations made by the Tax Ombud to SARS, the amount withdrawn from the complainant's account was refunded with an apology within days of the complaint being referred by the OTO.



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.

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.

FOLLOW US ON SOCIAL MEDIA

Follow the OTO on  @TaxOmbud,  Office of the Tax Ombud and  taxombudsa, and be part of an important dialogue in the country on tax matters.