

**REPORT ON**

## **TAX ADMINISTRATION**

**FOR THE MINISTER OF FINANCE**

Intended use of this document:

*The Davis Tax Committee is advisory in nature and makes recommendations to the Minister of Finance. The Minister will take into account the report and recommendations and will make any appropriate announcements as part of the normal budget and legislative processes.*

*As with all tax policy proposals, these proposals will be subject to the normal consultative processes and Parliamentary oversight once announced by the Minister.*



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**THE DAVIS TAX COMMITTEE**


September 2017

## Dear Minister

We, as the Members of the Davis Tax Committee, have the honour and privilege to provide you with this report which has been:

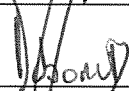
### Prepared by:

Judge Dennis Davis (Chairperson)

  
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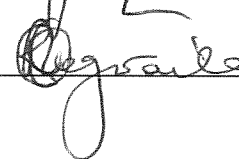
12 October 2017

Professor Deborah Tickle

  
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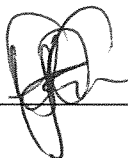
Professor Thabo Legwaila

  
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12 October 2017

### Reviewed and supported by:

Professor Annet Oguttu

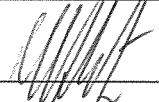
  
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**And the Secretariat for the Davis Tax Committee**

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## Introduction

1. On 29 July 2016, the Davis Tax Committee (the Committee) received the following additional terms of reference from the Minister of Finance:
  - “1) *Inquire whether the government and accountability model for SARS as set out in the report of the Katz Commission of inquiry remains appropriate for South Africa in 2016 and make proposals on an appropriate governance and accountability model;*
  - 2) *Inquire whether the present structure and operations of SARS is congruent with the detailed tax policy recommendations the Committee has made to date, including SARS’ ability to deal with the various base erosion and profit shifting (BEPS) proposals, assistance for small and medium, enterprises (SME’s) and the present structures regarding the collection of corporate tax and tax on high net worth individuals;*
  - 3) *Evaluate the current mechanisms within SARS to deal with illicit flows from tax and customs perspective, and the relevance of current model of integrating both taxation and customs activities, rather than splitting them. In so fulfilling this part of its investigation, the subcommittee will examine past responses by SARS to deal with this problem as well as considering the extent to which models adopted by other national tax authorities may be appropriate.”*
2. This report deals with specific issues relating to the administration of tax in South Africa and accordingly its implications for the structure, operation and practice of the South African Revenue Service (SARS). Not only is the optimum level of efficiency and accountability in all SARS operations vital to the maximisation of tax collection but, failure to achieve optimum performance, affects the State’s ability to capacitate millions of poor people.
3. The topics which are covered by the report are the structure of the SARS and the law relating to its governance, SARS’ challenge in dealing with base erosion and profit shifting (BEPS) as well as the treatment of high net worth individuals (HNWIs). These latter two topics have been chosen because of their profound importance for the efficacious administration of taxation in South Africa.

4. One of the mandates of this committee is to provide recommendations on how to address BEPS concerns from a South African perspective. Having delivered a comprehensive report in this regard, the committee was of the view that it was also necessary to deal with the challenges posed to SARS in administering a response to the problems of base erosion and profit shifting. Similarly, as SARS indicated to the committee, 'not enough has been done to deal not only with BEPS but also with high net worth individuals', the committee is of the view that an examination of SARS' record in this regard and the challenges posed to tax administration by the taxation of high net worth individuals was an important component of any examination of tax administration.
5. The balance of this report deals with the protection which must be afforded to taxpayers; that is the balancing of the powers and rights of SARS against those of taxpayers. For this reason, this report deals with an issue of growing concern to many tax jurisdictions, namely the need to include, within the relevant legislative framework, a taxpayers' Bill of Rights and the further extent to whether the existing institution designed to protect taxpayers, namely the office of the Tax Ombud has sufficient powers and resources to meet the objectives which have been set for the office.
6. One overarching issue which emerges from this inquiry is the need to examine all the relevant legislation affecting the running of SARS, which together are fundamental to the invariably delicate relationship between SARS and the taxpayer. For this reason the committee considers that a separate inquiry is required to examine the interrelationship between:
  - 1) The Constitution of the Republic of South African Act 108 of 1996
  - 2) The Public Finance Management Act 1 of 1999
  - 3) The South African Revenue Service Act 34 of 1997
  - 4) The Tax Administration Act 28 of 2011
  - 5) Customs Duty Act 30 of 2014

The object of this study would be to ensure;

- 1) that this legislation fits together and that no one piece of legislation is incongruent with another; and
  - 2) that read together this legislation prompted optimum levels of good governance in SARS
7. This report has not dealt with the administration of small and medium sized enterprises, for these entities were examined fully in earlier reports published by the Committee on its website [www.taxcom.org.za](http://www.taxcom.org.za) . However, we do note that traditional measures of encouraging registration among SME's have not met with great success. SARS should investigate possible alternative solutions to ensuring greater registration including, for example, the interrogation of bank account balances.

## Chapter 1: Governance

### The structure of the South African Revenue Service

Taxation by its very nature, imposes obligations upon taxpayers. For this reason, the arm of the State which administers tax collection, namely the South African Revenue Service, must fastidiously comply with the key values enshrined in the Republic of South Africa's Constitution (Act No. 108 of 1996), namely accountability to the public it serves to the widest extent possible, given its mandate and adherence to transparency of operation.

1. For this reason the first interim report the Katz Commission devoted considerable attention to the then existing structure of the Revenue Service. At the time of the Katz Commission's investigation, Inland Revenue was a branch of the Department of Finance headed by the Commissioner for Inland Revenue and for Customs and Excise who enjoyed the same status as a Deputy Director-General. At the time, the Inland Revenue Department comprised five sub-branches, namely operations, value added tax, tax policy department, law administration and operational control.

2. The Katz Commission noted that it had received numerous submissions to the effect that 'tax administration in South Africa is weakened by an outdated management structure an on-going attrition of qualified staff and the inflexibility of public sector personnel administration'.<sup>1</sup> Accordingly 'it favours a decisive break with the present status and organisation of the offices of the Commissioners for Inland Revenue and Customs and Excise'.<sup>2</sup> In recommending, the restructuring of the Revenue department into an independent entity, the Katz Commission recommended that the this transformation of tax administration in South Africa should be based on a set of broad principles, being:

- (a) independence of the revenues authorities, including responsibility for their own budgetary allocation and control, administrative policies and objectives, and recruitment, training, remuneration and codes of conduct for personnel;*
- (b) oversight by statutory boards responsible for Inland Revenue and Customs and Excise, appointed by and answerable to Parliament through the Minister of Finance;*

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<sup>1</sup> para 3.4.4 of the first interim report

<sup>2</sup> para 3.4.7

- (c) maintenance of unified Inland Revenue and Customs and Excise departments, with responsibility both to the national and provincial governments for all aspects of tax collection; and*
- (d) contracting out, where appropriate, of certain administrative functions, such as computer services, warehousing of documentation and customs merchandise, printing and distribution of tax returns and notices, preparation of tax manuals and documentation and collection of minor taxes.<sup>3</sup>*

3. The Katz Commission went on to suggest that the oversight function by a proposed statutory board should ensure that the board would have a series of broad responsibilities and powers including:

- (a) ensuring that tax laws are enforced with the highest degree of integrity;*
- (b) ensuring that revenue departments coordinate and share information where appropriate;*
- (c) establishment of an overall pay and job classification structure;*
- (d) provision of guidance in internal resource allocation;*
- (e) ensuring that appropriate personnel and programme management practices are in place;*
- (f) recommending legislative and other changes needed in the interest of improved tax administration to the Minister of Finance;*
- (g) establishment of an internal audit function within the tax administration;*
- (h) provision of revenue estimates on existing and proposed tax measures to the Minister of Finance; and*
- (i) establishment of a written code of conduct for employees of revenue departments and the board.*

4. In making these recommendations the Commission emphasised that its proposals for, a revamped tax administration should not “detract” from the “full responsibility” of the Minister of Finance and of Parliament for fiscal and tax policy making. It emphasised that legislation which would establish a new Revenue Service ‘should ensure the access of the Minister and the Department of Finance to such information on tax issues as maybe needed for macroeconomic and planning purposes’. Membership of the proposed boards of Inland

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<sup>3</sup> para 3.13.0



Revenue and Customs and Excise should comprise of no more than six senior civil servants with full time executive responsibility for revenue administration.<sup>4</sup>

5. In justifying these changes, the Katz Commission noted that the Commissioner for Inland Revenue and the Commissioner for Customs and Excise 'must have the ability, flexibility and freedom to employ competent and experienced staff and to use suitable equipment, facilities and buildings which are inherent in a modern tax administration. Of critical importance is not so much the number of staff which must be employed by the revenue authorities but their levels of skill and experience'.<sup>5</sup>

6. Government acted on these recommendations, pursuant to which the South African Revenue Service Act 34 of 1997 ("SARS Act") was passed to create the South African Revenue Service ("SARS") as an organ of State within the public administration but as an institution which fell outside the public service and which was designed for the purpose of collecting revenue and administering the tax laws in South Africa. Thus section 3 of the SARS Act provides that SARS objectives is the efficient and the effective collection of revenue as well as the control over the import, export, manufacture, movement, storage or use of certain goods. The legislation consolidated the offices of the Commissioner of Inland Revenue and the Commissioner of Customs and Excise into a unified revenue service (SARS).

### **The appointment of the Commissioner and consequent governance structures**

7. When the SARS Act was passed in 1997, s 7 (1) provided:

- (1) The Minister must appoint a person as the Commissioner for the South African Revenue Service
- (2) The Minister must consult both the Cabinet and the board before appointing a person as the Commissioner. The appointment would be for an agreed term not exceeding five years, which is renewable.

Following the recommendations of the Katz Commission a supervisory board was created in terms of the SARS Act. Section 11 of the SARS Act provided for a board which would act as an advisory and consultative body for the Minister and the Commissioner on matters concerning administration of the revenue collecting system under the Act.

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<sup>4</sup> para 3.13.8

<sup>5</sup> para 3.22.3

8. Section 12 provided that the board shall consist of not more than eight persons who are unconnected to SARS and appointed by the Minister together with Commissioner and no more than two senior employees of SARS designated by the Commissioner. In the appointment of the eight independent persons, the Minister was required to consult with the Cabinet.

9. In 2002 the SARS Act was amended. In particular s 6(1) was altered so that the President must appoint a person as the Commissioner for the South African Revenue Service (SARS) who will hold office for an agreed term not exceeding five years but which is renewable.

10. In summary, two significant changes were made to the SARS Act in 2002. Firstly, the President was given an unfettered discretion to appoint the Commissioner, while the Minister's role was diminished in that it is clear that, on the basis of a power to appoint, it is only the President who has the power to dismiss. Secondly, the nature of the advisory board was changed. Section 11 now provided that the Minister may appoint one or more specialist committees to advise the Commissioner and the Minister on any matter concerning the management of SARS resources, including asset management, human resources and information technology. There was no longer a central board and the mandate of the advisory committees was clearly different and couched in narrower terms than that which initially appeared in section 11.

### **The objectives of this chapter**

11. This chapter seeks to assess:

1. whether the existing structure of SARS has met the expectations of the Katz Commission and the legislation which followed pursuant thereto; and
2. whether the structure promotes the principles of accountability and integrity of administration.

### **Principles of accountability: the Commissioner**

12. We turn to deal firstly with the appointment of the Commissioner and the implications thereof for the principle of accountability of the office of the Commissioner to its statutory obligations and, further, to the taxpaying community.

13. The change of the SARS Act to provide that the President appoints the Commissioner received no proper justification in the explanatory memorandum which accompanied the 2002 amendment. Presumably, the justification was to enhance the independence of the office of the Commissioner and accordingly to protect him/her from interference which would otherwise have been generated by the Minister of Finance, who at that stage, possessed both the power to appoint and dismiss the Commissioner.

14. Before evaluating this amendment, a brief examination of other tax systems may prove instructive. The OECD has identified four broad categories of institutional arrangements for tax administration: one single directorate within the Ministry of Finance, multiple directorates within the Ministry of Finance, a unified semi-autonomous body, the head of which reports the Minister and finally a unified semi-autonomous body with a board, the head of which reports to the responsible government Minister and an oversight board of management comprising of external officials.

## **Australia**

15. The operations of the Australian Tax Office, which is the federal government's primary revenue collecting agencies, as well as the general administration thereof are supervised by the Commissioner of Taxation. The Commissioner is appointed to Governor General for a term of seven years which is renewable after the expiry of the term. The Commissioner is responsible for reporting to Parliament on matters relating to the Australian Tax Office. The Treasurer of Australia is the Minister responsible for government expenditure and revenue raising.

16. Governance and hence accountability are created initially by way of an office of an Ombud, the role of whom is to assist citizens, including taxpayers, by investigating complaints from those who believe that they have been treated unfairly or unreasonably by a government agency, including the Australian Taxation office. The Ombud may also commence an investigation on his/her own accord without any complaints received by the public.

17. Since 2015 a specialised office, the office of the Inspector General of Taxation, has focussed directly on tax administration. . This is an independent statutory agency whose task it is to review systems established by the Australian Tax Office, namely systems to administer tax laws and systems established by tax laws in relation to administrative matters.

It generates reports and makes recommendations on how these systems can be improved. On completion of a review, the Inspector General reports directly to government and the government in turn will make the review available to the general public.

18. The Australian Tax Office is an agency of what is referred to as the Treasury Portfolio. Treasury Ministers are accountable to Parliament for the performance of the Tax Office in line with the principle of a responsible government. Accordingly, Ministers have a right to obtain information from the Tax Office in order to fulfil their parliamentary responsibilities. Parliament requires the Commissioner to report annually on the operation of the Tax Office. The Commissioner also appears before parliamentary committees to explain the administration of the tax laws. In addition the Tax Office attends biannual hearings of the Joint Committee of Public Accounts and Audit.

19. There is also a Board of Taxation. Members of the Board are appointed by the Treasury for terms of up to three years. The Board comprises of eleven members, eight of whom have been appointed from the non-governmental sector, and three of whom are *ex officio* members (the secretary of the Australian Treasury, the Commissioner of Taxation and the Parliamentary Counsel). The Board provides advice to the Treasurer on the quality and effectiveness of tax legislation and the processes for its development, including processes of community consultation and other aspects of tax design, as well as improvements to the general integrity and functioning of the taxation system. Research and other studies are regularly commissioned on topics approved or referred by the Treasurer and taxation matters referred to the Board by the Treasurer. The Board represents a further mechanism for accountability in respect of the design, operation of tax laws and tax administration within Australia.

### **The United Kingdom**

20. The present structure of Her Majesty's Revenue and Customs (HMRC), a non ministerial department was established by the Commissioner for Revenue and Customs Act 2005. The executive chair and permanent secretary chairs the HMRC Board. The HMRC Board consists of the seven Commissioners and five non-executive directors. The Board provides strategic leadership, approves business plans evaluates performance and ensures that adequate standards of corporate governance are maintained by HMRC. It is responsible for creating and overseeing the strategy of the Department. The Chief Executive and permanent secretary is responsible for delivering a departmental strategy and for the organisation of performance. Together with the executive committee, the Chief

Executive is responsible for the running of the HMRC. The Queen appoints the Commissioners of the HMRC who are responsible for handling individual taxpayer's affairs impartially. The Chief Executive Officer is appointed by the Prime Minister, subject to approval of the cabinet secretary and the Chancellor of Exchequer, responsible for taxation and budgetary matters.

## USA

21. Section 7803 of the US Tax Code provides as follows:

*(A) COMMISSIONER OF INTERNAL REVENUE*

*(1) APPOINTMENT*

***(A) In general***

*There shall be in the Department of the Treasury a Commissioner of Internal Revenue who shall be appointed by the President, by and with the advice and consent of the senate. Such appointment shall be made for individuals who, among other qualifications, have a demonstrated ability in management*

***(B) Term***

*The term of the Commissioner of Internal Revenue shall be a 5-year term, beginning with a term to commence on November 13, 1997. Each subsequent term shall begin on the day after the date on which the previous term expires.*

***(C) Vacancy***

*Any individual appointed as Commissioner of Internal revenue during a term as defined in subparagraph (B) shall be appointed for the remainder of that term.*

***(D) Removal***

*The Commissioner may be removed at the will of the President.*

***(E) Reappointment***

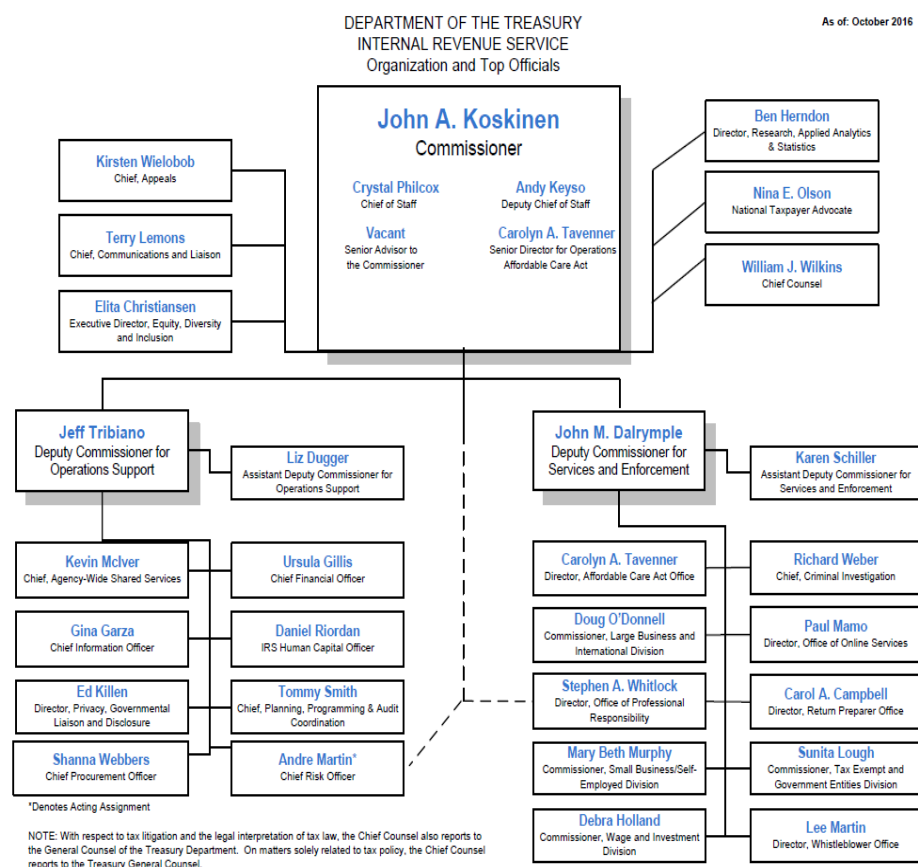
*The Commissioner may be appointed to serve more than one term.*

*(2) **Duties** The Commissioner shall have such duties and powers as the Secretary may prescribe including the power to-*

- (A) Administer, manage, conduct, direct, and supervise the execution and application of the internal revenue laws or related statutes and tax conventions to which the United States is a party; and
- (B) Recommend to the President a candidate for appointment as Chief Counsel for the Internal Revenue Service when a vacancy occurs, and recommend to the President the removal of such Chief Counsel

If the Secretary determines not to delegate a power specified in subparagraph (A) or (B), such determination may not take effect until 30 days after the Secretary notifies the Committees on Ways and Means, Government Reform and Oversight, and Appropriations of the House of Representatives and the Committees on Finance, Governmental Affairs, and Appropriations of the Senate

The diagram reproduced below reflects the complex structure of the IRS.



22. Governance is strengthened by the office of the Treasury Inspector General for Tax Administration.

23. This office was established in January 1999. It is tasked with providing independent oversight of IRS activities by conducting audits and providing investigative services, involving IRS programmes and operations. Three offices fall under the Inspector General. There is an office of audit which conducts independent, objective performance and financial audits of IRS programmes and operations to assess efficiency, economy effectiveness and program accomplishments, promotes compliance with applicable laws and regulations and prevents and detects fraud, waste and abuse. An office of investigations has the responsibility for conducting investigations to protect the integrity of tax administration and to protect tax administration from external threats and corruption. It is also enjoined to protect the integrity of IRS programmes, operations and critical infrastructure, detects and prevents fraud and abuse, identifies and investigates IRS employee misconduct. The office of inspections and evaluations provides a range of specialised services and products relating to tax administration including quick reaction reviews, on-site inspections and in-depth evaluations of the IRS functions, activities and programmes.

24. The office is placed within the Department of Treasury and reports to the Secretary of the Treasury and to Congress. However, it functions independently from the Department and all other Treasury offices and bureaus.

## **New Zealand**

25. The Commissioner of Inland Revenue is considered to be the Chief Executive of the Inland Revenue Department appointed under the State Sector Act 1988 and charged with the care and management of tax in terms of s 6 A (1) of the Tax Administration Act of 1994. The State Sector Act governs all aspects of how Chief Executives of departments are appointed by the relevant ministers. Where there is a vacancy, the responsible Minister informs the Commissioner of the State Services Commission who is appointed pursuant to the State Sector Act of any matter that the Minister wants the Commissioner to take into account when appointing the relevant Chief Executive (section 35). A panel is set up comprising of two members of the Commissioner's office and a third person, after consulting the relevant Minister. A candidate is recommended by the Commissioner to the Minister. The Minister refers the recommendation to the Governor General who decides if the recommendation is accepted or not. The appointment is for a maximum of five years.

26. In the case of New Zealand, the Minister of Revenue is the Minister to whom the Inland Revenue is accountable. Accordingly, the Minister is responsible for the governance of Inland Revenue and the budget decisions for its programs of work. Decisions on tax policy and social policy delivered by Inland Revenue are made jointly by the Minister of Revenue and the Minister of Finance or the appropriate Minister in the case of Social Policy.

## **Canada**

27. The Canadian government structure as set out in the Canada Revenue Agency Act of 1999 provides specifically for the roles of the Minister of Revenue, the Commissioner (Chief Executive Office) and the board of management. The Minister of National Revenue is responsible for the Canadian Revenue Agency and is accountable to Parliament for all of its activities including the administration and the enforcement of legislation. (See s 6 of the Act) In terms of s 38 of the Act the Commissioner is required to keep the Minister informed of any matter that can effect public policy, materially affect public finance or whether the Minister is directed that he or she should be informed of some matter. In terms of s 38, the Commissioner is required to 'assist and advise' the Minister in the performance of the latter's duties. The Commissioner is appointed by the Governor and Council to hold office for a period of not more than five years. The Governor and Council is a term for the cabinet acting in a legal capacity and accordingly the Governor General acts on the advice of cabinet. The tenure of the Commissioner is seen to be 'at the pleasure' of the Governor which means that he or she may be removed at the discretion of the Governor and Council.

## **Six African Countries**

28. The African Tax Administration Forum (ATAF) conducted a study in 2012 of the tax administration of Lesotho, Swaziland, Seychelles, Mauritius, Mozambique and Madagascar. While Madagascar has a system whereby tax administration falls under the Ministry of Finance, the other five countries have revenue administrations which are the responsibility of a unified semi-autonomous revenue body established through legislation. The model adopted in these countries attempts to provide a degree of autonomy through a governance arrangement that is theoretically placed at a distance from the Minister of Finance and the Ministry in terms of operations, unlike the more traditional government department which falls directly under the Ministry of Finance. A number of factors limit the objective of operationally separating the agency from the Minister of Finance. These include the power Minister of Finance retains in several key areas, including making recommendations to a



Board of Control. Tax policy determination remains the preserve of the Minister of Finance although inputs of an administrative nature are received from the revenue authority. The revenue authority is dependent on adequate government funding from the Ministry of Finance

### **Evaluation of the existing structure of appointment**

29. The objective of the Katz Commission was to ensure that SARS maintained a structural independence, which included responsibility for its own budgetary allocation and control over its administrative policies. Although the Katz Commission was unclear about the precise organisational line of responsibility, it emphasised that the Minister of Finance had to assume full responsibility for fiscal and tax policy making. It was also concerned about ensuring that there was proper oversight by statutory bodies responsible for Inland Revenue and Customs, appointed by and answerable to Parliament though the Minister of Finance.

30. When the SARS Act was passed in 1997 the appointment was made by the Minister of Finance and a further mechanism for accountability was the appointment of the Board. The Board was effectively shaped by the Minister of Finance because eight of the eleven member board had to be appointed by the Minister. Although s13 provided that the Board advises both the Minister and the Commissioner on any matter concerning the management of SARS and the improvement of efficiency of its performance, it was clear, given the appointment procedures, that it was the Minister who, ultimately, called the “shots”.

31. By 2002, the Minister’s powers had diminished considerably. In the first place the President - without any safeguards with regard to accountability such as the approval of Parliament or ‘upon the advice’ of the Minister of Finance - was possessed with the sole power to appoint and hence to dismiss, if necessary, the Commissioner. The advisory board had been diluted into a number of boards described above which diminished/reduced even further the principle of accountability of the Commissioner and his/her office to the Minister of Finance.

32. From a review of established revenue authorities, where the appointment to the post of Commissioner is not made by the Minister of Finance or his counterpart, a number of structures have been put in place in order to ensure a greater level of accountability of the Commissioner and hence the overall revenue authority to its mandate and thus the taxpaying community.

33. The present position is somewhat uncertain: In terms of the Constitution, the Minister of Finance has certain specific powers which are relevant to this enquiry in respect of all matters dealing with the National Revenue Fund. Within this context, we turn to the office of the Commissioner given the relationship between SARS and the collection of taxation pursuant to money bills. The President appoints the Commissioner and only the President can dismiss him/her. The Presidential appointment is not beholden to Parliament nor does he/she have to act in concurrence with the Minister of Finance. There is no body or office such as an Inspector General who can render the Commissioner accountable to the role that he or she is required to perform. The one exception is contained in provisions of the Public Finance Management (Act No. 1 of 1999) (PFMA) which, notwithstanding the description of the position of the Commissioner as outlined in this report, provides the Minister of Finance with some tools to enforce accountability. In terms of Schedule 3 to the PFMA, SARS falls within the scope of the Act. The Minister, who is responsible for the PFMA, is the Minister of Finance. In terms of s 6 (2), the Minister and National Treasury may investigate any system of financial management and internal control in any department, public entity or constitutional institution (s 6 (2)(e)). In terms of s 38 of the PFMA, the accounting officer for a department (in the case of SARS being the Commissioner) is accountable for a range of different activities. These include taking effective and appropriate disciplinary steps against any official in the service who contravenes a provision of the PFMA, commits an act which undermines the financial management and internal control system of, in this case, SARS, makes or permits unauthorised expenditure or irregular tax expenditure or fruitless or wasteful expenditure.

34. Reading the PFMA and SARS Act together, it is possible to define further principles of accountability. Section 1 of the SARS Act defines revenue as 'income derived from taxes, duty, levies, fees and any other monies imposed in terms of legislation including penalties and interest in connection with such monies. Section 3 of the SARS Act provides that SARS is responsible for the collection of such revenue. Section 9(3) of the Act provides that the Commissioner is responsible for the revenue collected by SARS. Turning to the PFMA, this Act concerns the management of South Africa's finances and it follows that the Minister is required to oversee the activities of the Commissioner and therefore SARS and hold the former accountable insofar as these finances are concerned. The relevant legislative provisions are ss 9(3) of the PFMA and 22 of the SARS Act. Section 9(3) provides that, as accounting authority for SARS, the Commissioner is responsible for the proper and diligent implementation of the PFMA. Section 22 provides that, as accounting authority for SARS, the Commissioner must comply with the PFMA in respect of all income and expenditure of

SARS all assets, liabilities and financial transactions SARS and all revenue collected by SARS.

35. As the ultimate custodian in terms of the PFMA, the Minister has the power to monitor and assesses the Commissioner's adherence to the PFMA. He can require the Commissioner to account to him pursuant to s 54(1) of the Act which provides that the accounting authority for a public entity must submit to a relevant treasury such information, returns, documents, explanations and motivations as may be prescribed or as the relevant treasury may require'. The Minister may investigate 'any system of financial management and internal control' in any public entity, which includes SARS or do anything that is necessary for him to fulfil his responsibilities pursuant to the PFMA. Section 6(2) of the PFMA provides the Minister with the power to investigate any system of financial management and internal control or do anything further if it is necessary to fulfil the responsibilities of the relevant institution.

36. It is arguable that by leaving the President with an unfettered discretion to appoint the Commissioner, the Commissioner would be placed on an equal footing to the Minister of Finance; beholden to the President, and not legally accountable to the Minister whose constitutional responsibility it is to prepare and present the budget, which includes the government proposals for the incurring of expenditure and concomitant proposals for the collection of the revenue required to fund that expenditure and the introduction of money bills before Parliament.

## **Recommendations**

37. A number of alternative proposals are offered for urgent consideration. All are fashioned to promote the constitutional values of accountability and transparency which, in turn, ensures a governance structure that promotes the core mandate of SARS. The Committee offers these to the Minister as viable alternatives to enhance good governance in SARS and to accord with the essence of the Katz Commission's proposals for an independent SARS which we consider to remain applicable. There is no reason why the Commissioner for SARS should not be appointed in the same fashion as is the Public Protector. The Public Protector is appointed in terms of s 193 of the Republic of South Africa Constitution Act which provides that the President, on the recommendation of the

National Assembly, must appoint the Public Protector. In turn, the National Assembly must recommend persons nominated by a Committee of the National Assembly proportionally composed of members of all parties represented in the National Assembly and approved by the latter body by a resolution adopted with the supporting vote of at least 60% of the members of the Assembly. Section 193(6) provides that the involvement of civil society in the recommendation process may be provided for.

38. Although the Constitution does not provide for a similar appointment process for the Commissioner, such a process would provide far greater confidence in the appointment of a Commissioner. This office plays an extremely important role in the development of democracy by virtue of its revenue raising powers together with the extremely wide powers granted to SARS in respect of the enforcement of its statutory tasks.

39. An alternative proposal would be to revert to the position which followed the Katz Commission's recommendations, namely that the appointment of the Commissioner of Inland Revenue is made by the Minister of Finance. There is adequate justification for this proposal. As noted, the Minister of Finance is constitutionally responsible for the preparation and the presentation of the budget. It is unclear whether the Minister plays any legal role in the accountability of SARS to its mandate, which mandate is critical to the success of any money bill as well as the Budget. It is the Minister who must take responsibility for the performance of government in circumstances where he may be powerless to deal with an obvious problem of tax collection/integrity. A system where the Commissioner operates outside the strictures of the Minister and indeed Cabinet and is only answerable directly to the President is not conducive to a responsive and accountable SARS. This second proposal could be modified to promote a further layer of accountability. The appointment by the Minister of Finance can be made subject to recommendations made by an advisory board. In this connection, the composition of which is described below.

40. The Committee strongly recommends the creation of a Board which would supervise the operation of SARS with the clear objective of promoting the integrity of its conduct as well as to ensure that it implement systems to collect revenue as fairly and efficiently as possible. The Board should be constituted by the Minister of Finance and, save for the Commissioner, or his/her delegee, the Deputy Commissioner and the Director General of Finance or his/her delegee, it should be comprised of members who are attached neither to Treasury nor SARS and who may be appointed by the Minister with due regard to representativity, expertise in finance and taxation and the general economy. It could be

chaired by a retired judge. The board could be provided with sufficiently strong powers of investigation so that it may be empowered to make meaningful recommendations to the Minister with regard to the question of accountability of SARS and to its compliance with its statutory obligations and own strategic vision and mandate. As recommended, the Board could be mandated to provide the Minister with a shortlist of candidates for the office of Commissioner, from whom the Minister is obliged to choose.

## Chapter 2: Base Erosion and Profit Shifting (“BEPS”)

### Introduction

1. Due to the fact that the international corporate tax framework has not kept pace with the changing business environment taxpayers, especially multinational enterprises (MNE), are able to artificially reduce their taxable incomes by shifting profits from high-tax to low-tax jurisdictions, in which little or no economic activity is performed.
2. In October 2015, the OECD released a package of 15 Actions - measures to curtail the resultant base erosion and profit shifting (BEPS). The measures are designed to be implemented domestically and through double tax agreement (DTA) provisions in a coordinated manner, supported by targeted monitoring and strengthened transparency. The implementation of the OECD’s BEPS package is designed to better align the location of taxable profits with the location of economic activities and value creation, as well as to improve the information available to tax authorities to apply their tax laws effectively. As a G20 country, South Africa participated in the BEPS Project, and was instrumental in shaping its outcomes
3. One of mandates of the Committee is to provide recommendations on how to address BEPS concerns from a South African perspective as part of its overall mandate to inquire into the role of South Africa’s tax system in the promotion of inclusive economic growth, employment creation, development and fiscal sustainability. It has issued a final report on BEPS, which has been submitted to the Minister of Finance<sup>6</sup> for review, prior to publication.
4. This chapter is designed to address South Africa’s administration around BEPS, and not to duplicate any of the recommendations set out in the earlier BEPS Report. Due to the fact that the BEPS Report covers administrative issues which are directly dealt with by the OECD in its Action Plan, and it was therefore appropriate to address them in the BEPS Report along with commentary on other aspects, this chapter should be read in conjunction with that report.

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<sup>6</sup> The DTC BEPS Report was submitted to Minister Pravin Gordhan in September 2016. However, he did not release it for publication prior to his departure from the post of Minister of Finance in April 2017. Thus, it is incumbent on the current Minister of Finance, Minister Gigaba, to provide authority for publication of the Report. Nevertheless, the DTC understands that the report was provided to Treasury for consideration.

5. Many of the actions proposed by the OECD, and supported by the Committee in its BEPS Report, have already been implemented, in South Africa. Thus, this chapter focusses largely on the capacity of the South African Revenue Service (SARS) to fulfil its mandate of ensuring compliance with the legislation.
6. It is once again important to differentiate between BEPS and illicit financial flows (IFFs). Although in the course of its work SARS will come across IFFs, SARS information gathering powers, as set out in Chapter 5 of the Tax Administration Act, are limited in that they are designed to enable SARS to accumulate sufficient information to determine the amount of tax that a taxpayer should have paid, be either on the basis of a tax audit or on the basis of a criminal investigation due to the fact that a taxpayer has evaded, rather than avoided, tax. The difference between these two concepts is that in the former case (evasion) the taxpayer has set out to deliberately deceive the tax authorities without reference to the tax legislation (i.e. some measure of fraud is involved) with a view to paying less tax, whilst the latter (avoidance) contemplates a differing view between SARS and the taxpayer based on how the tax legislation should be applied to a specific situation. The line between the two concepts may be viewed as being a fine one but the distinction is nevertheless important.
7. The concepts of transfer pricing, specifically, and IFFs are often confused and it is thus important to distinguish between these two concepts. 'Transfer pricing' is simply the term used to describe the price at which goods and services are transferred between cross-border connected parties. Provided the arrangements between the parties, and the consequent pricing, reflect what would arise between unconnected parties acting in their own interests (i.e. a price that would be negotiated in terms of an arm's length arrangement), the transfer pricing is not illegal, and cannot be viewed as an IFF. It is, of course, incumbent on the taxpayer to demonstrate that it has, in good faith, used a reasonable method for determining the arm's length price, in accordance with international principles. The basis on which the tax authority and the taxpayer have determined the nature of 'arm's length' may differ but, provided that both are able to support that they have applied the principles for determining arm's length, the line to bring the resultant flow of funds within the ambit of an IFF will not have been crossed.

8. In its investigations SARS may, however, come across situations which involve illegal activities in terms of laws other than tax e.g. flows of funds relating to money laundering, corruption, drugs, terrorism etc. In such situations SARS is required to refer to the relevant government authority required to attend to such matters (e.g. South African Police Service, National Prosecuting Authority). Furthermore, SARS may be the recipient of information from other organisations or government departments, as a consequence of criminal activities that those departments have identified.
9. Although the criminality of such cases is not within the purview of SARS and is therefore also not dealt with in this report, it is incumbent on SARS to investigate the tax implications thereof, and to prosecute in accordance with the tax laws. This is consistent with the structure of such investigations in other countries.

#### **OECD BEPS Action Plan as it pertains to tax administration**

10. The following key areas, arising out of the OECD BEPS Action Plan, have been identified as requiring attention from a tax administration perspective:
  - *Action 5* deals with countering harmful tax practices and, in particular, identifies the need for transparency (exchange of information and publication of rulings). South Africa publishes rulings and is party to a number of exchange of information agreements. Adequate and suitably skilled resources are essential to maintaining the required standards.
  - *Actions 8-10 and 13* recommend the methodologies, legislation and documentation required to enable tax authorities to determine whether multinational enterprises have adhered to the arm's length principle for cross border connected party transactions. Action 13 also sets out various principles which need to be followed by revenue authorities (concerning confidentiality, consistency and appropriate usage, as well guidelines for systems to facilitate the system of exchange of information). In addition, in line with Action 14, they recommend that countries provide for advance pricing agreements (APAs- a process whereby a tax authority agrees, upfront, with a taxpayer whether it is satisfied that a price is considered to be arm's length- again certainty is



achieved for all parties concerned) in order to provide certainty for businesses transacting cross-border that the relevant revenue authorities agree with the methodology for applying the arm's length principle up-front. In order to implement these recommendations, suitably qualified experienced personnel, and appropriate IT systems are required.

- *Action 11* recommends that specified data be collected by tax authorities and submitted to a central point so that the level of BEPS actually taking place can be measured on an on-going basis. Collecting such data requires suitably qualified and experienced personnel and appropriate IT systems.
- *Action 12* recommends transparency through reportable arrangement mechanisms and disclosure of tax rulings. South Africa has a Reportable Arrangement mechanism in its legislation. Recognising that such arrangements exist and dealing with those reported require suitably qualified and experienced personnel.
- *Action 14* recommends that countries adopt dispute resolution mechanisms (e.g. Mutual Agreement Procedure) to facilitate timely resolution of cross border disputes. This will require suitably qualified personnel.
- *Action 15* contemplates the signing of a Multi-lateral instrument that will set out the treaty rules relevant to all the signatory countries without each of them needing to renegotiate tax treaties with each and every other country. Participating countries may exclude specific clauses should they so choose. Specialised skills are required to negotiate treaties and to ensure that the relevant country will not be disadvantaged by signing up to any particular clause.

11. All these actions, together with recommendations on Actions 1 to 7, are specifically dealt with in this committee BEPS Report provided to the Minister in September 2016.
12. In its Action 13 report, the OECD indicates that 90% of global corporate revenues will be covered when determining which groups are required to prepare and submit country by country (CBC) reporting if all global corporate groups with consolidated revenues exceeding a figure of Euro750mn (approximately R10bn<sup>7</sup>) are required to report. However, this will amount to only 10% to 15% of all global groups<sup>8</sup>. This fact is an important one for country revenue authorities to bear in mind when dealing with

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<sup>7</sup> Action 13 requires currency translation to be performed on 1 January 2015. Thus, the South African equivalent of EU750mn at that stage was R10bn.

<sup>8</sup> Page 21 of Action 13 issued October 5 2015

BEPS in their own countries and in considering the number of personnel to employ, i.e. by focussing on a small number of large corporate players a significant amount of the BEPS activities may be identified and properly investigated.

13. The concerns that the OECD Action Plan is designed to assist developed, rather than developing, countries, may be taken into account by reference to the UN treaty and transfer pricing guidelines and commentary which, it is stated, are designed to assist developing countries. These align largely with the OECD Action Plan but set out specific guidance for developing countries in specific areas like commodity transactions. From an administrative perspective it would be expected, and it is understood, that the SARS and Treasury also take cognisance of the UN guidelines
14. Action 1 of the OECD BEPS Action Plan deals with the digital economy. In its final version the OECD discusses this extensively but notes that the research is on-going and that more comprehensive proposed recommendations will be issued at a later stage. As one of the greatest challenges for global tax authorities, as it pertains to the current environment, is the on-going growth of the digital economy, it is recognised by the Committee that this area has the potential to erode sovereign tax bases like no other. The Committee is aware that the Reserve Bank is currently investigating the monitoring of crypto currencies and the Committee recommends that a detailed investigation into the nature of transactions taking place within the digital economy and the options available to monitor them and ensure appropriate legislation and compliance, also be undertaken by SARS and Treasury.

### **The profile of corporate taxpayers in South Africa**

15. According to the 2016 Tax Statistics issued by SARS and Treasury in November 2016, corporate income tax contributed 18.1% of total tax revenue collected in 2015/2016. Of the nearly 3 million companies on the South African tax register as at March 2015, 702 395 were assessed (the rest were largely dormant), of which 126 400 were assessed as small business corporations (i.e. gross income less than R20mn) of the 702 395 approximately 25% i.e. 176 000 had positive taxable incomes (the rest nil or assessed losses). Only 325 large companies (0.2% of the companies with a positive

taxable income) had taxable income of more than R200mn, but were liable for 57.6% of the assessed corporate income tax<sup>9</sup>.

16. In addition, a review of the consolidated gross revenues of listed companies on the Johannesburg Stock Exchange indicates that between 40 and 50 such groups listed exceed the R10bn threshold, requiring them to submit CBC reports as the ultimate parent entity. Thus, even if the number of private groups also exceeding the R10bn threshold equalled that number, it would not be a significant total number of companies to deal with. The number of South African entities ultimately held by non-resident holding companies would need to be determined to establish the total number of entities with which SARS would need to engage to combat a significant portion of any potential tax base erosion through profit shifting, particularly in the form of transfer pricing. Thus, in line with the approach taken by the OECD, however, the number of companies that SARS needs to actually engage with in order to tackle BEPS may be limited.
17. In addition, the overall size of South Africa's economy (being less than the size of some of the largest corporations in the United States<sup>10</sup>) implies that the number of companies to be dealt with would be small when compared to the large global economies. This contrast, however, also highlights the vulnerability of South African business to global events and global companies' policies (e.g. on transfer pricing).

### **SARS' approach to dealing with BEPS**

18. In its Strategic Plan 2016/17 - 2020/21 SARS refers to its specific focuses and desired outcomes, going forward. Outcome 2, which deals with "Increased Tax Compliance", sets out the actions SARS needs to take to achieve this, which include:
  - "Implement end-to-end, segment based approach to taxpayer compliance management across priority segments (HNWI, Large corporations, SMMEs)";Specifically in relation to Large Corporates SARS will:
  - "Expand and strengthen BEPS team/capacity and capabilities;

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<sup>9</sup> Pages 128 and 129 of 2016 Tax Statistics issued by SARS and National Treasury November 2016.

<sup>10</sup> South African GDP =US\$350bn versus e.g market cap of Apple: US\$520bn (Source: Maarten Ackerman: Citadel- presentation to clients 11 October 2016)

- Identify non-compliant tax practitioners, preparers and trade intermediaries and use legal and enforcement tools to ensure compliance with regulations”.

19. In relation to high risk industries; SARS says that it must

- “Continue to monitor and develop interventions for high risk industries as identified in the compliance programme (e.g. illicit cigarettes, cash and carry, tobacco, construction, clothing and textiles)”

To improve case selection, it must

- “Introduce new risk engines for tax types ....and taxpayer segments (HNWI, Large corporates...)”

To strengthen enforcement capabilities:

- “SARS will seek to improve the efficacy of its enforcement arm by ensuring it has adequate skills to identify taxpayer non-compliance”
- “Continue to collaborate and work with other tax and customs jurisdictions on global compliance and enforcement issues, and to exchange information on individuals and companies for common revenue administration purposes”. This includes “Continue to develop and implement tools to securely share data and information under Automatic Exchange of Information Agreements...; Collaborate with more regional tax jurisdictions to share data and information securely and easily; Review and revise international bilateral tax policy as needed to ensure enablement of improved compliance across all segments, in particular Large Corporates and HNWIs”.

20. The Annual Performance Plan for 2016/2017 (APP) elaborates on the detail relating to some of these initiatives. Specifically in relation to Large Businesses it states that “SARS will continue to drive compliance of large businesses by elevating our focus on BEPS:

- Undertake 300 targeted audit interventions of Large Corporates.
- Conclude current pipeline of 30 BEPS related cases.
- Conclude our engagements with OECD and other Revenue agencies to leverage the assistance they offered to enhance our audit capability.
- Enhance 2016 corporate income tax returns to
  - obtain a clear view on all multinational enterprises;
  - obtain information on BEPS related transactions;
  - improve transfer pricing reporting for large corporates.
- New risk engine rules with specific focus on BEPS....

- Increase our capacity of TP specialists by 50% by end of March 2017.
  - Legislative changes, namely Record Keeping regulations in respect of foreign transactions as well as country by country reporting will be implemented this year.
  - A pilot project will be concluded in March 2017, to evaluate a process to undertake legal enquiries into entities that promote financing structures that ultimately erode the SA tax base.
  - In the context of BEPS being an international phenomenon, SARS will continue its active participation in BEPS forums and events hosted by OECD, United Nations as well as Africa Tax Administration Forum”.
21. In a meeting between the Committee and the Commissioner, held on 8 September 2016, the Committee was advised that SARS required skilled resources, including actuaries, chartered accountants, lawyers and industry specific specialists (e.g. in the extractives industry) to be effective in this area. It was recognised that the initiative that came out of the Katz Report, that SARS be independent from the Public Finance Management Act (No1 of 1999) potentially gives SARS the power and resources to achieve this goal.
22. It was indicated, at that time, that SARS resources were insufficient, with approximately 22 full time staff and 12 staff seconded from other areas of SARS. DTC is aware that senior skilled and experienced people from that department left over the last year.<sup>11</sup> SARS also indicated that it wished to bring skills from the OECD to train existing staff and that it intended to recruit a further 24 staff (some from the US and Canada) and ensure they acquired the relevant skills.
23. The Committee supports these initiatives and is aware that a number of them have been implemented, namely, enhancing the 2016 tax return, legislative changes have become effective, and there is continuing engagement with BEPS forums<sup>12</sup>.

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<sup>11</sup> Egg Nishana Gosai(Head of SARS Transfer pricing department) and Sunita Manik (who led South African’s involvement in the G20 OECD BEPS project) were recruited by Baker McKenzie

<sup>12</sup> In the UN report (Annexure 5 from a UN document<sup>12</sup> issued in October 2016 relating to a meeting of the Committee of Experts on International Cooperation in Tax Matters: Twelfth Session-Geneva, 11-14 October 2016 (Agenda item 3 (b) (i) Update of the United Nations Practical Manual) SARS has indicated its progress as follows:

“The following significant changes have been made to the Tax Administration Act, 2011, in South Africa. At a glance these relate to:

a) Filing of CbC reports;

24. However, key to the success of these initiatives is the procurement, training and retention of suitably skilled resources to deal with the complex issues that give rise to BEPS. As indicated, the committee is aware of the loss of key personnel in the transfer pricing division at SARS and it is not clear whether suitable replacements have been found.
  
25. It is, furthermore, not clear how the teams dealing with HNWIs and BEPS are currently structured. SARS officials, although in informal discussion, have not been able to conclusively indicate how the new operating model implemented has affected the structure of the division previously known as the large business centre or the approach to specialist skills versus a more generalist approach in interactions with taxpayers. It is thus not clear whether this implies that corporate groups of companies are still evaluated on a group basis or if they are each now evaluated on a company by company basis by separate generalist assessors/auditors. Should the latter be the case, the committee strongly recommends that specialist tax assessors/auditors be tasked to look at all the companies in a group, as a whole, in order to evaluate complex inter-group transactions and structures that large groups are able to implement. This approach would potentially result in greater collections, and simultaneously result in a better quality of interaction with taxpayer groups, on the basis that the assessor/auditor will have seen the 'bigger' picture and thus assemble more appropriate queries. A mechanism for holistic inquiry is imperative.
  
26. In the SARS strategy and Annual Performance Plan no mention has been made of personnel to deal with the mutual agreement procedure (MAP) process which arises from double tax treaties (designed to solve differing approaches of different tax authorities whose countries are party to a double tax treaty to ensure consistency for the taxpayer) or personnel to deal with APAs. The Committee recommends that

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- b) Access to information;
  - c) Extension of the statute of limitations to audit certain classes of BEPS related transactions, including transfer pricing; and
  - d) Expanding the corporate tax return to improve and increase disclosure requirements of transfer pricing and other BEPS related transactions.

#### **D.6.5.1. Country-by-Country Reporting**

Following final outcomes contained in the OECD CbC report, South Africa remains committed to adhere to the agreed framework of the CbC report. Legislation has been passed to ensure the filing and sharing of CbC reports".

SARS determines the costs and plans the timing for bringing such personnel on board, within the constraints of its budget.

27. Of further importance is the development and maintenance of systems designed to deal with information gathered to combat BEPS e.g. country by country reporting information received from South African ultimate parent companies (which needs to be timeously (ultimately within 15 months of the multi-national group's year end i.e. within three months of receipt by SARS) distributed to the revenue authorities of all countries mentioned in the CBC report that are signatories to the multilateral competent authority agreement (MCAA) for country by country reporting<sup>13</sup> or other tax exchange information agreement or tax treaty) via the XML Schema envisaged in Action 13<sup>14</sup>.
28. The committee is aware of the loss of personnel within the division of SARS that deals with information technology (IT).<sup>15</sup> It is critical *inter alia* to South Africa's participation in the OECD BEPS initiative that it maintains high standards in this area and the Committee recommends that SARS procures suitably trained staff to ensure this may take place on an ongoing basis.
29. The Committee furthermore emphasises the importance of IT systems and digital capabilities that keep abreast with constantly evolving technology. Not doing so risks opening opportunities for poor compliance by taxpayers and poor detection thereof by SARS.
30. With specific reference to its progress on transfer pricing SARS reported to the UN<sup>16</sup> (the UN document), in 2016. Its report is instructive; hence a substantive extract is reproduced in this report.

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<sup>13</sup> As at January 2017 there were 57 countries which had signed up to the MCAA for CBC reporting, including South Africa (OECD website accessed 8 April 2017)

<sup>14</sup> Page 38 Action 13.

<sup>15</sup> Resignation of Barry Hore reported in Sunday Times 2014. See also

<http://www.news24.com/SouthAfrica/News/lackays-ccma-case-places-spotlight-on-sars-20170418>

<sup>16</sup> Annexure 5 from a UN document<sup>16</sup> issued in October 2016 relating to a meeting of the Committee of Experts on International Cooperation in Tax Matters: Twelfth Session-Geneva, 11-14 October 2016 (Agenda item 3 (b) (i) Update of the United Nations Practical Manual)

#### **‘D.6.1. Introduction**

Over the last few years transfer pricing has been and still is a strategic focus area for the South African Revenue Service (SARS) forming an integral part of SARS's Compliance Programme.....

#### **D.6.2. South African Transfer Pricing Law**

By way of background, South Africa's transfer pricing legislation (set out in section 31 of Income Tax Act 58 of 1962) came into effect on 1 July 1995 followed by Practice Note 2 (published on 14 May 1996) and Practice Note 7 (published on 6 August 1999) which served to provide taxpayers with guidance on how SARS interpreted the legislation. Practice Note 2 covered thin capitalisation whilst Practice Note 7 dealt with transfer pricing. With effect from 1 April 2012 several legislative amendments to the transfer pricing rules became effective. However, the fundamental principle underpinning the South African transfer pricing legislation, since inception, has been the arm's length principle as set out in Article 9 of both the United Nations Model Double Taxation Convention between Developed and Developing Countries and the OECD Model Tax.

Convention on Income and on Capital, as well as the UN Practical Manual on Transfer Pricing for Developing Countries and the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Transfer Pricing Guidelines).

It is the stated intention of SARS to review Practice Note 2 and Practice Note 7 to take into account the legislative amendments mentioned above.”

As was recommended in the first DTC BEPS report (issued in 2014), also referred to by SARS in the UN document, in order to improve the administration around this area the Committee recommends that the revised transfer pricing interpretation notes/ Binding General Rulings, referred to in the undertaking by SARS to the UN, be issued



forthwith in order to provide certainty to taxpayers as a high level of uncertainty has been in place since April 2012 when the revised legislation was issued.

The UN report also referred to other DTC recommendations arising from the main BEPS reports issued by the Committee, which are re-iterated here (to some extent these mirror what SARS has included in its strategy document, as set out above. It is nevertheless considered appropriate to mention them here since, as late as 2016, via the UN document, SARS has indicated its willingness to take them on board:

- “SARS should consider an incentive programme to encourage compliance with transfer pricing documentation requirements;
- SARS should build a database of comparable information;
- SARS should establish a highly skilled transfer pricing team to include not only lawyers and accountants but also business analysts and economists, to ensure an understanding of commercial operations. This will require that measures are taken to identify, employ and retain skilled personnel especially in the regions;
- the collection and sharing of data should be extended to include other holders of vital information such as exchange control information about capital outflows collected by the South African Reserve Bank”.

In the past SARS has expressed its frustration regarding taxpayer’s strategies for withholding information which SARS believes to be important to its ability to evaluate BEPS and, in particular, transfer pricing related information. Although the advent of country by country reporting will assist in mitigating some of this frustration where it relates to large global groups (global revenues exceeding EURO 750mn (R10bn) as SARS will automatically receive data setting out a global ‘picture’ of the group, which will be supported by transfer pricing policy documentation in respect of the global (likely to be in Master file format) and local (likely to be in Local file format- including specific information required by SARS) to explain the data, in the 2016 UN Report SARS sets out the legislative countermeasures it has taken so far to circumvent this problem:

#### D.6.5.2. Access to Information

One of the key challenges in any transfer pricing analysis is access to information. This is a widespread problem not unique to South Africa and indeed was also acknowledged in the BEPS project. Over the past two years SARS has been challenged on a number of fronts regarding its information requests including, *inter alia*:

- SARS's right to certain categories of information. Taxpayers have argued for the non-submission of information on the basis that such information is commercially sensitive, irrelevant and out of scope, not accessible, or legally privileged;
- Taxpayers requesting numerous extensions of time within which to comply with a SARS information request to the point that the statute of limitation runs out for SARS or that it becomes almost impossible for SARS to review such information before the statute of limitations runs out; and
- Taxpayers have challenged SARS's powers to interview persons and personnel that may have information relevant to the transaction under audit.

To address these challenges, the following legislative amendments have been effected to the Tax Administration Act (Act No. 28 of 2011) (TAA):

- a) The overarching provisions of section 46 clarify the information gathering powers of SARS to be that SARS can request information that is relevant or foreseeably relevant. There is no onus on SARS to explain or justify information requests. However, it was acknowledged that legal professional privilege was an exceptional situation. For this reason section 42A was introduced clarifying the **requirements** to be met by taxpayers failing to submit relevant information to SARS on the basis of legal professional privilege and the **process** to be followed to resolve the issue;
- b) Amendment to section 46 with respect to access to foreign based information and to ensure that where a matter progresses to dispute resolution taxpayers are held to any assertions that they were unable to access information located offshore. Where a taxpayer makes such an assertion, the taxpayer may, under certain circumstances, be prohibited from submitting such information at a later stage;
- c) Amendment to section 47 clarifying persons who may be interviewed or called upon to provide information on a taxpayer/company/entity under audit. Important to this amendment is the existing requirement in terms of section 49 of the TAA, that

allows SARS to request such persons to be interviewed under oath or solemn declaration; and

d) A record keeping notice in terms of section 29 of the Tax Administration Act was issued in October 2016<sup>17</sup>, requiring specified persons to keep and retain the records, books of account or documents prescribed in the schedule to the notice. That public notice sets out additional record-keeping requirements for transfer pricing transactions.

#### **D.6.5.3. Extension of Prescription**

Previously there was a general three year statute of limitation for assessments by SARS to execute and conclude any audit, including audits relating to transfer pricing. In response to taxpayers requiring continuous extensions of time that impinge on the statute of limitation period, together with the recognition of the need for taxpayers to have sufficient time to collate information, amendments to section 99 of the TAA were made extending the prescription period by the period of delay by the taxpayer in responding to a request for information by SARS, and a further 3 years where an audit or investigation relate to transfer pricing, the application of substance over form, the general anti-avoidance rule or the taxation of hybrid entities or hybrid instruments”.

It is submitted that these legislative changes are likely to be very effective in providing SARS additional powers of information collection and assessment capability.’

#### **How are other Countries dealing with BEPS?**

31. The committee considered whether there would be any merit in investigating the administrative approach and, in particular, the levels of resources employed by other countries in order to combat BEPS. However, as the OECD Final Action Plan was only issued in October 2015 it was considered that all countries will still be in the process of determining the optimum resource levels to address BEPS issues, and that reference to their current position may not yield benefits at this stage.

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<sup>17</sup> The final notice was issued 28 October 2016 Government Gazette 40375

32. The Committee nevertheless recommends that SARS regularly benchmarks itself against other developing countries (and developed countries) to ensure its staff complement and skills adequately measure in this regard.
33. Furthermore, it is recommended that SARS has regard to the approach that other countries take with regards businesses smaller than those required to submit CBC reports.

### **Summary of this chapters recommendations**

- A detailed investigation, be conducted into the nature of transactions taking place within the digital economy and the options available to monitor them and ensure appropriate legislation and compliance, be undertaken by SARS and Treasury.
- The committee supports the implementation by SARS of its strategic initiatives pertaining to BEPS:
  - Undertake 300 targeted audit interventions of Large Corporates.
  - Conclude current pipeline of 30 BEPS related cases.
  - Conclude our engagements with OECD and other Revenue agencies to leverage the assistance they offered to enhance our audit capability.
  - Enhance 2016 corporate income tax returns to
  - Obtain a clear view on all multinational enterprises;
  - Obtain information on BEPS related transactions;
  - Improve transfer pricing reporting for large corporates.
  - New risk engine rules with specific .focus on BEPS....
  - Increase our capacity of TP specialists by 50% by end of March 2017.
  - Legislative changes, namely Record Keeping regulations in respect of foreign transactions as well as country by country reporting will be implemented this year.
- A pilot project will be concluded in March 2017, to evaluate a process to undertake legal enquiries into entities that promote financing structures that ultimately erode the SA tax base.
- In the context of BEPS being an international phenomenon, SARS will continue its active participation in BEPS forums and events hosted by OECD, United Nations as well as Africa Tax Administration Forum”.

- The Committee highly recommends that specialist tax assessors/auditors be tasked to look at all the companies in a group, as a whole, in order to evaluate complex inter-group transactions and structures that large groups are able to implement. Such an approach would potentially result in greater collections, and simultaneously result in a better quality of interaction with taxpayer groups, on the basis that the assessor/auditor will have seen the 'bigger' picture and thus assemble more appropriate queries. A mechanism for holistic inquiry is imperative.
- The Committee recommends that SARS determines the costs and plans, the timing for bringing personnel on board to deal with MAP and APA procedures, within the constraints of its budgets, with a view to ensuring taxpayer and tax authority certainty, and thereby supporting foreign direct investment initiatives.
- The Committee considers that, on behalf of the South African public, the strictest levels of governance be applied when recruiting staff to SARS.
- The Committee emphasises the importance of IT systems and digital capabilities that keep abreast of constantly evolving technology. Not doing so risks opening opportunities for poor compliance by taxpayers and poor detection thereof by SARS
- As was recommended in the committee BEPS report (issued in 2014), also referred to by SARS in the UN document, in order to improve the administration around this area the revised transfer pricing interpretation notes/ Binding General Rulings, referred to in the undertaking by SARS to the UN, be issued forthwith in order to provide certainty to taxpayers as a high level of uncertainty has been in place since April 2012 when the revised legislation was issued.
- The Committee re-iterates its recommendations from its 2014 Interim BEPS Report, some of which appear above but which are of such importance as to warrant repetition:
  - SARS should consider an incentive programme to encourage compliance with transfer pricing documentation requirements;
  - SARS should build a database of comparable information;
  - SARS should establish a highly skilled transfer pricing team to include not only lawyers and accountants but also business analysts and economists, to ensure an understanding of commercial operations. This will require that measures are taken to identify, employ and retain skilled personnel especially in the regions;
  - The collection and sharing of data should be extended to include other holders of vital information such as exchange control information about capital outflows collected by the South African Reserve Bank.

- The Committee recommends that SARS regularly benchmarks itself against other developing countries to ensure its staff complement and skills adequately measure up in the area of BEPS.
- The Committee recommends that SARS has regard to the approach that other countries take with regards businesses smaller than those required to submit CBC reports.

## Chapter 3: Treatment of High Net Worth Individuals (“HNWIs”)

### Introduction

1. In order to address certain questions regarding HNWIs, in 2008/9 the OECD in particular and an OECD working group conducted studies which involved consultation with tax authorities and a separate public consultation paper with intermediaries (representatives and private client advisors).
2. In its report, entitled “Engaging with High Net Worth (HNW) Individuals”<sup>18</sup> it reached a number of conclusions which identified four reasons why HNWIs are of particular interest to revenue authorities:
  - The complexity of the segment’s tax and private affairs, together with the large number of entities that the segment may control;
  - The amount of tax revenue at stake;
  - The opportunities available to undertake aggressive tax planning; and
  - The potential impact on the overall integrity of the tax system.
3. To improve compliance, this report indicated that tax administrations could consider changing the structure of their operations to focus resources effectively, for example, through the creation of a dedicated HNWI unit<sup>19</sup>. Other recommendations included:
  - gaining a greater understanding of the risks posed by the HNWI segment by looking at the types of aggressive tax planning in the marketplace and developing a strong commercial awareness concerns of HNWIs;
  - creating the appropriate legal framework targeted at specific aggressive tax planning risks;
  - exploring forms of co-operative compliance, including providing clarity on key issues of concern to taxpayers wishing to make full disclosure regarding past compliance; and

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<sup>18</sup> FTA Study- Engaging with High Net Worth Individual (HNWI) on Tax Compliance- Paris 28-29 May 2009 and [www.oecd.org/ctp/administration/42827651.pdf](http://www.oecd.org/ctp/administration/42827651.pdf).

<sup>19</sup> It should be noted that the recommendation of a creation of a HNWI unit is not recommended as being an exclusive proposal. The creation of a dedicated unit is seen as an addition to the existence, or creation, of other dedicated units e.g. BEPS; Small businesses; Public Benefit Organisations.

- engaging more in international co-operation, at both the strategic and operational level, to improve sharing of information.
4. In 2015, the OECD reported that one-third of countries had created such a unit, and around half of G20 countries
  5. A small minority of individual taxpayers in South Africa contribute a disproportionately large percentage of revenue - 0.1% of the South African population contributes about 30% of tax. The importance of this contribution to tax collection by a minority of taxpayers is recognised, particularly when considering that individuals contribute 38% of the total taxes collected compared to companies which contribute 17%<sup>20</sup>. Thus, the lessons learnt from the OECD studies and those of other countries are very relevant to South Africa.

### **The challenges inherent in administering the HNWI segment**

6. How the HNWI segment functions is only recently being understood by tax authorities and other regulators. What is clear is that the segment's affairs may be highly complex. Considering the vast amount the segment contributes to tax revenue, the segment's access to skilled professional services and other unique factors, the tax authority's approach to administering the segment must be prudent, skilled and calculated to match the HNWI's capabilities and expectations and to understand their levels of tax morality.
7. The International Consortium of Investigative Journalists (ICIJ) has, over the last few years, exposed information that gives some insight into the opportunities available to this segment of taxpayers, who may want to structure their affairs beyond the tax authority's scrutiny; in particular 2014 – The Luxembourg leaks; 2015 – The Swiss HSBC client leaks; 2016 – The Panama Papers leaks. While these scandals suggest that some who have vast wealth may obscure their affairs, SARS must be careful not to generalise, and must guard against adopting a combatant and hostile approach to administering the HNWI segment.

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<sup>20</sup> 2016/2017 Budget Review.



8. SARS has recognised the need that dealing with the HNWI requires specialist skills, which is affirmed by this committee. In engagement with SARS, this committee has identified that specialist skills will be needed to access and interpret external data and information as well as to build fiscal citizenship within this sector of taxpayers (see section 2).
9. Whilst the Committee has been advised by SARS<sup>21</sup> that no dedicated HNWI operational unit, in the traditional sense, was in place, for the most part of the 2016/2017 fiscal year, there was an initiative to ensure a dedicated focus on HNWI within each functional area, ensuring HNWI were on SARS' radar. For the 2017/2018 year, SARS advised that it is in the process of recruiting a team of 30 staff to form a cross-functional team for HNWI.
10. In line with this strategy, the Committee recommends that SARS should further review the experience of other tax administrations who have dedicated tax units focused on HNWI in order to identify what matrix of skills and experience is required of officials to administer the segment effectively (see section 5). These skills should also be informed by the actual functions which the HNWI unit will perform.

### **The organisational and structural response to HNWI segment**

11. The OECD Tax Administration 2015 Comparative Information series<sup>22</sup> observed that, although during 2014 tax authorities were giving the HNWI segment "increased attention", it was surprising that relatively few had established dedicated units. The 2015 Comparative Information series noted that Australia, Greece, Indonesia, United Kingdom and the United States had "sizeable operations".
12. Where authorities had focused on the segment, the OECD noted that there was no consistency in what resources were allocated to administering this taxpayer segment or on the roles and functions performed. Some authorities had dedicated units, while others

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<sup>21</sup> Information provided by SARS by email to DTC on 22 February 2017.

<sup>22</sup> <http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/tax-administration-2015>

administered the HNWI segment within other units such as a large taxpayer unit and aggressive tax planning program.

13. In April 2017 the Fiscal Affairs Department of the International Monetary Fund (IMF) issued, a document entitled “Revenue Administration: Implementing a High Wealth Individual Compliance Programme”. The issue of the document highlights the importance of a dedicated unit for this category of taxpayers and provides guidance on how to effectively resource and structure such a unit.
14. SARS has identified the need to concentrate resources on the HNWI segment, and has provided details of the organisational structure it is in the process of putting in place.
15. The Committee submits that the structure, when implemented, will go a long way to assisting SARS to deal with the HNWI segment, especially if, as envisaged by the qualifications required, senior personnel in this unit will need to have experience dealing with HNWIs outside SARS in order to be able to be fully effective in dealing with them from inside SARS, and thus supports that the qualifications for the personnel at this level require this element.
16. Although potentially costly, it is submitted by the Committee, that the benefits from a properly structured HNWI unit designed to ensure full compliance and promote fiscal citizenship (see section 4 below), provided that such a unit may operate unfettered, will outweigh the costs and recommends that the envisaged structure be put in place forthwith.

### **Definition of HNWIs and why they are important to SARS**

17. The World Wealth Report defines HNWIs as individuals with net assets exceeding US\$1,000,000.

According to SARS<sup>23</sup> the total HNWI on the SARS HNWI register is 37 299. To determine what would be considered to be HNWI for tax purposes in South Africa, SARS has defined the term in more detail:

18. The HNWI definition is expanded to include the following sub-segments<sup>24</sup>:

- Lower affluent individuals – These individuals are high income earners who earn more than R3 million per annum. There is no net asset criteria for this sub-segment. They are generally salaried employees and represent the majority (i.e. 54% i.e. 20 303 individuals) of the HNWI register (at SARS).
- Affluent individuals – These individuals earn between R5 million and R7 million income or have net assets worth more than R16 million. These individuals represent 27% of the HNWI register. Affluent individuals thus comprise a total of 10 217 individuals of which around 5,467 individuals meet only the income criteria of over R5m income, and around 4,449 people meet only the net-asset criteria with net assets in excess of R16m. The balance (around 301) meet both criteria.
- HNWI – These individuals' income exceeds R7 million per annum or they have net assets worth more than R40 million. They represent 18% of the HNWI register. Of the 6 545 individuals in this segment, about 557 have only net assets that meet the criteria i.e. in excess of R40m, without income in excess of R7m, and around 5 824 qualify under the income criteria, but not the assets criteria. Therefore, around 164 people in this sub-segment meet both the income *and* net-asset criteria i.e. income in excess of R7m *and* net assets in excess of R40m.
- Less than 1% of the individuals (234) on the HNWI register can be classified as Ultra HNWI. These individuals have net assets exceeding R75 million. There is no income criteria for this sub-segment.

19. In a joint publication between National Treasury and SARS<sup>25</sup> it is indicated that 4 061 individuals had taxable income greater than R5mn in 2014, 103 720 had taxable income greater than R1mn, but below R5mn, and 372 654 had taxable income greater than R500 000 but below R1mn. Thus, total taxpayers with taxable income greater than

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<sup>23</sup> Information derived from SARS and provided to DTC by email from V Pillay dated 3 November 2016

<sup>24</sup> Figures ie numbers of taxpayers confirmed by SARS HNWI unit (Fawzia Cassiem) December 2016

<sup>25</sup> 2015 Tax statistics available on National Treasury's website.

R500 000 amounts to 480 435. Total tax collected from this group amounted to R141bn in 2014. Of the 16 779 711 taxpayers registered (of which 6 597 244 were expected to submit returns), 4 941 390 were assessed, giving rise to tax of R245.8bn. From this it can be seen that 9.7% of tax taxpayers who pay tax (2.86% of registered taxpayers, and 0.9% if the South African population of 54,5mn), pay 57% of the total tax derived from individuals in South Africa.

20. Putting this slightly differently, 107 781 individuals pay R74bn of tax (i.e. 0.6% of the registered individual taxpayers and 0.1% of the South African population) pay 30% of the tax collected from individuals.
21. Of note is the proportion of total taxes that are collected from individuals. The 2016/2017 Budget Review indicates that of total taxes to be collected (R1.174 trn), total taxes from individuals were budgeted to amount to R441bn i.e. 38%. Compare this to companies R198bn (17%) and VAT R301bn (26%) (Other sundry R384bn)
22. Adopting the 80:20 principle, concentrating resources on identifying individuals in this category, and ensuring they are paying the right amount of tax, will undoubtedly bear fruit for tax collections. As indicated, SARS has recognised this and, in its compliance programme, launched in 2012<sup>26</sup>, which included seven priority areas for compliance improvement, the first item on the list was “Wealthy South Africans and their Trusts”<sup>27</sup>.
23. The Committee supports SARS in its focus upon the HNWI as a separate segment. This committee however raises a concern whether it is efficient to include the category “lower affluent individuals” in the classification as HNWI. It is noted that there are over 20 000 taxpayers in this category while the risks associated with this category of taxpayers, who are generally salaried employees, will be attenuated when compared to the “affluent” and HNWI categories. Perhaps, in the initial phase of setting up the HNWI unit, a more focused approach on a smaller number of taxpayers may be more effective.

<sup>26</sup> Per SARS (W Broughton and Fawzia Cassiem- December 2016) The focus on HNWI and associated trusts was located in the LBC.

The Tax Compliance Strategy is due by March 2017. SARS has engaged with HMRC and IRS. These tax administrations have units that focus on HNWI. The HMRC and IRS focus on HNWI both involve an investigation of off-shore structures and transactions. The learnings suggest dedicated units comprised of skilled staff across the entire HNWI value chain

<sup>27</sup> <http://www.sars.gov.za/TargTaxCrime/Pages?Tax-Crime-Statistics.aspx> accessed 27/7/2016

## **SARS' initiatives for dealing with HNWIs**

24. In a meeting between the Committee and SARS<sup>28</sup> on 8 September 2016, the latter explained, that “not enough has been being done to deal with BEPS and HNWIs”. Thus, HNWIs are to be identified and coded in order to facilitate resource planning and ensure that, due to the size of their contribution to the economy, focus is placed on them, both from a service as well as an audit perspective.
25. SARS advised that such individuals require a different risk assessment to other taxpayers, as their methods of avoiding or evading tax would be more complex. The need to understand the conduct and activities of such individuals has thus been recognised, and the need to tap into third party data e.g. the deeds office in relation to property, aircraft registration, and a focus on trusts, to identify where non-disclosure may exist, was flagged. Such work requires specialist skills at SARS. This is in line with the findings of the FTA/OECD and the Committee supports this approach and recommends that financial support, as well as legislative support (information exchange requirements for other Government institutions), be given to this area at SARS.
26. This discussion is re-iterated in a letter, issued to Tax Practitioners on 22 January 2016, setting out “SARS Operating Model: Progress” and indicating the names of persons responsible for relationships with Large Corporates, HNWIs and SMME's. The Committee, however, recommends that resources be dedicated to each of these areas, separately, as effective management of each of these areas of contribution to the fiscus, will be different.
27. SARS Annual Performance Plan 2016/17<sup>29</sup> (SAPP) confirms that South Africa is part of the ‘early adopters group’ committed to Automatic Exchange of Information (AEOI) by 2017. The Tax Administration Act (Act No.28 of 2011) (TAA) facilitates this for South Africa, through appropriate legislation. Furthermore the OECD has designed Common Reporting Standards (CRS) as the global standard for purposes of AEOI between tax authorities (based on information provided by the banks), for exchange of information

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<sup>28</sup> Attended by the DTC TAA sub-committee and Commissioner: Tom Moyane and Deputy Commissioner (at the time): Jonas Makwakwa

<sup>29</sup> ISBN 978-0-621-44370-7

globally. South Africa's confidentiality and data safeguards were considered adequate by the OECD in an assessment performed in December 2015. The CRS require banks in the participating countries to collect information (country of tax residence and tax numbers) about any non-residents who have bank accounts with them, and to pass that information to their local tax authority, which will in turn pass it to the relevant tax authority of the taxpayer. (This system is based on the US principles of FATCA<sup>30</sup>).

28. On 1 October 2016 the Special Voluntary Disclosure Programme ("SVDP") became effective. This is designed to enable non-compliant taxpayers (generally HNWIs), who have funds/assets outside South Africa on which tax is not being paid, to regularise those funds/assets, pay a deemed tax amount for past contravention, and pay tax properly thereon, going forward. Such measures are being adopted by many countries, in advance of the commencement of the CRS (e.g. France, Italy, and the UK). The committee supports this initiative, which is in line with suggestions made by the FTA/OECD and current global practice, although it notes that the South African deemed tax amount is high when viewed against other countries, which may diminish the initiatives' effectiveness.

29. SARS will commence receiving information through the CRS automatic exchange of information system from the 2017 tax year onwards. The SAPP (see also below) suggested that significant resources be "invested to develop the skills and capabilities to identify and deal with tax avoidance and evasion schemes employed by MNE's and HNWIs".

30. The specific actions, which are designed to achieve this are set out in the SAPP, as follows:

- Conclude 130 audit cases during the year;
- Increase specialised HNWI audit capacity by appointing 22 additional specialists into this area by January 2017;
- Review and implement an enhanced HNWI audit process by end March 2017;
- Introduce enhanced HNWIs risk rules by end March 2017.

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<sup>30</sup> Foreign Account Tax Compliance Act (2010) requires all non US financial institutions to identify and report the assets and identities of US persons to the US Department of the Treasury.

31. On February 22 2017 SARS advised<sup>31</sup>, about the resourcing and organisational structure it proposes to adopt to deal with HNWI's:

The Business Unit: Taxpayer Strategy for HNWI's and Trusts currently comprises of an Executive and 3 staff members, who are tasked to formulate and position the HNWI segment value chain, operating model and framework in a broadly defined organisational strategy and related functional strategy in order to position and enable horizontal alignment, implementation and adoption.

32. As at 22 February 2017, although there was no dedicated HNWI operational unit in the traditional sense, a process, driven by Taxpayer Strategy for HNWI, was well be underway to capacitate a cross-functional team for HNWI's. The team was to comprise 30 staff. The team was projected to take effect at the beginning of 2017/2018 fiscal year. All of these roles are designed to provide a support function to the team by engaging the taxpayer where required, resolving account issues and being hands-on with the assessments.

On 12 April 2017 the Committee was advised by SARS that:

Progress on the set up of the team has gained traction, with 8 people in the team by that stage, who had varying start dates from 1 February 2017 to 1 April 2017. At least 13 people are expected to be on-boarded by mid-May 2017, with the remaining 9 are to be added during the June-July 2017 period. HNWI activities within this team are currently underway and will be ramped up in May when the bulk of the staff take up duty.

33. As indicated, although potentially costly, the benefits from a properly structured HNWI unit, designed to ensure full compliance and promote fiscal citizenship (provided that such a unit may operate unfettered, will outweigh the costs and recommends that the envisaged structure continue to be put in place. Consideration of the number and appropriateness of the proposed resources of the unit also need to be determined with

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<sup>31</sup> Via email.

reference to other countries, like the UK, where the formation and operation of such units have experienced some success.

34. In order to achieve effective implementation, the Committee recommends that SARS considers its options to achieve this carefully. One option is to develop the unit incrementally in proportion to changing demands, thus incorporating different functions as and when the unit's functionality improves. It will be essential that the dedicated officials procured are capable of identifying persons who qualify as HNWIs and identifying the most apparent risk triggers, whilst simultaneously dealing with the HNWIs in an appropriate manner.

35. On this latter point the Committee also wishes to add a cautionary note:

35.1 In the SAPP various strategic risks, facing SARS, are identified and how these will be managed. These include:

- Low compliance of HNWIs: "who do not pay the right amount of taxes timeously due to non-declaration of income sources, overstating expenses and splitting of income through trusts". SARS indicates it will 'develop additional capacity and capability to tackle HNWIs effectively, in dealing with trusts and re-defining taxpayers in this segment'. It will furthermore ensure appropriate resource allocation to achieve the required focus and coverage. (The progress on this has been indicated above).
- Failure to explicitly identify and manage risks associated with the SARS' Operating Model Review Programme has the potential to significantly affect the organisation's transformation and achievement of its goals going forward. This could lead to major uncertainty for employees and taxpayers, and cause serious disruption to service. SARS indicates that it will implement a comprehensive and on-going change management programme as part of the implementation of the Model.

35.2 Regarding the first bullet point, as stated, the Committee supports the principles of procuring, training and allocating the necessary resources to establish which taxpayers are not complying with their tax obligations and ensuring that this is rectified. The Committee, however, refers to its comments under fiscal citizenship



and the risks associated with categorising *all* HNWI as having low compliance, in this manner.

35.3 Regarding the latter bullet, the Committee has, through discussion with various SARS employees and taxpayers, identified that the methods suggested, for mitigating this latter risk, have not been adequately implemented by the time of writing (Nov 2016) and that, hence, the SARS Operating model Review Programme has caused uncertainty for taxpayers and SARS' employees, leading to areas of poor service. It is recommended that the risk mitigation measures be reviewed and implemented properly going forward, in order to reduce further damage. The failure to do this will likely result in the implementation of the programmes, like the HNWI initiatives, and others, failing.

## **Documentation**

36. Although the level of information required from HNWI, in their tax return submissions, will, by default, be greater due to the number of types of income they receive, the current ITR 12 is a 'one size fits all'.

37. The Committee supports the proposal that the tax return (risk engine and audit processes) for HNWI be designed to cater for the specific circumstances of these individuals, with a view to identifying non-compliance and securing it.

38. In October 2015, the specially developed trust tax return was issued, for completion for tax years commencing 2012 onwards. It is designed to assist with ensuring that the types of income derived by trusts are identified, together with the location of in whose hands they should be taxed.

39. It is nevertheless recommended, that the detailed information and supporting documentation required, specifically for HNWI's tax returns, as well as the way they link to the relevant trusts, be more clearly identified and be included in the requirements, to enable both taxpayers and SARS to ensure the correct amount of tax is determined and

paid by both the taxpayer, and/or the trust or its beneficiaries. For example, the trust tax return needs to be adapted to ensure that there is adequate space for disclosure for all types of income received and distributed, including dividends, in order to ensure a complete picture of fund flows.

40. It is also recommended that SARS recognise the existence of 'family offices'<sup>32</sup>, whereby HNWIs entrust the management of their affairs, including tax, to their trusted employees. In advising such persons of SARS' notices issued on their income tax profiles, SARS should consider indicating which taxpayer in the family is being referred to (perhaps using a portion of their tax number (much like the sms system for credit card notifications)).

## **Fiscal Citizenship**

41. Fiscal citizenship was first formally defined by Richard Musgrave in the United States of America in 1996. In essence, it can be said that taxation is a fundamental part of the social contract between the State and its citizens. In the 1940's the level of fiscal citizenship in the United States was high and Americans, especially, immigrants, were proud to be part of the country and contributing to it. Globally, in recent years, the level of fiscal citizenship has reduced, as taxpayers view tax authorities and governments with mistrust.
42. The research showed that issues that reduce trust between a revenue authority and its taxpayers, and thereby reduce fiscal citizenship, include:
- Compliant taxpayers being made to feel targeted, with an aligned perception that non-compliers 'get away with it';
  - Seemingly arbitrary withdrawal of funds from taxpayer bank accounts (this perception appears to often arise in South Africa due to SARS apparently not engaging with the taxpayer on the merits of a matter before resorting to this practice<sup>33</sup>);

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<sup>32</sup> Globally a trend has arisen whereby HNWl families employ a person or person's to assist them to manage their personal affairs (financial, tax and otherwise as preferred by the HNWl) whilst they concentrate on the family business or philanthropic pursuits. Such person or persons may be dedicated to a single family or may look after a few families depending on their size and needs. The person or group of persons employed to provide this assistance has come to be known as a 'family office'.

<sup>33</sup> Based on discussion with banks appointed as 'agents';

- Delays of refunds to taxpayers when rightly due. (There is a perception that SARS has adopted a policy of withholding refunds for seemingly arbitrary reasons<sup>34</sup>);
- Decisions not made timeously, or not on an equal basis for all taxpayers<sup>35</sup>.

That such practices are not the policy of SARS is understood. Based on discussions by taxpayers with the Committee, these are real perceptions held firmly by taxpayers.

43. In the SARS Strategic Plan 2016/17-2020/21<sup>36</sup> (“the Plan”) SARS acknowledges that its weaknesses include:

- Aspects of our Governance Structure;
- Debt Management: Distinguishing between collectable and disputed debt. It states that it will continue to use its powers to collect debt by recovering money from taxpayer’s bank accounts as soon as debt becomes due and payable<sup>37</sup>. The Committee submits that it is important that the concept of “due and payable” is clarified, and that SARS’s staff are educated to ensure that only truly “due and payable” debt is recovered i.e. that there is no doubt that the amount is rightly owed to SARS, and that the taxpayer already understands why SARS believes the amount to be “due and payable” (it has recently become prevalent that SARS is not only depleting bank accounts where tax is rightly owed, but also in respect of amounts raised as owing which, it soon becomes clear, are not actually owing, or which the taxpayer does not believe are owing. This type of activity is likely to alienate compliant taxpayers<sup>38</sup>).

44. The Plan also acknowledges that “unfavourable public perception of poor state delivery and corruption” is a risk that needs to be managed. It states that research has shown that taxpayer’s attitudes towards compliance, and their willingness to comply, is influenced by how their taxes are to be utilized. It states that concerns about the

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<sup>34</sup> See report by Tax Ombud.

<sup>35</sup> Based on the fact that certain decisions ‘referred to committees’ are often determined by one person, the length of time for decisions to be made and the level of equity, especially for HNWIs, may be perceived to be limited.

<sup>36</sup> ISBN 978-0-621-44369-1. RP65/2016

<sup>37</sup> P43

<sup>38</sup> Information provided by banking sector.

corruption in the public sector<sup>39</sup>, poor service delivery, and the quality of service delivery, remain an issue. This, it states, has the potential to affect SARS's ability to achieve compliance, due to loss of public confidence in government.<sup>40</sup> SARS states that it will manage this risk by:

- Continuing to collaborate with a broad range of key stakeholders and government partners to develop and implement platforms to improve efficiency and effectiveness of operations across government;
- Continue education and outreach programmes to build a culture of fiscal citizenship;
- Improve the image of SARS's staff to be that of a highly-skilled professional and disciplined SARS workforce. This will involve improving skills and capacity to enable the effectiveness of enforcement activities whilst being fair to taxpayer<sup>41</sup>.

45. The Committee supports these initiatives and recommends their implementation. It also recommends that the rest of government take cognisance of the risk to tax collections that exists, as identified by SARS, should it not also embark on a path of action which will reinstate improved trust between the government and taxpayers, including HNWIs, where trust may be lowest.<sup>42</sup>

46.1 In its Plan, SARS sets out 'five core strategic outcomes' <sup>43</sup>, which include

- (2) Improved tax compliance;
- (3) Increased ease and fairness of doing business with SARS;
- (5) Increased public trust and credibility.

46.2 If achieved, these outcomes will substantially assist in improving fiscal citizenship.

The Strategic Plan refers to the eight SARS strategic shifts developed in the 2007

<sup>39</sup> The auditor general (AG), Kimi Makwetu, delivered his report on public sector audits, to Parliament, on 17 November 2016. He stated that there has been an 'almost 80% surge in irregular expenditure to more than R46bn' (p2 Business Day: Friday 18 November 2016) rendering this perception a reality.

<sup>40</sup> P26

<sup>41</sup> P42

<sup>42</sup> P33 of the Plan refers to the Edelman Trust Barometer on the basis that trust in business, media, NGO's government has climbed to an all-time high. However, reference to this Barometer (see "2016 Edelman Trust Barometer Finds Global Trust Inequality is Growing" (Press release published 17 January 2016) indicates that "Business is significantly more trusted than government in 21 of 28 countries, with large gaps in countries like South Africa (44 points)"

<sup>43</sup> P30

Modernisation Programme, that are needed to achieve these core outcomes. Although much progress has been made in some of the areas e.g. manual to digital, some of the other areas, specifically 1, 2, 6, 7 and 8<sup>44</sup>, which impact levels of fiscal citizenship, have a long way to go, and some e.g 6 (whole of government view) appear to have regressed. Thus, the Committee's recommendation is that SARS, with 'the whole of government's support, needs to action the initiatives set out to achieve these outcomes.

47. In determining what 'the whole of government support' might be in relation to procuring a high level of fiscal citizenship by HNWIs, it needs to be recognised that, as indicated earlier, regarding 'defining HNWIs', these same individuals pay for a significant portion of government itself and other public goods. Thus, in line with the FTA/OECD recommendations, the attitude of SARS and government to these individuals needs to reflect an element of respect, recognition and understanding as to their needs, and not only the needs of the remainder of the population for whom they pay.
48. Most taxpayers, including HNWIs, will acknowledge that social upliftment will benefit not only the beneficiaries but also the HNWIs themselves, due to a more coherent and safer social, economic and political environment in which to live; hence they contend they would therefore be happy to contribute if this is being achieved. However, if HNWIs are portrayed as pariahs, greater levels of tax avoidance may be practiced;<sup>45</sup> that is a more positive discourse should be promoted.
49. The New World Wealth<sup>46</sup> indicated that, in 2015, South Africa 'exported' 980<sup>47</sup> HNWIs (8000 since 2000), leaving 38500 (this figure largely aligns with SARS' estimations).

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<sup>44</sup> 1. Building fiscal citizenship among all South Africans to contribute to nation building and institutional sustainability; 2. Risk management approach; 6. Whole-of-government view with enhancement of value chain activities before and after it enters the SARS domain... to build service delivery excellence for SARS and its other government partners; 7. Reduced administrative burden through e.g. single registration, integrated channels and dynamic forms; 8. People performing at their peak through e.g. values alignment and high skill/value add.

<sup>45</sup> See the instructive book by Samuel Bowles *The Moral Economy: Why good incentives are not substitute for good citizens* (2016) in which it is argued that rather than placing an emphasis upon self-interest narrowly defined and responding thereto with legal deterrents, it is far more productive to promote the idea of citizens who possess moral commitment by enhancing total welfare of the societies.

<sup>46</sup> Quoted by Magnus Heystek, strategist at Brentworth Wealth in an article dated 16 October 2016

<sup>47</sup> 36% to UK, 15% to Australia, 11% to the US, 8% to Canada, 5% to Mauritius, 4% to Israel. (Source New World Wealth-

Although tax may be one of the reasons for the outflow of South Africa's taxpayers, it is likely that other reasons are more prominent e.g security (personal and financial), opportunity (quality of education and likely availability of future work), freedom (economic- the ability to amass wealth in a currency which holds value). Thus, these factors, which are outside the scope of the Committee's purview, need to be considered by government, in order to assure that wealth is retained in South Africa, and grown for all.

50.1 A Paper on "Testing the models of compliance- the Use Tax experiment"<sup>48</sup> ("the Paper") questioned why people voluntarily comply with tax laws, or not, and tested various theories using US State "Use Taxes"<sup>49</sup> relating to on-line purchases. In doing so, various reasons for increased or reduced compliance relating to all taxes, drawing on global research and experimentation that has already taken place, were researched and identified. A review of these findings supports the conclusions set out in this chapter of this report :

50.2 In order to determine what affected compliance, the Paper tested theories pertaining to:

- 1) levels of risk of tax audit (ie chances of identification of tax malfeasance) and potential penalties attached thereto (cost-benefit or expected utility); and
- 2) psychological and sociological factors like social norms and perception of equity.

50.3 What became clear from the research was that where the level of detection and punishment is almost assured (e.g. wages- tax deducted at source and direct reporting to the revenue authority following withholding by e.g. an employer) there is a higher the level of compliance.

50.4 In relation to the first theory (potential for audit and level of penalties associated therewith) the research has shown that as the perception of this risk increases

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<sup>48</sup> Adam B Thimmesch (Assistant Professor of Law- University of Nebraska College of Law).

<sup>49</sup> A "use Tax" specific type of tax in the United States, which was used for the specific purposes of the research described here.

low- and middle- income taxpayers, who may have the potential to evade tax (this potential has been found to be low, in any event, where there are paper trails (bilateral reporting requirements) providing disclosure) become more compliant, but that HNWI's do not react this way and compliance actually decreased.<sup>50</sup> What can be concluded from this is that a tax authority cannot rely solely on threat of audit and potential penalties to increase tax compliance in HNWIs.

50.5 In relation to the second theory pertaining to psychological and social norms a number of sub-theories emerged with a view to determining what affects compliance by taxpayers:

- 1) social norms;
- 2) citizen's views towards the legitimacy and fairness of government; and
- 3) behavioural influences that lead to seemingly 'irrational choices'.

50.6 The 'social norm' theory results from taxpayers being more compliant where they believe their peers to be compliant and *vice versa* i.e. seeing it as socially unacceptable to evade tax. As a result of this theory, communication by tax authorities about the levels of compliance of taxpayers becomes important to how taxpayers see themselves fitting into this norm.

50.7 "Fairness" of the system was also found to be an important factor. This is broken down into distributive justice, procedural justice and retributive justice.<sup>51</sup>

50.8 Where taxpayers believe others in the same situation to be paying less tax and they have the opportunity to evade, they are more likely to do so, rationalising that it is fair to so do (distributive justice<sup>52</sup>). Procedural and retributive justice

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<sup>50</sup> No supported explanation could be given for this, but it was posited that perhaps such taxpayers expected an audit in any event and wished to start off with a lower 'opening bid', or that the increased activity of the tax authority implied others are not complying and therefore nor should they.

<sup>51</sup> Ibid at page 15

<sup>52</sup> This is split into horizontal equity, vertical equity and exchange equity (ie the return for tax paid).

relate to the level of trust in government in its actions with citizens (procedural) and its competence (retributive). The paper cites one study in which an increase of tax compliance of up to 15% was experienced through an increase in perception of government's honesty and competency<sup>53</sup> (retributive). In another example, the author indicates that compliance is increased (up to 19%) where taxpayers were 'treated politely having respect shown for their rights'<sup>54</sup> (procedural). The evidence has also shown that if taxpayers 'have a voice' e.g. are asked to allocate a small portion (as little as 10%) of their tax, compliance increases, presumably as they consider it 'well spent' and exhibits to the taxpayer the correlation between tax and government services.<sup>55</sup>

51. Thus, in conclusion, the Paper supports the fact that, in dealing with all taxpayers, but HNWI's in particular, increased exchange of information (third party information) will assist SARS in enforcing compliance as it will have third party information of which HNWI's will be aware but that this has a lower effect on HNWI's than on other taxpayers. Of greater importance for any initiative to improve compliance by HNWI's, and as part of its compliance enforcement, SARS needs to respect and honour those taxpayers' rights, while Government needs to demonstrate that it can be trusted, both procedurally and retributively.
52. In its action plan, SARS also addresses the need to identify non-compliant tax practitioners, preparers and trade intermediaries and to use enforcement tools to ensure compliance with regulations. The Committee supports this proposal.
53. The Committee thus recommends that SARS embarks upon an action plan to improve fiscal citizenship, through building trusting relationships with HNWI's in order to inspire confidence in the tax authority, and thereby improve compliance, through:
- Constructive engagement with HNWI's to assist them to understand their tax obligations and comply, accordingly;
  - Facilitate the family office<sup>56</sup>s of Ultra HNWI to be given the same assistance as the HNWI's themselves, in their stead (with the proper authority and controls).

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<sup>53</sup> Ibid at page 16

<sup>54</sup> Ibid at page 17-

<sup>55</sup> Ibid at page 19

<sup>56</sup> See footnote 15 for explanation of 'family office'



- Provide refunds timeously, where owed;
- Quality control over actions of SARS officials to ensure all taxpayers are being treated fairly;
- Penalise heavily where there are contraventions, and prosecute where there is fraud, without fear or favour (no person or taxable amount should be outside the system);
- Support the principles of zero tolerance of corruption, by ensuring that this principle is enforced within SARS, and also clearly supported in all areas of the Government.

## **Approach of other countries**

### **United Kingdom**

54. The UK revenue authority (HMRC) issued a document on 1 November 2016<sup>57</sup> which advises that it considered there to be around 6,500 HNWIs at the start of 2015-16. These are people who have a net worth of more than £20 million. Net worth refers to all of the assets a person owns – such as property, stocks, savings and interests in other entities – less any debts. The threshold at which HMRC considers someone a high net worth individual changed during 2016-17 to a net worth of more than £10 million.
55. The Committee submits that, although both these figures are significantly more than the level at which SARS considers a person to be a HNWI, the principles behind how the HMRC deals with such individuals may be very relevant to assisting SARS. It is submitted that the criteria, set down by SARS, for determining who falls into the category of HNWIs should remain, as such categories merely act as a filter to enable the revenue authority to direct its limited resources most efficiently, and the total number of taxpayers included in the HNWI category is significantly less in South Africa than in the UK.

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<sup>57</sup> HMRC's Approach to Collecting Tax from High Net Worth Individuals (**HC 790 SESSION 2016-17 1 NOVEMBER 2016**) <https://www.nao.org.uk/report/hmrcs-approach-to-collecting-tax-from-high-net-worth-individuals/>

56. The HMRC document notes that HNWIs have complex tax affairs. Their wealth can take many forms. It typically includes assets such as property and investment income, and they may have complex business arrangements. Their assets may be located in many different countries, and they generally have more choice over how they manage their income and assets than the average taxpayer. Almost all HNWIs use tax agents to manage and advise on their tax affairs. It can thus be challenging for HMRC to understand their tax affairs and assess if there are any risks to address.

57. At the time of issue of the Paper, HMRC was investigating risks from HNWIs with a potential value of £1.9 billion. This figure is an initial estimate of the tax that could be due at the start of 2015-16 and covers more than one tax year. Of this, £1.1 billion relates to the use of marketed avoidance schemes; around 15% of high net worth individuals have used at least one scheme. HMRC has identified that the risks from HNWIs relate primarily to tax avoidance and the legal interpretation of complex tax issues, rather than tax evasion.

58.1 A briefing document<sup>58</sup> issued by HMRC on this area advises that the HNW unit has a number of specialist teams including, for example:

- Finance team – focuses on individuals connected to the finance sector. For example, hedge funds, private equity and banking entities
- Rising Stars team – deals with people who have rapidly increasing wealth, indicating that they will meet the HNWIs wealth criteria in the next few years
- Business Investment Tax Relief team – handles claims for Business Investment Tax Relief from individuals not living in the UK who propose to invest in UK businesses.
- Analysis and Intelligence Unit – focuses on using data and analysis to ensure that it understands the behaviour and financial structures of HNWIs, and where their interests lie.
- Dispute Resolution team – works to resolve disputes between HMRC and the HNWIs.
- By making sure the HMRC “customer relationship managers” work closely with this group of people, it is able to focus more time and effort on those HNWIs who it believes pose a significant risk of not paying what they owe

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<sup>58</sup> <https://www.gov.uk/government/publications/issue-briefing-dealing-with-the-tax-affairs-of-wealthy-individuals/how-we-deal-with-wealthy-individuals>

through tax avoidance or evasion. The customer relationship manager team comprises 40 people and each has around 60 taxpayers with which to deal.

- HMRC takes direct action by challenging those who fail to file tax returns and those who submit incorrect tax returns. It now issues what are known as 'follower notices' and 'accelerated payment' notices so that the disputed amount of tax in an avoidance scheme is paid upfront to HMRC while the dispute is resolved. It also takes disputes to tax tribunals when it has been unable to agree the amount of tax to be paid in line with its litigation and settlements strategy.
- The work of the High Net Worth Unit has brought in more than £1 billion in additional revenue since it was formed in 2009. The unit has increased the revenue it has brought in year-on-year to £268 million in 2013 to 2014 – a 20 per cent increase on the year before.
- Additional revenue collected by the High Net Worth Unit:

<b>Year</b>	<b>Additional revenue</b>	<b>Target</b>
2009 to 2010	£85 million	£80 million
2010 to 2011	£162 million	£153 million
2011 to 2012	£200 million	£195 million
2012 to 2013	£222 million	£200 million
2013 to 2014	£268 million	£210 million

- HMRC has also seen an increase in HNWIs filing their tax returns on time so that in the same five years the number of outstanding tax returns has reduced from 11.9 per cent to 3.4 per cent. A total of 96.4 per cent of HNWIs file online – an increase of ten per cent in four years.

58.2 In order to deal with HNWIs, HMRC set up a specific compliance unit (customer compliance) that brings together the HNWIs, their companies and trusts, to

facilitate a full understanding of their financial, and thus tax, profiles, and thereby identify where risks may lie.<sup>59</sup>

58.3 HMRC<sup>60</sup> is currently running a formal enquiry on around a third of high net worth taxpayers, with an average of four issues being examined per taxpayer. Where HMRC does not understand or agree with the position taken by a taxpayer it will open a formal enquiry. The customer relationship managers use the understanding of individual taxpayers they have developed over time to identify taxpayers at risk of misstating their tax affairs. They aim to resolve issues before the taxpayer submits their tax return. New information may trigger a reassessment of risks. Where customer relationship managers identify a tax risk that cannot be easily resolved, they will open a formal enquiry. These enquiries may take a long time to resolve; 6,000 issues under enquiry have been open for more than 18 months, 4,000 of which have been open for more than three years.

## Australia

59. In April 2016 the Australian tax office (“ATO”) released its approach to ensuring wealthy Australians and their private groups pay the right amount of tax.<sup>61</sup> Acting Second Commissioner Michael Cranston advised that the ATO was taking a prevention-before-correction approach and ramping up face-to-face engagement with key taxpayers to protect revenue.

*“While most wealthy Australians and their private groups do the right thing – contributing around \$31 billion in income tax last financial year – some choose to avoid tax,” Mr Cranston said.*

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<sup>59</sup> HMRC’s Approach to Collecting Tax from High Net Worth Individuals (HC 790 SESSION 2016-17 1 NOVEMBER 2016) <https://www.nao.org.uk/report/hmrCs-approach-to-collecting-tax-from-high-net-worth-individuals/>

<sup>60</sup> HMRC’s Approach to Collecting Tax from High Net Worth Individuals (HC 790 SESSION 2016-17 1 NOVEMBER 2016) <https://www.nao.org.uk/report/hmrCs-approach-to-collecting-tax-from-high-net-worth-individuals/>

<sup>61</sup> <https://www.ato.gov.au/media-centre/media-releases/ato-to-start-tax-assurance-talks-with-large-private-groups/> (accessed 31 December 2016)

*“We are shifting our approach and will be visiting our largest private groups to look at their tax affairs in real time, raise any concerns and resolve issues before companies lodge their tax returns.*

*“There are about 175 private groups controlling almost 6000 entities with more than \$1 billion in turnover or \$500 million in net assets and we will begin our visits by the end of the month.*

*“We risk-review all wealthy Australians and their private groups. About 30 per cent are considered high-risk and we regularly ensure they are compliant through reviews, audits and the provision of advice.”*

*If taxpayers are open and transparent with the ATO, they can expect better services and faster turnaround on key decisions, Mr Cranston said<sup>62</sup>.*

60. The ATO also advised that it has a new online resource dedicated to privately owned and wealthy groups with key information and guidance as well as advice on what might attract its attention. It is providing real-time information on risks, activities and results in Australia in order to be transparent.

61. It advised that, broadly, the following behaviours may attract the attention of the ATO:

- tax or economic performance is not comparable to similar businesses
- low transparency of tax affairs
- large, one-off or unusual transactions, including transfer or shifting of wealth
- a history of aggressive tax planning
- tax outcomes inconsistent with the intent of the law
- choosing not to comply or regularly taking controversial interpretations of the law
- lifestyle not supported by after-tax income
- treating private assets as business assets
- accessing business assets for tax-free private use
- poor governance and risk-management systems.

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<sup>62</sup> Ibid

62. The Committee is aware that SARS is taking advice from the UK HMRC and US IRS regarding their HNWI units. The Committee recommends that SARS also obtains risk data from revenue authorities like the UK and Australia and evaluates their relevance to the South African scenario in order to circumvent the learning curve that such countries have clearly already gone through, thereby creating an effective HNWI unit expeditiously.

### **The functions and capacity of a HNWI division at SARS**

63. The Committee recommends that the focus on the HNWI segment must involve, and include officials with the capacity to achieve, the following:

- Identify which taxpayers should fall within the ambit of a HNWI focus area;
- Understand the risks and benefits of the segment;
- Adequately handle the audit of potentially highly complex tax affairs that could span multiple jurisdictions and involve highly complex products and arrangements;
- Ensure that if disputes arise, they are dealt with expeditiously, independently of the author of an assessment and with the required degree of skill;
- Collection of unpaid tax debts, which have been proven;
- Appropriately deal with enforcement of tax laws when this is an appropriate and proportional response;
- Maintain a professional and effective relationship between SARS and:
  - the HNWI taxpayers and their advisers and ensure that services are performed with skill;
  - other sources of information such as the SARB;
- Identify shortcomings in the administrative, policy and legislative environments and engage internally to remedy them; and
- Retain accurate data.

### **Summary of DTC conclusions and recommendations**

64. In summary, the Committee:

64.1 supports SARS with its focus upon the HNWI as a separate segment.

64.2 However, a concern must be raised as to whether it is efficient to include the category “lower affluent individuals” in the classification as HNWI. It is noted that there are over 20 000 taxpayers in this category while the risks associated with this category of taxpayers, who are generally salaried employees, will be attenuated when compared to the “affluent” and HNWI categories. Perhaps, in the initial phase of setting up the HNWI unit (see section 2), a more focused approach on a smaller number of taxpayers may be more effective.

64.3 Although potentially costly, it is submitted that the benefits from a properly structured HNWI unit, designed to ensure full compliance and promote fiscal citizenship, provided that such a unit may operate unfettered, will outweigh the costs and recommends that the envisaged structure be put in place. See results from UK and Australia. Consideration of the number and appropriateness of the proposed resources of the unit also need to be determined with reference to other countries, like the UK, where the formation and operation of such units have experienced some success.

65. The Committee recommends that SARS (and National Treasury):

- In order to achieve effective implementation of a HNWI unit, considers its options to achieve this carefully. One option is to develop the unit incrementally in proportion to changing demands, thus incorporating different functions as and when the unit's functionality improves. The starting point would clearly be to procure dedicated officials who are capable of identifying persons who qualify as HNWI's and identifying the most apparent risk triggers, whilst simultaneously dealing with the HNWI's in an appropriate manner.
- Dedicates resources to each of the areas of large corporate taxpayers, HNWI's and SMME's separately (rather than one individual being tasked to perform the relationship management for all three categories, as is currently set out as being the case in the SARS Operating Model), as effective management of each of these areas of contribution to the fiscus will be different in each case.
- Works more closely with the Reserve Bank to obtain information regarding flows of funds in and out of the country. (The TCC system assists but does not cover all such flows).

- Tailors the detailed information and supporting documentation required for HNWIs tax returns as well as trusts;
- Reviews the risk mitigation measures pertaining to the SARS Operating model Review Programme, which has caused uncertainty for taxpayers and employees leading to areas of poor service.
- Obtains risk data from revenue authorities like the UK, US and Australia and evaluate their relevance to the South African scenario in order to circumvent the learning curve that such countries have clearly already gone through, thereby creating an effective HNWI unit expeditiously.
- Improves fiscal citizenship through building trusting relationships with HNWIs in order to inspire confidence in the tax authority through:
  - Constructive engagement with HNWIs to assist them to understand their tax obligations and comply, accordingly;
  - Facilitating the family offices<sup>63</sup> of Ultra HNWI to be given the same assistance as the UHNWIs themselves, in their stead (with the proper authority and controls). In addition, in advising such persons of SARS' notices issued on their income tax profiles SARS needs to indicate which taxpayer in the family is being referred to (perhaps using a portion of their tax number (much like the sms system for credit card notifications).
  - Adapting the trust tax return to ensure that there is adequate space for disclosure for all types of income received and distributed, including dividends, in order to ensure a complete picture of fund flows.
  - Providing refunds timeously, where owed;
  - Instituting quality control over actions of SARS officials, to ensure all taxpayers are being treated fairly.
  - Penalising heavily where there are contraventions, and prosecuting where there is fraud, without fear or favour (no one should be outside the system);
  - Supporting the principles of zero tolerance of corruption by ensuring that this principle is enforced within SARS and clearly supported in all areas of Government through the 'whole of government' approach.

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<sup>63</sup> See footnote 15 for explanation of 'family office'



## Chapter 4: Taxpayer Bill of Rights

### Introduction

1. As tax systems develop and become more complex, the need for a high level of tax compliance, together with effective tax systems become crucial to achieve the purpose they are designed for: tax collection.
2. It is common cause that, in balancing the powers and rights of tax authorities against those of taxpayers, there is a disproportionate bias of power and entitlement in favour of tax authorities. This is largely justified to ensure compliance, mainly by taxpayers who would rather not pay their fair share of taxes. This bias often overrides taxpayer's rights, which are in most instances unknown to the taxpayers. This bias has received overwhelming attention at differing levels in different countries over the last decade, but it has often been investigated taking into account the tax authorities' perspective exclusively.
3. Experiences gained in common law jurisdictions, and debates and studies at international level, make it clear that taxpayers' rights belong to the category of "human rights".<sup>64</sup> Considering that taxation is a fundamental part of the social contract between a state and its citizens, tax compliance cannot (only) be for the outcome of repression, but for the positive implication of voluntariness, education and high levels of fiscal citizenship. That presumes that the taxpayer will not be just "conceived as", but actually treated as a *person*, with his/ her/its individual dignity, as the centre of the assignment of rights and obligations, from a perspective of cooperation, not juxtaposition.<sup>65</sup>
4. In a paper presented at the Taxpayer's Rights Conference in 2015, Giovanna Tieghi aptly stated that "Taxpayers' Rights are today the key issue in a system authentically founded on liberty. The study of the relationship between tax authorities and taxpayers defines the balance between authority and liberty and highlights the limits of the fiscal Constitution in a wider institutional context. Assuming that perspective in contemporary distressed democracies, the comprehension of the crucial importance of

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<sup>64</sup> N. E. Olson, *A Brave New World: The Taxpayer Experience in a Post-Sequester IRS*, *Tax Notes*, June 3, 2013.

<sup>65</sup> G. Tieghi, *Taxpayer and Human Rights: the Taxpayer Advocate and the Challenge of Contemporary Democracies Towards New Constitutional Forms*, in *Dir. pubb. comp.eur.*, no.4/2014, pp.1475-1488.

taxpayer rights and duties becomes essential for the functioning of democratic systems.”<sup>66</sup>

### The need for a taxpayer bill of rights

5. It is trite that in recent years tax authorities, worldwide, face tremendous pressure to collect revenue, following slow financial growth in most economies. Furthermore the coming decades are likely to see greater pressure on revenue. On the other hand, taxpayers’ rights have become increasingly normalised and integrated into tax legislation.<sup>67</sup> However, there is a danger that the law is not accessible or understandable to those it seeks to protect and this extends to taxpayer rights. Legal and taxpayers’ rights are often spread across multiple laws and their application to tax law and practice may not be commonly understood. This can undermine taxpayer confidence in the system.
6. US National tax Advocate Nina Olson’s oft quoted warning is more than ever, relevant: “I believe a strong Taxpayer Bill of Rights provides a roadmap for effective tax administration...If the tax system measures its performance through the lens of the [Taxpayer Bill of Rights], taxpayers can be confident that they will be treated right, even when they don’t get the relief they hope for.”<sup>68</sup>
7. Taxpayers’ rights need to be understood in the constitutional context as well. Farrar considers that it is properly within the constitutional interpretation and process that the incentive for a redefinition of the safeguard of the taxpayer rights can find the appropriate context for effectiveness. He asserts that the taxpayers Bill of Rights (TBOR) may be instrumental in that sense, in ensuring smooth interactions between tax authorities and taxpayers.<sup>69</sup> On the other hand it is considered that the principles in the TBOR have to represent adaptable criteria of interpretation of tax law. The interpretation compliant with the TBOR has to result, he asserts, in the interpretation compliant with constitutional rules. The appropriate approach for taxpayers’ rights is, in

<sup>66</sup> Giovanna Tieghi “Taxpayer Rights: a constitutional perspective - The Italian Taxpayer Bill of Rights 15 years on ‘at the top of the world’. But what about effectiveness?”

<sup>67</sup> S Piciotto, ‘Indeterminacy, complexity, technocracy and the reform of international corporate taxation’ (2015) 24 (2) *Social and Legal Studies*, 165;

<sup>68</sup> National Taxpayer Advocate (NTA), *Fiscal Year 2015 Objectives Report to Congress, Preface, “The Role of a Taxpayer Bill of Rights in Tax Administration”*, in [www.taxpayeradvocate.irs.gov/2015ObjectivesReport](http://www.taxpayeradvocate.irs.gov/2015ObjectivesReport), p. 4.

<sup>69</sup> J. Farrar, *An Empirical Analysis of Taxpayers’ Fairness Preferences from Canada’s Taxpayer Bill of Rights*, quot., p. 78.

fact, a consideration of their role as a matter of interpretation, especially constitutional interpretation: for the purpose of their effectiveness that kind of interpretation has to be considered binding for the tax authority.<sup>70</sup>

8. Taxpayer rights must be disseminated, and understood by both tax administrators and taxpayers and their advisors. Bentley argues that “there is a need in each jurisdiction to define rights, to provide appropriate and contextual means to enforce different rights, in a way that encourages voluntary compliance with taxpayer obligations. Pervasive reliance on enforceable legal rights law suggests that a system has broken and the applicable country is moving towards a failing state. That is why relationships, understanding, transparency and trust are so important. Taxpayers need to understand this just as much as the tax authorities, for part of the social compact is for citizens to be persuaded that other citizens, as well as the state itself, can be perceived as operating legitimately.”<sup>71</sup>

### **Taxpayer rights in South Africa**

9. The Katz Commission confirmed that the South African tax system is subject to the Constitution and must conform to society’s commitment to the rule of law.<sup>72</sup> This means not only that the system should be effective in the enforcement of all tax laws, equally and irrespective of status, but also that citizens’ rights to be taxed strictly in accordance with the terms of the relevant laws should be scrupulously protected both in the design of those laws and in their implementation.<sup>73</sup>
10. Following the Katz Commission Report the South Africa Revenue Service (“SARS”) published the SARS Client Charter (“the Charter”) in 2005. The Charter was intended to increase taxpayer awareness of their rights and obligations and to create and improve the service culture of the revenue staff in the dealing with taxpayers. The Charter stated as follows:

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<sup>70</sup> P. Zumbansen, *What lies Before, Behind and Beneath a Case? Five Minutes on Transnational Lawyering and the Consequences for Legal Education*, in *Odgoode Hall Law Scholl*, Research Paper No. 62/2013, p. 19,

<sup>71</sup> Duncan Bentley *Revisiting rights theory and principles to prepare for growing globalisation and uncertainty* International Conference on Taxpayer Rights, Washington DC, November 18-19, 2015

<sup>72</sup> **Katz Commission** *Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa* (1997).

<sup>73</sup> HA Mkhawane “Challenges in “Operationalizing” Taxpayer Rights” page 1- 2.

*You are entitled to expect SARS:*

*To help you through*

- *self-explanatory leaflets and booklets as well as our website*
- *courteous and professional service at all times*
- *providing clear, accurate and helpful responses*
- *making clear what action you need to take and by when*
- *being accessible via our call centre and walk-in centres*
- *listening to your suggestions*

*To be fair by*

- *expecting you to pay only what is due under law*
- *treating everyone equally*
- *ensuring everyone pays their fair share*

*To respect your constitutional rights and privacy by*

- *keeping your private affairs strictly confidential*
- *furnishing you with reasons for decisions taken*
- *applying the law consistently and impartially*

*If you are not satisfied, you may*

- *request that your tax affairs be re-examined*
- *exercise your right to object and appeal*
- *request that we advise you of the procedures to be followed in our Alternate Dispute Resolution (“ADR”) process*
- *lodge a formal complaint at any of our offices*
- *lodge a complaint with the SARS Service Monitoring Office (SSMO)*

*In return, your obligations are to*

- *be honest*
- *submit full and accurate information on time*
- *pay your tax and/or duties on time and in full*
- *encourage others to pay their tax and /or duties*
- *report others who are not paying their fair share*

- *not encourage or be party to bribery or fraud in any form*

11. This charter did not create any new rights, nor did it indicate how taxpayers might enforce any rights. Significantly this charter has since been removed from the SARS website. A new one has been drafted and is awaiting publication. It should be noted that a charter has a different standing from a TBOR. The charter would potentially operationalise the TBOR by setting service standards for the tax authority, while the TBOR, which is enforceable, guarantees taxpayers rights as against the tax authority.

### **The Taxpayer Bill of Rights**

12. The US Taxpayer Bill of Rights is said to be an administrative document, which specifically seeks to overcome taxpayers' concerns by drawing together the disparate legal and administrative protections into broad categories, making them easier to find and understand.<sup>74</sup> The TBOR (or at least the US TBOR) does not create new rights, but makes existing rights accessible to taxpayers and their advisers, and importantly to tax authority officials. To become instruments of implementation of service standards, the TBOR has to be easy to understand and be a living and dynamic pattern of the legal system in order to build an accountability network among different institutions: legislator, tax administration and judges.
13. The Canadian TBOR contains 16 rights and explains what taxpayers can do if they believe that the Canadian Revenue Agency has not respected taxpayer's rights. It is also available in braille, large print, e-text or MP3 for the blind or partially sighted. The American TBOR, on the other hand, is more concise, with ten rights guaranteed.
14. What follows below is an outline of identified rights contained in various TBOR.

#### **14.1 *The right to pay no more than what is required by law***

This entails the right to receive the benefits, credits and refunds to which a taxpayer is entitled under law. This right also entails the right to have the tax authority apply all tax payments properly.

#### **14.2 *The right to service in your language***

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<sup>74</sup> Taxpayer Bill of Rights Fact Sheets, available at <https://www.irs.gov/Taxpayer-Bill-of-Rights>

This self-explanatory right ensures that taxpayers are conversant with, and fully understand the tax implications and liability. It also ensures that taxpayers are comfortable discussing their tax matters. As a general matter, by virtue of 11 languages being official languages, this obliges government to communicate and service people in any of those official languages. In addition, currently the SARS service centre provides the option of being serviced in various official languages, although requesting to be serviced in a particular language may and often does result in longer waiting periods than if that entitlement is not requested. This entitlement is, however, not limited, therefore to tax-related services and therefore should not be included in the South African TBOR.

#### ***14.3 The right to privacy and confidentiality***

This is a very crucial and fundamental right. The extent of the right is debatable. Whether the right limits the use of information to a division in the tax authority, for example, that information provided in terms of a voluntary disclosure should not be shared with the audit department within the revenue authority or that the information in the possession of the revenue authority should not be shared with other government department, like the police or the central bank, or anyone else remains an open question. However, as a minimum, such information should be kept confidential by the tax authority. The disclosure within the revenue authority is dependent on what the information is and the purpose for which it would have been obtained. For example if the revenue authority seeks to encourage voluntary disclosure then, for effectiveness, it would have to promise non-disclosure even within its divisions. In addition to this right, the Canadian TBOR provides for a right to lodge a service complaint or request a formal review without fear of reprisal. The latter right can be encapsulated in the right to confidentiality. Finally, the tax authority inquiries, examinations or enforcement actions should not be more intrusive than necessary.

#### ***14.4 The right to review and appeal***

This right is provided in the common law, the Constitution and various pieces of legislation. This is also specifically provided for in Chapter 9 Part B of the TAA. Having said that, it is still important to pronounce it openly and emphatically in the TBOR, in order to assure taxpayers that the tax authority's decisions are not final and that they have recourse to the judicial system in their disputes with the tax authority. This right, is however encapsulated in the right to a fair and just

tax system as, without recourse to the judicial system, there cannot be fairness and justice.

#### **14.5 *The right to complete, accurate, clear and timely information***

Einaudi warns of the importance of letting taxpayers be aware of the reasons why they are paying tax, because if that reason is not clearly illustrated they have a title to cry out ‘injustice’.<sup>75</sup> The American TBOR grants the right to be informed. It provides the right to for taxpayers to know what they need to do in order to comply with the tax laws. Taxpayers are entitled to clear explanations of the laws and the tax authority’s procedures in all tax forms, instructions, publications, notices and correspondence. They also have the right to be informed of the tax authority’s decisions about their tax accounts and to receive clear explanations of the outcomes.

#### **14.6 *The right not to pay tax amounts in dispute before you have had an impartial review***

South Africa applies the “pay-now-argue-later” principle, which requires the taxpayer to pay the full amount of tax liability albeit disputed. A variation of this that is applied in many other jurisdictions is a requirement to pay a portion of the tax to insure against frivolous objections and disputes. Both these variations are, to differing extents, adverse to taxpayers. With certain determinations of the validity of tax claims, objections and disputes, taxpayers should be afforded this right, lest they be left financially stranded. Alternatively, the interest rates applicable to amounts paid to tax authority disputed claims could be linked to the prime lending rate so that taxpayers are not left out of pocket due to the time that lapses over the course of an open tax dispute.

#### **14.7 *The right to have the law applied consistently***

The importance of this right is to remove the arbitrary and discretionary application of tax laws in relation to audits, incentives, and other compliance items. However, this right is legally provided by the rule of precedence and therefore there is no need to repeat it, as that would lead to confusion as to whether the rule of precedence applies to other legal processes. The essence of this right is encapsulated in the right to a fair and just tax system.

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<sup>75</sup> L. Einaudi, in the presentation of L.V. Berliri, *La giusta imposta*, Roma, 1945, quoted by G. Falsitta, *Per un fisco “civile”*, quot. p.ix.

**14.8 *The right to lodge a service complaint and to be provided with an explanation of the findings***

The Canadian TBOR limits this right to service complaint. This right can, and should, be extended to any kind of complaint. This right straddles and incorporates key components of the right to appeal and review (in the right to fair and just tax system), the right to quality service as well as the right to complete, accurate, clear and timely information. It is therefore recommended that this right should not be independently enunciated.

**14.9 *The right to have the cost of compliance taken into account when administering tax legislation***

This right has become important in light of the amount of administration of taxes that is placed on taxpayers. The cost of compliance has, in the recent past, increased significantly. This right forms a major policy component of tax law design and administration. The purpose of turnover tax on micro businesses is to reduce the compliance costs on micro- businesses. However, the high cost of compliance is inevitable for large businesses. Simplicity of tax legislation could go a long way to ease compliance costs. This discourse is beyond the scope of this report and the scope of taxpayer's rights in administration, and as stated earlier, is a policy issue.

**14.10 *The right to relief from penalties and interest under tax legislation because of extraordinary circumstances***

Relief from penalties is provided for in certain provisions of the Tax Administration Act.<sup>76</sup> Relief from interest, which represents an account of the time value of money and which in its nature is not punitive would be to the financial detriment of the tax authority.

**14.11 *The right to expect the tax authority to publish service standards and report annually***

The effect of this right is contained in the right to complete, accurate, clear and timely information. In addition, this right would be better placed as an obligation to the tax authority, which in most countries it is. In addition, this is effortlessly part and parcel of the right to quality service.

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<sup>76</sup> See Chapter 15 of the TAA.



**14.12 The right to legal representation**

Sections of this report propose the embellishment of the office of the Tax Ombud. It is proposed that the Tax Ombud should have the powers to represent taxpayers in tax disputes. In addition, depending on affordability, the government should provide taxpayers with legal assistance in tax matters. The American TBOR, in guaranteeing the right to “retain representation” provides the right to seek assistance from the Low Income Taxpayer Clinic if they cannot afford representation. In addition, in providing the right to a fair and just tax system, the American TBOR provides taxpayers with the right to receive assistance from the Taxpayer Advocate Service if they are experiencing financial difficulty which may compromise their rights.<sup>77</sup> The right to legal representation is of paramount importance to assure taxpayers that they could have a standing against the monumental powers and resources of the tax authority. At the outset, taxpayers are generally not tax experts and their experience, in interactions with the tax authorities, is often one which is intellectually skewed and biased in favour of the tax authority. It is therefore important to hoist taxpayers out of the terror of ignorance of the tax laws, by openly and upfront exposing them to the facility of legal representation, not only in their interactions with the tax authority, but also in the on-going contests such as litigation.

**14.13 The right to finality**

In terms of the American TBOR, this right entails that taxpayers have the right to know the maximum amount of time they have to challenge the tax authority's position, as well as the maximum amount of time the tax authority has to audit a particular tax year or collect a tax debt. Taxpayers also have the right to know when the tax authority has completed an audit. It is important that these time frames be legislated in order to create certainty. The statute of limitations is clearly stated in the TAA; however, review and audit time frames are not. Without such clarity, finality cannot be guaranteed, and audits are sometimes never formally finalised.

**Enforcement of the rights**

- 15 Rights are of no value if they cannot be enforced. Beneficiaries of rights need to know that rights afforded to them can be enforced and also know how to enforce those

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<sup>77</sup> See the discussion on “The South African Office of the Tax Ombudsman” above.

rights. Obviously, different rights of different kinds require different modes of enforcement. Most rights spelled out above are enforceable in terms of the existing provisions of the TAA. For example, in relation to the right to privacy and confidentiality, Chapter 5 of the TAA regulates the manner in which the SARS may infringe on a person's privacy in the gathering of information. This is in addition to the right to privacy granted by the South African Constitution. Chapter 6 of the TAA is devoted to confidentiality of information.

- 16 Along the same lines, in relation to the right to complete, accurate, clear and timely information, section 5 of Promotion of Administrative Justice Act<sup>78</sup> (PAJA) prescribes that "any person whose rights are being materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days of the date on which that person became aware of the action and might reasonably have been expected to become aware of the action, request that the administrator as defined in the PAJA furnish written reasons for the action. The administrator to whom the request is directed must, within ninety days after receiving a request, supply that person with adequate reasons in writing for the administrative action. In the event that the administrator fails to supply adequate reasons for an administrative action, it must be presumed in any proceedings for judicial review that the administrative action was taken without good reason."<sup>79</sup>
- 17 Several countries have institutionalised the enforcement of taxpayer's rights. The following are noteworthy:
- United Kingdom: In the United Kingdom taxpayers can refer complaints against the HMRC to their Member of Parliament who in turn can direct the Ombudsman to deal with the complaint. Furthermore, the United Kingdom established the office of Adjudicator to investigate complaints made about the work of HMRC. The primary function of the Taxpayer Adjudicator in the UK is to act as an impartial referee where taxpayers believe that they have been badly treated by HMRC.
  - New Zealand: The New Zealand Inland Revenue has established a complaints management service to deal with taxpayers' complaints relating to poor service.

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<sup>78</sup> Act 3 of 2000.

<sup>79</sup> See SAICA "Constitutionality and current approach by SARS with reference to collection of taxes" [https://www.saica.co.za/integritax/2003/1093\\_Constitutionality\\_and\\_current\\_approach\\_by\\_SARS\\_with\\_reference\\_to\\_collection\\_of\\_taxes.htm](https://www.saica.co.za/integritax/2003/1093_Constitutionality_and_current_approach_by_SARS_with_reference_to_collection_of_taxes.htm)

Taxpayers can also request that the office of the Ombudsman review decisions taken by Inland Revenue in that country.

- United States: In the United States taxpayers can lodge a formal complaint to the Taxpayer Advocate where they believe they have not been properly dealt with by the Internal Revenue Service.<sup>80</sup>
- A similar system applies in South Africa, despite the current absence of the TBOR in terms of which taxpayers that are unhappy with their interactions with SARS can lodge a complaint through SARS' Service Centre, Complaints Management Office or SARS' Service Monitoring Office.

- 18 The preceding part of this chapter recommends the embellishment of the powers of the Office of the Tax Ombud. Such augmentation of the powers would enable the Tax Ombud to administer and enforce the TBOR with specificity of the individual rights enshrined in the TBOR. To this end, the Tax Ombud should be given direct powers, explicitly to enforce the rights in the TBOR. It is noted that there is recourse provided in other instruments, as stated above, such as the Constitution and the TAA. It is recommended that where there is recourse provided in other instruments, the taxpayer should still have recourse to the Tax Ombud as an alternative to the recourse provided for elsewhere. Similarly, processes that allow taxpayers that are unhappy with their interactions with SARS to lodge a complaint through SARS' Service Centre, Complaints Management Office or SARS' Service Monitoring Office should be retained but augmented by reference to the Tax Ombud as recommended herein.

## Recommendations

- 19 Based on this analysis, it is clear that there is a need for a TBOR, and it is thus recommended that South Africa develops a TBOR to not only guarantee taxpayers rights in their interactions with the SARS, but also to make the SARS responsible in its dealings with taxpayers and regulate the interactions and expectations of the relationship between SARS and taxpayers. The TBOR should be enforceable and with legal effect. It is recommended that the TBOR be precise and concise, so that the rights encapsulated therein are clear, poignant and precise. To avoid a proliferation of

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<sup>80</sup> *Ibid.*

rights with little or no apparent or embedded additional value, some of the rights stated above have been merged in the rights in the proposed list below.

- 20 An elaborate explanatory memorandum could be drafted to explain the extent of the rights. Thus the Committee recommends that a TBOR should contain the following rights:

20.1 The right to finality

*This right essentially entails the right to know the time frames for reviews and audits, as well as response times for SARS to revert or respond to taxpayer's queries, objections, appeals, etc. In consequence, the taxpayer should be given the benefit of conclusion of the matter where the tax authority fails to abide by such time frames. In this regard the matter would be deemed to have been settled in favour of the tax authority.*

20.2 The right to privacy and confidentiality

*These entitlements are contained both in the South African Constitution as well as in the TAA. However an exposition and elaboration of this right serves as a handy affirmation to taxpayers not to be unduly violated by SARS.*

20.3 The right to complete, accurate, clear and timely information

*This entails the right to know. It refers to information about new laws, the SARS practices, information about procedures and decisions taken by SARS in relation to a taxpayer. This right also entails the entitlement to explanations and reasons why, and the bases on which, such decisions have been taken.*

20.4 The right to pay no more than the correct amount of tax

*This right endorses the entitlement for the taxpayer to pay no more than the amount of tax legally due.*

20.5 The right not to pay tax amounts in dispute before you have had an impartial review

*This is a controversial right in the South African context where the "pay now argue later" principle is applied by the SARS savagely, regardless of the fact that its constitutionality has not been tested. The "pay now argue later" rule is, however, an infringement to the right to property as enshrined in the Constitution. The main reason for the rule is to ensure that SARS is not out of pocket (put differently, that SARS is in the money) during the process of appeal or review.*

*This rule also has the effect of discouraging taxpayers from engaging in appeal or review processes against SARS as, psychologically the taxpayer would have “lost” the money already. This rule creates a huge bias in favour of SARS. The argument that taxpayers often raise frivolous objections serves to ignore various other available measures of determining the validity of objections. This role, it is proposed, should be given to the empowered Office of the Tax Ombud, as per the preceding part of this report.*

*In order to strike a balance between the taxpayer’s right not to pay amounts in dispute before the matter has been heard by an impartial tribunal and SARS powers to collect taxes without the impediment of frivolous objections, it is recommended that taxpayers be required to pay a portion of the tax claim in dispute. This amount would be deemed to be a down payment if the matter is decided against the taxpayer. On the other hand the amount would be refunded should the matter be fully decided in favour of the taxpayer. The Committee recommends that the amount be set at 40% of the claim by SARS.*

#### 20.6 The right to legal representation

*This is a fundamental right that is not peculiar to tax related matters. Taxpayers should know that they are able to obtain legal advice and assistance by lawyers that are experts in tax to assist them in challenging the SARS positions and assessments. The right to legal representation can only be effective if taxpayers, rich or poor, are able to obtain legal representation. In line with practices in other countries, the Tax Ombud should be able to represent taxpayers in claims of up to a certain amount.*

#### 20.7 The right to quality service

*This right should cover the entitlement to receive prompt, courteous and professional assistance and to be spoken to in an official language of your choice by SARS officials.*

#### 20.8 The right to fair and just tax system

*This captures the right to challenge the tax position of the SARS as well as the right to appeal the SARS decisions in an independent forum without fear of reprisal.*

- 21 It is recommended that the TBOR should be legally enforceable. Further, based on the interaction between the TBOR and the powers of the Tax Ombud (once revamped and embellished) it is recommended that the Tax Ombud be given the powers to enforce the TBOR.

## Chapter 5: The South African Office of the Tax Ombud

### Introduction

1. As indicated in Chapter 4, tax authorities are, by necessity, in the very unique position of being monopoly service providers to the community in which taxpayers do not benefit directly from the taxes that these authorities collect from them. The benefit to taxpayers is indirect and takes the form of provision of infrastructure and services such as health care, education and other amenities.<sup>81</sup> The powers needed by, and granted to, the tax authorities also create an information imbalance in that revenue authorities have, and are able to collect, a great deal of information about taxpayers who often feel there is a lack of transparency in the way the collected information is processed and used in compliance activities.<sup>82</sup>
2. The fundamental asymmetry in the relationship between revenue authorities and the taxpayer community can lead to public dissatisfaction, erosion of confidence in the tax system, decreasing levels of voluntary compliance and ultimately loss of revenue.<sup>83</sup> Given the unique position of revenue authorities, this asymmetry can only be addressed through effective governance and scrutineering functions. Effective scrutineering functions have to be appropriately structured and resourced otherwise they cannot fulfil public expectations of holding to account large and well-resourced revenue authorities.
3. Reviews of a tax administration require the examination of significant amounts of information, including case files, correspondence and internal communications as well as meeting with relevant officers of the revenue authority. The parliamentary review processes are not designed for that level of scrutiny and are often reliant upon

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<sup>81</sup> Ali Noroozi 'The Role of the Inspector General of Tax of Australia' 2016 Australian Government: Inspector-General of Taxation 1 [https://taxpayerrightsconference.com/wp-content/uploads/2015/11/Noroozi\\_Final\\_Paper.pdf](https://taxpayerrightsconference.com/wp-content/uploads/2015/11/Noroozi_Final_Paper.pdf).

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

information provided by the tax authority which may not always present the whole story or may be perceived to suffer from a degree of inherent bias. Taxpayers are also frequently reluctant or unwilling to raise their concerns with aspects of tax administration directly with the revenue authority or parliamentary committees due to fear of retribution against taxpayers who publicly criticise the conduct or approaches of the revenue authorities.<sup>84</sup>

4. To effectively scrutinise the administration of the tax system by revenue authorities, the work of parliamentary committees needs to be augmented by other activities. These activities may be conducted by taxpayer representatives such as advocate groups, government agencies (specifically, for example, an ombudsman), dedicated and specialised tax scrutineer agency or by any combination of such agencies.<sup>85</sup>
5. The non-judicial defence of the taxpayers' rights represents the implementation of a new sort of procedures to achieve this objective. The new pattern of defence implies the adoption of more informal, flexible, friendly, easy and accessible procedures.<sup>86</sup> The history of the Ombudsman around the world may be described as a combination of three interrelated developments: proliferation (as regards numbers), diversification (as regards categories and types) and mutation and variation (as regards functions and purpose).<sup>87</sup> The word "Ombudsman" is a Swedish word meaning "representative" with the roots traced back to the Ombudsman for Justice which was established in Sweden in 1809. Many countries have adopted the concept of the Ombudsman, such that by 2006 the Ombudsman existed in 125 countries around the world, some at national and others at sub national levels.<sup>88</sup>
6. In the recent past, in light of the recognition of the importance of taxpayer rights and protection, and due to the uniqueness of the relationship between the taxpayer and the

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<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> Diana Benal 'The role of PRODECON in the Protection of taxpayers' rights' [https://taxpayerrightsconference.com/wp-content/uploads/2015/11/Role\\_Prodecon.pdf](https://taxpayerrightsconference.com/wp-content/uploads/2015/11/Role_Prodecon.pdf).

<sup>87</sup> See R Gregory 'The Ombudsman Observed' 1997 *The International Ombudsman Yearbook* 78.

<sup>88</sup> F Serrano 'The Taxpayer's Rights and the Role of the Tax Ombudsman: an Analysis from a Spanish and Comparative Law Perspective' 2007 *Intertax* 331 – 340.



tax authorities, countries around the world have adopted a separate and unique office of the tax ombudsman to specifically focus on engagements between the tax authorities and the taxpayers in a non-judicial set up.

7. This chapter considers the office of the South African Tax Ombudsman (OTO) with a view to determining whether it is efficient in assisting taxpayers with their engagements with the South African Revenue Service (SARS). In considering the improvements that could be effected to the office to improve its efficiency, credibility, reliability and use, the report analyses the functions and powers of similar and more (and differently) empowered institutions in various jurisdictions. The report contains brief comparative discussion of similar offices in various countries (with the aim of covering both developing and developed countries), mainly the United States of America, Mexico and Australia as well as a brief outline of other Ombudsmen in South Africa to determine if any lessons could be learnt from such offices. Finally recommendations are made on how the OTO can be improved in light of the developing global economy and tax developments.

### **The creation of the OTO**

8. The office of the Tax Ombud was created by the Minister of Finance in terms of section 259 of the Tax Administration Act<sup>89</sup> (TAA) in 2013 to deal with problems of administrative nature between the SARS and taxpayers.<sup>90</sup>

### **Appointment of the Tax Ombud**

9. The Tax Ombud is appointed by the Minister of Finance. South Africa's first Tax Ombud, retired Gauteng Judge President Bernard Ngoepe was appointed by Minister

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<sup>89</sup> Act 28 of 2011.

<sup>90</sup> See Letete P *An analytical examination of the legal framework creating the tax ombudsman: Any hope for South African taxpayers?* 2013 International Journal of Public Law and Policy 444 – 453.

Pravin Gordhan on 1 October 2013.<sup>91</sup> The Minister was originally empowered to appoint a person as Tax Ombud for a renewable term of three years and under such conditions regarding remuneration and allowances as the Minister may determine.<sup>92</sup> The Tax Administration Laws Amendment Act, 2016<sup>93</sup> (“the TALAA”) increased the duration of the term to five years. According to Personal Finance, Judge Ngoepe said that this request was based on a study of similar institutions within and outside South Africa, which found that, in most cases, ombuds were appointed for five years and that the longer term will make it easier to recruit people with the right qualifications to the position.<sup>94</sup>

10. The person appointed as Tax Ombud is accountable to the Minister.<sup>95</sup> Accordingly, the Minister also has the power to remove the Tax Ombud for misconduct, incapacity or incompetence.<sup>96</sup> The Minister may designate a person to act as Tax Ombud during a vacancy in the office of the Tax Ombud, for a maximum period of 90 days at a time.<sup>97</sup> Once and while in office, the Tax Ombud may designate a person to act as Tax Ombud during a vacancy in the office of the Tax Ombud, for a maximum period of 90 days at a time.<sup>98</sup>
11. The appointment and removal of the Tax Ombud as well as the appointment, and presumably removal of a person acting as Tax Ombud are the competency of the Minister, and are not subject to approval of the Cabinet of the Republic or subject to Parliamentary oversight.<sup>99</sup> Of great importance in this regard is that the Tax Ombud is not accountable to the Commissioner for SARS at all. Historically the Tax Ombud did not have a separate budget allocation from Parliament and therefore expenditure connected with the functions of the office of the Tax Ombud was paid out of the funds of SARS.<sup>100</sup> The Committee learnt that in practice, several of the Tax Ombud’s actions

<sup>91</sup> National Treasury Media Statement ‘Minister of Finance Appoints tax Ombud’ (1 October 2013) available at <http://www.treasury.gov.za>.

<sup>92</sup> Section 14(1) of the TAA.

<sup>93</sup> In terms of section 49 of Act 16 of 2016.

<sup>94</sup> Personal Finance (16 July 201) M Bechard “The Tax Ombud’s office is here to help” available on <http://www.iol.co.za/personal-finance/tax/the-tax-ombuds-office-is-there-to-help-2045992>.

<sup>95</sup> Section 14(5)(a) of the TAA.

<sup>96</sup> Section 14(2) of the TAA.

<sup>97</sup> Section 14(3) and (4) of the TAA.

<sup>98</sup> Section 14(3) and (4) of the TAA.

<sup>99</sup> See Croome and Olivier *Tax Administration* (2015) 76-77.

<sup>100</sup> Section 15(4) of the TAA. Croome and Olivier (at 78) suggest that the lack of budget allocation from Parliament is due to the fact that the allocation of funds from Parliament would have required a variety of statutory amendments to give effect thereto, and that this should not undermine the

and processes were approved by the Commissioner, much to the dismay of both the Tax Ombud and the current Commissioner.<sup>101</sup> As a result, the TALAA amended this provision to allow the Tax Ombud to have and control his own budget which is approved by the Minister for the office of the Tax Ombud.<sup>102</sup>

12. The Tax Ombud should have a good background in customer service as well as tax law.<sup>103</sup> The Tax Ombud may not prior to appointment have been convicted (whether in South Africa or elsewhere) of theft, fraud, forgery or uttering a forged document, an offence under the Prevention and Combating of Corrupt Activities Act<sup>104</sup> or any other offence involving dishonesty, for which the Tax Ombud has been sentenced to a period of imprisonment exceeding two years without an option of a fine, or to a fine exceeding the amount prescribed in the Adjustment of Fines Act.<sup>105</sup>
13. Section 15(1) of the TAA determines the sourcing and therefore composition of the staff of the Tax Ombud. Historically, section 15(1) provided that “[t]he staff of the office of the Tax Ombud must be employed in terms of the SARS Act and be seconded to the office of the Tax Ombud at the request of the Tax Ombud in consultation with the Commissioner”. This seemed to limit the staff sourcing capacity of the Tax Ombud, in that it did not allow the Tax Ombud to source staff from outside the SARS. This also implied that the staff of the Tax Ombud would consist solely of persons that worked for the SARS, presumably with allegiance thereto. Clearly this created bias in SARS favour over taxpayers, or at the very least created an impression of lack independence from the SARS by the staff of the Tax Ombud. It was also not clear whether this meant that the Tax Ombud could identify individuals that the Tax Ombud sought to employ or whether the Tax Ombud could merely request suitable staff for a particular function and such staff is chosen by the Commissioner. According to Croome and Olivier -

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credibility of the Tax Ombud’s office – what is more important is the stature of the person appointed as Tax Ombud.

<sup>101</sup> This emanated from the meeting between the DTC and the Commissioner on 08 September 2016 at the SARS offices in Pretoria.

<sup>102</sup> Clause 50(b) of the TALAA.

<sup>103</sup> Section 14(5)(b) of the TAA.

<sup>104</sup> Act 12 of 2004.

<sup>105</sup> Act 101 of 1991. Section 14(5)(c) of the TAA.

14. “[s]ome commentators have expressed unhappiness that former SARS officials will be seconded to the office of the Tax Ombud and that this undermines the independence of the tax Ombud. It is interesting to note that the Tax Ombud, Judge Ngoepe, when addressing a South African Institute of Tax Practitioner’s function indicated that he would not merely accept any prospective employee offered by the Commissioner. Judge Ngoepe indicated that his office was also recruiting persons directly, and that not all of his office’s employees were being seconded from SARS to reach the required staff levels to perform his functions under the TAA”.
  
15. The TAA allowed the Tax Ombud to recruit potential staff from outside the SARS, but such staff would be employed, in consultation with the Commissioner, by the SARS. With regards to the direct recruits, the question that arose was what the effect of the consultation with the Commissioner was. Staff employed in terms of the SARS Act are employed by the Commissioner. Thus, if a new direct recruit is to be employed, the Commissioner should be willing to appoint that recruit. Potentially, the Commissioner could refuse to employ a person to be seconded to the office of the Tax Ombud if he considers that person not “suitable” to be in the office of the Tax Ombud, for whatever reason, including that the person is pro-taxpayers or anti-SARS. Whether this in practice transpired did not help the impression of lack of independence that has been noted.

16.1 In his 2015/2016 Annual Report, the Tax Ombud stated the following as challenges relating to the independence of the office of the Tax Ombud: the fact that the office of the Tax Ombud cannot employ its own staff, “it can only employ its staff through SARS; and that the fact that expenditure connected with the functions of the Office of the Tax Ombud is paid out of the funds of the SARS “means no financial independence from the SARS”.<sup>106</sup>

16.2 The Report continues to state as follows: “[t]hese provisions are anomalous, given the fact that the Ombud’s mandate is to investigate complaints against SARS itself. The [OTO] has therefore made certain proposals for the amendment of these provisions. It is hoped the amendments, supported by the Minister, Treasury and SARS, will be expedited. The matter is urgent for the credibility of the Office.”

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<sup>106</sup> Tax Ombud 2015/2016 Annual Report 11.

17. Following this Report, the TALAA changed the provisions relating to the appointment of the staff of the Tax Ombud. The new provision reads as follows: “[t]he Tax Ombud must appoint the staff of the office of the Tax Ombud who must be employed in terms of the SARS Act.” The effect of this change is to remove the requirement of consultation with the Commissioner.

### **Mandate of the Tax Ombud**

18.1 The mandate of the Tax Ombud is provided for in section 16(1) of the TAA as follows:

“The mandate of the Tax Ombud is 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 this Act or procedural or administrative provisions of a tax Act”.<sup>107</sup>

18.2 In addition section 16(2) provides:

“In discharging his or her mandate, the Tax Ombud must –

- (a) Review a complaint and, if necessary resolve it through mediation or conciliation;
- (b) Act independently in resolving a complaint;
- (c) Follow formal, fair and cost effective procedures in resolving a complaint;
- (d) Provide information to a taxpayer about the mandate of the Tax Ombud and the procedures to pursue a complaint;

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<sup>107</sup> Added by 2016 Tax Administration Laws Amendment Act

- (e) Facilitate access by taxpayers to complaint resolution mechanisms within SARS to address complaints; and
  - (f) Identify and review systemic and emerging issues related to service matters or the application of the provisions of this Act or procedural or administrative provisions of a tax Act that impact negatively on taxpayers.”
19. It is clear that, until the 2016 amendments became effective,<sup>108</sup> action on the part of the Tax Ombud was triggered by, and only by a complaint by a taxpayer.<sup>109</sup> Only in January 2017 was the Tax Ombud given the powers to independently review any service, procedural or administrative matter unilaterally. This also implied that the Tax Ombud would only review and address matters specifically and not as a general or application of SARS processes. The 2017 amendments are thus considered to be a notable improvement to the erstwhile powers conferred by the TAA.
20. The Tax Ombud has the powers to review a 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 the SARS. This is clear and specific to the kind of matters that the Tax Ombud may address. This clearly excludes matters of a technical nature of interpretative matters or any systemic issue. In his Annual Report the Tax Ombud noted that the Tax Ombud lacked powers to initiate investigations into any apparent systemic issue, “no matter how important that matter might be considered to be”.<sup>110</sup> The matter has been referred to the Minister for consideration and has clearly been taken cognizance of.
21. The TALAA extended the powers of the Tax Ombud in this regard and empowered the Tax Ombud to 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 this Act or procedural or 25 administrative provisions of a tax Act.<sup>111</sup>

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<sup>108</sup> 19 January 2017

<sup>109</sup> This was further emphasised in section 18 headed “Review of complaint” which states in subsection (1) that “[t]he Tax Ombud may review any issue within the Tax Ombud’s mandate on receipt of a request from a taxpayer.”

<sup>110</sup> Tax Ombud Annual Report 23.

<sup>111</sup> Clause 51 of the TALAA.

22. Powers under section 16 are limited by section 17, which provides that the Tax Ombud may not review the following:
- (a) legislation or policy;
  - (b) SARS policy or practice generally prevailing other than to the extent that it relates to a service matter or procedural or administrative matter arising from the application of the provisions of a tax Act by the SARS;
  - (c) a matter subject to objection and appeal under a tax Act, except for an administrative matter relating to such objection and appeal; or
  - (d) a decision of, proceeding in or matter before the tax court.”
23. Croome and Olivier note that while the Tax Ombud may not review a matter that is subject to objection and appeal, if a taxpayer has noted an appeal against the disallowance of their objection and request is made for the matter to be dealt with via alternative dispute resolution and SARS fails to make a decision within the stipulated time frame or at all, the taxpayer would be entitled to approach the Tax Ombud to assist in the matter. They further note that unfortunately SARS often fails to meet the time frames specified in the rules governing objection and appeal<sup>112</sup> and a taxpayer would be able to seek the intervention of the Tax Ombud in these cases.<sup>113</sup> With regards to the limitation on reviewing a decision of, proceeding in or matter before the tax court, the simple logic is that you cannot have two separate tribunals dealing with the same matter. This is because the Tax Ombud is not part of the court system and exists to facilitate the resolution of *administrative*<sup>114</sup> complaints against SARS and therefore cannot deal with legal disputes for which well defined rules and procedures exist.<sup>115</sup>

## Review of complaints

24. Section 18 of the TAA gives the Tax Ombud authority to review any issue within the

<sup>112</sup> The time frames are promulgated under section 103 of the TAA.

<sup>113</sup> Croome and Olivier 79. The Tax Ombud Annual Report 11 states that the Tax Ombud has raised the issue of delays on the part of the SARS in finalizing complaints in meetings with the SARS and “came out with the hope that the problem will be solved”.

<sup>114</sup> Our emphasis.

<sup>115</sup> Croome and Olivier 79 – 80.

Tax Ombud's mandate on receipt of a request from a taxpayer.<sup>116</sup> In so doing the Tax Ombud may determine how a review is to be conducted and whether a review should be terminated before completion.<sup>117</sup> In exercising the discretion as to the review or termination thereof the Tax Ombud must consider such factors as—

- a. the age of the request or issue and the amount of time that has elapsed since the requester became aware of the issue. In this regard, the nascency of the matter works in the taxpayer's favour;
- b. the nature and seriousness of the issue. For example, if numerous taxpayers raise similar systemic problems to the Tax Ombud, the matter should be accepted to resolve the matter on a large scale;
- c. the question of whether the request was made in good faith; and
- d. the findings of other redress mechanisms with respect to the request.<sup>118</sup>

25. The Tax Ombud may only review a request if the requester has exhausted the available complaints resolution mechanisms in SARS, unless there are compelling circumstances for not doing so.<sup>119</sup> Unfortunately this process and to whom a taxpayer must first complain is not clear especially since the SARS Service Monitoring Office was disbanded. To determine whether there are compelling circumstances, the Tax Ombud must consider factors such as whether—

- a. the request raises systemic issues;
- b. exhausting the complaints resolution mechanisms will cause undue hardship to the requester; or
- c. exhausting the complaints resolution mechanisms is unlikely to produce a result within a period of time that the Tax Ombud considers reasonable.<sup>120</sup> As stated in the example above numerous taxpayers may raise systematic issues of a similar nature. It would be unreasonable for the Tax Ombud to expect that all such taxpayers should first go through the dispute resolution mechanisms provided by the SARS, when there is clearly a systemic problem.

26. SARS' complaints procedure is laid out in on its website.<sup>121</sup> It entails that the taxpayer should interact with the SARS by calling SARS Call Centre or Branch Office to lodge a

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<sup>116</sup> Section 18(1) of the TAA.

<sup>117</sup> Section 18(2) of the TAA.

<sup>118</sup> Section 18(3) of the TAA.

<sup>119</sup> Section 18(4) of the TAA.

<sup>120</sup> Section 18(5) of the TAA.

<sup>121</sup> See <http://www.sars.gov.za/Contact/How-Do-I/Pages/Lodge%20a%20complaint.aspx> accessed on 14 November 2016.



complaint relating to matters such as quality or speed of service, unresolved issue or missing documentation. The taxpayer would obtain a case number from the agent responding to the complaint. The taxpayer can then lodge a complaint via e-filing, at a Branch Office or call the Complaints Management Office (CMO). The taxpayer may also lodge a complaint via e-filing, Branch Office or call the CMO without a case number if the matter relates to staff behavior or competence, the taxpayer's experience or the environment (for example no parking at branch) or a legal or policy matter (such as the fact no debit cards being accepted for payment). Once a complaint has been lodged, the taxpayer should receive an acknowledgement of receipt of the complaint the same day. The resolution date should be a maximum of 21 days after the complaint was lodged. The SARS states that if the taxpayer is not satisfied with the outcome, then the taxpayer may follow the Tax Ombud process. Presumably the taxpayer should be able to "follow the Tax Ombud process" if the 21 days dispute resolution period is not adhered to by the SARS.

27. The Tax Ombud is obliged to inform the requester of the results of the review or any action taken in response to the request, but at the time and in the manner chosen by the Tax Ombud.<sup>122</sup> In terms of section 20(1), "[t]he Tax Ombud must attempt to resolve all issues within the Tax Ombud's mandate at the level at which they can most efficiently and effectively be resolved and must, in so doing, communicate with SARS officials identified by SARS." It is noteworthy that the Tax Ombud is merely required to *attempt* to resolve the issues. The fact that an issue may not be resolved, with all reasonable steps been taken to resolve it, does not mean that the Tax Ombud has not discharged his obligation.

### **Effect of Tax Ombud recommendations**

28. The Tax Ombud's recommendations are not binding on taxpayers or SARS.<sup>123</sup> It is therefore important to understand the effect of these recommendations. Can the SARS simply disregard the recommendations? The Tax Ombud does not have direct powers to compel SARS to act in accordance with the Tax Ombud's recommendations. However, indirectly, the Tax Ombud may include the recalcitrance of the SARS in his report to the Minister and to Parliament. Notably, in this regard, the

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<sup>122</sup> Section 18(6) of the TAA.

<sup>123</sup> Section 20(2) of the TAA.

Tax Ombud states –

29. “[i]n terms of Section 195 of the Constitution of the Republic, Act No 108 of 1996, public administration must be governed by the democratic values and principles enshrined in the Constitution, including a high standard of professional ethics; efficient, economic and effective use of resources; provision of impartial, fair and equitable service, transparency and accountability. As an agent of public administration, SARS, in its dealing with taxpayers and the OTO, is bound by this Constitutional Mandate. The Office of the Tax Ombud is equally bound by the Constitutional Mandate.”
30. Although, once again, this is not directly empowering the Tax Ombud, it provides an indirect force that the Tax Ombud may use, through different channels, to oblige SARS to comply with the Tax Ombud’s recommendations. The TALAA proposed an extended level of accountability by SARS or the taxpayer where SARS or the taxpayer, respectively, does not accept the recommendations by the Tax Ombud. The TALAA implemented as follows: “[t]he Tax Ombud’s recommendations are not binding on a taxpayer or SARS, but if not accepted by a taxpayer or SARS, reasons for such decision must be provided to the Tax Ombud within 30 days of notification of the recommendations and may be included by the Tax Ombud in a report to the Minister or the Commissioner under section 19.”<sup>124</sup>

### **Tax Ombud reports**

31. The Tax Ombud reports directly to the Minister; and must submit an annual report to the Minister within five months of the end of SARS’ financial year.<sup>125</sup> The Minister, in turn, must table the annual report of the Tax Ombud in the National Assembly.<sup>126</sup> The Tax Ombud must also submit a report to the Commissioner quarterly, or at such other intervals as may be agreed.

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<sup>124</sup> Ibid.

<sup>125</sup> Section 19(1) (a) and (b) of the TAA.

<sup>126</sup> Section 19(3) of the TAA.

32. Section 19(2) requires that the reports must contain a summary of at least ten of the most serious issues encountered by taxpayers and identified systemic and emerging issues related to service matters or the application of the provisions of this Act or procedural or administrative provisions of a tax Act that impact negatively on taxpayers. The summary must also contain a description of the nature of the issues, and an inventory thereof for which
- a. action has been taken and the result of such action;
  - b. action remains to be completed and the period during which each item has remained on such inventory; or
  - c. no action has been taken, the period during which each item has remained on such inventory and the reasons for the inaction.
33. The reports must contain recommendations for such administrative action as may be appropriate to resolve problems encountered by taxpayers. In his keynote address and panel discussion at the South African Institute of Tax Practitioners, Judge Ngoepe stated that the reporting framework contained in the TAA for the Tax Ombud is critical in ensuring the effectiveness of the office of the Tax Ombud, and that if SARS were to disregard the Tax Ombud's findings and recommendations, such disregard would be reported in the Tax Ombud's annual report to the Minister and to Parliament.<sup>127</sup>

## **Confidentiality**

34. The confidentiality provision of section 21(1) of the TAA states that the provisions of Chapter 6 apply with the changes required by the context for the purpose of this Part. These in general relate to the confidentiality of information, and specifically the general prohibition of disclosure, secrecy of taxpayer information, disclosure to entities outside SARS and disclosure in criminal, public safety or environmental matter; self incrimination and publication of names of offenders. The "changes required by the context" mainly are that the Tax Ombud is required to deal with information in the same way that SARS is required to do so in terms of the confidentiality of information clauses contained in Chapter 6 of the TAA.
35. Section 21(2) obliges SARS to allow the Tax Ombud access to information in the

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<sup>127</sup> See also Croome and Olivier 83.

possession of SARS that relates to the Tax Ombud's powers and duties under the TAA. In terms of section 21(3) the Tax Ombud and any person acting on the Tax Ombud's behalf may not disclose information of any kind that is obtained by or on behalf of the Tax Ombud, or prepared from information obtained by or on behalf of the Tax Ombud, to SARS, except to the extent required for the purpose of the performance of functions and duties in terms of the TAA.

36. It is of absolute importance that taxpayers be afforded protection and assurance if they lodge a complaint against SARS, that their identity would not be disclosed, and that such disclosure will not subject them to victimization by SARS. At the same time it is acknowledged that some matters cannot practically be dealt with by the Tax Ombud without disclosing the identity of the taxpayer; for example where the issue is taxpayer specific. In this case, the taxpayer should still be provided protection against any victimization on later matters. Unfortunately, the victimization take place where the Tax Ombud does not have powers and this taxpayer has to approach either the SARS or a different tribunal to address such a matter.
37. Comparative experience proves useful in examining what improvements to the existing dispensation might be recommended.

### **The Mexican Procuraduría de la Defensa del Contribuyente<sup>128</sup>**

38. The *Procuraduría de la Defensa del Contribuyente* (PRODECON) is an independent public body, which assumes such function to protect and promote the defence of each and every taxpayer in Mexico. PRODECON is an institution committed to developing a non-judicial review over the decisions, actions or resolutions of any government agency or public organisation which collects taxes or any other kind of duties (social security contributions, custom duties, fees for public services). PRODECON's mission is to ensure the right of taxpayers to receive justice in tax matters at the federal level, through the provision of free services of advising, counselling and also promoting legal defence in courts.

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<sup>128</sup> Contents of this section relating to the Mexican Procuraduría de la Defensa del Contribuyente are based on a paper presented by Diana Bernal "The Role of PRODECON in the Protection of Taxpayer's Rights" [https://taxpayerrightsconference.com/wp-content/uploads/2015/11/Role\\_Prodecon.pdf](https://taxpayerrightsconference.com/wp-content/uploads/2015/11/Role_Prodecon.pdf)

39. PRODECON receives complaints from taxpayers, individuals and corporations, and tries to find the best solution to those complaints; or in the case that a solution cannot be reached, to issue public recommendations to the federal tax authorities, in order to expose and promote the corrections of bad administrative practices which may cause excessive or unnecessary inconveniences to taxpayers or simply violate their rights.
40. PRODECON also has the power to:
- Propose to the Chamber of Deputies amendments to tax and customs legal norms;
  - Analyze systemic tax problems and offer to the involved authorities, suggestions to correct and prevent them; and
  - Act as a mediator in a new tax alternative dispute resolution mechanism, named Acuerdos Conclusivos, to solve the differences between audited taxpayers and tax authorities.

### **PRODECON as taxpayers' public advocate**

41. PRODECON acts as an advocate for taxpayers when they require legal defense in tax courts. All the taxpayers, corporations or individuals, can request this service from PRODECON, as long as the tax authority's decision does not exceed a sum of about US\$50,000. If the decision does not involve a monetary value,<sup>129</sup> there is no limit for PRODECON to act as taxpayers' advocate, not being relevant if the taxpayer is a salaried individual, a large taxpayer corporation, or even an MNE; in any case PRODECON, will take their legal defence.
42. It is also important to highlight that PRODECON has the facility to promote both ordinary and constitutional court actions, as public defender of taxpayers. In other

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<sup>129</sup> For example if the dispute relates to an information request, a search, etc.

words, the PRODECON can defend taxpayers even against a federal tax law if PRODECON considers that some law provisions violate fundamental taxpayers' rights.

43. In addition, PRODECON is not limited to strict tax law disputes; for example PRODECON has represented taxpayers to promote constitutional court actions, such as an action against a new provision of tax law that did not obey the constitutional rulings that taxes must be in proportion to the wealth of each taxpayer. In addition, PRODECON argued, the tax imposed ignored relevant human rights such as the right to health, the right to home and the right to education.
44. As a public advocate, PRODECON has engaged in many cases where tax authorities deny taxpayers' deductions of personal expenses. In an interesting case, a male individual incurred medical expenses for an infertility treatment, but the Tax Administration rejected the deduction of such expenses. PRODECON took the case and filed the suit before the Federal Administrative Tax Court (TFJFA), which ruled in favour of the plaintiff, since it was considered that the right to human reproduction is undoubtedly a human right.

### **PRODECON as taxpayers' Ombuds**

45. PRODECON also acts as an Ombudsman, defending, verifying and reviewing the effective compliance of taxpayers' rights. As an Ombuds, PRODECON can receive tax related complaints in order to verify and investigate the behaviour of federal tax authorities, and issue, if applicable, public, but not binding, recommendations. Taxpayers can complain to PRODECON about tax authority's actions which go against their fundamental rights. PRODECON receives the complaint and makes a formal request to the specific tax office involved. The tax office is required to respond to the request within 72 hours.

46. PRODECON seeks the best solution for the taxpayer in consultation with the tax authority involved. If the tax authority does not accept the solution proposed, PRODECON as the taxpayer's Ombudsman would make a public recommendation exhibiting the name of the related public official in order to prevent further similar violations.
47. In the first nine months of 2015, PRODECON received more than 18,000 complaints in Mexico. The following achievements on this issue are notable:
- 47.1 Through the complaint process, the relationship between taxpayer and tax authorities has been noticeably enhanced. The Tax authorities also understand the complaint process as a new opportunity to correct and amend their actions under law, and so, in many cases, the taxpayers find an acceptable and satisfactory solution to their cases, avoiding further litigation before the tax courts.
- 47.2 The Mexican tax authority had a process in terms of which the tax authority would secure funds from taxpayers' bank accounts to guarantee tax debts, to the detriment of the taxpayer's cash flow. PRODECON proactively and unilaterally worked towards the abolishment of this process.
- 47.3 Through the complaint process, PRODECON has identified that some bad administrative practices take place in tax audit procedures, violating the right of taxpayers to due process and causing incorrect determinations of their tax duties. PRODECON is addressing such matters as, for example:
- a. Tax authorities did not audit taxpayers' operations through a selective review of their documents and accounts. They misuse their faculties by requesting the full exhibition of all documents and accounts and referred to all operations of the audited taxpayers.
  - b. Tax authorities tend to generally reject the documentation and accounts of the audited taxpayers; they do not specify the operations which show precisely the tax inconsistencies.
  - c. Tax authorities often ignore that taxpayers have a presumption of good faith. They wrongly assume that the taxpayers must face the burden to prove that their accounts do not reflect simulated operations.

## **PRODECON as mediator in Conclusive Agreements**

48. Conclusive Agreements are the first alternative tax dispute resolution mechanism in Mexico, that allow Tax Administration and taxpayers to agree on the assessment of the facts or omissions identified by tax authorities during inspection procedures, before a tax debt is imposed. With the Conclusive Agreement Procedure, PRODECON facilitates and promotes agreements between the parties involved. PRODECON acts as a monitoring body to ensure that the agreements are carried out with transparency; and assures compliance of the tax provisions, mainly those referred to the taxpayers' rights.
49. It is important to note that this procedure suspends the audit. Also, by signing the Conclusive Agreement the taxpayer acquires legal certainty, since the agreement cannot be modified or even challenged in any further legal or court actions. Finally, the adoption of the Agreement excludes the imposition of penalties related to the tax debts which are the matter of thereof.

## **PRODECON: Analysing systemic tax problems**

50. In the analysis of systemic tax problems, PRODECON has also identified and engages in addressing other bad administrative practices, such as:
51. Tax authorities perform audit procedures with standardized rules, not paying attention to the nature and operations of the taxpayers' business model;
52. In order to verify that the operations are not simulated, tax authorities over require documentation; and
53. Tax authorities are making excessive and unnecessary requirements of documents or information that they already have.



***Persuasive collection: bad practices of tax authorities***

54. Persuasive tax collection constitutes actions which the tax authorities use to inform taxpayers of the best way in which they may comply with their tax obligations. Such actions can be performed through invitation letters, e-mails, text messages, interviews, etc. Since these kinds of actions are simple “invitations”, they are considered extra-official approaches to taxpayers, therefore there is no court action against them. Consequently, taxpayers are legally defenseless.
55. Concerned about the problems that these persuasive collection actions could bring to taxpayers, PRODECON pointed out the bad administrative practices arising from this issue and worked persistently with Mexican Tax Administration in order to establish simple and clear regulations to ensure the effective respect of taxpayers’ rights, guaranteeing that they will be able to express their arguments to the tax authorities relative to their tax situation or, if applicable, comply voluntarily with their tax obligations.
56. As a result, Mexican Tax Administration drafted general rules for persuasive tax collection, which have been reviewed by PRODECON. Such new rules are: 1) tax authorities must not use threatening language in their actions, 2) taxpayers shall be provided with clear and understandable information, 3) taxpayers must be informed that there are no legal consequences if they do not attend to the invitations, and, finally 4) taxpayers must be informed that they can approach PRODECON as a public defender of their rights.
57. PRODECON has indicated that it is not against actions which may improve tax collection through voluntary compliance mechanisms, but only as long as they respect the taxpayer’s rights.

***Tax Black List***

58. One of the most controversial measures that was approved in the 2014 Mexican tax reform is a faculty given to the Tax Revenue Service (SAT) to publish the names of the taxpayers who, according to its official records, have ongoing tax problems. Until 2013, it was illegal to reveal the name of any taxpayer, no matter the kind or “size” of the problem that he or she was involved in. Now, as a result of the changes applied to the Federal Tax Code, this absolute reserve disappeared, and the Tax Revenue Service can disclose a list referring the names of the taxpayers (individuals or companies) who have definitive unpaid tax debts or have been identified as non-reachable at their tax addresses.
59. The first black list was posted on the website of the Tax Revenue Service just one day after the tax reform became effective. Some Mexican taxpayers woke up on the following day surprised about finding their names in the “Unreliable Tax Payers List”. These included, among others, politicians, intellectuals, TV stars, a major soccer team, and even the Roman Catholic diocese in Acapulco. PRODECON reacted and also received several complaints from taxpayers who felt insulted by being identified as “unreliable”.
- (a) PRODECON analysed two relevant aspects:
1. The legal structure of this new regulation, under humans rights perspective; and
  2. The procedure and criteria that were considered by the Tax Revenue Service to apply the new measure.
- (b) During this systemic investigation, PRODECON realized that the taxpayers were being exhibited for reasons that they ignore. The blacklist only pointed out the name of individuals or companies, but it was remiss in explaining which legal assumption is present in the case of each taxpayer, in order to justify the publication of his name. PRODECON also determined that the criteria used by the authority to identify taxpayers as “non-reachable” at their addresses was inappropriate because the tax authority wrongly considered that one failed attempt to locate the taxpayer at his tax address means the same as if he were absent permanently from it.

- (c) In this context, PRODECON pronounced a Public Recommendation to the Tax Revenue Service asking it to adopt the following actions in order to stop the violations committed by the blacklist:
- 61.c.1 If the taxpayer appears in the blacklist as a debtor, the tax authority must include the necessary information to identify precisely the origin and kind of the debt. This is so that taxpayers could clarify the situation, or if they decide so, pay to be removed from the list.
- 61.c.2 For “non-reachable” taxpayers, PRODECON asked the authority to reconsider its criteria and publish exclusively the names of taxpayers that, in addition to their absence from their tax address, present an ongoing unfulfilling tax behaviour. Thus, all cases must receive different treatment.
- (d) Following the above actions by PRODECON, the Tax Revenue Service accepted the Recommendation and modified the list according to the actions proposed by PRODECON.

### **Implications that can be drawn from the PRODECON record**

62 As stated, PRODECON has the power to:

- propose amendments to tax and customs legal norms. This enables PRODECON to proactively participate in the improvement of the tax system;
- analyze systemic tax problems and offer, to the involved authorities, suggestions to correct and prevent them. This eliminates the need for taxpayers to approach the tax authority as individual, industry or as organised taxpayers, where the issue is widespread and can be dealt with by an independent statutory body for the benefit of all, or affected taxpayers; and
- act as a mediator in a tax alternative dispute resolution mechanism to solve differences between audited taxpayers and tax authorities.

63 These powers are of paramount importance in balancing the powers between the tax authority and the taxpayers. It is therefore recommended that South Africa should afford the Tax Ombud similar powers in order to achieve such goals.

- 64 PRODECON can also act as an advocate for taxpayers when they require legal defence in tax courts. It is desirable that, as with the Legal Aid Board services to the South African community, taxpayers be afforded legal representation against the fully resourced SARS. This legal representation should be subject to monetary limits, as well as viability requirements of the matter. This should cover policy, technical and administrative disputes. Due to the complications involved in this recommendation (including financial constraints on government), it is further recommended that this option be considered further at a later stage.

## **THE UNITED STATES OF AMERICA'S TAXPAYER'S ADVOCATE**

- 65 The U.S. Internal Revenue Code (IRC) § 7803 (c) creates the US National Office of the Taxpayer Advocate under the supervision and direction of an official known as the "National Taxpayer Advocate" (the NTA). The NTA reports directly to the Commissioner of Internal Revenue (the Commissioner) and is entitled to compensation at the same rate as the highest rate of basic pay established for the Senior Executive Service under the United States Code. The NTA is appointed by the Secretary of the Treasury after consultation with the Commissioner and the Oversight Board.<sup>130</sup>
- 66 Each state has a local taxpayer advocate's office. The NTA appoints local taxpayer advocates for each state and has the authority to evaluate and take personnel actions (including dismissal) with respect to any employee of any local office of a taxpayer advocate.<sup>131</sup> The NTA may consult with the appropriate supervisory personnel of the Internal Revenue Service in carrying out these responsibilities.
- 67 A person appointed as the NTA is required to have a background in customer service as well as tax law as well as experience in representing individual taxpayers.<sup>132</sup> Such individual should not have been an officer or employee of the Internal Revenue

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<sup>130</sup> §7803(c)(1) of the IRC.

<sup>131</sup> 7803(c)(2)(D) of the IRC.

<sup>132</sup> §7803(c)(1) of the IRC.

Service during the 2-year period ending with such appointment and such individual agrees not to accept any employment with the Internal Revenue Service for at least 5 years after ceasing to be the NTA.<sup>133</sup>

68 The functions of the Office of the Taxpayer Advocate are stated in general terms and as such seem broader than just administrative dispute resolution. The stated functions of the Office of the Taxpayer Advocate are to<sup>134</sup>—

- assist taxpayers in resolving problems with the Internal Revenue Service;
- identify areas in which taxpayers have problems in dealings with the Internal Revenue Service;
- to the extent possible, propose changes in the administrative practices of the Internal Revenue Service to mitigate problems identified above; and
- identify potential legislative changes which may be appropriate to mitigate such problems.

69 The NTA is required to report to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate on the objectives of the Office of the Taxpayer Advocate for the fiscal year beginning in such calendar year. Any such report shall contain full and substantive analysis, in addition to statistical information.<sup>135</sup> The NTA annually reports to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate on the activities of the Office of the Taxpayer Advocate during the fiscal year ending during such calendar year.<sup>136</sup> The reports contain full and substantive analysis, in addition to statistical information. The reports are required to:

- identify the initiatives the Office of the Taxpayer Advocate has taken on improving taxpayer services and Internal Revenue Service responsiveness;
- contain recommendations received from individuals with the authority to issue Taxpayer Assistance Orders
- contain a summary of at least 20 of the most serious problems encountered by taxpayers, including a description of the nature of such problems;
- contain an inventory of the above items for which
  - action has been taken and the result of such action;

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<sup>133</sup> Service as an officer or employee of the Office of the Taxpayer Advocate is not taken into account in applying this restraint clause.

<sup>134</sup> §7803(c)(2)(A) of the IRC.

<sup>135</sup> §7803(c)(2)(B)(i) of the IRC.

<sup>136</sup> §7803(c)(2)(B)(ii) of the IRC.

- action remains to be completed and the period during which each item has remained on such inventory; and
- no action has been taken, the period during which each item has remained on such inventory, the reasons for the inaction, and identify any Internal Revenue Service official who is responsible for such inaction;
- identify any Taxpayer Assistance Order which was not honored by the Internal Revenue Service in a timely manner;<sup>137</sup>
- contain recommendations for such administrative and legislative action as may be appropriate to resolve problems encountered by taxpayers;
- identify areas of the tax law that impose significant compliance burdens on taxpayers or the Internal Revenue Service, including specific recommendations for remedying these problems;
- identify the 10 most litigated issues for each category of taxpayers, including recommendations for mitigating such disputes; and
- include such other information as the National Taxpayer Advocate may deem advisable.

70 Each report is provided directly to the above committees without any prior review or comment from the Commissioner, the Secretary of the Treasury, the Oversight Board, any other officer or employee of the Department of the Treasury, or the Office of Management and Budget.<sup>138</sup> The NTA also has operational and administrative responsibilities in relation to the human resourcing and advertising of the local taxpayers advocates offices.<sup>139</sup>

71 The Commissioner is required to establish procedures requiring a formal response to all recommendations submitted to the Commissioner by the NTA within three months after submission to the Commissioner. NTA cases involve all types of issues: Audit,

<sup>137</sup> This is specified under section 7811(b) of the IRC.

<sup>138</sup> §7803(c)(2)(B)(iii) of the IRC.

<sup>139</sup> §7803(c)(2)(C) (iii) of the IRC. The National Taxpayer Advocate is required to

- monitor the coverage and geographic allocation of local offices of taxpayer advocates;
- develop guidance to be distributed to all Internal Revenue Service officers and employees outlining the criteria for referral of taxpayer inquiries to local offices of taxpayer advocates;
- ensure that the local telephone number for each local office of the taxpayer advocate is published and available to taxpayers served by the office; and
- in conjunction with the Commissioner, develop career paths for local taxpayer advocates choosing to make a career in the Office of the Taxpayer Advocate.

Assessment, Collection, Processing Problems, Taxpayer Rights. NTA employs analysts whose role is to identify, analyze and advocate with respect to systemic taxpayer problems. They also participate in IRS teams activities and review IRS guidance to employees.

72 The NTA may issue Taxpayers Assistance Orders (TAO) where a taxpayer is suffering or about to suffer a significant hardship as a result of the manner in which the internal revenue laws are being administered by the IRS.<sup>140</sup> Significant hardship is defined to include economic burden, systemic burden, impairment of rights or serious privation (more than mere economic or personal inconvenience).<sup>141</sup> The TAO may require the Secretary of the Treasury within a specified time period to:

- release property of the taxpayer levied upon (i.e. attached by the IRS), or
- cease any action, take any action as permitted by law, or refrain from taking any action, with respect to the taxpayer [with respect to collection, bankruptcy and receiverships, discovery of liability and enforcement of title,] or any other provision of law which is specifically described by the NTA in such order.<sup>142</sup>

73 Any TAO issued by the NTA may be modified or rescinded –

- only by the NTA, the Commissioner of Internal Revenue, or the Deputy Commissioner of Internal Revenue, and
- only if a written explanation of the reasons for the modification or rescission is provided to the NTA.<sup>143</sup>

74 Despite this provision stipulating the circumstances under which the TAO may be modified or rescinded, the IRC seems to allow room for the IRS not to honour the provisions of the TAO or the TAO itself. It provides that in its Annual Report to Congress, the NTA must: “identify any Taxpayer Assistance Order which was not honored by the Internal Revenue Service in a timely manner . . . .”<sup>144</sup>

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<sup>140</sup> IRC §7811(a)(1).

<sup>141</sup> IRC §7811(a)(2) and Treas. Reg. § 301.7811-1(a)(4)(ii).

<sup>142</sup> IRC §7811(b)(1) and (2).

<sup>143</sup> IRC §7811(c).

<sup>144</sup> IRC §7803(c)(2)(B)(ii)(VII).

- 75 The NTA may also issue a Taxpayer Advocate Directive in order to:
- mandate administrative or procedural changes to improve the operation of a functional process, or
  - grant relief to groups of taxpayers (or all taxpayers) when its implementation will protect the rights of taxpayers, prevent undue burden, ensure equitable treatment, or provide an essential service to taxpayers.<sup>145</sup>
- 76 The American model is still improving. The fact that the NTA operates as part of the IRS compromises independence. In contrast to this, as already stated, the South African Tax Ombud has already made strides away from the deemed or perceived dependence on the SARS.

### The Australian Inspector-General of Taxation

- 77 In Australia, the Commonwealth Ombudsman handles complaints by the community in their dealings with the Australian government agencies as a general matter.<sup>146</sup> The Australian Inspector-General of Taxation (IGT) was established by the Australian Inspector-General of Taxation Act 2003 (IGTA) to specifically deal with tax matters. The IGT is appointed by the Governor-General on a full time basis for a period not exceeding five years.<sup>147</sup> The IGT is paid remuneration that is determined by the Remuneration Tribunal. The Remuneration Tribunal is an independent statutory authority established under the **Remuneration Tribunal Act, 1973**.
- 78 The Remuneration Tribunal's role is to determine, report on or provide advice about remuneration, including allowances and entitlements for various office holders including federal Parliamentarians, Ministers and Parliamentary office holders as well as judicial and non-judicial offices of federal courts and tribunals.<sup>148</sup> The staff of the IGT is employed under the Public Services Act and are employed by the IGT on behalf of the Commonwealth.<sup>149</sup>

<sup>145</sup> Delegation Order 13-3 (formerly DO-250, Rev. 1), *Authority to Issue Taxpayer Advocate Directives* (Jan. 17, 2001). See also IRM 13.2.1.6, *Taxpayer Advocate Directives* (July 16, 2009).

<sup>146</sup> Australian Government – Australian Tax Office “Commonwealth Ombudsman” <https://www.ato.gov.au/About-ATO/Access,-accountability-and-reporting/Our-scrutineers/Commonwealth-Ombudsman/>

<sup>147</sup> Section 28 of the IGTA.

<sup>148</sup> See Remuneration Tribunal on <http://www.remtribunal.gov.au/n>

<sup>149</sup> Section 36 of the IGTA.



## Objectives of the IGT

79 The legislative objectives of the creation of the IGT are as follows:<sup>150</sup>

- (a) to improve the administration of taxation laws for the benefit of all taxpayers, tax practitioners and other entities;
- (b) to provide independent advice to the government on the administration of taxation laws;
- (c) to investigate complaints by taxpayers, tax practitioners or other entities about the administration of taxation laws; and
- (d) to investigate administrative action taken under taxation laws, including systemic issues, that affect taxpayers, tax practitioners or other entities.<sup>151</sup>

## The functions of the IGT

80 The functions of the IGT are as follows:<sup>152</sup>

- (a) upon a complaint by any entity, to investigate action affecting that entity that is taken by a tax official, relates to administrative matters under a taxation law;
- (b) to investigate other action that is taken by a tax official and relates to administrative matters under a taxation law;
- (c) to investigate systems established by the Australian Taxation Office, or Tax Practitioners Board, to administer taxation laws, including systems for dealing or communicating with the public generally or with particular people or organisations in relation to administrative matters under those laws;
- (d) to investigate systems established by taxation laws, but only to the extent that the systems deal with administrative matters;
- (e) to investigate actions that are the subject of a part of a complaint transferred to the Inspector-General by the Ombudsman<sup>153</sup> or that the Ombudsman advises<sup>154</sup> does not need to be transferred; and

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<sup>150</sup> Section 3 of the IGTA.

<sup>151</sup> Originally this function was the responsibility of Commonwealth Ombudsman who handles complaints about federal government agencies more generally.

<sup>152</sup> Section 7 of the IGTA.

<sup>153</sup> This is done under paragraph 6D(4)(b) of the *Ombudsman Act 1976*.

<sup>154</sup> Under paragraph 10(1)(b) of the IGTA.

(f) to report on the abovementioned investigations.

- 81 Save for investigations that the IGT would undertake pursuant to complaints by any entity or reference by the Ombudsman, the IGT may conduct the investigations on his or her own initiative or if so directed by the Minister of Finance.<sup>155</sup> While the IGT may be requested by the Minister, Parliament or the Commissioner of the Tax Practitioners Board to conduct an investigation, the IGT is not required by law to comply with such request.<sup>156</sup> The IGT may decide not to conduct an investigation or not to continue with an investigation at his or her own discretion having regard to circumstances surrounding the complaint.<sup>157</sup>
- 82 The functions of the IGT specifically exclude the investigation of rules imposing or creating an obligation to pay an amount under a taxation law and rules dealing with the quantification of such an amount.<sup>158</sup>

### South African Ombuds other than the tax ombud

- 83 South Africa has numerous varied ombudsmen, with generally the same objectives, according to the relevant industries, but mainly with specific mandates. Most of the ombudsmen are members of the Ombudsmen Association of South Africa.<sup>159</sup> The following are noteworthy Ombudsmen in different industries:

**83.1 The Office of the Credit Ombud** resolves complaints from consumers and businesses that are negatively impacted by credit bureau information or when a consumer has a dispute with a credit provider, debt counsellor or payment distribution agent.<sup>160</sup>

**83.2 The Financial Advisory and Intermediary Services (FAIS) Ombud's** role is to resolve disputes between financial services providers and their clients in a

<sup>155</sup> Section 8(1) and (2) of the IGTA.

<sup>156</sup> Section 8(3) of the IGTA.

<sup>157</sup> Section 9 of the IGTA.

<sup>158</sup> Section 7(2) of the IGTA.

<sup>159</sup> <http://www.toasa.org.za/ContactUs.htm>.

<sup>160</sup> [www.creditombud.org.za](http://www.creditombud.org.za).

procedurally fair, informal, economical and expeditious manner. The FAIS Ombud's jurisdiction is limited to violations and claims not exceeding R800 000.00.<sup>161</sup>

**83.3 The Office of the Motor Industry Ombuds (MIO)** is an institution which regulates the interaction and provides for alternative dispute resolution between persons conducting business within the automotive industry in South Africa and consumers, and also among participants in the motor and related industries.<sup>162</sup>

The MIO mandate to resolve disputes is confined to the boundaries of the terms and conditions of the agreement between the contracting parties, as well as South African Law. The MIO does not entertain the resolution of a dispute which falls within the mandate of any other Ombud whether regulated or recognised by its industry.

The MIO also does not entertain the resolution of a dispute when legal action has been instituted by either party, in connection with the transaction which forms part of the complaint when *prima facie* it appears that a criminal offence has been committed by either party or where it appears from any statute of the Republic that the MIO has no jurisdiction. The MIO's resolution of disputes in the motoring industry involves mediation of the issues as well as adjudication.

**83.4 The Ombudsman for Banking Services (OBS)** resolves individual complaints about banking services and products.<sup>163</sup> Any bank customer may lodge a complaint against his or her bank with the OBS, provided the OBS has jurisdiction. The OBS only has jurisdiction on disputes against banks that are members of the Banking Association of South Africa.

83.4.1 Entities such as companies, corporations, partnerships and trusts may lodge a complaint if the person making the complaint is authorised to do so and the annual turnover of the business or group of businesses is R10 million or less per year. The OBS handles complaints which relate to products or services provided by the bank, involve claims of R2 million or less; and arose within the past three years.

83.4.2 The OBS does not handle complaints that involve the following:

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<sup>161</sup> [www.faisombud.co.za](http://www.faisombud.co.za).

<sup>162</sup> [www.miosa.co.za](http://www.miosa.co.za).

<sup>163</sup> [www.obssa.co.za](http://www.obssa.co.za).

- a bank's commercial decision about lending or credit, interest rates or bank charges, unless there has been maladministration on the part of a bank;
- a matter that would more appropriately be dealt with by a court of law or another dispute resolution process; or
- a matter which is or has been the subject of litigation, subject to certain exceptions.

84 **The Long-Term Insurance Ombud** function of the office is to mediate in disputes between subscribing members of the long-term insurance industry and policyholders regarding insurance contracts.<sup>164</sup> It is an independent office which is accountable to an independent Long-term Ombudsman Council for providing an efficient and independent service to policyholders and others in response to disputes arising from long-term insurance policies. Policyholders who submit a complaint to the Ombudsman may still decide to follow the conventional civil justice process, although these two processes are not allowed to proceed simultaneously. The service is free to complainants. Industry subscribers are bound by the Ombudsman's rulings. There is provision in the rules for an informal appeal process.

## Conclusion on the offices of Ombuds

85 From the above, the following lessons can be learnt from the functions and powers of these various South African ombuds:

- 85.1 Most ombuds deal with complaints limited to certain amounts, to resolve the imbalance in powers between the service providers and the customers. This is also a perennial problem in the tax arena, given the extensive legislative powers granted to tax administrators.
- 85.2 The services of the ombuds are often limited to disputes against members of certain organisations. This limits the entities against which complaints can be lodged and potentially creates an opportunity for scrupulous service providers to avoid jurisdiction of the ombudsmen.
- 85.3 Ombuds could have the powers to make determinations, or resolutions that bind the parties to the dispute. Compliance with these determinations or resolutions may be enforced by law.

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<sup>164</sup> [www.ombud.co.za](http://www.ombud.co.za).

- 86 While valuable observations may be made on the role and powers of the various ombuds in South Africa, these ombudsmen intervene between service providers and customers, based on the services provided by the service providers, mainly on the assumption that the customer would have performed (paid) in terms of the contract, and is therefore entitled to a service. By contrast, the subject of the tax ombuds, that is tax, is by its very nature a payment for which no *quid pro quo* is provided, at least not directly. The tax administrator is not a service provider, but a collector of revenue that represents a constitutionally sanctioned deprivation of property without compensation. This therefore makes the nature of the core services of the other ombuds sufficiently different for an adoption by the tax ombuds.

## Conclusions and recommendations

- 87 South Africa has made positive strides towards the improvement of the OTO. However, it is recommended that more should be done to improve the role and powers of the Tax Ombud. In addition, the engagement model of the Tax Ombud with taxpayers and with SARS should be improved. An adoption of a new enhanced model would improve tax morality and compliance. It is recommended that the adoption be introduced promptly with improvements gradually into the system.
- 88 The confidence in, and the credibility of, the Tax Ombud would greatly benefit from transparency of the activities of the Tax Ombud. As has been seen, the NTA publicizes the successes achieved in their activities, which gives the taxpayer community knowledge and confidence in the existence, functions and benefits of the offices. Such credibility would be even better enhanced if the Tax Ombud dealt with issues of taxpayer concerns that are in the public domain, such as the highly publicized delays in the SARS refunding taxpayers' VAT inputs in 2016.
- 89 Of all the models considered in this report, the Mexican model is the most comprehensive. It may be found South Africa cannot adopt the full suite of the Mexican model because of the resources required to enhance the OTO to the level of the PRODECON. However, based on the functions and powers of the PRODECON, it is recommended that, over time, the Tax Ombud's functions and powers be extended to include the powers to:
- propose amendments to tax norms (both of administrative and technical nature). This would enable the Tax Ombud to proactively participate in the improvement of the tax system; and
  - act as a mediator in a tax alternative dispute resolution mechanism to solve differences between audited taxpayers and tax authorities.
  - in line with the powers to adjudicate vested in the customer related Ombuds, the Tax Ombud should have the power to adjudicate the disputes brought

before the Tax Ombud, subject to review and appeal by the courts. This should include technical matters that taxpayers may dispute with the SARS.

- 90 It is recommended that the OTO be staffed with adequately qualified tax technical analysts to be able to allocate tax disputes and immediately address simpler issues (Level 1 analysts team) as well as to be able to proactively monitor public concerns with the tax system.
- 91 It is further recommended that the Tax Ombud standardizes (or retains the standardization) the processes, particularly in relation to turn around times (and keeps to such turnaround times) in order to provide clarity of resolution of taxpayer disputes referred to the tax Ombud. The recommended turnaround period in this regard is 21 calendar days.
- 92 It is recommended that the limitation that the Tax Ombud may not deal with matters that are subject to legal processes (*sub judice*) be retained. However, where the taxpayer or the SARS is not satisfied with the Tax Ombud's determination, such aggrieved party should be able to access the legal system to resolve the matter.
- 93 As stated in relation to the NTA, the reports of the NTA are provided directly to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate on the objectives of the Office of the Taxpayer Advocate without any prior review or comment from the Commissioner, the Secretary of the Treasury, the Oversight Board, any other officer or employee of the Department of the Treasury, or the Office of Management and Budget. It is recommended that the reports of the Tax Ombud should be legislatively mandated to be provided directly to the Minister of Finance and to Parliament without review by anyone outside the office of the Tax Ombud, especially the Commissioner.
- 94 In order to foster accountability, it is recommended that as is the case with the National Taxpayer's Advocate in the USA, SARS should report to the Parliament in relation to

actions recommended by the Tax Ombud. SARS should submit a report to Parliament which should contain an inventory of the items for which

- action has been taken and the result of such action;
- action remains to be completed and the period during which each item has remained on such inventory; and
- no action has been taken, the period during which each item has remained on such inventory, the reasons for the inaction, and identify any Internal Revenue Service official who is responsible for such inaction.

95 The American NTA has the power to issue Taxpayers Assistance Orders (TAO) where a taxpayer is suffering or about to suffer a significant hardship as a result of the manner in which the internal revenue laws are being administered by the IRS. The TAO may require the Secretary of the Treasury within a specified time period to:

- to release property of the taxpayer levied upon, or
- to cease any action, take any action as permitted by law, or refrain from taking any action, with respect to the taxpayer [with respect to collection, bankruptcy and receiverships, discovery of liability and enforcement of title], or any other provision of law which is specifically described by the NTA in such order.

96 It is recommended that the Tax Ombud be granted the powers to provide such relief to taxpayers that may be placed under significant hardship by the manner in which the SARS administers the tax laws against the taxpayer.

97 It is desirable that, as with the Legal Aid Board services to the South African community, taxpayers be afforded legal representation against the fully resourced SARS. This legal representation should be subject to monetary limits, as well as viability requirements of the matter. This should cover policy, technical and administrative disputes. Due to the complications involved in this recommendation (including financial constraints on government), it is further recommended that this option be considered further at a later stage.