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Research Article

Will the Tax Ombud be an Effective Protector of Taxpayers' Rights?

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Abstract

Under the Tax Administration Act, complaints by taxpayers are subject to investigation by the Tax Ombud. It is an 'organ of state' that must respect, protect and promote the rights to which taxpayers are entitled by any law. In the execution of its functions, the Tax Ombud must adhere to the values and principles enumerated in s 195(1) of the Constitution, 1996. As creations of statute, the Tax Ombud is imbued with only those powers and functions conferred by legislation. Under the prevailing tax laws, the Tax Ombud suffers from short-comings which, ultimately, may hinder its ability to be an effective protector of taxpayer rights. These include that the Tax Ombud can only make non-binding recommendations and it is not governed by its own Tax Ombud Act which confers a defined legal status, including the power to litigate. The Tax Ombud is presently in its infancy so that its efficacy as a protector of rights remains unclear and will only be revealed in the fullness of time. However, to give the Tax Ombud more bite as a custodian of rights will require additional powers to be conferred on it of the kind proposed in this article.

Introduction

The South African Revenue Service (SARS) is responsible for collecting sufficient taxes that would capacitate the South African government to satisfy the needs of its people. The "privilege of serving the citizenry who invest their trust and taxes in the public administration"[1] necessitates that SARS and its officials act in the public interest and for public benefit [1]. As a creation of statute, SARS is imbued with statutorily conferred public powers[2]. Under the Tax Administration Act[3] (TAA), its powers include field audits (s 40), criminal investigations (s 41), unannounced on-site inspections (s 45), warranted (s 61) and warrantless searches (s 63). These provisions create a web of related, although independent, powers, each permitting SARS to gather information so as to efficiently and effectively police tax compliance and ensure optimal tax collection. The exercise of these powers may encroach on taxpayers' rights in the Bill of Rights in the Constitution of South Africa, 1996 (Constitution) to human dignity (s 10), privacy (s 14), property (s 25) and just administrative action (s 33)[4]. Statutorily, SARS is "established as an organ of state within the public administration" [2][5]. In accordance with s 239 of the Constitution, SARS is a constitutional 'organ of state' because it is an 'institution' that exercises public power in terms of legislation[6]. As such, SARS is bound by the Bill of Rights [3][7]. Since tax administration falls under the rubric of public administration, SARS must conduct its operations in a principled way by adhering to the values and principles enumerated in s 195(1) of the Constitution[8]. Therefore, tax administration must occur with due respect for taxpayers and their rights. In SA law, taxpayers' rights are sourced in the Constitution, legislation and the common law [4][9]. Failure to comply with its obligation to respect taxpayers' rights would, under the rule of law, render SARS's actions susceptible to judicial review[10].

Inadequate finances in the public treasury would hamstring the government's efforts to fulfil its constitutional mandate to bring about social justice[11]. In his 2017 Parliamentary Budget Speech [5][12], the former Minister of Finance, Pravin Gordhan, reported: "This year, revenue has lagged behind the economy, leading to a R30 billion shortfall by comparison with the budget estimate a year ago". These financial woes are worsened by endemic fraud, corruption, nepotism, tender irregularities, incompetence and fiscal mismanagement by public officials [6][13] and by the spectre of the capture of State institutions by private persons [7][14]. The government's financial woes are exacerbated by protesting communities demanding better service delivery and by university students demanding free tertiary education. These realities will inevitably culminate in demands for increased tax collection and deposits in the public purse. This, in turn, will create potential for abuse of power by SARS which heightens the importance of and need for a Tax Ombud.

Problem Statement and Research Question

The supreme, overarching Constitution with its entrenched Bill of Rights is, in part, a fiscal instrument outlining a set of basic rules, values and principles that regulate and control the exercise of all public power by SARS and its officials. Administrative conduct by them which violates the prescripts of the Constitution is subject to a declaration of invalidity[15]. The TAA promotes key values (such as, efficiency and effectiveness in tax administration, fairness, respect for taxpayers and their rights and a tax compliance culture based on honesty and integrity). These values are aids when interpreting and applying the TAA's provisions. Using the nomenclature of the marketplace, taxpayers are 'clients' or 'customers' who are entitled, on the one hand to treatment that is inter alia, courteous, decent, dignified, ethical, fair, humane, lawful and respectful and on the other, to a quality service that is, inter alia, accurate, efficient, effective, honest, punctual, prompt and professional. In South Africa, taxpayers do not have a right or legitimate expectation to perfect tax administration that is free of errors [8][16]. Section 195(1) of the Constitution sets forth democratic norms and standards that SARS is, as a constitutional organ of state, required to satisfy in order to ensure that tax administration in South Africa is efficient and effective.

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The TAA, which came into effect on 1 October 2012, has created the Tax Ombud and its Office (OTO) to which taxpayers may refer complaints against SARS and its officials. A need exists for research on the issue whether the Tax Ombud is fashioned in a way that would effectively protect taxpayers' rights. A literature survey reveals that this issue has hitherto not been the subject of considered academic research. In seeking to postulate an answer there to, the ensuing discussion will, first, sketch the role and powers of the Tax Ombud; secondly, the Tax Ombud's position as a constitutional organ of state will be canvassed; thirdly, the institutional structure and functional autonomy of the Tax Ombud and its office will be discussed; fourthly, an evaluation will be undertaken of the degree to which the Tax Ombud may likely be an effective tool to protect taxpayers' rights; finally, the conclusions drawn will be outlined.

Functions and powers of the tax ombud

The Tax Ombud is a creation of the TAA and like SARS, is imbued with only those powers conferred statutorily. Its role is framed rather narrowly. Section 16(1) of the TAA reads:

"(1) The mandate of the Tax Ombud is to-

- 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
- 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."

Section 18(1) provides that the Tax Ombud may review an issue in its mandate "on receipt of a request from a taxpayer"; s 18(4) stipulates that the "Tax Ombud may only review a request if the requester has exhausted the available complaints resolution mechanisms in SARS [9][17] unless there are compelling circumstances for not doing so". The Tax Ombud must discharge a mandate within its functional area by satisfying the benchmarks in s 16(2). These are: (i) To "review a complaint and, if necessary, resolve it through mediation or conciliation" (s 16(2)(a)); (ii) To "act independently in resolving a complaint" (s 16(2)(b)); (iii) To "follow informal, fair and cost-effective procedures in resolving a complaint" (s 16(2)(c)); (iv) To "provide information to a taxpayer about the mandate of the Tax Ombud and the procedures to pursue a complaint" (s 16(2)(d)); (v) To "facilitate access by taxpayers to complaint resolution mechanisms within SARS to address complaints" (s 16(2)(e)); and (vi) To "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" (s 16(2)(f)). Section 18(2) empowers the Tax Ombud to exercise discretion in determining both "how a review is to be conducted" and "whether a review should be terminated before completion"[18].

Status of the tax Ombud as a constitutional 'organ of state'

The Tax Ombud is a public servant (functionary) performing a public function under the TAA. Consequently, it is arguably an 'organ of state' as defined in para (b)(ii) of s 239 in the Constitution quoted in n 6 above. If so, then, in terms of s 8(1) of the Constitution quoted in n 7 above, the Tax Ombud would be bound by the Bill of Rights to respect and protect taxpayers' fundamental rights against infringement. As stated above at para 3.1, the Tax Ombud exercises public power in tax administration, a facet of broader public administration. Thus, under s 195(2) of the Constitution, the Tax Ombud must adhere to the democratic values and principles enumerated in s 195(1) thereof. Consequently, in the execution of its functions, the Tax Ombud must promote and maintain a high standard of professional ethics (s 195(1)(a)), must promote the efficient, economic and effective use of its resources (s 195(1)(b)), must provide services to the public impartially, fairly, equitably and without bias (s 195(1)(d)) and must respond to taxpayers' needs (s 195(1)(e)). Although the TAA (s 18(6)) permits the Tax Ombud to inform a taxpayer of the outcome of a review or action taken in response to a complaint "at the time and in the manner chosen by the Tax Ombud", under s 195(1)(g) of the Constitution, the Tax Ombud is obliged to provide taxpayers "with timely, accessible and accurate information".

Tax Ombud and OTO: Institutional structure and functional autonomy

Section 14(1)(a) of the TAA stipulates that the Minister of Finance (Minister) "must appoint a person as Tax Ombud" for a renewable term of five years and during a vacancy in that position, the Minister, acting in terms of s 14(3), "may designate a person in the office of the Tax Ombud to act as Tax Ombud". Section 14(1)(b) empowers the Minister to determine the Tax Ombud's terms and conditions of service. The TAA stipulates that the Tax Ombud "is accountable to the Minister" (s 14(5)(a)) and must "report directly to the Minister" (s 19(1)(a)). Also, the Tax Ombud "may be removed by the Minister for misconduct, incapacity or incompetence" (s 14(2)). The cumulative effect of the provisions regulating the appointment, employment, removal and accountability of the Tax Ombud reflects an unacceptably high level of governmental executive control over the Tax Ombud and the OTO. The Tax Ombud's subservience to a member of the National Executive is a potential Achilles heel of the Tax Ombud being an effective tool for the protection of taxpayers' rights during tax administration.

The TAA draws a clear differentiation between the 'Tax Ombud' as a person and the 'Office of the Tax Ombud'. This distinction is clear from ss 15(1) and (2) of the TAA which reads:

"(1) The Tax Ombud must appoint the staff of the office of the Tax Ombud who must be employed in terms of the SARS Act[19].

(2) When the Tax Ombud is absent or otherwise unable to perform the functions of office, the Tax Ombud may designate another person in the office of the Tax Ombud as acting Tax Ombud".

The distinction between the Tax Ombud and the OTO makes it important to understand the rules concerning the accountability of the Tax Ombud, on the one hand and that of staff in the OTO, on the other. Whereas s 14(5) and s 19(1) of the TAA renders the Tax Ombud accountable to the Minister, the human resources employed in the OTO are accountable only to the Tax Ombud. This was not always the legal position. Prior to an amendment of s 15(1) brought about by the Tax Administration Laws Amendment Act (TALAA) with effect from January 2017[20], it provided that the staff in the OTO were "seconded [from SARS] at the request of the Tax Ombud in consultation with the Commissioner [of SARS]". Accordingly, the staff deployed to the OTO were under SARS's indirect control by reason that they were SARS employees. As such, they were subject to SARS's code of conduct and its internal disciplinary processes. A SARS employee

seconded to the OTO remained duty-bound in law, by virtue of an employment relationship with SARS, to be faithful and loyal to his/her 'true' employer, namely SARS and to promote its interests. Failure to do so would be a breach of employment duties that would render an employee susceptible to disciplinary action. In the light hereof, the secondment of SARS's employees created fertile ground for potential conflicts between the interests of SARS, on the one hand and that of the OTO, on the other [10][21].

The staff in the OTO provides important administrative support to the Tax Ombud relating to the investigation of complaints against SARS. The secondment of its employees to the OTO meant that the OTO's operations were not sufficiently independent and free from the influence or control of SARS. The *de facto* close working (or functional) relationship between SARS and the OTO carried the real risk that taxpayers, their representatives and advisors would be wary of the Tax Ombud, its *bona fides* and the genuineness of its review of taxpayer complaints and mediation or conciliation of disputes with SARS. For this reason, the structural dependence of the OTO on SARS for staff created an unhealthy state of affairs. It provided grounds for an apprehension of bias in the eyes of informed, thoughtful, objective taxpayers who, on justifiable grounds, may reasonably perceive that the Tax Ombud would not be capable of rendering services that are fair and equitable, or may not be open to persuasion, or may not bring an unbiased, impartial mind to bear on a complaint[22]. This perception potentially undermined the role and public image of the Tax Ombud as an effective means available to taxpayers to protect their rights against assault by SARS and its officials in the execution of their legal duties.

SARS justified the deployment of its staff to the OTO as a matter of operational expediency. SARS describes this as "a practical matter which will ensure staff are knowledgeable about tax and SARS's internal processes and will simplify the administration of secrecy around taxpayers' affairs" [11][23]. This justification is flawed. First, the duty of staff at the OTO to treat sensitive taxpayer information in confidence does not stem from such persons being SARS employees but rather from the obligations imposed by the TAA [12][24]. Secondly, it is implausible for SARS to suggest that only its employees are knowledgeable in tax and SARS's internal organisational processes. At any rate, knowledge of such processes can be acquired through disclosure by SARS when the need to do so arises. Thirdly, knowledge of SARS's internal operations ought not to assume such prominence that it takes precedence over institutional independence and public trust in the Tax Ombud and its office. Without that trust, the system of review, mediation and conciliation conducted by the Tax Ombud will not garner the public's respect and acceptance that is essential for its effectiveness and success. The needs of taxpayers (or batho pele) must be put ahead of that of SARS and its operational expediency argument.

The secondment of SARS employees to the OTO was, understandably, a real cause for concern that it would dent the public's faith and confidence in the Tax Ombud and its processes. This is particularly so because the TAA lacks a provision similar to s 181(4) of the Constitution. The latter reads: "No person or organ of state may interfere with the functioning of these [Chapter nine] institutions." Thus, there is no obligation on SARS and its officials to desist from unduly interfering with the affairs of the Tax Ombud to the detriment of a taxpayer. This situation is more problematic by reason of the absence of any sanction for SARS and its officials who may unduly interfere in the execution of the Tax Ombud's mandate. This unsavoury state of affairs is also not addressed by the positive duty on the Tax Ombud to "act independently in resolving a complaint" (s 16(2)(b)). For practical purposes, this duty is cold comfort to taxpayers. First, it does not equate with the institutional independence of the Tax Ombud. Secondly, the Tax Ombud suffers from human weaknesses, frailties and potential for poor judgment. Hence, the duty to act independently is no guarantee that the Tax Ombud will act without fear, favour or prejudice.

In view of all the foregoing considerations, it is submitted that the amendment to s 15(1) of the TAA described above is a step in the right direction to fostering increased public faith and confidence in the inner workings of the OTO and, by extension, the Tax Ombud. This submission is further enhanced by s 15(4) of the TAA now catering for fiscal independence of the OTO from SARS. Prior to its amendment by the TALAA, s 15(4) stipulated that the "expenditure connected with the functions of the office of the Tax Ombud is paid out of the funds of SARS". Pursuant to the amendment, that expenditure is to be "paid in accordance with a budget approved by the Minister for the office".

Evaluation of the tax Ombud's potential efficacy to protect taxpayers' rights

Although s 16(1) of the TAA empowers the Tax Ombud to review a complaint pertaining to a service delivery failure ("service matter"), there is presently no SARS Service Charter or a statement outlining the standards of service to which a taxpayer is entitled during tax administration by SARS and its officials. In the absence thereof, the democratic values and principles of public administration in s 195(1) of the Constitution provides the only yardstick by which the Tax Ombud can assess and evaluate the standards of service adhered to by SARS[25]. Section 17 of the TAA imposes various limits on the Tax Ombud's authority. It is powerless to review (i) legislation or tax policy (s 17(a)), (ii) SARS policy or a practice generally prevailing, other than to the extent that it relates to a service matter or a procedural or administrative matter stemming from the application of the provisions of a tax Act by SARS as defined (s 17(b))[26] and (iii) a decision of, or a proceeding in or matter before, the Tax Court (s 17(d))[27]. The nature and extent of these limitations results in the Tax Ombud's role being watered-down to such a degree that it will probably have minimal (real) impact on taxpayers' relationships with SARS.

Section 17(c) expressly excludes from the Tax Ombud's jurisdiction any matter that is subject to an objection or appeal under a tax Act, except administrative matters related thereto. Thus, the Tax Ombud's jurisdiction covers matter that is not subject to objection or appeal, as well as a matter that is not, in terms of s 104, objectionable or appealable[28]. This is a sensible limitation on the Tax Ombud's authority. It would be unwise to confer concurrent jurisdiction on the Tax Ombud in relation to the same matter that is subject to a formal objection or appeal at another forum. If permitted, it would create confusion and an opportunity for taxpayers to engage in the unpalatable practice of 'forum shopping'.

Section 257(2) of the TAA bolsters the ability of the Tax Ombud to be effective in the execution of its duties. In terms thereof, the Minister may, after consultation with the Tax Ombud, issue regulations extending the Tax Ombud's jurisdiction in relation to a particular taxpayer's complaint. This variation in jurisdiction may be granted after having regard to, inter alia, the factual or legal complexity of the complaint, the nature of the taxpayer whose complaint is under

consideration, and the maximum amount which may be involved in the dispute between the taxpayer and SARS (s 257(2)(b))[29]. Regulations may also be issued relating to "the proceedings of the Tax Ombud" (s 257(2)(a))[30].

Notwithstanding the foregoing, from a taxpayer's perspective, the efficacy of the Tax Ombud as a tool in tax administration is to some degree undermined by the absence of an express statutory duty on SARS and its officials to co-operate with the Tax Ombud in the execution of its mandate. The TAA (s 21(2)) simply requires SARS to "allow the Tax Ombud access to information in the possession of SARS that relates to the Tax Ombud's powers and duties under this Act". Moreover, since the TAA (s 20(1)) only permits the Tax Ombud to "communicate with SARS officials identified by SARS", SARS's position is unduly strengthened *vis-à-vis* the Tax Ombud. The TAA contains no mechanism by which SARS can be compelled to co-operate with the Tax Ombud. Thus, its participation in the processes of the Tax Ombud is entirely voluntary and at SARS's discretion.

In accordance with international best practice, referral of a taxpayer's complaint to the Tax Ombud ought to be a measure of last resort, not a first port of call. The TAA (s 18(4)) permits a Tax Ombud to review a complaint only if the taxpayer has exhausted all available internal complaints resolution mechanisms within SARS, except if "there are compelling circumstances for not doing so" having regard to those factors listed in s 18(5). These are: (i) whether the request raises systemic issues; (ii) whether exhausting the internal complaints resolution mechanisms will cause undue hardship to the taxpayer; and (iii) whether exhausting the complaints resolution mechanisms is unlikely to produce a result within a reasonable time. It is submitted that a taxpayer bears the onus to satisfy the Tax Ombud that "compelling circumstances" exist for the exercise of the Tax Ombud's discretion in the taxpayer's favour.

When resolving a complaint under the TAA, the Tax Ombud must "follow informal, fair and cost-effective procedures" (s 16(2)(c)). However, in doing so, the Tax Ombud does not function as "an independent tribunal or forum" as envisaged by s 34 of the Constitution. This is so because the Tax Ombud has no decision-making powers and thus, cannot resolve a procedural or administrative dispute by way of a decision upon application of the law. The Tax Ombud must resolve all issues within its mandate "at the level at which they can most efficiently and effectively be resolved" (s 20(1)) and may issue recommendations but these "are not binding on a taxpayer or SARS" (s 20(2))[31]. Thus, these are, strictly speaking, unenforceable in law against SARS. Prima facie, this would suggest that the Tax Ombud is, largely, a toothless official in tax administration and may prove ineffective as an alternative for taxpayers to obtain redress concerning complaints levelled at SARS or its officials.

However, by way of an amendment to s 20(2) of the TAA by the TALAA, SARS is now obliged to provide reasons for any decision not to accept a recommendation made by the Tax Ombud. Such reasons "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 [of SARS] under section 19"[32]. Consequently, in practice, SARS would require strong justification for defying the Tax Ombud's recommendations through failure to implement same. For this reason, the Tax Ombud's recommendations may well carry weight and provide protection for taxpayers and their rights during tax administration conducted by SARS officials.

Conclusion

In a Constitutional State subject to the rule of law, as in South Africa, checks and balances are required to ensure that measures are available to counteract tax officials acting aberrantly or out of kilter with their powers and duties. Since litigation is largely unaffordable[33], a more cost effective means of redress is required. In modern times, the institution of an Ombudsman, as a custodian of the rights of members in a society, "has emerged as a sine qua non of people's welfare"[34], In foreign jurisdictions in the tax administration arena, this takes the form of, for example, referring a taxpayer's complaint to a Taxpayers' Ombudsman (as in Canada), a Tax Adjudicator (as in the United Kingdom), a Taxpayer Advocate (as in the USA) and a Special Advisor on Taxation (as in Australia)[35]. Thus, the establishment of the Tax Ombud and OTO by the TAA are significant developments. These are positive innovations which are part of broader transformation of the landscape of tax administration which brings South Africa into line with international best practice. In so doing, the TAA strikes a fair balance, on the one hand, between SARS's powers and duties and, on the other, the rights and duties of taxpayers. This balance serves to promote justice and equity in tax administration, values that are embraced by s 195(1) of the Constitution.

This article demonstrates that the Tax Ombud and OTO in SA are not moulded in a way akin to that of the Public Protector created by s 181 of the Constitution[36]. This is cause for concern as to the Tax Ombud's potential efficacy in playing a meaningful oversight function that will shield taxpayers' rights from being mere 'paper' ones. Since the Tax Ombud performs an oversight role that aims to provide enhanced, external protection for taxpayers and their rights against bureaucratic hostility or other improper conduct by SARS[37], the Tax Ombud ought to be an independent functionary regulated, like the Public Protector, by its own statute.

The TAA has not integrated the Tax Ombud and its office within the SARS organogram. Since the Tax Ombud's operations are still largely in their infancy, the jury remains out as to whether it will be a successful watchdog policing SARS and its officials, on the one hand and protecting taxpayers' rights, on the other. However, in order to give the Tax Ombud more teeth so as to promote its efficacy, the powers conferred by the TAA ought to be expanded. First, the Tax Ombud ought to be empowered to direct that SARS institute disciplinary action against an errant official whose actions are deemed by the Tax Ombud to amount to misconduct. Secondly, the Tax Ombud ought to be able to refer a matter to the South African Police Services for criminal investigation in circumstances where the Tax Ombud believes or suspects that a SARS official acted in a manner that justifies crimination prosecution. Thirdly, the Tax Ombud ought to be empowered to apply for a search and seizure warrant in relation to relevant documents stored at premises under SARS's control which may be relevant to an investigation undertaken by the Tax Ombud. In order for a power of this nature to be executed, it would also be necessary for the Tax Ombud to be granted the power to litigate. At present, no such power is conferred. Since the Tax Ombud is a creation of statute, it is not imbued with any of these proposed powers in the absence of legislation conferring them in express terms.

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1. Khumalo v MEC for Education, KwaZulu-Natal 2014 5 SA 579 (CC) para 36 [1]
2. AM Moolla Group Ltd v CSARS 2005 JOL 15456 (T) 3. The concept 'public power' includes the exercise of power that impacts on the general public (see Police and Prisons Civil Rights Union v Minister of Correctional Services 2006 2 All SA 175 (E) para 53), and also power exercised by a public functionary in the public interest (see Mustapha v Receiver of Revenue, Lichtenburg 1958 3 SA 343 (A) 347D-
3. 28 of 2011. The TAA is a comprehensive statute forming an integral part of fiscal transformation in SA. It fosters greater cohesion and harmonisation in the administration of those taxes falling within its remit.
4. A discussion of the TAA and Bill of Rights provisions referred to falls outside the remit of this article.
5. s 2, South African Revenue Service Act 34 of 1997. See also CSARS v Trend Finance (Pty) Ltd 2007 6 SA 117 (SCA) para 25; Pearse v CSARS 2012 ZAGPPHC 75 (4 05 2012) paras 49-51 [2].
6. In terms of para (b)(ii) of the 'organ of state' definition in s 239, 'organ of state' includes "any other functionary or institution" exercising a public power under "any legislation". "Any" casts widely the net of affected "legislation" and "functionary". See Southern Life Association Ltd v CIR 47 SATC 15 (C) 18-19; CIR v Ocean Manufacturing Ltd 1990 3 SA 610 (A) 618; Commissioner for Customs and Excise v Capital Meats CC (in liquidation) 61 SATC 1 (SCA) 5; Body Corporate of Greenacres v Greenacres Unit 17 CC 2008 3 SA 167 (SCA) para 5; ARMSA v President of South Africa 2013 7 BCLR 762 (CC) paras 33-35.
7. The Constitution (s 8(1)) reads: "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state" [3].
8. Section 4(2), SARSA. Mokgoro J, in Van der Merwe v Taylor 2008 1 SA 1 (CC) para 72, held: "In this constitutional era, where the Constitution envisages a public administration which is efficient, equitable, ethical, caring, accountable and respectful of fundamental rights, the execution of public power is subject to constitutional values. Section 195 reinforces these constitutional ideals. It aims to reverse the disregard, disdain and indignity with which the public in general had been treated by administrators in the past." See also President of South Africa v South African Rugby Football Union 2000 1 SA 1 (CC) para 133. The Court, in Jeeva v Receiver of Revenue, Port Elizabeth 1995 2 SA 433 (SECLD) 441G, held that certain practices of SARS's predecessor during the apartheid era were 'entirely inconsistent with modern values of openness and accountability in a democratically orientated administration'.
9. See Moosa F The 1996 Constitution and the Tax Administration Act 28 of 2011: Balancing efficient and effective tax administration with taxpayers' rights (2016 thesis) 248-284 [4].
10. Plasma View Technologies (Pty) Ltd v CSARS 72 SATC 44 (T) 57.
11. The Constitution (s 7(2)) reads: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights." See Government of South Africa v Grootboom 2001 1 SA 46 (CC) paras 19-20; Glenister v President of South Africa 2011 3 SA 347 (CC) paras 105-107.
12. [5]
13. See Auditor General 'Consolidated General Report on the National and Provincial Audit Outcomes 2015-2016 [6]
14. See Public Protector 'State of Capture', Report No. 6 of 2016/17 (14 10 2016) [7]
15. Jafta J (minority judgment), in MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd 2014 3 SA 481 (CC) para 60, usefully explained the legal position as follows: 'Under our Constitution the courts do not have the power to make valid administrative conduct that is unconstitutional. What may be done by the courts is to regulate the consequences of their declaration of invalidity.'
16. Logbro Properties CC v Bedderson NO 2003 2 SA 460 (SCA) para 17; MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd n 15 para 88 [8].
17. According to SARS's website at http://www.sars.gov.za (2 10 17), its complaints resolution mechanism entails lodging a complaint either electronically, or physically at a branch office, or telephonically via the Complaint's Management Office. This mechanism is, however, only available for a grievance or dissatisfaction concerning a service experience that is not adequately resolved (such as staff incompetence or misconduct), or in relation to a process (including queries, returns or any service request). That mechanism is not available when the formal dispute resolution mechanism of s 104 of the TAA applies [9].
18. When exercising the discretion conferred by s 18(2), the Tax Ombud must consider such factors as listed in s 18(3). These are (i) the age of the request or issue, (ii) the time period that elapsed since the taxpayer became aware of the issue, (iii) the nature and seriousness of the issue at hand, (iv) the bona fides of the taxpayer's request, and (v) the findings of other redress mechanisms with regards to the request at hand.
19. The 'SARS Act' is defined in the TAA (s 1) to mean the 'South African Revenue Service Act, 1997'.
20. 16 of 2016. This Act was assented to by the President on 18 1 17 and gazetted on 19 1 17 per GG 40563. The position prior to the amendment acquired legal force on 1 10 2012 when the TAA took effect.
21. The TAA (s 7) prohibits a SARS employee from engaging in a matter where a conflict of interest arises in the 'administration of a tax Act' as defined in s 3(2) of the TAA [10].
22. For the general legal test relating to institutional and structural independence, as well as for appearances and perceptions of bias, see S v Van Rooyen 2002 5 SA 246 (CC) paras 32-34. Although Van Rooyen dealt with the independence of the judiciary, the general test laid down there for evaluating the degree of its institutional independence may, it is submitted, be applied, mutatis mutandis, to the Tax Ombud and the OTO. For a discussion of the concept of independence, see Glencore Operations South Africa Proprietary Limited Coal Division v Minister of Mineral Resources 2016 ZALCJHB 31 (3 02 2016) paras 105-107.
23. SARS 'Short guide to the Tax Administration Act, 2011' (June 2013) 15 [11].
24. The TAA (s 21) reads: "Confidentiality --- (1) The provisions of Chapter 6 apply with the changes required by the context for the purpose of this Part. (2) SARS must allow the Tax Ombud access to information in the possession of SARS that relates to the Tax Ombud's powers and duties under this Act. (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 under this Part." For a discussion of 'confidentiality' in tax administration, see van der Walt J Tax confidentiality – a relic from a bygone era (20 09 2016) [12].
25. The Tax Ombud's mandate excludes an authority to prepare a SARS Service Charter or a Bill of Taxpayers' Rights as a roadmap for efficient and effective tax administration. For a discussion of taxpayers' rights in South Africa generally, see Moosa F n 9 ch seven. For a proposed charter of norms and standards of good service to taxpayers, see Moosa F n 9 ch eleven and the Appendix thereto.
26. The limitation in s 17(b) is subject to the proviso that the Tax Ombud has authority to the extent that a SARS policy or practice generally prevailing "relates to a service matter or a procedural or administrative matter arising from the application of the provisions of a tax Act by SARS".
27. The TAA (s 17(d)) refers only to the 'tax court' (as defined in s 1). Therefore, the express wording utilised in s 17(d) does not extend the application of the limitation therein to, inter alia, a court of law, 'inquiry proceedings' by a presiding office under s 52, or a 'determination' by an attorney pursuant to s 64. This, it is submitted, is a lacuna in s 17(d) which requires legislative intervention to cure.
28. Examples of non-objectionable or non-appealable decisions under the TAA include those pertaining to, inter alia, an application for the suspension of the payment of a tax (s 164), and a taxpayer's request for a write off or compromise of a tax debt (s 195, s 197, s 200).
29. Section 257(2)(b) envisages regulations for specific taxpayer complaints which are otherwise beyond the purview of the Tax Ombud's jurisdiction.
30. At the time of completion of this article, no regulation had been issued.
31. Although "[e]very complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits", (see Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly 2016 3 SA 580 (CC) para 70), the Tax Ombud lacks "authority to make any determinative decision" (see New Adventure Shelf 122 (Pty) Ltd v CSARS 2016 2 All SA 179 (WCC) para 18).
32. Although s 20(2) is now in line with the position found in certain foreign jurisdictions discussed by Malik MS A Comprehensive Analysis of the Law of the Ombudsman (2007) 216, the TAA does not go far enough. It ought to include a provision that would oblige SARS to report to the Tax Ombud, within a prescribed period, the action SARS intends to take to implement a recommendation accepted by it.

33. In Capendale v Municipality of Saldanha Bay; Capendale v 12 Main St, Langebaan (Pty) Ltd 2014 1 All SA 33 (WCC) para 106 the exorbitant cost of litigation was referred to as "the wide highway of High Court litigation, a highway upon which well-healed lawyers gladly drive in their expensive motor cars".

34. Malik MS n 32 (2007) 32.

35. A comparative analysis between the Tax Ombud and OTO in SA with that of similar institutions in foreign jurisdictions falls outside the purview of this article. It ought to be the subject of further research.

36. For a discussion of the constitutional role of the Public Protector, see Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly n 31para 65. From a tax perspective, see Croome BJ Taxpayers' Rights in South Africa (2010) 311.

37. For a discussion of the protection of taxpayers' rights in the United Kingdom, Canada, New Zealand, Pakistan, Australia, Tanzania and the USA, see Croome BJ n 36 266-303.