

TAX ADMINISTRATION BILL, B11 - 2011
STANDING COMMITTEE ON FINANCE
BRIEFING NOTE: TAX OMBUD: CLAUSES 14 - 21

Background

The modern concept of an ombud found its first expression in Sweden in 1809. It has been taken up in various forms around the world since the 1950s. In South Africa the equivalent of the Swedish Parliamentary Ombudsmen is the Public Protector, established in terms of the Interim Constitution of 1993 and continued in the Constitution of the Republic of South Africa, 1996.

The concept of a Tax Ombud was floated in South Africa in the Third Interim Report of the Katz Commission in 1995, which recommended that; “while the role of the Public Protector as ultimate watchdog over taxpayer and other rights should be recognised and strongly encouraged, the underlying foundation of trust between taxpayers and authorities would be better served by the more direct mediatory role of a Tax Ombudsman or Adjudicator along the lines of the United Kingdom example.”

The Joint Standing Committee on Finance’s views on this recommendation were that; “While accepting the principle contained therein, the recommendation to appoint a separate Tax Ombud is not supported at this stage. The JSCOF expressed concern at the proliferation of such oversight bodies. Further consideration of alternatives is needed, including the possibility that the Public Protector’s Office establish a specialised, skilled tax unit to achieve this purpose.”

In 2002 the then Minister of Finance announced that a new dispute resolution process for disputes arising from the interpretation of the tax laws, which had been the subject of extensive consultation with tax practitioners, advocates and judges, would take effect shortly. The rules took effect on 1 April 2003 and are aimed at providing clearer, faster and cheaper mechanisms for resolving disputes of this nature with SARS. They allow for the following avenues for resolving a dispute:

- Objection
- Alternative dispute resolution
- Tax Board (smaller, simpler cases)
- Tax Court (appeals from Tax Board and more complex cases)
- Normal Court system

At the same time, it was recognised that the mechanism for resolving disputes of an administrative or procedural nature needed improvement. This led to the creation of the SARS Service Monitoring Office in October 2002. At the launch of the SSMO the then Minister of Finance announced that; “Once SARS’ processes and procedures have improved sufficiently, the next important step that will be taken in emulating international standards will entail an important role for an Ombud.”

Current Proposal

One of the key objectives of the Tax Administration Bill is to achieve a balance between SARS’s powers and duties, on the one hand, and taxpayer obligations and rights on the other. The main benefit in achieving this balance is that it will enhance the degree of equity and fairness in the Bill.

Given the extension of SARS’s powers in the Bill, a number of measures to assist taxpayers have also been inserted. The creation of an independent and effective recourse for taxpayers in respect of administrative and procedural issues would be in line with this objective, as well as

international best practice. The SSMO currently provides an internal recourse for taxpayers but a Tax Ombud's office is generally regarded as a more effective and independent remedy to address complaints or enforce taxpayer rights.

As Victor Thuronyi notes, however; "Other countries have gotten along without a tax ombudsman because the functions in question are by and large dealt with by existing institutions. Chief among these is the internal appellate function and the court system, which hears appeals from assessments and provide judicial review of other agency actions. External and internal audit agencies monitor whether administrative agencies are carrying out their functions properly. Finally, legal aid schemes assist low-income individuals in asserting their rights."¹

The question that arises is what then is the best model for a South African Tax Ombud? In answering this question two issues must be considered. Firstly, the Tax Ombud's responsibilities and powers must fit into South Africa's existing legal and constitutional dispensation. Secondly, the Tax Ombud's office should be aligned with existing international precedent, so that the experience of other countries can be drawn upon.

In considering the first issue, the following avenues currently exist for resolving a procedural or administrative dispute:

- SARS internal service issue resolution
- SSMO
- Public Protector
- Normal Court system

The Katz Commission proposal and the proposal in the Bill locate the Tax Ombud between the SSMO and the Public Protector. In doing so care must be taken that the Tax Ombud does not intrude on the role or status of the Public Protector or the Courts. As an example, a separate Tax Ombud with the same powers and responsibilities as the Public Protector would conflict with the Constitutional assignment of those powers and responsibilities to the Public Protector. Care must equally be taken that the Tax Ombud is independent from SARS.

The Bill proposes that the Tax Ombud be appointed and report to the Minister of Finance. Although the Bill proposes that SARS employ the staff of the Tax Ombud's office and it be funded from SARS's budget, it will operate independently of SARS. The Bill proposes that the Tax Ombud resolves issues by way of investigation, mediation and recommendation. The Bill proposes that the Tax Ombud provide an annual report to the Minister of Finance and a quarterly report to the Commissioner. SARS's response document of 21 September 2011 recommends that the ambit of the annual report be widened to cover systemic and emerging issues and that the Minister of Finance table the report in Parliament.

Comparative Overview: International

Separate Tax Ombud

United Kingdom²

The Katz Commission based its proposal on the Tax Adjudicator's office in the UK, which is located between Her Majesty's Revenue and Customs complaint handling service and the Parliamentary and Health Service Ombudsman. The Tax Adjudicator's office was set up in 1993 to look into complaints centred on service related issues about the then Inland Revenue. Today the Adjudicator deals with complaints about HMRC, Valuations Office Agency and Insolvency Service. She is not appointed in terms of legislation but rather by way of contract.

¹ Victor Thuronyi, *Comparative Tax Law* (Kluwer Law International: 2003) page 230

² Useful links: <http://www.adjudicatorsoffice.gov.uk/>, <http://www.adjudicatorsoffice.gov.uk/pdf/sla2011.pdf>
<http://www.adjudicatorsoffice.gov.uk/pdf/report2011.pdf>

Although HMRC funds the Adjudicator's office and provides staff, accommodation, equipment and materials in terms of a service level agreement, the Adjudicator's office operates independently of the agencies it monitors. The service level agreement also provides for access to all relevant staff, information and data required for the consideration of complaints received. The Adjudicator resolves issues by way of investigation, mediation and recommendation. She issues a public annual report on her office's activities and finances. According to the Katz Commission; "In its first two years of operation, the office of the Tax Adjudicator has been remarkably successful in mediating procedural conflict between taxpayers and the authorities" and from the latest annual report it appears to have continued its success.

Applying this model in South Africa would not intrude on the role of the Public Protector or Courts but may be considered to give insufficient weight to the perceived independence of the Tax Ombud from SARS.

*Canada*³

There is no federal ombud in Canada, so the Taxpayers' Ombudsman is located between the Canadian Revenue Authority's Service Complaints Office and the Courts. The first Taxpayers' Ombudsman was appointed in 2008 to look into complaints about the CRA centred on service rights and service related issues. He is appointed as a special adviser to the Minister of National Revenue, to whom he is accountable and reports, in terms of a 2007 Order-In-Council under the Public Service Employment Act, 2003.

Although the CRA employs the staff of the Taxpayers' Ombudsman's office and provides support to it, it operates independently of the CRA. The Taxpayers' Ombudsman resolves issues by way of investigation, facilitation and recommendation. He provides an annual report on his office's activities to the Minister of National Revenue, who tables it before Parliament.

Applying this model in South Africa would provide a legislative framework for the independence of the Tax Ombud from SARS but would not intrude on the role of the Public Protector or Courts.

*United States of America*⁴

There is no federal ombud in the USA, so the Taxpayer Advocate Service is located between the Internal Revenue Service's Problem Resolution Program and the Courts. The Taxpayer Advocate Service took its current form in 1998 in terms of section 7803 of the Internal Revenue Code and assists taxpayers suffering "economic harm" or "experiencing delays" in the resolution of a tax problem. The National Taxpayer Advocate is appointed by the Secretary of the Treasury and she reports directly to the Commissioner of the IRS.

Although Taxpayer Advocate Service staff are employed by the IRS and its budget is part of the overall IRS appropriation, it operates independently of the IRS. The Taxpayer Advocate Service resolves issues by way of investigation, facilitation, recommendation and – in rare cases – direction to the IRS. Only the National Taxpayer Advocate, Commissioner, or Deputy Commissioner may modify or rescind such a direction and then only in writing. The National Taxpayer Advocate is required by legislation to submit an annual report covering defined issues, including the modification or rescinding of directions, to the House and the Senate in Congress.

Applying this model in South Africa would provide a legislative framework for the independence of the Tax Ombud from SARS but would potentially intrude on the role and status of the Public Protector given a direct reporting duty to Parliament.

³ Useful links: <http://www.oto-boc.gc.ca/typs-eng.html>, <http://www.oto-boc.gc.ca/rdrncncl-eng.pdf>, <http://www.oto-boc.gc.ca/rprts/2009-2010/rprt-nnl0910-eng.pdf>

⁴ Useful links: <http://www.irs.gov/advocate/>, <http://www.fas.org/sqp/crs/misc/RL34606.pdf>, <http://www.gao.gov/new.items/d07156.pdf>, http://www.irs.gov/pub/irs-utl/caseadvocacy_2010arc.pdf

Reliance on Public Protector Alone

An alternative model that is encountered frequently internationally is to rely on the equivalent of the Public Protector's office to deal with tax matters as part of its overall responsibilities. The JSCOF's suggestion of a dedicated unit within the Public Protector's office is a variation on this alternative model. This variation also has international precedent.

*Australia*⁵

The Special Adviser on Taxation in the office of the Commonwealth Ombudsman handles issues that cannot be resolved by the Australian Tax Office's Problem Resolution Office. These issues are resolved by way of consultation, negotiation and recommendation. The Commonwealth Ombudsman is accountable and reports to Parliament.

*Botswana*⁶

The Office of the Ombudsman handles issues that cannot be resolved by the Botswana Unified Revenue Service. These issues are resolved by way of investigation and recommendation. The Ombudsman is accountable and reports to the President. The Ombudsman's annual report and special reports are laid before Parliament.

*New Zealand*⁷

The Office of the Ombudsmen handles issues that cannot be resolved by the New Zealand Inland Revenue's Complaints Management Service. These issues are resolved by way of investigation and recommendation. The Ombudsmen are accountable and report to Parliament.

*Sweden*⁸

The Parliamentary Ombudsmen (two of whom are assigned tax issues as part of their portfolios) handle issues that cannot be resolved by the Swedish Tax Agency. These issues are generally resolved by way of investigation and recommendation, although an Ombudsman may also act as a special prosecutor if a criminal act has been committed or disciplinary code breached. The Parliamentary Ombudsmen are accountable and report to Parliament.

Conclusion

The model proposed in the Bill is a hybrid of the UK and Canadian models and will move closer to the Canadian model if the Minister of Finance is to table the Tax Ombud's annual report in Parliament. It provides taxpayers with an effective remedy that is located within South Africa's existing legal and constitutional dispensation. SARS, therefore, recommends that the model proposed be adopted.

SARS

6 October 2011

⁵ Useful links: <http://www.ombudsman.gov.au/pages/about-us/our-office/what-we-do.php>,
<http://www.ombudsman.gov.au/reports/taxation-ombudsman-activities>, http://www.ombudsman.gov.au/pages/publications-and-media/reports/annual/ar2004-05/chapter_4/chapter_4c.html

⁶ Useful links: <http://www.gov.bw/en/Ministries--Authorities/Ministries/Office-of-the-Ombudsman-of-Botswana/>,
<http://www.ombudsman.gov.bw/>

⁷ Useful links: <http://www.ombudsmen.parliament.nz/index.php?CID=100026&AID=100058>,
<http://www.ombudsmen.parliament.nz/imagelibrary/100419.doc>

⁸ Useful links http://www.jo.se/Page.aspx?MenuId=12&ObjectClass=DynamX_Documents&Language=en,
http://www.jo.se/Page.aspx?MenuId=38&MainmenuId=12&ObjectClass=DynamX_Persons&Language=en