Sars vs Taxpayers’ Rights
The Tax Administration Act, No 28 of 2011 (TAA), was promulgated on 4 July 2012 and took effect on 1 October 2012, except for certain specific provisions dealing with the imposition of interest payable to the Commissioner: South African Revenue Service (SARS) by taxpayers and also by the Commissioner to taxpayers.

The TAA provides that, once the new interest rules take effect, interest will be compounded on a monthly basis, both in respect of interest payable by a taxpayer on the late payment of tax, and also in respect of refunds payable by SARS to taxpayers.

The TAA was enacted to regulate the administrative provisions of all tax acts administered by the Commissioner: SARS. In preparing the legislation, the Commissioner consulted extensively, seeking input on the legislation, with a view to ensuring that its provisions comply with the Bill of Rights contained in the Constitution of the Republic of South Africa, Act 108 of 1996, as amended.

TAX OMBUD

The TAA creates the legal framework for the creation of the tax ombud in South Africa. SARS has indicated that the tax ombud will follow the model adopted by the United Kingdom in creating a tax adjudicator’s office, and the tax ombud’s office in Canada. The legislation provides that the staff of the office of the tax ombud must be employed in terms of the SARS Act, and will be seconded to the office of the tax ombud from SARS. The TAA requires that the ombud be appointed within one year from 1 October 2012. The Minister of Finance has indicated that it was intended to appoint a tax ombud before the end of 2012.

The mandate of the ombud is to review and address complaints by a taxpayer regarding a service or a procedural administrative matter. The ombud must review a complaint lodged by a taxpayer and resolve it either through mediation and conciliation, and must act independently in resolving taxpayers’ complaints. He is required to follow informal, fair and cost-effective procedures in resolving taxpayers’ complaints. The creation of the position is to be supported in that it creates a mechanism for complaints to be dealt with by a formalised procedure, despite the fact that it may be located within the SARS structure.

Section 17 of the TAA makes it clear that the tax ombud may not review legislation or tax policy, or SARS policy or practice generally prevailing, or deal with any matter subject to objection and appeal under a fiscal statute, or any decision which is before the Tax Court. In those overseas countries where tax ombud offices have been created, the resolution of legal disputes falls outside of the jurisdiction of the tax ombud and, in this respect, South Africa is adhering to the international norm.

The TAA provides that once the tax ombud receives an issue falling within its mandate, it may determine how the review of the taxpayer’s complaint is to be conducted, and whether a review should be terminated before completion of the matter.

Currently, where taxpayers encounter administrative difficulties with SARS, it is necessary to raise the matter first with the official dealing with the taxpayer’s affairs and failing resolution at that level, to refer the matter to the branch manager of the Receiver of Revenue office in question. Only once that procedure has failed to resolve the matter, may it be escalated to the SARS service monitoring office. Section 18 of the TAA requires that the taxpayer exhaust available complaints resolution mechanisms in SARS before resorting to the ombud, unless there are compelling circumstances not to do so and this follows international practice.

It is provided that the tax ombud may entertain a request for assistance without exhausting SARS internal complaints procedures where the matter raises systemic issues or exhausting the complaints resolution mechanism will cause undue hardship to the taxpayer, or exhausting the SARS procedures is unlikely to produce a result within a period of time, which the tax ombud considers reasonable.

The ombud has a duty to submit reports to Parliament on an annual basis, and to identify those issues which are causing problems for taxpayers, and it is hoped that this will ultimately enhance tax administration in South Africa and reduce the administrative burden faced by taxpayers.

CRIMINAL INVESTIGATIONS

The TAA seeks to ensure that taxpayers’ rights are protected where a taxpayer faces a criminal investigation. The Act requires that audits and criminal investigations are separated, ensuring that the rights of an accused under the Constitution are protected. This was previously not properly dealt with under the provisions of the Income Tax Act or other fiscal statutes.

SEARCH WITHOUT A WARRANT

One power contained in the Act that has attracted much comment is SARS’ power to conduct a search-and-seizure operation without a warrant to protect documents from imminent destruction by taxpayers.
Previously, SARS could search a taxpayer’s premises and seize documents only when authorised to do so by a warrant issued by a court in terms of section 74D of the Income Tax Act.

Section 63 of the TAA provides that a senior SARS official may, without a warrant, exercise the powers contained in section 61 of the TAA, which regulates the search of premises and seizure of documents. It is intended that the search of premises without a warrant should take place only in exceptional circumstances, but there is always the concern that the power may be abused.

It is appropriate to point out that 17 other statutes in South Africa confer on state organs a similar power to conduct search-and-seizure operations without a warrant. It remains to be seen if this part of the TAA will face a Constitutional challenge at some point.

SARS AUDITS AND FEEDBACK

Previously, taxpayers experienced frustration in dealing with SARS, in that a letter of inquiry would be received from SARS and the taxpayer would submit a response. Sometimes many months and, in some cases even years, would pass before the taxpayer received any indication from SARS as to whether the inquiry or audit was completed or, alternatively, what adjustments were to be made to the taxpayer’s assessments.

Fortunately, the TAA contains a provision whereby SARS must advise a taxpayer as to the status or progress of an audit conducted on their affairs.

There was, previously, no such provision under the other fiscal statutes. In accordance with section 42(1) of the TAA, the Commissioner was required to release a public notice setting out the details and processes relating to the manner in which taxpayers should be kept informed of audits conducted by SARS.

Under Rule 2 of the public notice, dealing with keeping taxpayers informed, a SARS official responsible for an audit instituted before but not completed by the commencement date of the TAA, or instituted on or after 1 October 2012, must provide the taxpayer subject to audit with a report indicating the stage of completion of the audit.

Where the audit started before the commencement date of the TAA, the Commissioner must provide feedback within 90 days of the TAA’s commencement and within 90 day intervals thereafter. Where SARS instituted an audit on or after 1 October 2012, the report must be submitted within 90 days of the start of the audit, and within 90 day intervals thereafter.

“The TAA seeks to ensure that taxpayers’ rights are protected where a taxpayer faces a criminal investigation.”
until the audit is concluded by SARS.

The Commissioner is required to advise the taxpayer as to the current scope of the audit, the stage of completion of the audit and relevant material still outstanding from the taxpayer.

It is hoped that the Commissioner: SARS will adhere to this requirement, thereby alleviating the frustration that occurred in the past, that taxpayers subject to an audit would hear nothing from SARS for a long period of time and then suddenly be requested to supply additional information within a very short period of time.

Previously, the Commissioner would also not advise a taxpayer as to when an audit had been completed, particularly, when no adjustments were made in the calculation of the taxpayer’s taxable income. Since the commencement of the TAA, it would appear that SARS is now advising taxpayers that an audit has been completed and that no adjustments are being made in the calculation of taxable income.

GROUND OF ASSESSMENT

Where the audit identifies amounts which SARS wishes to subject to tax, it is necessary for SARS to advise the taxpayer and furnish the grounds or reasons for the assessment issued to the taxpayer. The Commissioner is required to submit this information within 21 business days of the assessment being issued to the taxpayer. Previously, the taxpayer had a right to request reasons for assessments issued by SARS, but no provision was contained in the Income Tax Act compelling SARS to issue reasons within a specified period after the issue of an assessment. The TAA therefore improves the position for taxpayers in this regard.

VOLUNTARY DISCLOSURE PROGRAMME

The TAA also contains a permanent voluntary disclosure programme whereby taxpayers can approach the Commissioner to rectify previous defaults under any fiscal legislation, other than customs and excise. If taxpayers have failed to comply with their obligations under the fiscal laws of the country, they are, therefore, entitled to rectify those defaults under the framework contained in the TAA.

Unfortunately, the provisions of the Voluntary Disclosure Programme contained in the TAA are not as attractive as that contained in the Voluntary Disclosure Programme and Taxations Laws Second Amendment Act, No 8 of 2010. This is by virtue of the fact that, under the TAA, taxpayers will remain liable for interest due to SARS, and, depending on their particular circumstances, may remain liable to an understatement penalty ranging from 5 to 10%.

OBJECTIONS TO ASSESSMENT

The TAA amends the time frame within which taxpayers need to object to an assessment. Previously, a taxpayer was required to submit an objection within 30 days after the date of the assessment, which was defined in the Income Tax Act as the due date of the assessment. This was typically a date some time after the date on which the assessment was issued. Under the TAA, the objection must now be lodged within 30 days of the date of issue of the assessment, which generally means that an objection must be lodged earlier than what would have been the case under the Income Tax Act.

TAX CLEARANCE CERTIFICATES

The Income Tax Act previously contained no procedure dealing with the issue of tax clearance certificates applied for by taxpayers. The TAA now contains specific provisions regulating the manner in which tax clearance certificates may be applied for and issued by the Commissioner.

The TAA requires that SARS must issue or decline to issue the tax clearance certificate within 21 business days from the date that the application is properly filed. Unfortunately, it would appear that, historically, SARS did not issue tax clearance certificates promptly, and it is hoped that the new statutory provisions in the TAA will be complied with.

The TAA contains many provisions with which taxpayers are familiar, but also refines and modifies a number of provisions which were contained in the various fiscal statutes and introduces various new provisions.

It is important that taxpayers and SARS officials are aware of the provisions of the TAA so as to ensure that the provisions of the TAA are complied with. In drafting the TAA, the Commissioner was sensitive to the rights of taxpayers and sought to ensure that the TAA does not infringe on the rights of taxpayers.

Certain of the provisions contained in the TAA referred to here do enhance the protection of taxpayers’ rights by way of new provisions which were not found in the other tax acts. It remains to be seen, though, whether the Commissioner is geared to providing taxpayers with regular feedback on the status of audits, and to deal properly with the other provisions contained in the TAA.