

FAIR PLAY

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Welcome

As the Covid-19 global health issue continues to evolve, we are faced with many new challenges. This reality entails taking extra precautions to ensure the safety of our employees and taxpayers. Since the lockdown, the OTO has been working tirelessly to ensure that all precautionary measures are maintained while we continue to service our taxpayers. We suspended walk-ins to the Office and used our communication platforms to ensure that taxpayers who wanted to contact us could use all our available channels. Many taxpayers have been experiencing severe negative economic consequences and challenges, as some standard processes have been very slow during this period. Read more about how Covid-19 has affected some South Africans in this issue.

We also welcome our new CEO, Prof. Thabo Legwaila, who is now on board despite the circumstances that we find ourselves in. He has managed to fit in very easily and has already made some strides in connecting with some stakeholders virtually.

Enjoy this issue and stay safe!



PEARL SEPELA
Senior Manager:
Communications &
Outreach



What's Inside?



The challenge of the "Power of Attorney"

There is no need for this legal concept to cause you confusion or frustration.

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Tax Ombud's Corner

June marks the end of the first quarter of the 2020/21 financial year, and to say the period has been a challenge would be an under-statement. The coronavirus pandemic has been devastating on all fronts, crippling the country's economy, exacerbating already high unemployment and poverty, and putting extra strain on South Africa's health system. But worst is the loss of life that we have seen. In just four months, more than a thousand lives have been lost and thousands have become infected with the disease. Despite this, life must go on.

OTO Continues to Work Despite Lockdown Challenges

Towards the end of March, following the enforced pandemic lockdown and the introduction of social distancing measures, our ability to service taxpayers to the optimum of our ability was affected. The lockdown and insufficient resources on our part meant that for the better part of the quarter we worked remotely, but not to full capacity. This had a huge impact on the time and manner in which we resolve taxpayer complaints, as well as the platforms we normally utilise when engaging complainants and other stakeholders. Despite these challenges, we continued to provide a free, fair and independent service, and we thank all taxpayers for their patience and understanding during this trying period. It is not clear when, if ever, the coronavirus pandemic will be contained, so all we can do is to continue being vigilant about our safety and that of those we engage with.

CEO Hits the Road Running

On 1 April 2020, the Office of the Tax Ombud's (OTO) received its new Chief Executive Officer, Professor Thabo Legwaila, a highly qualified and experienced individual. Due to lockdown restrictions, he was only able to meet some employees in person, while others were met using virtual platforms. We are pleased to once more have a permanent CEO again, and are ready to continue to provide a service that taxpayers will be proud of, despite the trying environment. We also express our gratitude to Senior Manager Legal Services, Gert van Heerden, who acted in the CEO position for almost a year, doing a wonderful job. The CEO held his first engagement with Recognised Controlling Bodies (RCBs) on 21 May using a virtual platform. In the next few months he will start engaging with different stakeholders, as part of our plan to nurture existing and mutually beneficial partnerships with taxpayers and other stakeholders, and to build new ones. We are committed to working with different structures for the benefit of taxpayers and the improvement of the country's tax administration system.

Systemic Investigation

On 10 September 2018, we obtained permission from the Minister of Finance to conduct our second systemic investigation. The investigation was prompted by complaints received from taxpayers and other stakeholders, including Recognised Controlling Bodies (RCB). The investigation focused on two issues: complaints by taxpayers about the fluidity of the Pay As You Earn (PAYE) statement of account; and failure by the South African Revenue Service (SARS) to



Judge Bernard Ngoepe
Tax Ombud

adhere to the Dispute Resolution Rules, Procedures and Timeframes prescribed in the Regulations and the Tax Administration Act (TAA). I am pleased to advise that after 20 months of investigation and consultation with affected parties, we have now concluded our investigation. Our Systemic Investigation Report has been finalised and shared with our stakeholders and is also available to the public. The investigation we conducted sought to establish if the two issues investigated were systemic issues or revealed emerging systemic issues.

The investigation gave our institution insight into important tax matters. For example, on the PAYE complaints matter, we discovered that a combination of factors contributed to the complaints being made to us. These included SARS errors, inadequate communication, and absorption of credits, questionable letters, and lack of knowledge of the Payment Allocation Rules. It is important to note that both SARS and taxpayers were at fault, and some matters were found to be systemic, but others not.

On the Dispute Resolution Rules matter, we found that both taxpayers and the revenue collector failed to adhere to the prescribed timeframes. It is important to note that SARS was found to be at fault to a greater degree, due to the power it wields against taxpayers and the prejudice that taxpayers might suffer. We therefore recommended that it adhered to the prescribed timeframes and addressed the fundamental causes of the delays it caused.

I am grateful for the contribution made by our stakeholders, the cooperation and support we received from SARS, and most importantly, that of my OTO colleagues, who conducted the investigation. I am confident that we can continue working together with our stakeholders, including SARS, to reduce systemic issues and improve our country's tax administration system. The full report is available here: www.taxombud.gov.za

Committed to Continuing to Serve

As we mark the end of June, which is the end of the first quarter of the financial year, we are not oblivious to the many challenges that taxpayers have encountered recently - not just with our Office - but also with the South African Revenue Service. We are working together with SARS to improve the taxpayer's experience with our respective institutions and to expedite the resolution of their complaints.

In conclusion, we would like to thank all our stakeholders for their continued support during these challenging times, as well as our taxpayers - especially those who were able to lodge complaints with us in the past four months - for their patience and understanding. As we forge ahead with life amid unprecedented challenges, let us all pursue excellence in whatever we do and be vigilant with our safety. Let us come out of this pandemic stronger and more committed to making our country great.



Overview from the CEO's Desk

It has been 90 days since I joined the OTO at a crucial time, when Covid-19 entered our country. Covid-19 is now a global health issue that continues to evolve, with alarming statistics announced by the Minister of Health on daily basis. I am pleased that I found an Office that is characterised by a solid foundation, even during the Covid-19 Lockdown.



Prof. Thabo Legwaila
Chief Executive Officer

The OTO has made all efforts to ensure that, during the lockdown period, we mitigate all potential issues that could have an impact on our business operations, without compromising the taxpayer or our employees. We take our operational obligations seriously and can assure you that we are doing everything possible to ensure the safety of all our employees and taxpayers, while ensuring that this does not affect our services.


Strategic Overview

During the last three months I have been familiarising myself with the work of the Office and establishing my executive purpose, so that I can work towards achieving our long-term goals. In the next few months, my focus will be on ensuring that I support the OTO to achieve the objectives articulated in our Strategic Performance Plan 2020-25.

Engagement with representatives of RCBs

On Thursday, 21 May, I had my first virtual engagement with the representatives of RCBs. The meeting was to formally introduce myself and to discuss various important matters affecting the RCBs and the OTO.

I acknowledge that there is a good working relationship between the two parties, and I am optimistic that the fruitful partnership will continue. I am also grateful for the support the RCBs have given to the OTO, and because of this, it will be difficult to improve an office that is already effective and has great integrity. In the meeting, I also noted the survey conducted amongst RCB member organisations, which revealed that their perceptions of the OTO were:

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- It is taking too long to resolve complaints lodged by tax practitioners.
 - Competency challenges in terms of how the Office deals with some complaints, including the high percentage of rejected complaints lodged.
 - Many taxpayers being unsure as to when they should approach the OTO with tax complaints against SARS.

I am committed to ensuring that these issues are attended to, as well as looking into the OTO's mandate, as many stakeholders have called for strengthening of the mandate over the past few years. It should be noted that a good number of complaints that come to us without first going through SARS are outside of our mandate. We need to improve in terms of educating tax practitioners about our mandate and when they should come to us. We also need to review the mandate of the OTO to ensure that it is still relevant.

The OTO team is working together with SARS to improve efficiency in the way they deal with complaints, and I therefore urge to you to send me all the cases that you believe the OTO has not dealt with competently. As part of my commitment, I will hold regular quarterly meetings, at which matters of mutual interest will be discussed. I look forward to us working together and to strengthening this partnership.

Business Operations and Management of Complaints During national Covid-19: Level 3 Lockdown

The Office of the Tax Ombud continues to review its operational arrangements in line with the National Government's lockdown regulations and social distancing measures. "We are still committed to servicing our clients, but at the same time protecting the well-being of our employees and stakeholders," explains Mmamelao Malakalaka, Senior Manager: Office Enablement.



Mmamelao Malakalaka
Senior Manager: Office
Enablement

Please take note of the following operational plans that have been put in place:

- We have implemented a business continuity plan to address areas that require special attention in line with preventive measures.
- We have ensured that employees who have resources are able to work from home.
- Social distancing measures are in place for employees who are working in the office, and we have suspended walk-ins to our office until further notice.
- Our Call-Centre number (**0800 662 837**) is now fully operational from **09:00 to 15:30** on weekdays.
- We encourage taxpayers to obtain an update on the status of their complaints through text message or WhatsApp message to **082 085 0763**; or send an email to complaints@taxombud.gov.za.

The challenge of the “Power of Attorney”



Frik Pretorius
Specialist:
Legal Services



Many people struggle with the issue of “Power of Attorney” (POA). The legal requirements of the POA have caused a lot of confusion and frustration among tax practitioners and taxpayers alike. In order to be valid, a POA must meet all the requirements set out by SARS and the Office of the Tax Ombud. While this may seem complicated, you can follow various simple steps to make sure you aren’t turned away.

What is a Power of Attorney?

A Power of Attorney is a legal document giving one person (the agent or attorney-in-fact) the power to act for another person (the principal). The POA can give a tax practitioner permission to act on a taxpayer’s behalf and make decisions for the taxpayer. This can be for specific matters (special power of attorney) or for all matters (general power of attorney).

When will you need a POA?

Power of Attorney is usually used by people who are unable to manage to their own tax and financial matters. This can be due to illness, disability, or when the person can’t be present to sign legal documents for financial transactions. While a POA is a valuable tool, it can cause lots of frustration because SARS is very strict about the law of representation and its tight requirements. Tax practitioners have often been turned away by SARS because the POA did not comply with the requirements as stipulated by SARS.

What are the requirements for a valid POA?



It must be completed in full by the taxpayer or the tax practitioner, signed by both the taxpayer, the tax practitioner and two witnesses.



It must mention the specific tax products that the tax practitioner is given a mandate to deal with.



It’s safest to use SARS’s POA template. If you use your own letterhead, then the contents must be the same as that of the SARS template.



It must specify the time period of the POA, which should not be more than 12 months from the date of signing the document.



Go to <https://bit.ly/3edlt3A> to access the POA of the Tax Ombud, which meets all SARS legal requirements.



Go to <https://bit.ly/30SApQC> to access all the SARS POA templates. Tax practitioners are strongly encouraged to use them.

These documents are vital for giving the tax practitioner the authority to legally deal with the tax affairs on behalf of the taxpayer. The taxpayer must sign the POA personally; otherwise the document will not be valid. If a taxpayer or tax practitioner signs on behalf of another, this constitutes fraud and could even lead to a prison sentence. To give a degree of certainty that the POA is legitimate, it must be accompanied by a certified copy of both the tax practitioner’s and the taxpayer’s ID documents.

The concept of POA is really not complicated. Following these guidelines will save both the tax practitioner and the taxpayer time and money, and will reduce frustration. To read the full article on this subject, please go to www.taxombud.gov.za.

Expert's Corner

Covid-19 Pandemic: Taxpayer Rights



Patricia Williams
Partner: Bowmans



In the context of the Covid-19 pandemic and the national lockdown, many taxpayers are experiencing severe negative economic consequences. Complying with tax laws may become extremely difficult, if not impossible. This is where the broader rights-based legal context of tax laws becomes important.

It is critical to note that the Constitution is the supreme law of South Africa and the obligations imposed by it must be fulfilled, but a law that is inconsistent with it is invalid¹. SARS is an administrative body within the public administration system². Accordingly, SARS' powers must be exercised within the framework of administrative justice, which requires that everyone has the right to administrative action that is lawful, reasonable and procedurally fair³. It does not appear reasonable for SARS to make "short-sighted" decisions and delay paying a refund to a taxpayer or insist on the payment of taxes where this puts severe strain on a business and results in the real possibility of loss of employment or full or partial business closure. Similarly, penalising a taxpayer because of inability to make full and timely payment of taxes, where this is not intentional or within the control of the taxpayer, does not appear fair and reasonable.

In terms of section 4(2) of the South African Revenue Service Act, "SARS must perform its functions in the most cost-efficient and effective manner and in accordance with the values and principles mentioned in section 195 of the Constitution". These principles of administrative justice include that public administration must be development-oriented⁴, and that "[p]eople's needs must be responded to..."⁵

The fact that the public administration system (including SARS) must respond to people's needs is a key reason why SARS should carefully consider any submissions made by taxpayers within the context of the Covid-19 pandemic, the national lockdown and the associated material negative impact on the financial position of taxpayers. This constitutional obligation to respond to people's needs overrides the content of any tax legislation⁶, although, in most cases, the relevant tax legislation likewise provides SARS with the necessary discretionary power to remit interest and penalties or to accept later payment of taxes.

The need for the public administration system to be development-oriented means that SARS needs to ensure that its decisions do not negatively impact the community (which includes employees of taxpayers) and businesses, particularly where the businesses are involved in developmental activities. In many cases, there are development goals associated with regulatory compliance, and placing a business under financial strain could threaten these developmental outcomes. Taxpayers should consider sharing these aspects with SARS, if and when SARS is requested to exercise discretion for the benefit of taxpayers.

It is true that the collection of revenue for the fiscus is critical, and perhaps even more so during these difficult times. However, it is submitted that it is the long-term sustainability of the tax base that should be prioritised, and this would involve lenience to taxpayers during this period of economic difficulty.

¹ Section 2 of the Constitution

² Section 2 of the South African Revenue Service Act

³ Section 33 of the Constitution

⁴ Section 195(1)(c) of the Constitution

⁵ In terms of section 195(1)(e) of the Constitution

⁶ In terms of section 2 of the Constitution, because of the supremacy of the constitution

Disclaimer: This is an opinion piece contributed by Patricia Williams from Bowmans Attorneys, who does not have any affiliation with the OTO. The article does not necessarily reflect the views of the Office.

Challenges facing tax practitioners During Lockdown

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Rhangani Mbhalati
CA (SA), RA

In South Africa, there are several tax matters that cannot be handled online and still require taxpayers or tax practitioners to visit a SARS branch in person. The introduction of the nationwide lockdown has had a negative impact on taxpayers and tax practitioners continuing to fulfil their tax obligations. Services such as amending key taxpayer information and submitting supporting documents for tax returns are some of the matters that cannot be resolved online. Below are some of the challenges facing tax practitioners during lockdown.



SERVICES OF TAX PRACTITIONERS NOT CLASSIFIED AS ESSENTIAL

Taxation services rendered by tax practitioners were not declared essential services during the initial phase of the nationwide lockdown. This posed a challenge for tax practitioners as they could not provide all the necessary services to ensure compliance by taxpayers. On 1 May, the country moved to lockdown Alert Level 4, which allowed the relaxation of some regulations and allowed certain services to re-commence; however, the regulations did not clearly state whether the services provided by tax practitioners are essential financial services or not.

The lack of clarity in the regulations raised a concern for taxpayers and practitioners about whether or not they can visit SARS branches to fulfil their tax obligations. Notably, the exclusion meant that some companies that qualify for business relief may not be able to access the relief funds due to their non-compliant tax status. On 4 May, the Minister of Finance issued an amended directive that clarified that essential financial services include services required to comply with an obligation imposed, or to exercise a right afforded, in terms of the Tax Act or the Customs and Excise Act. The directive applies to matters such as disputing an assessment, requesting reasons for an assessment and seeking debt relief.

This directive will remain valid at all Covid-19 alert levels to ensure continuous tax related services, even where the country or certain regions are placed on a higher Covid-19 alert level. Furthermore, the extension allows for other ancillary services to be provided that are directly related to tax obligations, such as capturing books of record, compiling accounting statements, issuing invoices and making payments to SARS.



LIMITATIONS TO OBTAINING INFORMATION FROM TAXPAYERS DUE TO LOCKDOWN

Due to the lockdown restrictions that are in place, travel to SARS branches has been restricted. While taxpayers and practitioners can visit SARS branches, they must make an appointment via the SARS website and will be allocated a specific consultation time. Taxpayers also face the challenge of sharing necessary information for taxation services with their tax practitioners due to the travel restrictions. This has negatively impacted tax compliance. SARS advises taxpayers and tax practitioners to use the online system, which is efficient and can help overcome most of the challenges brought about by the nationwide lockdown. Tax practitioners and taxpayers can perform duties such as uploading most supporting documents, registering for various types of tax (such as VAT) and obtaining a statement of account online.



LACK OF CLARITY IN THE REGULATIONS

The regulations do not provide clear guidance on possible relief in instances where taxpayers are not able to fulfil their tax obligations due to the lockdown. There is no relief regarding the submission of tax returns; therefore taxpayers are still required to submit tax returns of all types on or before the due date. Taxpayers are encouraged to make an effort to engage SARS in instances where they are not able to fulfil their tax obligations as a result of the lockdown. The SARS call centres remain operational and are able to assist taxpayers during this time.



TAX SUBMISSION DEADLINES NOT EXTENDED

SARS has changed the tax filing season, due to the impact of Covid-19. The SARS Commissioner announced that the filing season will start on 1 September, two months later than the usual start date of 1 July. However, it must be noted that no extension to the deadlines has been provided. This will place pressure on taxpayers to meet the deadlines. To alleviate the pressure, individual taxpayers and employers will have to adhere to the phased approach introduced by SARS, which can be found on SARS website.

Disclaimer: This is an opinion piece contributed by a practitioner, Rhangani Mbhalati, Managing Director of Chapu Chartered Accountants Inc., who does not have any affiliation with the OTO. Therefore, the article does not necessarily reflect the views of the Office.

Fairness for all



Gert Van Heerden
Senior Manager:
Legal Services



SIP Project Managers (Pty) Ltd v SARS - COURT JUDGEMENT CONFIRMS OTO STANCE ON COMPLAINTS

Tax is an intimidating subject for many of us. Often, taxpayers feel very anxious when they have to challenge a decision made by the South African Revenue Service (SARS) regarding their tax matters. Some approach the Tax Ombud to assist, but many others just abandon legitimate complaints, even when they believe their rights have been trampled by the revenue collector. The case below shows the reasoning that the Office of the Tax Ombud has adapted and applied when dealing with SARS' failure to follow proper procedures when issuing a Third Party Appointment. The OTO independently makes decisions on complaints based on facts, without fear or favour, explains Gert van Heerden, Senior Manager: Legal Services.

On 29 April 2020, a very interesting judgement was handed down in the Gauteng division of the High Court, in the matter between SIP Project Managers (Pty) Ltd v CSARS (11521-2020) [2020] ZAGPPHC (29 April 2020). This judgement confirmed several legal principles that the OTO has relied on in the past to successfully resolve taxpayer complaints.

In this matter SARS raised an additional assessment creating a tax liability on the account of the taxpayer. According to SARS, three final demands were sent to the taxpayer before the a Third Party Appointment ("TPA") was issued to the taxpayer's bank in terms of s179 of the Tax Administration Act. The bank complied with the TPA and paid an amount over to SARS. The Court confirmed that s179(5) is peremptory and that a TPA is not lawful if SARS did not issue a final demand that comply with the requirements set out therein.

SARS relied on three documents to prove compliance with s179(5) which it contended were copies of the actual final demand letters sent to the taxpayer. **The taxpayer however, denied having received any of the final demands** and provided the Court with a screenshot of its eFiling profile to support its contention that no final demand was sent to it.

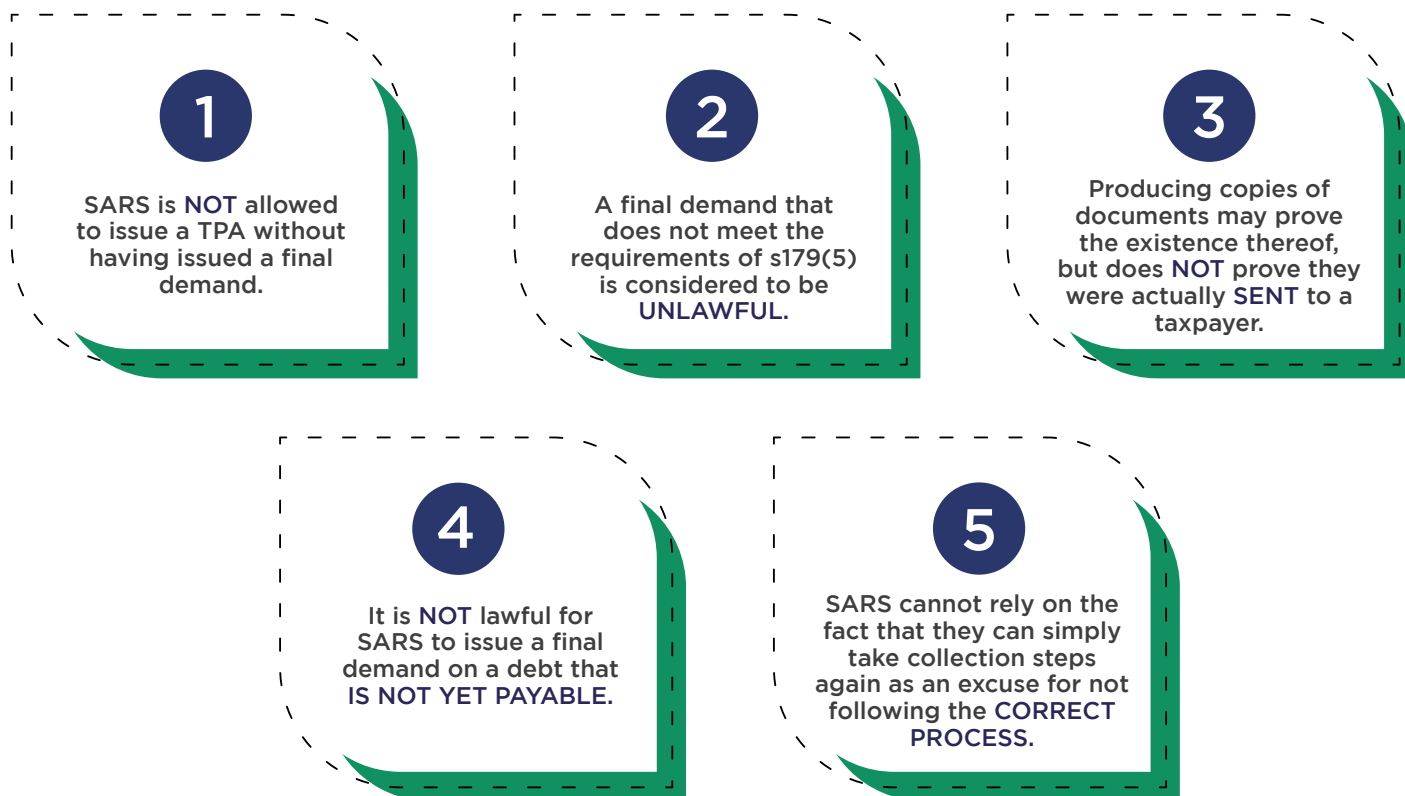
During arguments, SARS's counsel abandoned reliance on two of the alleged final demands, conceding they were not valid as one was merely a reminder and the other was not issued more than 10 days before the TPA. **SARS acknowledged therefore that both of these final demands did not comply** with the requirements set out in s179(5).

In relation to the third final demand, the Court noted that it is not sufficient for SARS to just prove the existence thereof (as it sought to do by producing copies of the final demands). SARS must be able to demonstrate that it actually sent the final demand to the taxpayer. Where eFiling is used, as in this case, SARS would have to demonstrate that it placed the final demand on the taxpayer's eFiling profile in order to meet the requirements set out in the Rules for Electronic Communications. Having failed to do this, the Court made the finding that **no final demands were delivered by SARS** to the taxpayer in this case.

Furthermore, the third final demand relied on by SARS was issued before the due date of the liability as stipulated on the Notice of the Assessment. The Court confirmed that s179 only allowed SARS to issue a TPA for a debt that is "outstanding". **In this case the final demand relied on by SARS was premature because the debt was not due and payable yet and therefore (even if SARS could prove that it was in fact sent to the taxpayer) unlawful.**

Finally, SARS contended that it should not be ordered to repay the amount collected in terms of the TPA due to the fact that at the time of the hearing, the debt was outstanding and recoverable even if there was an objection and no suspension of payment. The argument was that repayment would serve no purpose as SARS could simply take the recovery steps again. The Court rejected this argument and found that if accepted, it would render s179(5) obsolete. The Court specifically stated that SARS could not be excused for following unlawful process.

Key points to take away from this case:



LATEST TAX OMBUD SYSTEMIC INVESTIGATION REPORT AGAINST SARS

In terms of the Tax Administration Act, the Tax Ombud must identify and review systemic and emerging issues related to service matters, the application of the provisions of this Act, or procedural or administrative provisions that impact negatively on taxpayers. This systemic investigation report can be found at: <http://www.taxombud.gov.za/Documents/SYSTEMICINVESTIGATIONREPORT2020.pdf>

Notice

This is a quarterly newsletter that will be published every three months. We urge our readers and stakeholders to contribute (in the form of articles, important announcements, opinion pieces or letters to the editor) on any matter concerning this Office or tax issues. Your contributions should be emailed to PSeopela@taxombud.gov.za or Communications@taxombud.gov.za.

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