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AN UPDATE ON THE TAX OMBUD

The Office of the Tax Ombud was officially launched by the Minister of Finance, Pravin Gordhan on 7 April 2014. Although 7 April 2014 was the official launch date, the Tax Ombud (Ombud) was appointed on 1 October 2013 as per the Tax Administration Act, No 28 of 2011 (TAA).

Mandate and limitations on powers of Tax Ombud

The mandate of the Ombud, in accordance with s16 of the TAA, 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 the South African Revenue Service (SARS). The TAA further provides for those complaints which the Ombud may not review, namely:

- Legislation or tax policy;
- SARS policy or practice generally prevailing other than practice relating to service, procedural or administrative matters arising from the application of a tax Act by SARS;
- A matter subject to objection and appeal under a tax Act, except an administrative matter relating to such objection and appeal; or
- A decision of, proceeding in or matter before a tax court.

Additionally, s18(4) of the TAA provides that the Ombud may only review a request if the requester has exhausted the available complaints resolution mechanisms in SARS, unless there are compelling circumstances for not doing so. 'Compelling circumstances' will be determined by factors such as the request raising systemic issues and whether exhausting the complaints mechanism will cause undue hardship to the requester or is unlikely to produce a result within a period of time that the Ombud considers reasonable.

Judge Bernard Ngoepe was appointed as the Ombud, who previously served as Judge President of the High Court for the North and South Gauteng divisions and he had been responsible for the appointment of judges to the Tax Court. It is interesting to note that the website of the Office of the Tax Ombud contains a statement by Judge Ngoepe in which he links taxpayers' rights to s10 of the Constitution and further provides that SARS is bound by this constitutional mandate. Judge Ngoepe explains that the Office of the Tax Ombud provides "a simple and impartial channel to seek a resolution for a service, procedural or administrative dispute" which could not be resolved through SARS' complaints management channels.

SARS feedback regarding Tax Ombud

According to SARS, between 1 October 2013 and 31 March 2014, the Office of the Tax Ombud had received 673 approaches from taxpayers. Only 9% of those were deemed to fall within the ambit of the Ombud's powers of adjudication. Of the approaches made, 76% were enquiries. Most of the remaining approaches were invalid complaints, or raised by persons who had not exhausted the complaints management channels within SARS before approaching the Ombud.

Of the 673 approaches to the Ombud during this time period, 61 legitimate complaints were received. Of the legitimate complaints, 70% have already been resolved. The remainder of the cases are still in progress or awaiting feedback from SARS.

The majority of the taxpayers who have thus far approached the Ombud's Office have been individuals (62%), while 24% have been tax practitioners. The Office can be approached by all tax-paying entities, including businesses.

The prognosis

SARS has continually placed great emphasis on efficient turnaround time in managing complaints lodged with the Ombud and it appears that they delivered on their promise. Legitimate complaints have so far been dealt with efficiently.

However, there still appear to be some concerns regarding the limited nature of matters that may be assessed by the Ombud and consequently the number of invalid complaints lodged. These concerns are additionally impacted by the transitional provisions under s259(2) of the TAA which provide that the first Tax Ombud appointed under the TAA may not review a matter that arose more than one year before the day on which the Ombud was appointed, unless the Minister requests him to do so. The result of this provision is that no service, administrative or procedural matters arising prior to 1 October 2013 may be reviewed by the Ombud.

Given that the Ombud cannot review legislation, accept a complaint about the liability for tax or the amount due, or review a matter to which one may object, the question arises whether the Ombud is not merely a very efficient system to alleviate service and administrative issues that should ultimately be dealt with by SARS itself. Only time (and the taxpayer) will tell.

Danielle Botha

COMMERCIAL BUILDING ALLOWANCES

The South African Revenue Service (SARS) recently released an interesting binding private ruling (BPR 169) dealing with the deduction of a commercial building allowance in respect of a unit, as contemplated in the Sectional Titles Act, No 95 of 1986 (Sectional Titles Act).

By way of background, the applicant, a public company incorporated in and resident of South Africa and the property developer (developer), acquired a vacant piece of land which was held jointly in undivided shares. Upon the joint acquisition of the land, the applicant and the developer each paid their proportionate share of the purchase consideration.

In terms of the proposed transaction, the parties intend to register a sectional title development scheme over the property (and its proposed buildings), in terms of the relevant provisions of the Sectional Titles Act, the object of which is to erect commercial buildings on the land.

Accordingly, it is proposed that the applicant and the developer will give effect to the proposed transaction by concluding a development agreement for each party to erect a commercial building on the jointly owned land, each for its respective separate use and at its own cost.

The proposed development will see the erection of two commercial buildings which will be separated by a green thoroughfare and below ground will be a parking basement, which is to be constructed as a single basement and which will establish a single foundation for the two towers. The basement will further be separated into two parts by a wall on each level, with dedicated parking for each unit.

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The development agreement will govern the terms of the proposed development, and will specifically set out the quality and extent of the construction of the applicant's unit, the actual construction project (which will be managed by the developer) and will also regulate the division of the development costs between the applicant and the developer. Furthermore, the applicant will have sole financial responsibility for the development of its separate unit and insofar as the development costs in relation to the shared amenities are concerned, such costs will be shared between the parties in accordance with the ratio to their joint land ownership.

The issue under consideration before SARS is whether the applicant is entitled to claim the commercial building allowance as contemplated under s13quin of the Income Tax Act, No 58 of 1962 (Act).

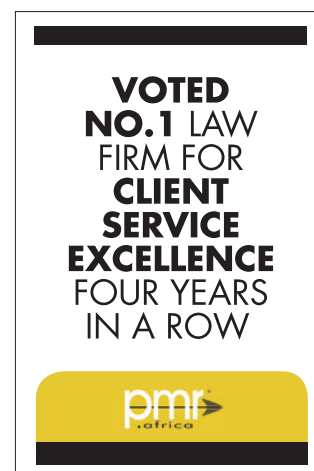
S13quin of the Act provides for a 5% annual allowance on the cost of any new and unused building owned by the taxpayer, if:

- The building is wholly owned or mainly used by the taxpayer;
- During the year of assessment;
- For the purposes of producing income in the course of the taxpayer's trade.

The ruling made by SARS in connection with the proposed transaction is as follows:

- The applicant will be entitled to claim the commercial building allowance on its unit, as contemplated in s13quin of the Act, on occupying the unit after registration of the sectional plan and prior to tenants of the developer occupying the developer's unit; and
- The applicant will also be entitled to claim the commercial building allowance on its unit, as contemplated in s13quin of the Act, on occupying its unit after registration of the section plan, should the tenants of the developer occupy the developer's unit.

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