

Abbreviations

AAT	The Administrative Appeals Tribunal
ADR	Alternative Dispute Resolution
ATO	Australian Taxation Office
Days	Business days
DRP	Dispute Resolution Process
SARS	The South African Revenue Service
TAA	Tax Administration Act 28 of 2011
The Notice	Rules promulgated under section 103 of TAA

INTRODUCTION

Background

Tax disputes between a taxpayer and a tax authority regarding an amount of tax owed or timing of the payment of tax is a frequent occurrence amongst tax administrations across the world (HM Revenue Customs, 2014:4). Tax law or the manner in which it is to be applied to a specific set of circumstances may be intricate, which may result in the legal cases (HM Revenue Customs, 2014:4). An effective tax system should, however, have processes in place for resolving such tax disputes (Johannes, 2014:1). The tax system should preserve the revenue authority's responsibility to collect taxes whilst protecting the taxpayer's rights (Johannes, 2014:1).

Tax dispute resolution in South Africa

The TAA consolidates the administrative legislation that was previously scattered across the various acts administered by the South African Revenue Service ('SARS') (Johannes, 2014:5). This Act came into effect from 1 October 2012 and essentially establishes the rights and obligations of both the taxpayer and SARS (Kotze, 2014:240). The TAA further introduced section 9 (sections 101 to 150 of the TAA) which establishes the rules relating to dispute resolution. Section 9 is further broken down into the following categories:

- General rules, including burden of proof (Part A);
- Objection and appeal, including Alternative Dispute Resolution ('ADR') (Part B);
- Tax Board (Part C);
- Tax Court (Part D);
- Appeals against Tax Court decisions (Part E); and
- Settlement of dispute (Part F).

As indicated by the categories above, the DRP provides various platforms of addressing disputes between SARS and the taxpayer (South African Revenue Service, 2014b:58). These platforms are necessary when a taxpayer is not satisfied with the outcome and the reasons associated with an assessment or certain decisions by SARS and the taxpayer has decided to object to this (Kotze, 2014:241).

Tax dispute resolution in Australia

A federal system of government was established by the Australian Constitution (Australian Government, n.d.). Powers are divided between a central (federal) and several regional (state) governments under a federal system (Australian Government, n.d.). The federal and state governments separately impose and administer of their own taxes (Frost &

Hanson, 2015:19). The federal government imposes income tax, value-added tax, petroleum resource rent tax and import duties and excises taxes (Frost & Hanson, 2015:19). The state governments, in turn, impose land tax, payroll tax and stamp duty on certain transactions (Frost & Hanson, 2015:19).

Disputes often arise between taxpayers and the federal or state tax authorities in Australia (Frost & Hanson, 2015:19). The Tax Administration Act of 1953 contains provisions in Part IVC relating to tax objections, reviews and appeals. Law Administration Practice Statements address settlements as well ADR. Furthermore, the Australian Taxation Office ('ATO') has implemented strategies and techniques to address tax disputes (Australian Taxation Office, 2015).

Reasons for comparing DRP's in South Africa with those in Australia

Australia was selected for the comparative analysis of this report. The reasons for selecting Australia are as follows:

- Both countries are members of the Commonwealth Group (Commonwealth Network, 2015). The Commonwealth Group is a group of nations that support and work with one another in meeting international objectives (Commonwealth Network, 2015). Member countries have 'common heritage in language, culture, law, education and democratic traditions' (Commonwealth Network, 2015).
- The ATO aims to resolve tax disputes efficiently and effectively (Australian Taxation Office, 2015a).
- The ATO is subject to scrutiny. Government-appointed entities complete the scrutiny by way of examining various features that relate to the administration of Australian tax. This aims to continuously improve the administration of taxes by the ATO (Australian Taxation Office, 2013).
- 'The drafting of the Tax Administration Bill was informed by international best practice and a comparative evaluation with tax administration laws over long periods, such as Australia' (Memorandum on the Objects of the Tax Administration Bill, 2011:179).

From the above it appears appropriate to compare the dispute resolution platforms in South Africa to the platforms in Australia.

Purpose of Research

DRP, being an important aspect of the tax legislation in countries, needs to be adequate and effective in achieving its objective. In South Africa, new/amended DRP rules were introduced in the TAA in 2012. The purpose of this research report is therefore to examine whether these rules, as contained in section 9 of the TAA, are adequate in providing platforms that address objections and appeals, lodged by either the taxpayer or SARS.

Research problem

The main research problem is the adequacy of the tax dispute resolution platforms available in South Africa, as contained in section 9 of the TAA. This is assessed through a comparative analysis of the platforms available in South Africa with those in Australia.

Sub-problems:

- What dispute resolution platforms are available to the South African taxpayer and SARS (Section 2)?

- What dispute resolution platforms are available to the Australian taxpayer and the ATO (Section 3)?
- Are the dispute resolution platforms available in South Africa adequate in comparison to the dispute resolution platforms in Australia (Section 4)?

Methodology

A literature review was performed to determine the dispute resolution platforms in South Africa and Australia respectively using, amongst others, statutes, government publications, books, e-journals, electronic resources and a thesis. A comparative analysis was thereafter performed in respect of the provisions in the TAA and the dispute resolution platforms in South Africa to that in Australia. Findings from the comparison were analysed to determine whether the DRP in South Africa is aligned with that of Australia and therefore adequate.

Scope and Limitations

This report addresses section 9 of the TAA only. Other provisions of the TAA, except for section 269 of the TAA (which relates to continuation of authority, rights and obligations found in the section 20, the Transitional Provisions, of the TAA), are not dealt with in this report; the exclusion applies to the Tax Ombudsman which is addressed in section 2 of the TAA. Provisions contained in any other piece of legislation, whether tax-specific or not, are also excluded from the scope of this report.

In terms of foreign jurisdictions, only provisions in respect of the tax dispute resolution platforms in Australia will be considered.

THE DISPUTE RESOLUTION PLATFORMS PROCESS IN SOUTH AFRICA

Introduction

Section 3 of the South African Revenue Service Act 34 of 1997 provides that 'SARS's objective is the efficient and effective collection of revenue'. A 'natural tension', however, exists between the taxpayer and SARS (Johannes, 2014:1). This tension is due to the taxpayer aiming to minimise the amount of taxes that should be paid to SARS whereas SARS aims to maximise the amount to be collected from the taxpayer on behalf of the State (Johannes, 2014:1). This 'natural tension', which includes processing and human errors, often gives rise to disputes between taxpayers and SARS (Johannes, 2014:1).

As evident from section 1 of this report, taxpayers have a right to dispute an assessment or a decision by SARS when they are in disagreement with such assessment or the decision (South African Revenue Service, 2014a:16). As previously stated, the TAA provides for administrative-type matters relating to tax and contains provisions on the rights and obligations of both the taxpayer and SARS. Section 9 of the TAA specifically addresses tax disputes and the related resolution process. Section 9, read together with any rules published by the Minister of Finance in terms of sections 103 and 269 of the TAA, makes available a legal structure for tax disputes across all tax categories found in the Acts administered by SARS (refer to annexure 1), excluding the Customs and Excise Act 91 of 1964 (SARS, 2015).

Section 9 of the TAA accordingly stipulates the platforms and procedures to be followed when a taxpayer is aggrieved by an assessment or specific decision formulated by SARS. Section 103 of the TAA allows for additional or more detailed rules regarding dispute

resolution and the objection and appeal process to be published by the Minister of Finance. A set of rules, as referred to in section 103 of the TAA, has been published by notice in Government Gazette 37819, Notice 550; effective from 11 July 2014 (referred to hereafter as 'the Notice').

In publishing the rules, SARS' objective was to align them with the dispute resolution framework of the TAA (South African Revenue Service, 2014a:16). These rules administer the following:

- The processes to be followed when lodging an objection and appeal against an assessment or decision that is subject to section 104(2) (section 104(2) is explained further below);
- ADR processes, in accordance with part C of the Notice, to be applied where SARS or the person, aggrieved by an assessment or decision, may use in resolving a tax dispute; and
- The conduct and hearing that is specific to an appeal presented before a Tax Board or Tax Court (Government Gazette 37819, Government notice 550).

Section 269 provides that 'rules, notices and regulations issued under the provisions of a tax Act repealed by this Act that are in force immediately before the commencement date of this Act, remain in force as if they were issued under the equivalent provisions of this Act, until new rules, notices and regulations are issued under such provisions' (Tax Administration Act, section 269(1)).

Section 9 comprises of sections 101 to 150 inclusive and is categorised into various parts, as listed in section 1 of this report, each dealing with different rules and platforms available to taxpayers. Matters that can be disputed by a taxpayer may be objected to and appealed against through the objection and appeal process, the rules for which are contained in Part B of section 9 of the TAA. Depending on the outcome of this objection and appeal, taxpayers may take further steps through the remaining platforms available to them like ADR, settlement or tribunal and court hearings. Rules relating to these further steps are contained in Parts B to F of section 9 of the TAA. These are all discussed in more detail below, together with general rules on assessments and burden of proof.

Assessments and burden of proof

An assessment is defined in section 1 of the TAA as: 'the determination of the amount of a tax liability or refund by way of self-assessment by the taxpayer or assessment by SARS.' For the purposes s103 of the TAA, an assessment includes 'a decision referred to in section 104(2)' of the TAA (Government Gazette 37819, rule 1). These decisions are as follows:

- A decision not to prolong, by a senior SARS official, the time frame for lodging an objection;
- A decision not to prolong, by a senior SARS official, the time frame for lodging an appeal; and
- 'Any other decision that may be objected to or appealed against under a tax Act' (Tax Administration Act, section 104(2)).

A taxpayer who seeks to object to the aforementioned assessment has the burden to prove that the assessment is incorrect (Tax Administration Act, section 102(2)). Section 102(1) imposes the burden on the taxpayer to prove whether an amount is not taxable, whether or

not an amount is deductible, whether valuation is correct, whether an amount qualifies as a deduction or the tax rate applicable to a transaction or a taxpayer (Tax Administration Act, section 102(1)). Furthermore, the onus is on the taxpayer to prove, in Court, that the tax treatment is incorrect should the taxpayer appeal against the disallowance of his objection (Tax Administration Act, section 102(1)). The burden of proof only falls on SARS in instances when SARS is unsuccessful in respect of a court case and decides to appeal the decision of a Tax Court to a Higher Court (Haupt, 2015:1012).

Objections and appeals

Should a taxpayer be aggrieved by an assessment, the taxpayer should be permitted by SARS to understand the reason for the assessment (Government Gazette 37819, rule 6(1)). The request for reasons must be provided, within 30 business days ('days') from the date of assessment, to SARS (Government Gazette 37819, rule 1 and rule 6(2)(c)). Where reasons, in the opinion of SARS, have been provided, SARS must, within 30 days after delivery of the request, inform the taxpayer as to where the taxpayer may locate the reasons that were provided (Government Gazette 37819, rule 6(4)). Where reasons, in the opinion of SARS, have not been provided SARS is required to provide reasons to the taxpayer within 45 days after the receipt of the request for the reasons from the taxpayer (Government Gazette 37819, rule 6(5)). These reasons may be used to formulate an objection, in terms of rule 7, relating to the assessment that the taxpayer is aggrieved by (Government Gazette 37819, rule 6(1)).

Rule 7(1) of the Notice provides that a taxpayer should lodge an objection within 30 days of receipt of the reasons for the assessment as requested in terms of rule 6 of the Notice (Government Gazette 37819, rule 7(1)). SARS may then allow, partly allow or disallow an objection (Tax Administration Act, section 106(2)).

A taxpayer may respond to such disallowance of an objection through the additional available platforms, as discussed below.

ADR

The ADR process affords a taxpayer the opportunity to resolve a tax dispute without the use of litigation (South African Revenue Service, 2014a:46). Compared to the Courts, the ADR process is less formal, less costly and allows for disputes to be resolved within a reduced time frame (South African Revenue Service, 2014a:46).

The ADR process, as contained in Part B of section 9 of the TAA, provides SARS and the taxpayer with a platform to reach a mutual agreement (Tax Administration Act, section 107(5)). This agreement is reached by considering the counterparty's analysis of the facts, the counterparty's application of tax law to the facts or both (South African Revenue Service, 2014a:46). The parties subject to the ADR process may elect to have a facilitator (who is a SARS official that is in good standing in the arbitration, mediation, legal, tax or accounting profession, has experience in the aforementioned fields and complies with the duties as per rule 17 of the Notice) facilitate the process (Government Gazette 37819, rule 16(1) and (2)). The facilitator may provide a written recommendation to the disputed parties, if an agreement is not reached between the disputed parties, at the conclusion of the ADR process (Government Gazette 37819, rule 21(1)).

Within 90 days, after the commencement date provided for in rule 15(1), rule 15(3) of the Notice provides that the taxpayer and SARS should finalise the ADR procedures (Government Gazette 37819, 15(3)). Should an agreement between the taxpayer and SARS be concluded, an assessment that gives effect to the agreement should be issued to the taxpayer within 45 days after the last signing of the agreement (Government Gazette 37819, rule 23(3)). Unresolved issues may be appealed, by the taxpayer or SARS, to the Tax Board or the Tax Court within 15 days of the date of the agreement (Government Gazette 37819, rule 23(4)).

Where SARS and the taxpayer are unable to reach an agreement, the parties may opt to settle the dispute instead, as described below (Government Gazette 37819, rule 24(1)).

Settlements

Section 143 of the TAA stipulates that it is the duty of SARS to assess and collect tax in accordance with laws legislated by Parliament and not to forfeit a tax that a taxpayer is legally entitled to pay (Tax Administration Act, section 143(1)). Part F of section 9 of the TAA, however, affords SARS and taxpayers an opportunity to resolve a tax dispute by way of a settlement (Government Gazette 37819, rule 24(1)). A settlement entails the resolution of a tax dispute by way of a compromise, either by SARS or the taxpayer, of a disputed liability (Tax Administration Act, section 142). This process should result in an agreement relating to the tax liability (Haupt, 2015:1016). Section 146 of the TAA provides the circumstances under which a settlement would be appropriate whereas, section 145 of the TAA provides the circumstances under which a settlement would be inappropriate (Tax Administration Act, section 145 and section 146).

Section 150 provides that once a dispute is settled, SARS may alter the taxpayer's assessment to provide for the settlement (Tax Administration Act, section 150(1)). SARS should within 45 days, after the date of the last signing of the settlement, issue the taxpayer with the altered assessment (Government Gazette 37819, rule 24(3)). This altered assessment may not be subject to objection and appeal (Tax Administration Act, section 150(2)).

A tax matter that remains unresolved, after the consideration of both ADR and settlement, may be subject to an appeal to the Tax Board or the Tax Court. The taxpayer should process the notice of appeal within 15 days of the date of the agreement or settlement (Government Gazette 37819, rule 23(4) and 24(4)).

Hearing of objections and appeals by administrative tribunals and the Courts

A tax matter that remains unresolved, after the consideration of both ADR and settlement, may be subject to an appeal to the Tax Board (Part C of section 9) or Tax Court (Part D of section 9). The taxpayer and SARS have the right to appeal to a High Court (Part E of section 9) if either party is dissatisfied with the decision of the Tax Court. A decision of the High Court may be appealed to the Supreme Court of Appeal and the Constitutional Court is able to overturn a decision of the Supreme Court of Appeal, if the decision pertains to a constitutional matter.

Tax Board

The Tax Board is an administrative tribunal created by the TAA (SARS, 2015). Both the taxpayer and SARS must consent for a matter to be heard by Tax Board (Tax

Administration Act, section 109(1)(b)). The Tax Board may currently only hear appeals involving disputes up to the value of R500,000 (Tax Administration Act, section 109(1)(a) and section 269(1) and Government Gazette 29742).

The Tax Board's decision must be provided within 60 days after the conclusion of the hearing (Tax Administration Act, section 114(2)). This decision is submitted by notice to both the taxpayer and SARS (Tax Administration Act, section 114(3)). Decisions of the Tax Board, which do not have precedent value, are binding on both the taxpayer and SARS (SARS, 2015). The party, however, who is unsatisfied with the outcome of the Tax Board hearing, has the option to have the matter be heard 'de novo' by the Tax Court (Tax Administration Act, section 115(1) and (2)). Such a hearing does not amount to an appeal but rather a new trial (SARS, 2015). The party who is not satisfied with the decision of the Tax Board may within 21 days, after the date of notice of the Tax Board's decision, request the appeal to be referred to the Tax Court (Tax Administration Act, section 115(1)). The appeal period is subject to extension, based on whether good cause exists, at the discretion of the Chairperson of the Tax Board (Government Gazette 37819, rule 29(5)).

Tax Court

The Tax Court is an administrative tribunal created under the TAA (SARS, 2015). The Tax Court has the authority to interpret and apply the law with regards to tax appeals lodged under section 107 of the TAA (Tax Administration Act, section 117(1)). Furthermore, the Tax Court may hear and decide 'an interlocutory application or an application in a procedural matter relating to a dispute' that falls under section 9 of the TAA, as provided for in the rules contained in the Notice (Tax Administration Act, section 117(3)).

The court's written decision should, within 21 days, be provided to both the taxpayer and SARS (Tax Administration Act, section 131). The decisions of the Tax Court are binding only between parties involved in the dispute (SARS, 2015). The Tax Court, however, does have 'persuasive value' in other Tax Courts, the High Courts and the Supreme Court of Appeal (SARS, 2015). A decision of the Tax Court is absolute; however, the taxpayer and SARS have the right to appeal to a High Court (de Swardt, 2015:1166).

High Court

Should either the taxpayer or SARS not be satisfied with the decision of the Tax Court, they may appeal the decision of the Tax Court (Tax Administration Act, section 133). An appeal, by the taxpayer or SARS, should be lodged with a High Court within 21 business days after the date of notice of the Tax Court's decision (Tax Administration Act, section 134(1)). The appeal may, on good cause, be extended at the discretion of the president of the Tax Court (Tax Administration Act, section 134(1)).

The decision of the High Court is binding on all lower courts and tribunals (SARS, 2015). Furthermore, the decision of the High Court is of 'persuasive value' in other High Courts, the Supreme Court of Appeal and the Constitutional Court (SARS, 2015).

Supreme Court of Appeal

The Supreme Court of Appeal deals with cases in which the High Court ruling was appealed (SARS, 2015). Section 133(2)(b) of the TAA, however, permits direct access to the Supreme Court of Appeal from the Tax Court (Tax Administration Act, section 133(2)(b)). The direct access from the Tax Court to the Supreme Court of Appeal is only permitted if permission is granted by the president of the Tax Court or the appeal was heard by the Tax

Court referred to in section 118(5) of the TAA (section 118(5) applies *inter alia* in instances where the disputed amount exceeds R50 million) (Tax Administration Act, section 133(2)(b)(i) and(ii)).

The decision of the Supreme Court of Appeal is binding on all lower courts and tribunals (Kotze, 2014:242). The Constitutional Court is, however, able to overturn a decision of the Supreme Court of Appeal if the decision pertains to a constitutional matter (Kotze, 2014:242).

Constitutional Court

An appeal against the decision of the Supreme Court of Appeal, pertaining to disputes of a constitutional matter, may be lodged with the Constitutional Court (Johannes, 2014:7). The Constitutional Court is the highest Court for all constitutional matters; however, in terms of dealing with tax appeals the Constitutional Court has limited jurisdiction to review judgement issued by the Supreme Court of Appeal (SARS, 2015).

Conclusion

Both the taxpayer and SARS are afforded several platforms to address tax disputes in terms of section 9 of the TAA. Should a taxpayer be aggrieved by an assessment, the taxpayer should be permitted by SARS to understand the reason for the assessment (Government Gazette 37819, rule 6(1)). These reasons may be used to formulate an objection, in terms of rule 7, relating to the assessment that the taxpayer is aggrieved by (Government Gazette 37819, rule 6(1)). SARS then is entitled to allow or disallow an objection (Tax Administration Act, section 106(2)). A taxpayer may respond to the disallowance of an objection through the ADR process, settlement, Tax Board or Tax Court (Haupt, 2015:1015). The ADR process provides SARS and the taxpayer with a platform to reach a mutual agreement (Tax Administration Act, section 107(5)). Where SARS and the taxpayer are unable to reach an agreement, the parties may opt to settle the dispute instead (Government Gazette 37819, rule 24(1)).

If still in disagreement, both the taxpayer and SARS should consent for the matter to be heard by the Tax Board (Tax Administration Act, section 109(1)(b)). If either party is not satisfied with the decision of the Tax Board, that person may request the matter to be referred to the Tax Court (Tax Administration Act, section 115(1)). A decision of the Tax Court is absolute; however, the taxpayer and SARS have the right to appeal to the High Court (de Swardt, 2015: 1166). The Supreme Court of Appeal deals with cases in which the High Court ruling was appealed (SARS, 2015). Section 133(2)(b) of the TAA also allow direct access to the Supreme Court of Appeal from the Tax Court (Tax Administration Act, section 133(2)(b)). An appeal may be lodged with the Constitutional Court regarding disputes of a constitutional matter (Johannes, 2014:7).

THE TAX DISPUTE RESOLUTION PLATFORMS IN AUSTRALIA

Introduction

As noted in section 1 of this report, a federal system of government was established by the Australian Constitution (Australian Government, n.d.). This system has two levels of government, the federal and state government, of which each level separately levies and governs their own taxes (Frost &Hanson, 2015:19).

A dispute between the taxpayer and federal or state government is a regular occurrence in Australia (Frost & Hanson 2015:19). One of the objectives of ATO is to preclude disputes from occurring (Australian Taxation Office, 2015a). Should these tax disputes, however, occur the objective of the ATO is to resolve them efficiently and effectively (Australian Taxation Office, 2015a). To support the aforementioned objective 'the ATO has introduced or improved a number of dispute management principles, strategies and techniques to avoid, minimise and resolve disputes as early, cooperatively and collaboratively as possible' (Australian Taxation Office, 2015a).

The Tax Administration Act of 1953 contains provisions in Part IVC relating to tax objections, reviews and appeals. Matters that can be disputed by a taxpayer may be objected to and appealed against through the objection and appeal process. Depending on the outcome of this objection and appeal, taxpayers may take further steps through the remaining platforms available to them like ADR, settlement or tribunal and court hearings. These are all discussed in more detail below, together with general rules on assessments and burden of proof.

Since the federal government levies and administers what is considered to be the main taxes (i.e. income tax, value-added tax, Petroleum Resource Rent tax and import duties and excises taxes), this section will focus on the dispute resolution platforms available within the federal system.

Assessments and burden of proof

The tax system in Australia is subject to a self-assessment model (Australian Taxation Office, 2015b). This model requires the taxpayer to submit an annual tax return, which should reflect the taxpayer's assessable income and the deductions and other credits that the taxpayer is entitled to (Australian Taxation Office, 2015b). The ATO may review the taxpayer's annual tax return (Australian Taxation Office, 2015b). This may result in the decrease or increase in the tax payable by the taxpayer (Australian Taxation Office, 2015b).

A taxpayer who is not satisfied with an assessment, decision, determination or notice of the ATO or with the inability to process a private ruling may officially process a 'tax objection' by way of the method established in Part IVC of the Tax Administration Act of 1953 (Tax Administration Act, section 14ZL(1) and (2)). The burden, however, to prove that an assessment is inaccurate or excessive as well as what the correct assessment should be is that of the taxpayer (Tax Administration Act, section 14 ZZO and section 14 ZZK). Furthermore, the appellant has the burden to prove that a taxation decision is inappropriate and what the appropriate decision should be (Tax Administration Act, section 14 ZZO and section 14 ZZK).

Objections and appeals

The objection to the ATO subject to section 175A of the Income Tax Assessment Act, which relates to an assessment, should be within:

- Two years: This is applicable to objections to assessments by individuals and small businesses about income tax matters;
- Four years: This is applicable to companies and individuals with more complex matters than the above mentioned; or
- Sixty days: This is applicable to all other matters (Tax Administration Act, section 14ZW and Income Tax Assessment Act section 170(1) and section 175A).

The Commissioner of the ATO is required to make a decision regarding an objection lodged by the taxpayer (Jones & Maples, 2012:539). The Commissioner of the ATO may allow, partly allow or disallow the objection (Jones & Maples, 2012:539). The decision by the Commissioner of the ATO is not required, by statute, to be provided within a specific time limit (Jones & Maples, 2012:539). If the Commissioner of the ATO disallows the objection, the resulting tax dispute between taxpayer and the ATO may be resolved through the use of several mechanisms (Jones & Maples, 2012: 539 and Tran-nam & Walpole, 2012:479). These mechanisms include ADR process, the ATO's independent review, the Administrative Appeals Tribunal as well as Courts (Frost & Hanson, 2015: 20 and Tran-nam & Walpole, 2012:479). Emphasis has been placed on ADR in Australia as it is platform provided to taxpayers and the ATO to prevent the expense associated with tax litigation (Tran-nam & Walpole, 2012:479).

ADR

ADR is the process in which a 'fair-minded person', also known as an ADR practitioner, assists disputing parties to resolve or reduce the extent of issues between them (Practice Statement Law Administration 2013/3, paragraph 4). ADR may be achieved through the following forms:

- Facilitative processes: An ADR practitioner aids the aggrieved parties in identifying the disputed issues, developing solutions, considering other alternatives and attempting to reach an agreement about the dispute in its entirety or in part (Practice Statement Law Administration 2013/3, paragraph 23).
- Advisory processes: An ADR practitioner provides advice on part or all of the facts associated with the dispute, the law applicable to the disputed assessment and potential outcomes (Practice Statement Law Administration 2013/3, paragraph 23).
- Determination processes: An ADR practitioner assesses the dispute and makes a decision regarding the dispute (Practice Statement Law Administration 2013/3, paragraph 23).

In pursuing ADR there is no optimal time frame (Practice Statement Law Administration 2013/3, paragraph 17). It is, however, ideal to initiate ADR procedures during the review performed in the objection stage (before the conclusion of the final decision by the ATO), after the issue of a position paper by the ATO during an audit or during the litigation phase of a dispute (Practice Statement Law Administration 2013/3, paragraph 17). The initiation of the ADR process is often triggered by an agreement between the ATO and the taxpayer (Practice Statement Law Administration 2013/3, paragraph 19). Any agreement that is reached in the ADR process must be made in terms the Code of Settlements, which provides the procedures associated with the settlement of tax disputes (Practice Statement Law Administration 2013/3, paragraph 45). The Code of Settlements is discussed below.

Settlements

A settlement is an agreement between parties to resolve a matter in dispute. The parties involved in the dispute compromise on what they consider to be the 'legally correct position' (Practice Statement Law Administration 2015/1, paragraph 2). The ATO policy regarding settlement of tax disputes is stipulated in the Code of Settlements provided for in Practice Statement Law Administration 2015/1.

The commencement of procedures regarding settlements may be initiated by any party subject to the dispute (Practice Statement Law Administration 2015/1, paragraph 4). The

settlement procedures may ensue at any stage of the dispute, including the period prior to the raising of an assessment (Practice Statement Law Administration 2015/1, paragraph 4).

Where a settlement agreement is reached, the settlement agreement should be finalised in writing and signed by both parties (Practice Statement Law Administration 2015/1, paragraph 8). The settlement agreement provides for the agreed position between the ATO and the taxpayer (Practice Statement Law Administration 2015/1, paragraph 8). This agreement may only be changed in extraordinary circumstances (Practice Statement Law Administration 2015/1, paragraph 8).

Independent Review

The independent review service came into effect from 1 July 2013 (Australian Taxation Office, 2015a). The service is only available to entities with a turnover exceeding Australian \$250,000,000 (Australian Taxation Office, 2014). Furthermore, this process is only available if the entity has received a Statement of Audit Position that relates to the entity's income tax, excise, goods and service tax or other forms of tax (Australian Taxation Office, 2014).

As mentioned above, the ATO aims to avoid or resolve disputes as early as possible (Australian Taxation Office, 2015a). As a result, the independent review service is considered a vital platform to resolve, prior to an issue of an amended assessment, areas of disagreement and disputes early (Frost & Hanson, 2015:20 and Australian Taxation Office, 2015a).

In providing the service, a reviewer, who has had no prior involvement in the tax audit process, evaluates the areas of disagreements from the perspective of both the ATO and the taxpayer 'to determine a better view' (Australian Taxation Office, 2015a).

Where ADR, Independent Review or a settlement has failed to resolve the dispute between the taxpayer and the ATO, either party may appeal to the courts and administrative tribunals to attempt to resolve the tax dispute.

Courts and administrative tribunals

Australia does not have a dedicated tax court. The Administrative Appeals Tribunal ('ATT'), the Federal Court and the High Court, however, are platforms that hear disputes about federal government taxes (Frost & Hanson, 2015:22). A state administrative decisions tribunal, the District Court or Supreme Court hear disputes about state taxes (Frost & Hanson, 2015:22).

The Administrative Appeals Tribunals

While the AAT is not formally a court; the proceedings before the AAT are often conducted in a manner similar to that of a court (Frost & Hanson, 2015:22). The AAT is a judicial review body (Administrative Appeals Tribunal Act, section 2A and Tran-nam & Walpole, 2012:482). Therefore, the review of the decisions of administration agencies, which include the ATO, may be performed by the AAT (Tax Administration Act, section 14ZZA). An application to the AAT for a review of a decision should be lodged within 60 days after the receipt of notice of the decision of a review by the taxpayer making the application to the AAT (Tax Administration Act, section 14 ZZC).

The decision of the AAT may replace the decision of the ATO (Administrative Appeals Tribunal Act, section 43(1)(c)). The AAT may further reassess any penalty to be levied on the ATO or the taxpayer (Frost & Hanson, 2015:22).

The Federal Court provides a platform for taxpayers who are dissatisfied with the decision of the AAT to appeal its decision (Frost & Hanson, 2015:22). This appeal is restricted to only a 'question of law' (Frost & Hanson, 2015:22).

The Federal Court

Taxpayers may initiate proceedings in the Federal Court if the ATO has rejected the taxpayer's objection to the original decision. (Frost & Hanson, 2015:22.). An appeal to the Federal Court should be lodged within 60 days after the taxpayer is provided with notice of the decision (Tax Administration Act, section 14ZZN).

The Full Court of the Federal Court

Taxpayers or the ATO have a right to appeal to a Full Court of the Federal Court if they are dissatisfied with the decision of the Federal Court (Frost & Hanson, 2015:23). Taxpayers or the ATO are afforded 28 days, from the initial judgment of the Federal Court, to process an application to appeal the decision of the Federal court (Frost & Hanson, 2015:23).

The High Court

The High Court, the supreme judicial body in Australia, affords dissatisfied taxpayers with a platform to appeal the decision of the Full Court of the Federal court (Frost & Hanson, 2015:23). Within 28 days of the date of judgment of the Full Court of the Federal Court, an application to appeal its decision should be processed (Frost & Hanson, 2015:23).

The High Court, without the consideration of the lower courts, will accept a case that raises issues of constitutional legitimacy (Frost & Hanson, 2015:23).

State tax disputes

The proceedings for tax disputes that are specific to State taxes are similar to the proceedings for tax disputes at federal level (Frost & Hanson, 2015:23).

A taxpayer who is dissatisfied with their declared position may request the ATO to re-examine the taxpayers declared position (Frost & Hanson, 2015:21). The ATO may then subject the declared position to an adjustment (Frost & Hanson, 2015: 21). A taxpayer who is not satisfied with the adjustment processed by the ATO may, within 60 days after the decision was made, object to the adjustment (Frost & Hanson, 2015:21). This objection will result in an internal review by the ATO (Frost & Hanson, 2015:21).

Taxpayers who are dissatisfied with the outcome of the internal review may approach the state administration tribunal, the district court or Supreme Court to appeal against the decisions of the State government (Frost & Hanson, 2015:21 and 23).

Conclusion

In Australia, two levels of government, federal or state, each separately imposes and administers their own taxes (Frost & Hanson, 2015:19). Taxpayers who are dissatisfied with an assessment or decision of the ATO may process a 'tax objection' (Tax Administration Act, section 14ZL). The Commissioner of the ATO is then required to make a decision

regarding the objection (Jone & Maples, 2012: 538). Should the ATO disallow the objection the taxpayer has the option to appeal the decision (Jone & Maples, 2012:537). The Administrative Appeals Tribunal (ATT), the Federal court and the High Court are platforms that hear appeals from taxpayers or the ATO about federal government taxes. Federal government taxes include income tax, value-added tax, petroleum resource rent tax and import duties and excises (Frost & Hanson, 2015:19). Disputes about state taxes are dealt with by the state administrative decisions tribunal, the district court or Supreme Court (Frost & Hanson, 2015:22).

COMPARATIVE ANALYSIS OF THE DISPUTE RESOLUTION PROCESS IN SOUTH AFRICA AND AUSTRALIA

Introduction

This section will provide a comparative analysis of the dispute resolution platforms available in South Africa and Australia (as discussed in detail in sections 2 and 3). This section will establish whether the DRP in South Africa and Australia are, in all material respects, similar and accordingly conclude if the DRP in South Africa is adequate, based on the presumption that the Australian DRP addresses disputes adequately.

Comparative Analysis

'The importance of the ability of taxpayers to challenge the legality of actions and decisions within the tax system is internationally recognised' (South African Revenue Service, 2014a:14). Countries like South Africa and Australia therefore have established platforms to deal with tax disputes. One method of determining the adequacy of the platforms in South Africa is by comparing the dispute resolution platforms in South Africa with the dispute resolution platforms in Australia. The findings of the comparison are analysed below. Tables 1 and 2 below summarise some of these findings.

Burden of proof and objection and appeals

In both South Africa and Australia, a taxpayer who seeks to object to an assessment has the burden to prove that an assessment is incorrect. Both SARS and the ATO are required to make a decision regarding an objection lodged by the taxpayer. SARS or the ATO may then allow, partly allow or disallow an objection. A taxpayer may respond to such disallowance of an objection through various platforms. The burden of proof and objections and appeals process in South Africa is thus similar in its intent that in Australia.

Alternative Dispute Resolution processes

ADR processes are present in South Africa and Australia. This process aims to resolve disputes through mutual agreement (Tax Administration Act, section 107(5)). These platforms provide taxpayers with the opportunity to resolve disputes without litigation as well as save the costs and time associated with litigation (South African Revenue Service, 2014a:46 and Australian Taxation Office, 2015a). The ADR process in South Africa is thus similar in its intent to the ADR process in Australia.

The ADR process in Australia provides for Facilitative processes, Advisory processes and Determination processes (Practice Statement Law Administration 2013/3, paragraph 23). South Africa, however, only provides for Facilitation (Government Gazette 37819, rule 16(2)). This difference indicates that South Africa may need to improve the ADR process.

Independent Review

Reviews aims to avoid or resolve disputes as early as possible (Australian Taxation Office, 2015a). The review platform is only available in Australia; South Africa does not have such a platform. The Australian review process is specific to entities with a turnover greater than Australian \$250,000,000 (Australian Taxation Office, 2014). It is therefore directed at large corporations.

The lack of the review structure in South Africa implies that South Africa does not have adequate means to solve tax disputes without the consideration of litigation, should ADR or settlements fail.

Settlement

Settlement is an available platform to resolve disputes in South Africa and Australia. This dispute resolution platform is available to the taxpayers and tax administration authorities, prior to the consideration of litigation; appearing to facilitate timely resolution of disputes without lengthily litigation processes. The settlement platform in South Africa thus appears similar in its intent to that in Australia.

Courts and Tribunals

South African and Australian courts may differ in name but provide the similar platforms to taxpayers in terms of legal action and appeal. Both countries provide taxpayers and the tax administration authorities access to the Courts and options to object and appeal the decisions of lower courts or tribunals.

Australian taxpayers or the ATO have the option to object and appeal tax disputes to the High Court, which is the highest jurisdiction to which a tax dispute may be appealed (Frost & Hanson, 2015:23). In the South African context, tax disputes may be appealed by the taxpayer or SARS to the extent of the Supreme Court of Appeal (SARS, 2015). In addition, an appeal against the decision of the Supreme Court of Appeal, which relates to disputes of a constitutional matter, may be lodged with the Constitutional Court (Johannes, 2014:7). The Constitutional Court is the highest court for all constitutional matters (SARS, 2015).

As a result of the above mentioned, the litigation platforms available to the South African taxpayer or SARS indicate that dispute resolution process in South Africa is, in material respects, similar to that of Australia as in both countries taxpayers and tax authorities may appeal to the highest courts to resolve disputes.

Table 2 below provides the respective timeframes in which an objection or appeal is to be lodged with the respective court or tribunal. It is apparent, from the table, that South Africa has the least number of days to object or appeal to the decisions of a court. South African legislation, however, makes provision for the extension of the timeframe in which an objection or appeal may be lodged. This indicates that the intent to resolve disputes in a timely manner is present.

Table 1 below summarises the main aspects of the dispute resolution platforms available in South Africa and Australia.

Table 1: The available tax dispute resolution platforms

	South Africa	Australia
	Process available to resolve a tax dispute?	Process available to resolve a tax dispute?
Alternative Dispute Resolution	Yes	Yes
Independent Review	No	Yes
Settlement	Yes	Yes
<u>Courts and tribunals:</u>		
Tribunal: Tax Board (South Africa) / ATT (Australia)	Yes	Yes
Dedicated Tax Court	Yes	No
First level general court: High Court (South Africa)/ Federal Court (Australia)	Yes	Yes
Second level general court: Supreme Court of Appeal (South Africa) / Full Court of the Federal Court (Australia)	Yes	Yes
Third level general court: Constitutional Court (South Africa) / High Court (Australia)	Yes	Yes

Table 2: Time frames for lodging objections and appeals

	South Africa	Australia
Tribunal: Tax Board (South Africa) / ATT (Australia)	21 days	60 days
Dedicated Tax Court	21 days	Not applicable
First level general court: High Court (South Africa)/ Federal Court (Australia)	21 days	60 days

Conclusion

In both countries, ADR processes and settlement processes are available to taxpayers prior to the consideration of litigation. South Africa, however, trails behind Australia in the following respects:

- Specific elements of ADR processes available in Australia i.e. Determination and Advisory processes are not currently available to South African taxpayers; and
- An independent review process is also not available to South African taxpayers at present.

A tax dispute that is subject to litigation in South Africa may be appealed, by the taxpayer or SARS, to the High Court, Supreme Court of Appeal or the Constitutional Court (should the matter be of a constitutional nature). This indicates that the litigation platforms available to South African taxpayer or SARS are adequate as appeals may be heard by various levels of courts and by the highest court in the country (SARS, 2015). The period, however, in which a South African taxpayer or SARS may process an appeal is shorter than that in Australia. This may be considered a notable disadvantage to South African taxpayers. Provision is made for the extension of the appeal period, however this applies in limited circumstances. This indicates that intent to resolve tax disputes in a timely manner is present, although SARS may want to consider relaxing the time frames.

South Africa's dispute resolution platforms per section 9 of the TAA are, in all material respects, similar to those available in Australia, with the exception of the independent review and specific elements of the ADR process. It is therefore reasonable to conclude that majority of the South African tax dispute resolution platforms are in agreement with Australian platforms and are thus adequate to resolve tax disputes.

Going forward, SARS may want to consider wider jurisdiction of Tax Board (such as increase the monetary value of appeals that the Tax Board may hear), Independent Review panel for large companies, a wider ADR scope and more relaxed time frames.

CONCLUSION

The objective of this research report is to determine whether the tax dispute resolution process as per section 9 of the TAA is adequate, in comparison to Australia, in providing platforms that address objections and appeals by way ADR processes, independent review, settlement and litigation.

South African taxpayers have the right to request reasons for an assessment and if not satisfied with these reasons, the taxpayer may object (South African Revenue Service, 2014a: 31). SARS may, in turn, allow, partly allow or disallow an objection (Tax Administration Act, section 106(2)). A taxpayer who is subject to the disallowance of an objection may then appeal the assessment through the ADR process, Tax Board or Tax Court (Haupt, 2015: 1015). The High Court, Supreme Court of Appeal and the Constitutional Court are available platforms to address appeals.

Australian legislation aims to preclude tax disputes from occurring (Australian Taxation Office, 2015a). Should these tax disputes, however, occur the objective of the ATO is to resolve them efficiently and effectively (Australian Taxation Office, 2015a). ADR, independent review and settlements are techniques available to resolve tax disputes. Litigation is, however, available to the taxpayer or the ATO if the aforementioned mechanisms do not resolve the tax dispute in a satisfactory manner (Frost & Hanson, 2015: 22).

South Africa, in comparison to Australia, promotes the same platforms, with exception of an independent review process and specific elements of the ADR process. In conclusion, the DRP as per section 9 of the TAA that provides the platforms to address tax disputes in South Africa may be considered adequate as majority of the material dispute resolution platforms available to taxpayers and the tax authorities in Australia are available to South African taxpayers and SARS.

Going forward, SARS may want to consider wider jurisdiction of Tax Board (such as increase the monetary value of appeals that the Tax Board may hear), Independent Review panel for large companies, a wider ADR scope and more relaxed time frames.

Recommendations for future research:

For future research purposes, it is recommended that consideration be provided to the tax dispute resolutions platforms available in the United Kingdom.

ANNEXURE 1

Section 9 of the TAA and the rules promulgated under section 103 of the TAA provide the tax dispute resolution process for the following Acts:

- Diamond Export Levy (Administration) Act, 14 of 2007;
- Diamond Export Levy Act, 15 of 2007;
- Employment Tax Incentive Act, 26 of 2013;
- Estate Duty Act, 45 of 1955;
- Income Tax Act, 58 of 1962;
- Merchant Shipping (International Oil pollution Compensation Fund) Administration Act, 35 of 2013;
- Merchant Shipping (International Oil pollution Compensation Fund) Administration Act, 36 of 2013;
- Mineral and Petroleum Royalty Resources (Administration) Act, 29 of 2008;
- Mineral and Petroleum Royalty Resources Act, 28 of 2008;
- Skills Development Levies Act, 9 of 1999;
- Transfer Duty Act, 40 of 1949;
- Unemployment Insurance Contributions Act, 4 of 2002; and
- Value-Added Tax Act, 89 of 1991 (South African Revenue Service Act 34, section 4(1)(a)(i) and SARS, 2014a:18).

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