



Observatory for the Protection of Taxpayers' Rights

Below you will find a questionnaire filled in by or with the contribution of the National Reporter of South Africa, Dr. Beric Croome, a representative from the tax practitioners.

This questionnaire comprises the National Reporter assessment on the level of compliance of the minimum standards and best practices on the practical protection of taxpayers' rights identified by Prof. Dr. Pistone and Prof. Dr. Philip Baker at the 2015 IFA Congress on "*The Practical Protection of Taxpayers' Rights*". This report was filled in considering the following parameters:

1. It contains information on those issues in which there were movements towards or away from the level of compliance of the relevant standard/best practice in South Africa between 2015 and 2017.
2. It is indicated, by the use of a checkmark () whether there were movements towards or away from of the level of compliance of the relevant standard/best practice in South Africa between 2015 and 2017.
3. It contains a summarized account on facts (legislation enacted, administrative rulings, circulars, case law, tax administration practices) that serves as grounds for each particular assessment of the level of compliance of a given minimum standard / best practice, in a non-judgmental way.

South Africa

Minimum Standard	Best Practice	Shift towards	Shift away	Development
1. Identifying taxpayers, issuing tax returns and communicating with taxpayers				
Implement safeguards to prevent impersonation when issuing unique identification numbers				
The system of taxpayer identification should take account of religious sensitivities				
Impose obligations of confidentiality on third parties with respect to information gathered by them for tax purposes	Where tax is withheld by third parties, the taxpayer should be excluded from liability if the third party fails to pay over the tax			
Where pre-populated returns are used, these should be sent to taxpayers to correct errors				
Provide a right of access for taxpayers to personal information held about them, and a right to apply to correct inaccuracies	Publish guidance on taxpayers' rights to access information and correct inaccuracies			
Where communication with taxpayers is in electronic form, institute systems to prevent impersonation or interception				
Where a system of "cooperative compliance" operates, ensure it is available on a non-discriminatory and voluntary basis				
Provide assistance for those who face difficulties in meeting compliance obligations, including those with disabilities, those located in remote areas, and those unable or unwilling to use electronic forms				

South Africa

of communication				
Minimum Standard	Best Practice	Shift towards	Shift away	Development
2. The issue of tax assessment				
	Establish a constructive dialogue between taxpayers and revenue authorities to ensure a fair assessment of taxes based on equality of arms			
	Use e-filing to speed up assessments and correction of errors, particularly systematic errors			
3. Confidentiality				
Provide a specific legal guarantee for confidentiality, with sanctions for officials who make unauthorised disclosures (and ensure sanctions are enforced)	Encrypt information held by a tax authority about taxpayers to the highest level attainable			
Restrict access to data to those officials authorised to consult it. For encrypted data, use digital access codes	Ensure an effective fire-wall to prevent unauthorised access to data held by revenue authorities			
Audit data access periodically to identify cases of unauthorised access				
Introduce administrative measures emphasising confidentiality to tax officials	Appoint data protection/privacy officers at senior level and local tax offices			
If a breach of confidentiality occurs, investigate fully with an appropriate level of seniority by independent persons (e.g. judges)				
Introduce an offence for tax officials covering up unauthorised disclosure of confidential information				

South Africa

Minimum Standard	Best Practice	Shift towards	Shift away	Development
3. Confidentiality (cont).				
Provide remedies for taxpayers who are victims of unauthorised disclosure of confidential information				
Exceptions to the general rule of confidentiality should be explicitly stated in the law, narrowly drafted and interpreted				
If “naming and shaming” is employed, ensure adequate safeguards (e.g. judicial authorisation after proceedings involving the taxpayer)	Require judicial authorisation before any disclosure of confidential information by revenue authorities			
No disclosure of confidential taxpayer information to politicians, or where it might be used for political purposes	Parliamentary supervision of revenue authorities should involve independent officials, subject to confidentiality obligations, examining specific taxpayer data, and then reporting to Parliament			
Freedom of information legislation may allow a taxpayer to access information about himself. However, access to information by third parties should be subject to stringent safeguards: only if an independent tribunal concludes that the public interest in disclosure outweighs the right of confidentiality, and only after a hearing where the taxpayer has an opportunity to be heard				
If published, tax rulings should be anonymised and details that might	Anonymise all tax judgments and remove details that might identify the taxpayer			

South Africa

identify the taxpayer removed				
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Minimum Standard	Best Practice	Shift towards	Shift away	Development
3. Confidentiality (cont).				
Legal professional privilege should apply to tax advice	Privilege from disclosure should apply to all tax advisors (not just lawyers) who supply similar advice to lawyers. Information imparted in circumstances of confidentiality may be privileged from disclosure			The Tax Administration Act was amended during January 2016 to address the protection of information which may be subject to legal professional privilege when the South African Revenue Service ('SARS') conducts an audit on the taxpayer's affairs. The law previously only dealt with information subject to legal professional privilege when a taxpayer was subject to a search and seizure warrant issued by a court.
Where tax authorities enter premises which may contain privileged material, arrangements should be made (e.g. an independent lawyer) to protect that privilege				
4. Normal audits.				
Audits should respect the following principles: (1) Proportionality (2) <i>Ne bis in idem</i> (prohibition on double jeopardy) (3) <i>Audi alteram partem</i> (right to be heard before any decision is taken) (4) <i>Nemo tenetur se detegere</i> (principle against self-incrimination). Tax notices issued in violation of these principles should be null and void				
In application of proportionality, tax				

South Africa

authorities may only request for information that is strictly needed, not otherwise available, and must impose least burdensome impact on taxpayers				
	In application of <i>ne bis in idem</i> the taxpayer should only receive one audit per taxable period, except when facts that become known after the audit was completed			
Minimum Standard	Best Practice	Shift towards	Shift away	
4. Normal audits (cont).				
In application of <i>audi alteram partem</i> , taxpayers should have the right to attend all relevant meetings with tax authorities (assisted by advisors), the right to provide factual information, and to present their views before decisions of the tax authorities become final				
In application of <i>nemo tenetur</i> , the right to remain silent should be respected in tax audits.				
	Tax audits should follow a pattern that is set out in published guidelines			
	A manual of good practice in tax audits should be established at the global level			
	Taxpayers should be entitled to request the start of a tax audit (to obtain finality)			
Where tax authorities have resolved to start an audit, they should inform the taxpayer	Where tax authorities have resolved to start an audit, they should hold an initial meeting with the taxpayer in which they spell out the aims and procedure, together with timescale and targets. They should then disclose any additional evidence in their possession to the taxpayer			

South Africa

<p>Taxpayers should be informed of information gathering from third parties</p>				
	<p>Reasonable time limits should be fixed for the conduct of audits</p>			
<p>Technical assistance (including representation) should be available at all stages of the audit by experts selected by the taxpayer</p>				
<p>Minimum Standard</p>	<p>Best Practice</p>	<p>Shift towards</p>	<p>Shift away</p>	<p>Development</p>
<p>4. Normal audits (cont).</p>				
<p>The completion of a tax audit should be accurately reflected in a document, notified in its full text to the taxpayer</p>	<p>The drafting of the final audit report should involve participation by the taxpayer, with the opportunity to correct inaccuracies of facts and to express the taxpayer's view</p>			
	<p>Following an audit, a report should be prepared even if the audit does not result in additional tax or refund</p>			
<p>5. More intensive audits.</p>				
	<p>More intensive audits should be limited to the extent strictly necessary to ensure an effective reaction to non-compliance</p>			
<p>If there is point in an audit when it becomes foreseeable that the taxpayer may be liable for a penalty or criminal charge, from that time the taxpayer should have stronger protection of his right to silence, and statements from the taxpayer should not be used in the audit procedure</p>				
<p>Entering premises or interception of communications should be authorised by the judiciary</p>				

South Africa

Authorisation within the revenue authorities should only be in cases of urgency, and subsequently reported to the judiciary for <i>ex post</i> ratification				
Inspection of the taxpayer's home should require authorisation by the judiciary and only be given in exceptional cases.	Where tax authorities intend to search the taxpayer's premises, the taxpayer should be informed and have an opportunity to appear before the judicial authority, subject to exception where there is evidence of danger that documents will be removed or destroyed			
	Access to bank information should require judicial authorisation			
Minimum Standard	Best Practice	Shift towards	Shift away	Development
5. More intensive audits (cont).				
	Authorisation by the judiciary should be necessary for interception of telephone communications and monitoring of internet access. Specialised offices within the judiciary should be established to supervise these actions			
Seizure of documents should be subject to a requirement to give reasons why seizure is indispensable, and to fix the time when documents will be returned; seizure should be limited in time				
	If data are held on a computer hard drive, then a backup should be made in the presence of the taxpayer's advisors and the original left with the taxpayer			
Where invasive techniques are applied, they should be limited in time to avoid disproportionate impact on taxpayers				
6. Review and appeals.				

South Africa

	E-filing of requests for internal review to ensure the effective and speedy handling of the review process			SARS announced recently that taxpayers can now request reasons for an assessment as well as request the suspension of payment of tax in dispute electronically via the SARS e-filing system. This should facilitate better control over such requests. In addition, the time period which SARS can extend the period in which to lodge an appeal was increased from 21 to 30 business days.
The right of appeal should not depend upon prior exhaustion of administrative reviews				
	Reviews and appeals should not exceed two years			
<i>Audi alteram partem</i> should apply in administrative reviews and judicial appeals				

Minimum Standard	Best Practice	Shift towards	Shift away	Development
6. Review and appeals (cont).				
Where tax must be paid in whole or in part before an appeal, there must be an effective mechanism for providing interim suspension of payment	An appeal should not require prior payment of tax in all cases			
	The state should bear some or all of the costs of an appeal, whatever the outcome			
Legal assistance should be provided for those taxpayers who cannot afford it				
Taxpayers should have the right to request the exclusion of the public from a tax appeal hearing				
Tax judgments should be published				
7. Criminal and administrative sanctions.				

South Africa

Proportionality and <i>ne bis in idem</i> should apply to tax penalties				
	Where administrative and criminal sanctions may both apply, only one procedure and one sanction should be applied			
	Voluntary disclosure should lead to reduction of penalties			The law was amended to create the so-called special voluntary disclosure programme whereby South African taxpayers can make a voluntary disclosure to SARS about unauthorised foreign assets prior to the automatic exchange of information takes effect in September. The SVDP commenced on 1 October 2016 and will end on 31 August 2016 and in all cases successful application will not be subject to the understatement penalty they would have been subject to had SARS identified them before the voluntary disclosure.
Sanctions should not be increased simply to encourage taxpayers to make voluntary disclosures				
8. Enforcement of taxes.				
Collection of taxes should never deprive taxpayers of their minimum necessary for living				

Minimum Standard	Best Practice	Shift towards	Shift away	Development
8. Enforcement of taxes (cont).				
	Authorisation by the judiciary should be required before seizing assets or bank accounts			
Taxpayers should have the right to request delayed payment of arrears				
	Bankruptcy of taxpayers should be avoided, by partial remission of the debt or structured plans for deferred payment			

South Africa

Temporary suspension of tax enforcement should follow natural disasters				
9. Cross-border procedures.				
The requesting state should notify the taxpayer of cross-border requests for information, unless it has specific grounds for considering that this would prejudice the process of investigation. The requested state should inform the taxpayer unless it has a reasoned request from the requesting state that the taxpayer should not be informed on grounds that it would prejudice the investigation	The taxpayer should be informed that a cross-border request for information is to be made			
	Where a cross-border request for information is made, the requested state should also be asked to supply information that assists the taxpayer			
	Provisions should be included in tax treaties setting specific conditions for exchange of information			

Minimum Standard	Best Practice	Shift towards	Shift away	Development
9. Cross-border procedures (cont).				
If information is sought from third parties, judicial authorisation should be necessary				
	The taxpayer should be given access to information received by the requesting state			
	Information should not be supplied in			

South Africa

	<p>response to a request where the originating cause was the acquisition of stolen or illegally obtained information</p> <p>A requesting state should provide confirmation of confidentiality to the requested state</p>			
A state should not be entitled to receive information if it is unable to provide independent, verifiable evidence that it observe high standards of data protection				
	<p>For automatic exchange of financial information, the taxpayer should be notified of the proposed exchange in sufficient time to exercise data protection rights</p>			
	<p>Taxpayers should have a right to request initiation of mutual agreement procedure</p>			
<p>Taxpayers should have a right to participate in mutual agreement procedure by being heard and being informed as to progress of the procedure</p>				

Minimum Standard	Best Practice	Shift towards	Shift away	Development
10. Legislation.				
<p>Retrospective tax legislation should only be permitted in limited circumstances which are spelt out in detail</p>	<p>Retrospective tax legislation should ideally be banned completely</p>			<p>During May 2017, the Gauteng High Court delivered a lengthy and comprehensive judgment dealing with the lawfulness of retrospective tax legislation. In Pienaar Brothers (Pty) Ltd v Commissioner for the South African Revenue Service and Another (87760/2014) [2017] ZAGPPHC 231 (29 May 2017) the court decided that a retrospective tax amendment did not violate the Rule of Law in the South African Constitution. In evaluating the possible violation</p>

South Africa

				of the Rule of Law the court applied the rationality test and the test of reasonableness or proportionality. The court decided that the amendment did not violate the standards used in South African law in testing the lawfulness of retrospective amendments. In addition, the court held that the amendment did not violate the taxpayer's right to property in the Constitution.
	Public consultation should precede the making of tax policy and tax law			
11. Revenue practice and guidance.				
Taxpayers should be entitled to access all relevant legal material, comprising legislation, administrative regulations, rulings, manuals and other guidance				
Where legal material is available primarily on the internet, arrangements should be made to provide it to those who do not have access to the internet				
Binding rulings should only be published in an anonymised form				
Where a taxpayer relies upon published guidance of a revenue authority which subsequently proves to be inaccurate, changes should apply only prospectively				

South Africa

Minimum Standard	Best Practice	Shift towards	Shift away	Development
12. Institutional framework for protecting taxpayers' rights.				
Adoption of a charter or statement of taxpayers' rights should be a minimum standard	A separate statement of taxpayers' rights under audit should be provided to taxpayers who are audited			During September 2016, the Commissioner for SARS advised at a tax conference that the outdated SARS service Charter would be updated and finalised by December 2016. To date the updated charter has not been released or published for public comment.
	A taxpayer advocate or ombudsman should be established to scrutinise the operations of the tax authority, handle specific complaints, and intervene in appropriate cases. Best practice is the establishment of a separate office within the tax authority but independent from normal operations of that authority			The Tax Administration Act was amended by way of the Tax Administration Laws Amendment Act 16 of 2016 extending the term of office of the Tax Ombud from 3 to 5 years. Furthermore, the law now provides that the Office of the Tax Ombud can appoint his or her own staff without involving the Commissioner: SARS. In addition, the Office of the Tax Ombud is financed out of funds to be provided from National Treasury and not from the funds of SARS. Finally, the Office of the Tax Ombud can ask the Minister of Finance to agree to investigate systemic issues in the tax system. These measures should enhance the independence of the Office of the Tax Ombud in south Africa. During 2017 the Tax Ombud received authorisation from the Minister of Finance to investigate the alleged undue delay in tax refunds experienced by taxpayers generally.
	The organisational structure for the protection of taxpayers' rights should operate at local level as well as nationally			