
PUBLIC PROTECTOR
SOUTH AFRICA

REPORT NO 14 of 2017/18

"Allegations of improper prejudice suffered as a result of maladministration committed by the South African Revenue Service (SARS)".

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER PREJUDICE SUFFERED AS A RESULT OF MALADMINISTRATION COMMITTED BY THE SOUTH AFRICAN REVENUE SERVICE IN HANDLING MS MFM TEBEILA'S TAX AFFAIRS
INDEX

Executive Summary 3

1. INTRODUCTION 8

2. THE COMPLAINT 8

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR 9

4. THE INVESTIGATION 12

5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS 15

6. FINDINGS 27

7. REMEDIAL ACTION 30

8. MONITORING 31
Executive Summary

(i) This is a report of the Public Protector issued in terms of section 182(1) (b) of the Constitution of the Republic of South Africa, 1996, and section 8(1) of the Public Protector Act, 1994.

(ii) The report relates to an investigation into allegations of improper prejudice suffered as a result of maladministration committed by the South African Revenue Service (SARS) in handling the Complainant's tax affairs.

(iii) The Complainant is Michelle Felicity Matema Tebeila, an adult female who was previously an employee of the United States Embassy from the years 1997 to 2007.

(iv) The complaint in this matter is lodged against the South African Revenue Service (SARS).

(v) Essentially, the Complainant alleges that SARS did not conduct itself in accordance with the applicable legislative prescripts when it sought to recover certain outstanding taxes from her.

(vi) SARS discovered that the US Embassy was not deducting income tax Pay as You Earn (PAYE) from her salary and she was not aware about same. After conducting an internal investigation, SARS concluded that the Complainant had failed to declare the full amount of taxable income for the years 2000 to 2005.

(vii) The Complainant's allegation of maladministration focused primarily on a failure by SARS to consider her representations and subsequent objection prior to the imposition of additional taxes and interest in terms of sections 76 and 89 quat (2) of the Income Tax Act, 58 of 1962. She alleges further that this conduct caused her financial prejudice.
(viii) SARS submitted that it had not committed any maladministration and had acted in accordance with the applicable tax legislation when recovering the outstanding tax from the Complainant.

(ix) On analysis of the complaint, the following issues were identified and investigated:

(a) Did SARS improperly fail to take into account the Complainant's representations when it levied additional taxes and interest in terms of section 76 and 89 quat (2) of the Income Tax Act 58 of 1962 (the Act); and

(b) Did SARS improperly fail to deal with the Complainant's objection in respect of the 2000 to 2008 years of assessment?

(c) If the answer to any of the above issues is in the affirmative, was the Complainant prejudiced as envisaged in section 6(4)(a)(v) of the Public Protector Act?

(x) The investigation process was conducted through email correspondence and phone calls as well as meetings with the Complainant and relevant officials of SARS as well as inspection of all relevant documents and analysis and application of all relevant laws, policies and related prescripts.

(xi) Key laws and policies taken into account to determine if there had been maladministration by the Department and prejudice to the Complainant were principally those imposing administrative standards that should have been complied with by the Department or its officials when processing claim documents for compensation. Those are the following:

(a) Section 33 of the Constitution, 1996 (the Constitution).
(c) The Tax Administration Act, 28 of 2011 and accompanying Regulations.
(d) The Promotion of Administrative Justice Act No. 3 of 2000 (PAJA)

(xii) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:

(a) With regard to whether SARS improperly failed to take into account the Complainant’s representations when it levied additional taxes and interest in terms of section 76 and 89quat(2) of the Income Tax Act; and

(aa) The allegation of whether SARS improperly failed to take into account the Complainant’s representations when it levied additional taxes and interest in terms of section 76 and 89quat(2) of the Income Tax Act is substantiated.

(bb) SARS failed to consider the Complainant’s representations prior to them levying additional taxes in terms of section 76 of the Act and when they penalized the Complainant in terms of section 89quat(2). The objection which was disallowed was also not considered. This failure to consider her representations as well as the objection amounts to maladministration.

(cc) The conduct of SARS constitutes improper conduct as envisioned in section 182 of the Constitution, and maladministration as envisioned in section 6(5) (a) of the Public Protector Act.

(b) Regarding whether SARS improperly failed to deal with the Complainant’s objection in respect of the 2000 to 2008 years of assessment?

(aa) The allegation that SARS improperly failed to deal with the Complainant’s objection in respect of the 2000 to 2008 years of assessment is substantiated.

(bb) The fact that the Complainant’s objections could not be traced casts doubt on whether it was properly considered. It is thus accepted that the objections were never considered by SARS and this amounts to maladministration.
The conduct of SARS is found to be improper conduct in terms of section 182 of the Constitution and amounts to maladministration in terms of section 6(5)(a) of the Public Protector Act.

Regarding whether the Complainant indeed suffered prejudice as envisaged in section 6(4) (a) (v) of the Public Protector Act; if the answer to any of the above issues is in the affirmative?

The Public Protector finds that SARS did not afford the complainant the same opportunity for a compromise in terms of section 200 of the Tax Administration Act and in so doing, prejudiced the complainant as envisaged in section 6(4)(a)(v) of the Public Protector Act.

As a result of the maladministration listed above, additional tax was levied in terms of section 76 of the Act as well as interest on the underpayment of provisional tax in terms of section 89quat(2) of the Act and the Complainant's liability increased from R97 996.92 to R352 764.70.

The Public Protector thus finds that as a result of this maladministration, the Complainant was financially prejudiced.

It is noteworthy that at all relevant times, SARS were amenable to settling this matter and assisted in the finalisation of the matter due to their co-operation throughout the investigation process.

SARS was sent a notice in terms of section 7(9) of the Public Protector that in the light of the above findings the Public Protector intends takes the following remedial action:
a) SARS must enter into a compromise with the Complainant in terms of section 200 of the Tax Administration act taking into account the principal debt; and additional tax levied in terms of section 76 of the Act; and

b) SARS must waive the interest charged in terms of section 89(2) and section 89 quat (2).

(aa) SARS accepted the findings and the intended remedial action and agreed to remedy the maladministration and prejudice suffered by the Complainant. At a meeting held on 8 March 2017 at the Public Protector’s Head Office between officials from the office of the Public Protector and SARS, it was agreed that the Complainant and SARS should enter into a compromise in terms of s 200 of the Tax Administration Act.

(bb) In terms of s 200 of the said Act, the Complainant would be required to admit liability for the entire outstanding amount which is due to SARS and submit a proposal on the amount which she is able to pay to settle her debt.

(cc) On 30 May 2017, the Complainant and SARS reached a settlement agreement in terms of s 200 of the Act, the contents of which are confidential and cannot be elaborated upon further in this report. The Complainant furnished the Public Protector with a copy of the aforementioned settlement agreement.

(dd) In light of the compromise entered into between the parties, the Public Protector considers the s 200 compromise as an appropriate and sufficient remedy to the maladministration and improper conduct mentioned in this report. As such, I do not propose that any further remedial action be taken in this matter.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER PREJUDICE SUFFERED AS A RESULT OF MALADMINISTRATION COMMITTED BY THE SOUTH AFRICAN REVENUE SERVICE IN HANDLING MS MFM TEBEILA’S TAX AFFAIRS

1. INTRODUCTION

1.1. This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

1.2. The report is made available in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of my investigation:

1.2.1.1 The Commissioner for SARS, Mr Tom Moyane; and
1.2.2 Ms Michelle Felicity Matema Tebile (The Complainant) to inform her about the outcome of my investigation.

1.3. The report relates to an investigation into the alleged maladministration committed by the South African Revenue Services (SARS) in respect of the manner in which it handled the Complainant’s tax affairs which resulted in the Complainant suffering improper prejudice.

2. THE COMPLAINT

2.1. The Complainant was an employee of the Embassy of the United States of America (the US Embassy) from the year 1997 to 2007. She lodged a complaint with my office alleging that:

2.1.1. SARS discovered that the US Embassy was not deducting income tax Pay as You Earn (PAYE) from her salary and she was not aware about same.
2.1.2. SARS requested her to submit her employee tax certificate (IRP5 certificate) and the US Embassy informed SARS in writing that it was exempted from issuing IRP5 certificates because it was not a South African employer for the purposes of tax law;

2.1.3. SARS laid criminal charges against her, however the charges were later withdrawn by the National Prosecuting Authority (the NPA) due to the failure by the South African Police Service (SAPS) and SARS to appear in court;

2.1.4. SARS conducted an internal investigation and concluded that she was liable for the payment of tax in respect of the income derived between the 2000 and 2005 years of assessment.

2.1.5. Upon her resignation from the US Embassy, SARS attached her pension money;

2.1.6. SARS cancelled outstanding tax debts of other embassy employees who were in the same position as her;

2.1.7. In general she has been unfairly prejudiced as a result of maladministration committed by SARS officials when they were handling her tax affairs; and

2.1.8. The alleged maladministration involved SARS' failure to consider her representations when they imposed additional tax and interest whilst they were considering her objection to the assessment, the disappearance of her second objection and SARS' refusal to write-off the interest and additional assessment.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR
3.1 The Public Protector is an independent constitutional body established under section 181(1) (a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.2 Section 182(1) of the Constitution provides that:

"The Public Protector has the power as regulated by national legislation –

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial action."

3.3. In the constitutional court, (in the matter of Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016), Chief Justice Mogoeng stated the following, when confirming the powers the public protector:

3.3.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (para 65);

3.3.2 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. (para 67);

3.3.3 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally
empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (para 68);

3.3.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow. (para 69);

3.3.5 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to. (para 70);

3.3.6 The Public Protector's power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made. (para 71);

3.3.7 Implicit in the words "take action" is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And "action" presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence; (para 71(a));

3.3.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (para 71(d));

3.3.9 "Appropriate" means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (para 71(e));
3.4. The Constitutional further held that the remedial action taken by the Public Protector has a binding effect. The Constitutional Court further held that: "When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences."

3.5. Section 182(2) directs that the Public Protector has additional powers and functions prescribed by legislation.

3.6. The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given the power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.7. SARS is an organ of state and its conduct amounts to conduct in state affairs, as a result, the matter falls within the ambit of the Public Protector’s mandate.

3.8. The Public Protector’s power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties.

4. THE INVESTIGATION

4.1 Methodology

4.1.1. The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.

4.1.2. The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act gives the Public Protector
the authority to resolve a matter without conducting an investigation and resolve a complaint through appropriate dispute resolution (ADR) measures such as conciliation, mediation and negotiation.

4.1.3. The complaint was initially classified as an Early Resolution matter capable of resolution by way of a conciliation process or mediation in line with section 6(4)(b) of the Public Protector Act, 1994. However, after several attempts to conciliate the matter, it was escalated into an investigation.

4.2. Approach to the investigation

4.2.1. Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

4.2.1.1 What happened?
4.2.1.2 What should have happened?
4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?
4.2.1.4 In the event of maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the maladministration or improper conduct?

4.2.2. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not SARS handled the Complainant’s tax affairs properly and whether this may have prejudiced the Complainant.

4.2.3. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the Department or organ of state to prevent maladministration and prejudice.
4.2.4. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. Where a Complainant has suffered prejudice the idea is to place him or her as close as possible to where they would have been had the Department or organ of state complied with the regulatory framework setting the applicable standards for good administration.

4.3. On analysis of the complaint, the following issues were considered and investigated:

4.3.1. Did SARS improperly fail to take into account the Complainant’s representations when it levied additional taxes and interest in terms of section 76 and 89quat (2) of the Income Tax Act 58 of 1962 (the Act)

4.3.2. Did SARS improperly fail to deal with the Complainant’s objection in respect of the 2000 to 2008 years of assessment?

4.3.3. If the answer to any of the above issues is in the affirmative, was the Complainant prejudiced as envisaged in section 6(4)(a)(v) of the Public Protector Act?

4.4. The Key Sources of information

4.4.1. Documents

4.4.1.4. Summons issued against Complainant from Pretoria Magistrate’s Court dated 5 June 2006.
4.4.1.5. Letter from SARS to Complainant dated 24 July 2006.
4.4.1.6. Sworn Affidavit by Mr Gero Bertrams of SARS dated 26 July 2006.
4.4.1.9. Letter from SARS confirming receipt of objection from Complainant dated April 2009.
4.4.1.10. Letter from SARS to Complainant dated 17 March 2011.
4.4.1.12. Annexures submitted by SARS at meeting held on 9 March 2017.

4.4.2. Meetings conducted

4.4.2.1. Meeting held at Public Protector Head Office on 8 March 2017 between officials from the Public Protector's office and officials from SARS.

4.4.3. Correspondence sent and received

4.4.3.1. Letter from SARS to Public Protector South Africa dated 15 November 2013.
4.4.3.2. A Notice by the Public Protector in terms of section 7(9) letter to SARS to Mr Moyane dated 8 December 2016.
4.4.3.3. Response to the section 7 notice from SARS to Public Protector South Africa responding to s 7(9) letter dated 13 January 2017.
4.4.3.4. Letter from Public Protector South Africa to the Complainant dated 23 February 2017.

4.4.4. Websites consulted/electronic sources

4.4.4.1. www.mylexisnexis.co.za
4.4.5. Legislation and other prescripts

4.4.5.2. The Public Protector Act, 23 of 1994.
4.4.5.3. The Income Tax Act, 58 of 1962.
4.4.5.4. The Tax Administration Act, 28 of 2011 and accompanying Regulations.
4.4.5.5. The Promotion of Administrative Justice Act, 3 of 2000.

4.4.6. Case law

4.4.7.1. Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another 1988 (2) ALL SA 308.

5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

5.1 Did SARS improperly fail to take into account the Complainant's representations when it levied additional taxes and interest in terms of section 76 and 89 quat (2) of the Income Tax Act 58 of 1962 (the Act)

Common cause issues

5.1.1. The following issues are common cause and have not been disputed by the parties:
5.1.1.1 The Complainant was requested by SARS during May and June 2005 to submit IRP5 certificates to SARS after it was discovered that she had not submitted her tax returns for the 2000 to 2005 years of assessments. The Complainant submitted that the US Embassy informed SARS in writing that it was exempted from issuing IRP5 certificates because it was not a South African employer for the purposes of income tax. She was provided with a letter confirming her annual salary (which did not include her 13th cheque and other benefits) by the US Embassy and she then completed her tax returns and submitted it to SARS based on that information during May and June 2005.

5.1.1.2 SARS commenced with an audit of the Complainant’s returns for the 2000 to 2005 years of assessments. Following the audit, SARS concluded that she understated her taxable income. On 5 June 2006, SARS issued criminal summons in terms of section 75(1) of the Act on the basis that she understated her salary. On 24 July 2006 SARS wrote to the Complainant informing her that she failed to disclose her full and correct income in her tax returns and indicated that the following income tax liabilities were payable by the Complainant:

<table>
<thead>
<tr>
<th>Year</th>
<th>DISCIPLENCE (R)</th>
<th>TAX LIABILITY (R)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>72 370</td>
<td>16 202.80</td>
</tr>
<tr>
<td>2001</td>
<td>98 891</td>
<td>10 497.20</td>
</tr>
<tr>
<td>2002</td>
<td>117 653</td>
<td>14 612.88</td>
</tr>
<tr>
<td>2003</td>
<td>171 562</td>
<td>19 082.66</td>
</tr>
<tr>
<td>2004</td>
<td>187 147</td>
<td>16 730.86</td>
</tr>
<tr>
<td>2005</td>
<td>202 814</td>
<td>20 870.52</td>
</tr>
</tbody>
</table>

5.1.1.3 The Complainant then approached the US Embassy and they provided her with updated information which included her 13th cheque and other benefits. She then submitted the corrected information to SARS.
5.1.1.4 On 24 July 2006 SARS requested the Complainant to furnish reasons as to why additional taxes (penalties) as stipulated in section 76 of the Act should not be imposed due to under-declaration of taxable income to SARS. She was further requested to submit a statement of current assets and liabilities and a duly completed income tax return.

5.1.1.5 The Complainant submitted her representations on 8 August 2006. In her representations letter the Complainant did not dispute that she understated her income and conceded that she omitted her thirteenth cheques and other benefits received and accrued to her in terms of her employment with the US Embassy. She however, argued that she was under the impression that the aforementioned benefits were not taxable. She further mentioned that she submitted the tax returns in good faith relying solely on the information obtained from the US Embassy.

5.1.1.6 SARS started to levy interest in terms of 89(2) of the Act since September 2005. In September 2009, SARS imposed interest in terms of section 89quat(2) of the Act. SARS further proceeded to impose additional assessments in terms of section 76 of the Act in respect of the 2000 – 2005 years of assessment on 1 December 2006.

5.1.1.7 The Complainant submitted the correct statement of income after she was informed that she understated her income.

5.1.1.8 The Complainant lodged an objection on 24 May 2007 against the additional assessments.

Issues in dispute

5.1.2 What is disputed is that the Complainant’s representations were not taken into consideration prior to the imposition of the additional assessments and interest levied thereon.
5.1.3 SARS, conceded that they may not have reacted to the Complainant’s queries and correspondence on time or in a way acceptable to the Complainant. In order to attempt to resolve this matter, SARS is therefore, prepared to waive some of the interest levied in terms of section 89(2) of the Act on a monthly basis on the Complainant’s income tax account.

5.1.4 In a letter dated 15 November 2013, SARS confirmed that the Complainant can request SARS to reach a compromise in terms of section 200 of the Tax Administration Act, 28 of 2011 provided that she complies with the requirements laid down by the Act.

5.1.5 SARS disputed the basis of the objection and stated that the complainant objected on the ground that she was registered as a provisional taxpayer and she did not understand why the assessments were raised.

5.1.6 The Complainant on the other hand argued that the ground for her objection was that she submitted representations to SARS and they were not considered. On 11 September 2007, SARS disallowed the objection because the Complainant was registered as a provisional taxpayer in 2005.

5.1.7 SARS further submitted that in terms of the Act there was accordingly no dispute between the Complainant and SARS as no appeal (ADR2) had been lodged after the disallowance of the objection during 2007. SARS could not therefore, enter into any settlement arrangements with the Complainant in terms of section 88D of the Act. Therefore, according to SARS, the Complainant could not make a settlement proposal to SARS in terms of section 91A of the Act as she still had a regular income and would be able to settle the debt.

5.1.8 SARS submitted that there is no basis for reducing the assessments in terms of the Act. However, in terms of section 89(2) of the Act, SARS may extend the payment date of any assessment having regard to the circumstances.
5.1.9 In response to the notice issued in terms of section 7(9) of the Public Protector Act, SARS submitted that it is the duty of a taxpayer (the Complainant) and not her employer to declare all her income correctly, failing which would result in the imposition of penalties and interest. SARS submitted that the Complainant had a duty to ensure that the information she received from her employer was a correct and true reflection of all income she had received. SARS concluded that because she had failed to do so, this resulted in the imposition of additional taxes and interest in terms of sections 76 and 89quat (2) of the Income Tax Act.

5.1.10 SARS submitted further that the discretion in terms of the Act is to be exercised in a sound, reasonable and rational manner taking into account the personal circumstances of the taxpayer. SARS argued however that the Complainant was not an 'ideal candidate' for SARS to exercise its discretion in her favour.

**Application of the relevant law**

5.1.11 SARS levied tax interest in terms of section 76(1) of the Act which provides that "a taxpayer shall be required to pay in addition to the tax chargeable in respect of his taxable income if he/she inter alia omits from his/ her return any amount which ought to have been included therein" since the position was that the Complainant understated her taxable income. Whilst Section 76(2) states that in the event that there were extenuating circumstances for the submission of the incorrect assessments in the opinion of the Commissioner, he shall remit the additional charges. It was on this basis that the complainant was requested to submit representations.

5.1.12 Section 76(2) allows SARS to remit the additional charges imposed in terms of section 76(1) or any part thereof as the Commissioner may deem fit, provided that the Commissioner is satisfied that any act or omission of the taxpayer referred to was not done with the intent to evade taxation. It is clear that section 76(2) places
an obligation on SARS to satisfy itself that the taxpayer's act or omission was not intended to evade taxation, SARS is therefore required to take into account the reasons submitted by the taxpayer for the omission prior to imposing the additional charges. SARS was therefore required to consider the Complainant's submission regarding her understatement of her taxable income.

5.1.13 SARS raised additional assessments in terms of section 79(1) which empowers them to raise additional assessment upon a taxpayer who has already been assessed for a particular year of assessment when any amount which was subject to tax and should have been assessed was not; when any amount which was chargeable and should have been assessed was not or any tax payable otherwise than under assessment was not levied. This was after they discovered that the Complainant understated her income. Prior to SARS invoking the provisions of section 79(1) they invited the Complainant to make representations and she in turn submitted representations.

5.1.14 Section 81(1) confers the right to object upon a taxpayer who is aggrieved by an assessment. It is clear that a taxpayer whose taxable income has been determined erroneously is always aggrieved even if the reason for the erroneous calculation is entirely attributable to her. In this case the complainant was aggrieved by SARS decision to levy additional assessments and interest on the basis that she understated her income on her returns. This was confirmed by the Tax court in the case of ITC 1785 (2004) 67 SATC 98 where it held that the taxpayer was allowed to lodge an objection where the taxpayer failed to claim a tax deduction in respect of foreign exchange losses. She lodged an objection against her assessment on this basis, which was disallowed by SARS.

5.1.15 SARS has 30 days after receiving the notice to show the taxpayer where it has already provided reasons, or if it has not it has 60 days to give such reasons in writing. If SARS needs more time due to exceptional circumstances or complexity of the matter, it must advise the taxpayer that it needs a further 45 days. The
complainant was not requested to provide reasons for her objection despite the fact that it was eventually disallowed by SARS.

5.1.16 Section 6(2) (e) (vi) of the Promotion of Administrative Justice Act, 2000 (PAJA) provides for the review of administrative decisions taken by Administrators which are taken “arbitrarily or capriciously”. PAJA does not define these terms, but at common law action is said to be “arbitrary or capricious” when it is irrational or senseless, without foundation or apparent purpose. Capricious decision makers can certainly be said to have failed to apply their minds to the matter. SARS failed to adhere to this administrative law principle when it did not consider her representations and it disallowed her objection.

Conclusion:

5.1.17 From the abovementioned provisions, it is clear that SARS has an obligation to consider a taxpayer's representations before it can levy additional taxes and interest in terms of ss 76(2) and 89quat (2).

5.1.18 Whether SARS considered the Complainant's representations prior to making additional assessments is a question of fact that must be determined from all the available evidence. From the available evidence, it is difficult to believe SARS' contention that the Complainant might have objected to the additional assessments levied by them on the basis that she was registered as a provisional taxpayer and that she does not understand why the assessments were raised, after having submitted her representations in August 2006. Even if one were to accept SARS' view, one would have expected SARS to invite the Complainant to clarify her reasons for her objection when they adjudicated on her objection.

1 Johannesburg Stock Exchange v Witwatersrand Nigel Limited 1988 (3) SA 132 (A) at pg 151-152
5.1.19 Therefore from the available evidence, it is clear that SARS failed to consider the Complainant’s representations prior to levying additional taxes and interest in terms of ss 76(2) (a) and 89 quat (2).

5.1.20 It is evident furthermore, that the Commissioner has an obligation to exercise his discretion where he is satisfied that the taxpayer’s misstated income was not done with the intent to evade taxation. In the Public Protector’s view, there is no evidence to suggest that the Complainant acted *mala fide* when she completed her tax returns in respect of the period between the 2000 and 2005 years of assessment. SARS accordingly failed to exercise its discretion against the imposition of penalties in terms of s 76(2) (a) as it was obliged to.

5.2 Regarding whether SARS improperly failed to deal with the Complainant’s objection in respect of the 2000 to 2008 years of assessment?

*Common cause issues:*

5.2.1 There appear to be no common cause issues in respect of this issue.

*Issues in dispute:*

5.2.2 What is disputed is whether or not SARS improperly failed to deal with the Complainant’s objection in respect of the 2000 to 2008 years of assessment.

5.2.3 SARS submitted that the Collection division requested the Complainant to pay the outstanding income tax based on the "*pay now, argue later principle*" which according to SARS is both a valid and enforceable legal principle of the South African law, as the debt was not suspended in terms of section 88 of the Act. Based on the aforementioned principle the Complainant’s pension amounting to
R264 341.00 was attached by SARS on 28 September 2007 upon her resignation from the US Embassy.

5.2.4 SARS submitted further that on 19 January 2011, a meeting was held between the Complainant, her legal representative and SARS officials from different divisions. During the said meeting, the Complainant’s legal representative informed SARS officials that she had lodged an objection against the assessments up to and including the 2008 years of assessment.

5.2.5 Unfortunately, the Complainant was not in possession of a copy of the Notice of Objection (ADR1) which was allegedly submitted and she only produced an acknowledgement of receipt issued by SARS in respect of the said objection. The acknowledgement of receipt confirms receipt of an ADR1 which was in respect of only the 2008 year of assessment. However, according to the Complainant, the objection was in respect of the 2001 to 2008 years of assessment.

5.2.6 During the aforementioned ADR session it was further discovered that the Complainant submitted another ADR1 in 2009 and SARS Assessment Maintenance division referred the ADR1 to Account Maintenance on 3 June 2009. SARS concluded that the objection was in respect of provisional tax and not related to an assessment as such.

5.2.7 SARS submitted further that they introduced new systems of tracking documents electronically since 2009. During June 2009 there was still a manual register and the information relating to the referral of the objection was entered into the manual register. Although the Account Maintenance division was unable to trace the ADR1, however, as an acknowledgement of receipt of the objection was issued, the ADR 1 was therefore regarded as finalised.

5.2.8 The Complainant insisted she had submitted an objection against the additional assessments and SARS failed to consider the reasons for her objection.
5.2.9  In response to a notice issued in terms of section 7(9) of the Public Protector, SARS submitted that the grounds in the objection received from the Complainant were different from the reasons which were provided in the Complainant's representations.

5.2.10 SARS submitted further that the grounds of the objection were insufficient and consequently disallowed. SARS argued however that they advised the Complainant to pursue the appeal process but she failed to do so.

*Application of the relevant law:*

5.2.11 Section 81(1) provides that objections to any assessment made under the Act shall be made in the manner and under the terms and within the period prescribed by the Act and the rules promulgated in terms of section 107A by any taxpayer who is aggrieved by any assessment in which that taxpayer has an interest. The Complainant was not satisfied with SARS' decision when she lodged the first objection in 2007 and the second objection in 2010.

5.2.12 SARS has 30 days after receiving the notice to show the taxpayer where it has already provided reasons, or if it has not it has 60 days to give such reasons in writing. If SARS needs more time due to exceptional circumstances or complexity of the matter, it must advise the taxpayer that it needs a further 45 days.

5.2.13 In terms of the ADR rules² SARS has 60 days to request the information, documents or things required deciding the taxpayer's objection and the taxpayer then has 60 days to comply. SARS has 90 days after the objection to decide on it (or 60 days after receiving the information required). If the matter is complicated or circumstances are exceptional the Commissioner can take a further 60 or 90 days to decide the matter, and must inform the taxpayer of the delay. The delay may

---

² Guide on Tax Dispute Resolution; SARS Law Administration: Litigation Section January 2005 at pg 8
also be because of a legal principle. The Complainant lodged the second objection and SARS acknowledged receipt of the objection, however, SARS admitted that they could not trace it.

**Conclusion:**

5.2.14 As SARS was unable to trace the objection which the complainant had proof of submitting, the Public Protector accepts Complainant’s contention that she objected to the assessments as the evidence shows that the objections arose from the same or similar facts.

5.3 Regarding whether the Complainant indeed suffered prejudice as envisaged in section 6(4) (a) (v) of the Public Protector Act if the answer to any of the above issues are in the affirmative?

5.3.1 The Complainant submitted that she had been unfairly prejudiced as a result of maladministration committed by SARS officials when they were handling her tax affairs because of the following:

(a) That she had a meeting with SARS legal section and she was informed that other embassy employees, who were in similar circumstances to the Complainant applied for amnesty and that the Complainant should have applied for amnesty as well;

(b) The Complainant further submitted that according to her knowledge SARS had cancelled outstanding tax debts of other embassy employees who were in the same position as her;

(c) The imposition of penalties and interests by SARS increased her debt exponentially.
5.3.2 However, SARS indicated that the other embassy employees who were in the same position as the Complainant entered into a compromise in terms of section 200 of the Tax Administration Act 28 of 2011. In terms of this section, the incumbent will have to acknowledge the debt owing to SARS before the section can be applied. SARS submitted that the Complainant is disputing the amount of outstanding tax (with interest) owing to SARS and hence section 200 could not be applied under the circumstances.

5.3.3 In response to a notice issued in terms of section 7(9) of the Public Protector Act, SARS conceded that several other employees of various diplomatic missions in the country entered into compromise arrangements with SARS. SARS argued however that these arrangements could only be made because the relevant taxpayers had admitted tax liability. SARS argued that unlike these other taxpayers, the Complainant was not prepared to admit tax liability and thus a compromise arrangement was not possible.

Applicable law and related prescripts:

5.3.4 In terms of s 6(4)(v) of the Public Protector Act, the Public Protector has the power to investigate any act or omission by a person in the employ of government at any level which results in unlawful or improper prejudice to any other person.

Conclusion:

5.3.5 In light of the conduct of SARS enumerated upon above, the Complainant did suffer improper prejudice as envisaged by s 6(4) (v) of the Public Protector Act.

6 FINDINGS

6.1 Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:
6.1.1 With regard to whether SARS improperly failed to take into account the Complainant’s representations when it levied additional taxes and interest in terms of section 76 and 89quat(2) of the Income Tax Act?

6.1.1.1 The allegation of whether SARS improperly failed to take into account the Complainant’s representations when it levied additional taxes and interest in terms of section 76 and 89quat(2) of the Income Tax Act and when it rejected her objection is substantiated.

6.1.1.2 SARS failed to consider the Complainant’s representations prior to them levying additional taxes in terms of section 76 of the Act and when they penalized the Complainant in terms of section 89quat(2). The objection which was disallowed was also not considered. This failure to consider her representations as well as the objection amounts to maladministration.

6.1.1.3 The conduct of SARS constitutes improper conduct as envisioned in section 182 of the Constitution, and maladministration as envisioned in section 6(5) (a) of the Public Protector Act.

6.1.2 Regarding whether SARS improperly failed to deal with the Complainant’s objection in respect of the 2000 to 2008 years of assessment?

6.1.2.1 The allegation that SARS improperly failed to deal with the Complainant’s objection in respect of the 2000 to 2008 years of assessment is substantiated.

6.1.2.2 The fact that the Complainant’s objections could not be traced casts doubt on whether it was properly considered. It is thus accepted that the objections were never considered by SARS and this amounts to maladministration.
6.1.2.3 The conduct of SARS is found to be improper conduct in terms of section 182 of the Constitution and amounts to maladministration in terms of section 6(5)(a) of the Public Protector Act.

6.1.3 Regarding whether the Complainant indeed suffered prejudice as envisaged in section 6(4) (a) (v) of the Public Protector Act; if the answer to any of the above issues is in the affirmative?

6.1.3.1 The Public Protector finds that SARS did not afford the complainant the same opportunity for a compromise in terms of section 200 of the Tax Administration Act and in so doing, prejudiced the complainant as envisaged in section 6(4)(a)(v) of the Public Protector Act.

6.1.3.2 As a result of the maladministration listed above, additional tax was levied in terms of section 76 of the Act as well as interest on the underpayment of provisional tax in terms of section 89quat(2) of the Act and the Complainant's liability increased from R97 996.92 to R352 764.70.

6.1.3.3 The Public Protector thus finds that as a result of this maladministration, the Complainant was financially prejudiced.

6.1.3.4 It is noteworthy that at all relevant times, SARS were amenable to settling this matter and assisted in the finalisation of the matter due to their co-operation throughout the investigation process.

7. REMEDIAL ACTION

7.1. A notice was sent to SARS in terms of section 7(9) of the Public Protector Act and in that notice the Public Protector indicated that based on the findings above the Public Protector intends to take the following remedial action:

7.1.1 SARS must enter into a compromise with the Complainant in terms of section 200 of the Tax Administration act taking into account the following:
c) the principal debt; and

d) Additional tax levied in terms of section 76 of the Act

7.1.2 SARS must waive the interest charged in terms of section 89(2) and section 89 quat (2).

7.2 In response to a notice issued in terms of section 7(9) of the Public Protector Act, SARS submitted that a compromise in terms of s 200 of the Tax Administration Act would not be an appropriate mechanism to resolve the dispute because the Complainant was not willing to admit tax liability. As such, SARS proposed that the parties enter into a settlement in terms of s 194 of the Tax Administration Act. The latter provision provides for a settlement between SARS and a taxpayer if is to the best advantage of the state and is fair and equitable to both parties.

Conclusion

7.3 At a meeting held on 8 March 2017 between the office of the Public Protector and SARS officials, it was agreed that the Complainant and SARS should enter into a compromise in terms of s 200 of the Tax Administration Act.

7.3.1 In terms of s 200 of the said Act, the Complainant would be required to admit liability for the entire outstanding amount which is due to SARS and submit a proposal on the amount which she is able to pay to settle her debt.

7.3.2 On 30 May 2017, the Complainant and SARS reached a settlement agreement in terms of s 200 of the Act, the contents of which are confidential and cannot be elaborated upon further in this report. The Complainant has furnished our office with a copy of the aforementioned settlement agreement.

7.3.3 The Public Protector considers the settlement between the parties as an appropriate and sufficient remedy to the maladministration and improper conduct
mentioned in this report. As such, the Public Protector does not propose that any further remedial action be taken in this matter.

8. MONITORING

8.1 In the absence of any remedial action taken, there will be no monitoring.

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 02/10/2017

Assisted by: Ms Rugshana Mdleleni
Mr Nditheni Raedani
Mr Ohene Ampofo-Anti