

Factors to consider when establishing an effective tax Ombudsman in South Africa

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Dedication

I dedicate this study to:

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KEYWORDS

Tax Ombudsman

Tax Ombud

Taxpayers' rights

The Constitution of South Africa Act 108 of 1996 (The Constitution)

The Bill of Rights

Draft Tax administrative Bill (TAB)

South African Revenue Service (SARS)

SARS Service Monitoring Office (SSMO)

Abuse of Power

The Income Tax Act 58 of 1962 as amended (The Act)

Maladministration

Tax evasion

Australian Tax Authority (ATO)

Tax Administration Act 28 of 2011 (TAA)

LIST OF ABBREVIATIONS

Act	-	The Income Tax Act 58 of 1962 as amended (The Act)
ADR	-	The Alternative Dispute Resolution (ADR)
ADB	-	African Development Bank (ADB)
ATO	-	Australian Tax Authority (ATO)
ATR	-	The advance tax ruling system (ATR)
Board	-	Board of directors (the Board)
CCTB	-	Canada Child Tax benefit (CCTB)
Constitution	-	The Constitution of South Africa Act 108 of 1996 (The Constitution)
CRA	-	The Canada Revenue Agency (CRA)
IRS	-	The Inland Revenue Services (the IRS)
JCPAA	-	The Joint Committee of Public Accounts and Audit (JCPAA)
Minister	-	The Minister of Finance (the Minister)
MIO	-	The Motor Industry Ombudsman (MIO)
MIOSA	-	The Motor Industry Ombudsman of South Africa (MIOSA)
MP	-	Member of Parliament (MP)
OALD	-	Oxford Advanced Learned Dictionary (OALD)
OBS	-	The Banking Services Ombudsman (the OBS)
PAIA	-	The Promotion of Access to Information Act (2 of 2000) (PAIA)
PAJA	-	The Promotion of Administrative Justice Act (3 of 2000) (PAJA)
PAYE	-	PAY-AS-YOU-EARN system (PAYE)
SAHRC	-	The South African Human Rights Commission (SAHRC)
SARS	-	South African Revenue Service (SARS)
SSMO	-	SARS Service Monitoring Office (SSMO)
TAA	-	Tax Administration Act 28 of 2011 (TAA)
TAO	-	Taxpayer assistance orders (TAO)
TO	-	Tax Ombudsman (TO)
UK	-	The United Kingdom (The UK)
USA	-	The United States of America (USA)

ABSTRACT

This study examines the factors to consider in establishing an effective tax Ombudsman in South Africa. It seeks to establish how the democratic protection institutions such as the South African Public Protector and the South African Human Rights Commission and the Courts created in terms of the 1996 Constitution vis-à-vis the ways the South African Revenue Service' (hereinafter referred to as SARS) new court rules and Service Monitoring Offices safeguard and protect taxpayers rights against SARS' administrative abuses.

The researcher reviews and analyses literature gathered from the following sources: the Australian and Canadian tax Ombudsman, the United Kingdom's tax adjudicator, the South African motor industry Ombudsman, the South African banking services Ombudsman, the South African Public Protector, the Tax Administration Act (28 of 2011) (hereinafter referred to as the TAA), the South African Constitution (108 of 1996), and other popular scientific articles and reports on the introduction of the tax Ombudsman in South Africa.

The findings reveal the core factors that underscore the establishment of an effective tax Ombud in South Africa to include: independence, neutrality, credible review process and confidentiality. Other auxiliary factors with regard to the appointment of the tax Ombud are: leadership skills, honesty, integrity and courage. Furthermore, the provisions of the TAA, in relation to the appointment of the tax Ombud's funding, staffing, location, and powers with particular reference to cost recovery and disclosure of taxpayers' confidential information, impede on the tax Ombud's independence. It also emerged from this study that the independence of the tax Ombud's office is being over-emphasised, leaving other pertinent issues of equal importance, such as education and publicity, unattended to. The recommendations for this study revolve on the tax Ombud's appointment, budget and recruitment of its own staff, building a reputation of independence through public education and the power to recover costs.

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CHAPTER 1

INTRODUCTION AND OBJECTIVES OF THE MINI-DISSERTATION

1.1 INTRODUCTION AND BACKGROUND

South Africa is governed by the democratic principles of the 1996 Constitution (hereinafter referred to as the Constitution). Therefore, South Africa is a constitutional democratic state. This means that the Constitution is the highest law in the country. The Constitution contains the Bill of Rights, which enshrines the rights of the people in the country and affirms the democratic values of human dignity, equality and freedom. The Bill of Rights applies to all laws and binds the legislature, the executive, the judiciary and all organs of state (The Constitution, 1996). The South African Revenue Service (hereinafter referred to as SARS), as an organ of state, is therefore subject to the Constitution and as such expected to protect and respect the rights of taxpayers.

According to Croome (2010a:1), all legislation introduced in South Africa must uphold the Bill of Rights. Croome contends that while the Constitution does not specifically refer to taxpayers' rights, it is clear that taxpayers can rely on the Bill of Rights. Croome further explains that as a result of the constitutional dispensation, all fiscal statutes should adhere to the provisions contained in the constitution, failing which the courts could rescind the legislation as being repulsive under the constitutional provisions. The Bill of Rights therefore influences the powers conferred on SARS in the fiscal statutes and, more importantly, how SARS conducts itself in dealing with taxpayers.

Taxpayers have numerous rights that flow from the constitution. None of these rights are absolute. Before an attack on the constitutionality of a section of the Income tax Act 58 of 1962 (hereafter referred to as the Act) can be successful, a taxpayer will have to prove that one of these rights has been infringed and the Commissioner will have to be unsuccessful in proving that the infringement constitutes a legitimate limitation of those rights (Van Schalkwyk, 2004:197).

Taxpayers whose rights have been infringed upon under the present statutory provisions can, in terms of Section 182 of the Constitution (1996), seek recourse through the Public Protector, the Human Rights Commission or the courts. Retief (2010a:1) claims that, apart from the courts, taxpayers have no effective remedy to contest SARS's administrative action. This means that an aggrieved taxpayer, who has no financial means to help pursue his/her case, could become the victim of the cumbersome SARS administrative procedures.

Van Schalkwyk (2001:286) observed that the low tax morale of taxpayers in South Africa, as recognised by Coetzee in 1995, and the higher incidence of tax evasion identified by the Margo Commission in 1987, would be aggravated if the constitutional protection of the rights of taxpayers is not safeguarded. Therefore, the protection of taxpayers' rights through the elimination of unconstitutional provisions in the tax acts would enable taxpayers to successfully challenge the unfair and abusive practices of SARS (Van Schalkwyk, 2004:186).

Friedland (2010:1) maintained that the call by South African individual taxpayers, corporate organisations, civil rights organisations and others for the establishment of an independent and impartial state institution with the responsibility of settling disputes between taxpayers and SARS was a step in the right direction. Friedland believed that the presence of a tax Ombudsman institution would assist in building trust in the country's tax system, foster voluntary compliance and engender accountability on the part of the government. Croome (2010b:1) supported the view expressed by Friedland and emphasised that the decision to create a tax Ombudsman in South Africa would be in response to a call for its establishment years ago by the commission of enquiry into the tax structure of South Africa, professional bodies and tax practitioners.

The laws of South Africa have accorded SARS far-reaching powers and it is important that such powers are constantly monitored and tempered by a counter-balancing force. SARS (2013a:4) maintained that the balance between the powers and responsibilities of SARS and the rights and obligations of taxpayers would promote equity and fairness in

the South African tax administration system. It is therefore envisaged that the appointment of the tax Ombudsman would to some extent serve as an administrative watchdog over the activities of SARS, and also assist in addressing the administrative impasse of taxpayers.

1.2 IMPORTANCE AND BENEFITS OF THE PROPOSED STUDY

This study is purported to make a significant contribution towards the government initiative of creating a broader tax base where all citizens would voluntarily accept their civic responsibility of honouring their tax obligations without fear of intimidation and abuse from the commissioner of SARS and his staff. Friedland (2010:1) stated that if SARS officials knew that such a body as the tax Ombudsman existed, it would in itself inculcate better service and less abuse. This would lend credibility to the tax system, entrench fairness and in so doing obtain taxpayers' co-operation. SARS should not believe that its officers are beyond human error; human error in these circumstances could be devastating for the taxpayer and especially businesses. The study therefore seeks to reiterate the call for SARS to respect the democratic values of human dignity, equality and the freedom of citizens.

The purpose of the study is to evaluate the powers and characteristics of the tax Ombudsman in order to put the ombudsman's appointment in the right perspective for the benefit of South African taxpayers who would know the extent to which the office of the tax Ombudsman could aid in addressing their tax problems.

The failure of the new court rules and the SARS Monitoring Office to adequately protect and safeguard the democratic rights of taxpayers from abuse through harassment from maladministration, abuse of power, negligence and corruption of tax officials has led to the call by taxpayers for an independent state organ: The tax Ombudsman.

Many Ombudsmen's offices are referred to as 'soft teeth'. This is because these offices lack the requisite fundamental and essential characteristics needed for the creation of an efficient and effective Ombudsman.

1.3 PROBLEM STATEMENT

What factors should be taken into consideration in order to establish an effective Tax Ombudsman's office that would successfully address taxpayers' problems in South Africa within the framework of the Tax Administration Act (28 of 2011)?

1.4 AIMS AND OBJECTIVES

To get to an answer to the problem statement, the primary objective of this study is to systematically unpack the essential characteristics needed for the creation of a successful tax Ombudsman in South Africa for the protection of taxpayers' administrative rights. The primary objective will be addressed by the following four secondary objectives:

- i. The first secondary objective of the study is to investigate the reason why the constitutional provisions, the new court rules and SARS's Service Monitoring Office had failed to adequately protect taxpayers from abuse as will be addressed in Chapter 2.
- ii. The second secondary objective of the study is to evaluate the essential characteristics of a successful Tax Ombudsman in other countries with the view to establish the best practices to be followed and the factors to be taken into account for the establishment of an effective tax Ombudsman in South Africa, as will be addressed in Chapter 3.
- iii. The third secondary objective of the study is to establish the reasons behind the successful creation and implementation of Ombudsman programmes within some of the major industries in South Africa and what lessons could be learnt from their experiences in the establishment of an efficient, accountable and independent tax

Ombudsman within the framework of the Tax Administration Act (28 of 2011) (hereinafter referred to as the “TAA”) in South Africa, as will be addressed in Chapter 4.

- iv. The fourth secondary objective of the study is to evaluate the regulatory framework of the tax Ombud in South Africa with regard to the characteristics identified for the establishment of a successful Ombudsman in South Africa and to make recommendations based on these findings, as will be addressed in Chapters 5 and 6. Findings from Chapters 3 and 4 will also assist in arriving at the characteristics needed for the tax Ombud.

1.5 RESEARCH METHODOLOGY AND DESIGN

1.5.1 Literature review

Relevant literature on the topic of the tax Ombudsman, the right of taxpayers, certain provisions of the Act and the institution of a tax Ombudsman in countries such as Canada, the United Kingdom (hereafter referred to as the UK) and Australia will be critically evaluated in order to reach conclusions.

The literature includes the following:

1. The Constitution of the Republic of South Africa No. 108 of 1996 as amended;
2. The Income Tax Act No 58 of 1962 as amended;
3. The Tax Administration Act No 28 of 2011;
4. Laws in Canada, the U K and Australia regarding the tax Ombudsman; and
5. Various popular scientific articles and reports on the introduction of the tax Ombudsman in South Africa as well as that of the office of the tax Ombudsman in other countries such as Australia, Canada and the UK would be accessed from the Internet to aid in drawing conclusions and making recommendations in this research.

The choice of the UK, Canada and Australia for comparison is based on the premises that the institution of the tax Ombudsman has relatively stronger presence in developed countries. The study would investigate the reason why these countries established the tax Ombudsman's office in their respective jurisdictions in order to form an opinion as to whether their circumstances are similar to the situation prevailing in South Africa, and the merits and demerits of following their style of implementing the tax Ombudsman programme in South Africa.

1.5.2 Research boundaries

This study investigates the factors to be taken into consideration in establishing an effective tax Ombudsman in South Africa against the background of the failure of SARS to adequately protect the rights of taxpayers in the country. The study does not deal with the administration of a specific provision in the Act, but rather how SARS applies the Constitution and other laws of the Republic in fulfilling its mandate of collecting taxes from taxpayers and the problems they face. The call for the establishment of a tax Ombudsman's office in South Africa is a current issue; therefore, the available literature on the matter is limited locally. The literature reviewed in this study is mostly drawn from articles commenting on the TAA. Other materials are accessed through the Internet from the Australian, Canadian and UK tax authorities.

1.6 OVERVIEW

This study will be divided into six chapters, the content of which is summarised as follows:

Chapter 1 will serve as a general background to the study, the problem statement, the aims and objectives of the study, the research methodology and design, which serve as a guide to the research process.

In Chapter 2 the rights of taxpayers in terms of the Constitution, SARS's responsibility in protecting the rights of taxpayers, how it has failed and the necessity for the

establishment of a tax Ombudsman would be considered and will address the research objective as identified in par. 1.4 (i) on p.4.

In Chapter 3, the theoretical and conceptual background of an Ombudsman as a trusted intermediary and specific problems regarding the powers and function of the Ombudsman Institution in South Africa are considered. A comparative study regarding the independent status of the tax Ombudsman in Australia, Canada and the United Kingdom will be performed and will address the research objective as identified in par. 1.4 (ii) on p.4.

In Chapter 4, the importance of independence and other factors essential for the creation of a tax Ombudsman, compared to other industries' Ombudsmen offices established within the country would be investigated and will address the research objective as identified in par. 1.4 (iii) on p.4.

In Chapter 5 an evaluation of the regulatory framework of the tax Ombud in South Africa is made to identify the areas of the framework that need further attention and consideration and will address the research objective as identified in par. 1.4 (iv) on p.5.

In Chapter 6, the findings, recommendations and conclusion of the study are presented and will address the research objective as identified in par. 1.4 (iv) on p.5.

CHAPTER 2

TAXPAYERS' RIGHTS IN TERMS OF THE CONSTITUTION

2.1 INTRODUCTION

This chapter explores taxpayers' rights in terms of the constitution, SARS's responsibility in protecting the rights of taxpayers, how it has failed, and why there is the need for an independent tax Ombudsman, and will address the research objective as identified in par. 1.4 (i) on p.4 .

Taxation is fundamental to development and economic growth, as it accelerates state building and enhances accountability between citizens and the state. Democratic states have the moral and social responsibility to mobilise the resources needed to deliver essential services for the welfare of their citizens (Magashula, 2010:3). The resources needed by the government of a state to fund these services are mostly provided by the citizens in the country in the form of taxation. A state possesses both an inherent power and a legislative power to tax. The state's inherent power is an attribute of its sovereignty, while its legislative power evolves from its involvement in the promulgation and implementation of laws.

Luoga (2009:1) maintained that the challenge of developing countries today is to establish and achieve trust and cooperation in state-society relations. The issue that is central to development and that requires full public cooperation is the mobilisation and allocation of resources by the state. According to Luoga (2009:1), the state's ability to mobilise and allocate resources is the functioning of its system of taxation. The problem afflicting the state's ability to mobilise resources is the absence of acceptable rules and principles that guide and regulate the exercise of taxing powers. Taxation plays a very important role in the socio-economic development and transformation of nations of which South Africa is no exception. It is therefore imperative that the constitutional and other legislative provisions that shape and provide direction to the protection and defence of the rights of taxpayers are preserved.

In South Africa, the post-1994 government embraced the administrative provision of tax legislation, framed in accordance with the basic administrative rights of a more general nature applying specifically to taxpayers. Accordingly, certain provisions of the Constitution offer protection against unfair administrative practices. Chapter III of the Constitution contains several provisions that influence the tax environment. The Constitution of South Africa is the supreme law of the country and it prevails not only over the executive, but overall laws, including tax legislations. The deepening administrative imbalance between the revenue authorities and taxpayers is becoming more of a concern as citizens become aware of their democratic rights enshrined in the Constitution. It is therefore hoped that the consolidation of the various tax administrative provisions in the TAA would set the pace to address state-taxpayer relationship.

Croome (2010b:14) stated that taxpayers are invariably in an unequal relationship with the fiscus in that it compels them by statute to contribute to the state coffers. This chapter will unpack the positives and the negatives of the measures thus far taken by the government of South Africa to protect the rights of taxpayers both in terms of the Constitution and other tax legislations since the dawn of the new democratic regime in 1994 led by former president Nelson Mandela and why there is currently the need for the establishment of an independent tax Ombudsman's office to strengthen the already existing avenues of addressing taxpayers' complaints.

2.2 DEFINING TAXATION

There is no one concise definition of the term 'taxation'. Many authors have given their own scientific view about the subject matter. However, for the purpose of this study, the following three definitions will be considered;

1. The Oxford Dictionary (2012) defines tax as "a compulsory contribution to state revenue, levied by the government on workers' income and business profits, or added to the cost of some goods, services, and transactions".

2. According to Nicholas (2003:71), taxation is a contribution designed to reduce private expenditure in favour of public expenditure to enable the government to obtain funds in order to provide social and merit goods and services, redistribute income, clear market imperfection and stabilise the economy of the state.
3. Wells (1896:6) stated that taxation is the taking or appropriating such portion of the product or property of the country or community as is necessary for the support of its government; by methods that are not in the nature of extortions; punishment or confiscations; a system of orderly arrangement and presentation of the knowledge gained by experience and discussion, with a view to effect such a result with certainty, uniformity, and minimum of cost and trouble to society and its individual taxpayers or contributors.

From the perspective of the above definitions, it could be concluded that taxation is a process by which the government of a state regulates the economy by means of the imposition of compulsory charges on the resources of its citizens and corporate entities to raise funds to meet its public expenditure by methods that do not infringe on the rights of taxpayers.

2.3 THE SOURCE OF THE STATE'S POWER TO IMPOSE TAX

According to Hyatali (as quoted by Croome, 2010e:14), the power to tax rests upon necessity, and it is inherent in any sovereignty. The legislature of every free state will possess this power under the general grant of legislative power, whether particularly specified in the constitution among the powers to be exercised or not, as no constitutional government can exist without it. Due to the forced and gratuitous character of tax, it is particularly important for the government to protect taxpayers' legal rights and interest from violation during tax collection and administration by tax authorities. A good tax system is based on the principles of equity, certainty, convenience, efficiency and neutrality, but it is often difficult to ensure an economically

successful tax system based on these principles and providing rights in an open and democratic society.

2.4 TAXPAYERS' RIGHTS BEFORE 1994

Deak (1997:3) maintained that before the transition towards a constitutional democracy, taxpayers in South Africa had no legal ground to challenge the tax laws in the country. This was because, before the first democratic elections in 1994, South Africa was a parliamentary state. This means parliament reigned supreme. This flowed from section 34(3) of the Republic of South Africa Constitution Act (110 of 1983) (the 1983 Constitution).

Under the 1983 Constitution, no court of law was deemed competent to enquire into or pronounce upon the validity of an act of Parliament. The Constitution of 1983 did not contain a Bill of Rights and it was therefore possible for Parliament to introduce whatever legislation it thought fit and legislation could only be set aside on the ground that it had not been introduced in accordance with the rules laid down by Parliament itself (Croome, 2010e:5).

Williams (as quoted by Croome & Olivier, 2010:2) claimed that a taxpayer could not challenge the revenue authorities' power in a court of law because such power contained in, *inter alia*, the Act violated her rights. The only remedy available to taxpayers to challenge the conduct of SARS's officials was through a very narrow common law ground of administrative justice.

2.5 THE 1993 INTERIM CONSTITUTION AND THE BILL OF RIGHTS

Deak (1997:7) submitted that, prior to the enactment of South Africa's new interim constitution in 1993, South African constitutional law was structured in the Westminster mould of parliamentary supremacy in which the courts had no power to review and strike

down legislation. Under this constitutional dispensation, the full panoply of apartheid legislation was passed into law. This was within the context of the gross violation of human rights by the South African government during the 1950s through the 1980s. Deak also emphasises that the oppressive aspects of the Income Tax Act seemed inconsequential and were naturally not the focal point of pressures for the reform. Nevertheless, they included:

1. Provisions with gender and racial bias;
2. Non-appealable discretionary decisions vested in the Commissioner;
3. Provisions that placed the onus of proof on taxpayers;
4. Draconian search and seizure provisions; and
5. A general imbalance of power regarding the taxpayer and the revenue authorities in relation to time limits for objecting to assessment and limitations on the grounds of appeal.

Following the multiparty negotiation process in 1993, an interim constitution was enacted and came into force on 27 April 1994. Williams (1997:7) said: "The post-script to the interim constitution records that it aspires to be a historic bridge between the past of a deeply divided society characterized by conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence." Williams further argued that, though the 1993 interim constitution entrenches 25 fundamental rights, none of these rights are absolute, because all are subject to Section 33 of the 1993 interim constitution (usually called the general limitation clause).

The general limitation clause is similar to that in the Canadian Charter of Rights and provides that the constitutionally protected rights may be limited by a law of general application provided that such limitation shall be permissible only to the extent that it is reasonable and justifiable in an open and democratic society based on freedom and equality and shall not negate the essential content of the right in question. Therefore, any statutory provision that infringes upon a constitutionally entrenched right must be examined by the court to see whether the infringement can be justified in terms of this general limitation clause. The onus of proving that a limit on a constitutionally-

guaranteed right or freedom is justified under the general limitation clause rests on the party seeking to uphold the limitation (Williams, 1997:7).

From the above it can be concluded that the impact of the Bill of Rights in matters of income tax, is likely to attract great attention as the fiscal statute of the country seeks to expand its base by encouraging the citizens to be tax compliant.

2.6 TAXPAYERS' RIGHTS AFTER 1994

South Africa is now a constitutional state, a state where the Constitution is the supreme law of the country and no laws that are in conflict therewith may continue to exist. In the tax arena, this means that the fiscal laws of the country must adhere to the provisions of the constitution and particularly the Bill of Rights, which confers various rights on taxpayers in the country (Van Heerden, 1996:38).

The courts are vested with the power to test the validity of any law or executive action that is inconsistent with the constitution. This clearly means that South Africa has departed from a system of parliamentary sovereignty, which was our previous ground norm and that dominated our constitutional law and politics until 1994 (Constitution, 1996).

The protection of taxpayers' rights under the 1996 Constitution is contained in chapter two of the Constitution, which is known as the Bill of Rights. The Bill of Rights strives to protect the rights and freedom of individuals.

2.7 TAXPAYERS' PROTECTION

The taxpayers' protection within the context of democratic governance in South Africa is discussed in relation to Section 7(2) of the 1996 Constitution. This section states that "the state must respect, protect, promote and fulfil the rights in the Bill of Rights." In this regard, the Bill of Rights places essential responsibilities on the state organs and their

employees to have a positive duty to carry out their functions in relation to the Bill of Rights.

Wyngaard (2008:1) emphasised that the South African legal system consisted of a combination of legal traditions because of its historical past with both the Dutch and the English. Wyngaard explained that the civil legal tradition was predominantly influenced by the Dutch, while the common law tradition emanated from the English. In addition, indigenous law remains a central part of the South African legal system. The South African constitutional dispensation resulted in the development of common law in line with the constitution and the invalidation of the statutory laws that were found to be inconsistent with the South African constitution. Section 35(3) of the final constitution provided that the common law and the customary law must be developed by both the Supreme court and the Constitutional court to promote the values underlying an open and democratic society based on human dignity, equality, and freedom, without abolishing the common and customary laws (Pienaar, 1998:1). Pienaar alluded to the fact that the interim Constitution of 1993 and the final Constitution of 1996 contained specific provisions applicable to juristic persons. To the extent that juristic persons are also entitled to the fundamental rights contained in the Bill of Rights, these rights are applicable to them. Pienaar further explains that in the case of juristic persons acting as organs of state, the vertical application of the Bill of Rights safeguards the fundamental rights of persons against state action or interference.

It can be inferred from the above discussion that it is the moral and constitutional responsibility of SARS to respect, protect, and safeguard the fundamental rights of taxpayers and other tax-paying entities as provided for in the Bill of Rights.

2.7.1 Natural and juristic persons' rights in terms of the Bill of Rights

Section 8 of the Constitution subjects the legislature, the executive, the judiciary and all the state organs such as SARS to the provisions of the Bill of Rights. The court may, in its application of the provisions of the Bill of Rights to juristic or natural persons' rights, develop or apply common law rules to give effect to that right or limit it in certain

circumstances, provided that the limitation does not violate the provisions of Section 36 of the Constitution. The extent of a juristic person's right in terms of the Bill of Rights depends on the nature of that juristic person. The implication of Section 8 is that SARS, as an organ of the state, is obliged to conduct itself in a manner that is consistent with the provisions of the Bill of Rights. It is the link that brings the taxpayer as a natural person and SARS as juristic person together and this means that the section is a critical provision in the Constitution.

According to Nader (1996:3), South Africa's new constitution establishes that juristic persons are entitled to the rights in the Bill of Rights to the extent required by the nature of the rights as well as the nature of that juristic person. This provision affords fundamental constitutional protections, freedom of expression, political rights and guarantees of privacy; not just to people, including those within corporations, but to the artificial entity of the corporation itself. Nader (1996:3), however, cautioned that this key provision of the new South African constitution risks entrenching a fresh form of power abuse in the country because if corporations and institutions, all of which are influenced by government, are given the same rights as human beings, human beings will not have the same effective rights as juristic persons. Nader (1996:3) further argued that apart from the huge financial and technological resources available to juristic persons, the exclusive powers, opportunities and protection that are inherent in transnational corporate entities could sometimes cause such entities to supersede natural persons' rights.

The view shared by Nader regarding the rights of juristic persons *vis-à-vis* natural persons' rights indicates that in order not to allow the juristic persons' rights to override the rights of natural persons, there is the need for the establishment of some oversight institution to oversee the activities of those institutions that are affiliated to the government in the way they interact with natural persons.

2.7.2 Equality and the administrative rights of taxpayers

Equality is a fundamental principle in taxation that emphasises that the taxing powers of the legislature must be exercised in such a way that the burdens imposed by taxation are administered in an unbiased manner on all classes of the citizenry. In terms of Section 9 of the Constitution, the democratic values of the citizens' rights to receive equal treatment, protection, and the benefit of the law are emphasised. The main crux of the section is that all persons (natural and juristic) are equal before the law and must be treated as such. Equality, therefore, forbids all forms of unfair discrimination pertaining to race, gender, colour, sexuality, religion, culture etc. To safeguard the attainment and enforcement of equality as a democratic principle, the South African government has instituted legislative and other measures to protect persons disadvantaged by unfair discrimination. The enactment of the Promotion of Administrative Justice Act (3 of 2000) (hereinafter referred to as PAJA) and the establishment of the South African Human Rights Commission (hereinafter referred to as SAHRC) exemplify some of the practical steps taken by the government of South Africa to ensure equality and fairness.

Ordowner (2007:1) maintained that equal and fair treatment is both a substantive and procedural concept. Substantive equal treatment entails that laws permitting, restricting, and regulating individual activities and behaviour apply uniformly to all individuals. Procedurally equal treatment, on the other hand, suggests that the enforcement of law should be even-handed. Government representatives, including tax administrative officials, should not act arbitrarily, but rather, the exercise of their discretion should conform to strict limits and should often be transparent, so that affected persons would understand the reasons for unfavourable and discretionary government decisions. In addition, individuals expect to have remedy through impartial arbitrators, when they suspect that governmental representatives did not adhere to either the substantive or the procedural equality principle.

The concept of equality is fundamental to any democratic state. Cockfield (2010:17) maintained that South African taxpayers who are the financial contributors to the state's coffers should enjoy the right to be given equal and fair treatment by the Constitution. In

view of this right, tax administrators with the staff of SARS, as government agents, have the civic and moral responsibility to render equal services and assistance to all taxpayers without regard for their social, political or financial status.

2.7.3 Tax legislative enforcement and taxpayers' privacy

Tax information normally involves financial and other detailed information about a taxpayer's personal circumstances. It may be considered confidential because such information is capable of revealing the various sources of the taxpayer's income, spending, savings, assets and liabilities, financial and social standing that are, among others, the key indicators in the formation of a detailed profile of a person.

Taxpayers' rights to privacy are enshrined in the 1996 Constitution. Section 14 of the Constitution states that everyone has the right to privacy, which includes the right not to have:

1. their person or home searched;
2. their property searched;
3. their possessions seized; or
4. the privacy of their communications infringed.

The question whether and to what extent people should have a legally protected right to cover up personal information and for that matter their tax information emanates from the fact that taxpayers' information should be protected by reasonable security safeguards, such as that other people might not be able to access the information and use it for their selfish interest (Cockfield, 2010:17).

A taxpayer's personal right to privacy includes, among others, the right to maintain bodily integrity not to have state agents such as SARS explore their bodies or force the disclosure of objects or matters that they wish to hide. Furthermore, taxpayers do possess territorial privacy rights that enable them to maintain privacy over their place of residence as well as over any other property they possess as citizens of the state. Taxpayers, including individuals, groups or institutions have the democratic right to

determine for themselves when, how, and to what extent information about them is to be communicated to others (Cockfield, 2010:47).

The quest for information privacy could be founded on the desire to influence others' perception and beliefs about oneself through the hiding of information. The concealment of tax information offers the opportunity for taxpayers to arrange and misrepresent their tax affairs with the view of taking advantage of others and even misleading the state through payment of lower taxes.

The infringement of taxpayers' privacy rights by SARS has for some time now received large public outcry. Taxpayers are entitled to have the information that they supply for purposes of their compliance with tax laws used only for that purpose. However, Duncan (2011:5), in commenting on the Tax Administrative Bill, had this to say: "There are new confidentiality provisions providing for a taxpayer's right to privacy but specifically providing that SARS may disclose personal information to counter false allegations made in the media".

The above statement connotes the view that, as individuals or groups expose themselves in any kind of 'trade' as defined in terms of the Income Tax Act (58 of 1962) (hereinafter referred to as the Act), their privacy might be subjected to certain limitations as a result of the prevailing tax legislation.

It could be inferred from the above discussion that because transparency promotes tax compliance and leads to increased tax revenue, while secrecy does not, privacy in the form of tax information concealment, should be protected and safeguarded only when the social beneficitation it brings supersedes the losses it creates.

2.7.4 The extent of taxpayers' rights and the power of SARS in terms of the Bill of Rights

As has already been alluded to in the previous chapters, the Constitution is the supreme law of South Africa and all state organs, including SARS, on one hand, and the citizenry are subject to it. Chapter 2 of the Constitution contains the Bill of Rights that regulates the relationship between the state organs and the citizens both vertically and horizontally.

For the purposes of the administration of the Act, and in particular the execution of the mandate of collecting taxes, the Act confers on the Commissioner of SARS certain powers (e.g. search and seizure). The Bill of Rights, as contained in the Constitution, on the other hand, bestowed a number of rights on the taxpayer (e.g. right to privacy). Friedland (2003:1) submitted that the Bill of Rights as contained in the Constitution imparts directly on the powers available to the Commissioner of SARS in respect of the collection of taxes as well as the enforcement of fiscal legislation.

According to Keulder (2011:1), tension exists between SARS's task and the taxpayers' rights. However, he explained that the Constitution, together with other measures adopted by SARS, does provide adequate protection for taxpayers against SARS in such a way that the tension between SARS's duty to collect taxes and taxpayers' right is balanced. Section 36 of the Constitution provides that the rights in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity. 'Conduct' is not considered to be the law of general application. This means that any 'conduct' on the part of SARS cannot be justified by the limitations of rights clause. The emphasis here is that, should the conduct of any SARS official, which may include the exercise of discretion, infringe on the rights of an individual as contemplated by the Constitution, it will be invalid (Dwyer, 2004:60).

Taxpayers are to be aware that the fundamental rights contained in Chapter 2 of the Constitution are not absolute and may be limited by Section 36 of the Constitution. Croome (2010e:9) stated that many taxpayers have the mistaken impression that because the constitution enshrines rights, it may not be restricted or violated.

2.8 THE ROLE OF THE PUBLIC PROTECTOR AND HUMAN RIGHTS COMMISSION IN THE PROTECTION OF TAXPAYERS' RIGHTS IN SOUTH AFRICA

The most important form of external control in a democracy is that exercised by the legislature on the executive. Literature reveals that legislative controls are generally inadequate, particularly in cases where one single individual or a small group is in need of protection. This is where the other external controls such as the Constitutional Court, the Public Protector and the SAHRC, among others, acquire particular relevance. Pienaar (1998:1) submitted that the tasks performed by these democratic protection institutions are, generally speaking, complementary and supplementary. Pienaar further argues that a state is not genuinely constitutional merely by virtue of the fact that it possesses a constitution, but achieves that quality or status when the Constitution acquires a practical significance. In other words, when the principles and rights enshrined in the Constitution can be translated into practice.

The South African Constitution has established a number of institutions in the quest to make the Bill of Rights a reality for the ordinary citizen. Pienaar (1998:2) maintained that the constitutional government in South Africa has in the Public Protector and the SAHRC an important addition to the armoury of mechanisms that are utilised to create the substance of fair and stable constitutional government.

In terms of Chapter 9 of the Constitution, the Public Protector is mandated to investigate any conduct in the state affairs or in the public administration in any sphere of government (including SARS) that is alleged or suspected to be improper or to result in

any impropriety or prejudice; to report on that conduct and to take appropriate remedial action.

The Public Protector is therefore one of the institutions created to promote and fulfil the constitutional democratic objective of empowering the poor and the vulnerable to enforce their rights as true citizens of the Republic of South Africa. The Public Protector's office also serves to give the people of South Africa a voice in so far as exacting accountability in the exercise of public power is concerned (Ackerman, 2005:9).

The SAHRC is one of the many national institutions established in the post-apartheid South Africa to address the ills associated with years of racial discrimination and to support constitutional democracy. Sekagga (as quoted by Peter, 2009:351) said that the activities of the SAHRC is complimentary to the already established institutions, but the very nature of its work places the office in a special position that enables it to make a unique contribution to the government's efforts to protect its citizens and to develop a culture that is respectful of human rights and fundamental freedoms.

The SAHRC was established in 1995 in terms of the Human Rights Act (54 of 1994). It is funded by the state and enjoys considerable independence. In terms of Section 184(2) of the Constitution, the Commission is endowed with extensive powers under the law to investigate and report on the observance of human rights; to take steps to secure appropriate redress where human rights have been violated. The SAHRC has three main functions. These are, firstly, to promote respect for human rights and a culture of human rights; secondly, to promote the protection, development and attainment of human rights; and thirdly, to monitor and assess the observance of human rights in the country (Section 184 of the Constitution).

Commenting on the work performed thus far by the SAHRC since its inception, Peter (2009:358) stated that, over the years, the Commission has tended to spend most of its time and resources addressing the many complaints filed at his office. This left it with very little time to spare for its strategic thinking. Peter also stressed that with the

economic gap widening at an accelerated rate between the various classes of people in the country, and with the poor being driven deeper into poverty, the work and focus of the Commission are not likely to change.

Taking the circumstances of the SAHRC into consideration regarding the number of complaints that flow through its office provides an indication that all is not well with the general public in their dealings with the government's administrative set-ups. The question then arises as to how efficient and effective the offices of the SAHRC and the South African Public Protector had been in addressing the administrative needs of taxpayers against the background of the specialised knowledge that is needed in handling tax issues.

2.9 SARS'S RESPONSIBILITY TO PROTECT THE RIGHTS OF TAXPAYERS

2.9.1 Administration of the Income Tax Act

SARS is established in terms of the South African Revenue Service Act (34 of 1997). It is an organ of the state within the public administration, but is an institution outside the Public Service. SARS performs its function under the policy control of the Minister of Finance and is subject to any directives and guidelines on policy matters issued by the Minister. SARS is expected to act in accordance with the values and principles mentioned in Section 195 of the Constitution. Section 195 deals with 'Public Administration' and requires, among other things, a high standard of professional ethics, efficient use of resources, as well as transparency and fair and impartial treatment of the public (Huxham & Haupt, 2012:2).

2.9.2 The mandate of SARS

Tax collection is central to the ability of every government to provide essential services such as water, housing, education, pension and other similar services to millions of its citizens. SARS is tasked by law to expeditiously collect all taxes due to the fiscus from

all eligible South African taxpayers in the right amount and at the right time. SARS's approach in this regard has been to continuously ensure vertical equity among all taxpayers through some of its collection mechanisms (SARS, 2008:1), such as the PAY-AS-YOU-EARN system (hereinafter referred to as PAYE). The vertical equity system of tax is founded on the premise that a taxpayer's contribution to the fiscus be commensurate to his or her level of income to the extent that those endowed with more wealth contributes more to the national coffer than the poor.

In a book review of Beric Croome's *Taxpayer's Rights in South Africa*, Van Zyl (2010:621) emphasised that in a community where consumers are usually reminded of their rights, and in which consumers' rights are protected at every cost, a constant question seems to be whether taxpayers, when dealing with revenue authorities, can be classified as consumers. Van Zyl contended that consumers may freely choose which suppliers they wish to support on the basis of client service, quality of goods and the type of consumer rights available to them. However, taxpayers do not have the privilege of making a free choice as to whether they want to enter into a relationship with the fiscus because there is a stern unequal relationship between them and the revenue authorities. A good tax system should therefore be based on the principles of equity, certainty, convenience, efficiency and neutrality, but it is often difficult to ensure an economically successful tax system based on these principles and giving effect to consumer rights in an open and democratic society.

The fact that taxpayers and SARS transact on terms often prescribed by fiscus is a *prima facie* gross violation of the taxpayers' rights in terms of Section 2 of the Constitution and for which the taxpayer can never have any remedy (Constitution, 1996).

Croome (2010e:11) stated that while taxpayers' rights may not be unnecessarily limited, the government of the day needs funds to finance its administration and meet specified social objectives imposed on it by the Constitution. It is therefore essential that tax collection be properly administered to ensure that taxpayers comply with the law and

meet their obligations. Croome warns, however, that the revenue authorities should not exceed their powers.

2.9.3 The source of the Commissioner's powers

According to Croome (2010c:10), the fiscal statutes of the country confer certain powers on the Commissioner with the view of empowering him to ensure the proper and efficient collection of taxes. However, Croome stressed that, in as much as some of these powers can aid the Commissioner in the proper execution of his mandate under the statutes, many of such powers may be unconstitutional.

Some of the powers conferred on the Commissioner by the revenue laws were previously contained in Sections 74A-D, 75, 76, and 88 of the Act. With the enactment of the TAA, and as from 1 October 2012, the provisions of the TAA govern SARS's powers, for example to request information from taxpayers, obtain information, make enquiries, and conduct search and seizure actions. These powers are discussed in Chapter 5 (Sections 40 to 60) of the TAA. According to SARS (2013), the information gathering powers of SARS under the provisions of TAA have been supplemented or in other words extended. Taxpayers' rights, on the other hand, are amplified and made more explicit to counterbalance SARS's new extended powers. The provisions of the TAA recently came into effect and more time is needed to assess the impact it may have on improving taxpayers' circumstances and ensuring an efficient tax collection system.

A practical demonstration of the Commissioner's power under the statute can be cited from the judgment of a case involving Carlson Investments Share Block (Pty) Ltd v Commissioner for the SA Revenue Services (2002). In this case, the taxpayer challenged the constitutionality of a part of Section 79(1) of the Act, which authorises the Commissioner of SARS to reconsider a tax assessment within a three-year period subsequent to a decision to allow an objection thereto, and to issue a revised assessment. The taxpayer contended that the right to fair administrative action had been infringed upon by reason of the fact that taxpayers are 'entitled' to rely upon the 'finality' of a decision allowing an objection. The court held that the part of Section 79(1) that the

taxpayer had challenged did not sanction arbitrary and capricious behaviour and was unconstitutional. It was held that the application was totally misconceived. The statute in question permits SARS to rectify an assessment within a three-year period. This is known to taxpayers in advance. The statute enables SARS to rectify mistakes of fact and law and this power to revisit was held to be in the national interest. The author submits that it will be very difficult to prove the unconstitutionality of any section in the Act that might lead to the recovery of an amount of tax by SARS, since the very functioning of the state is predicated upon its capacity to impose and collect taxes; the national interest will triumph (Van Schalkwyk, 2004:191).

Butani (2007:1) was of the opinion that even though the South African tax system has undergone significant reforms regarding the powers conferred on the Commissioner of SARS against the rights of taxpayers enshrined by the constitution and embodied in the revenue laws, PAJA and the Promotion of Access to Information Act (2 of 2000) (hereinafter referred to as PAIA), a great deal more still needs to be done for the South African tax system to get close to global best practices.

2.10 MEASURES INITIATED BY THE SOUTH AFRICAN REVENUE SERVICE TO PROTECT THE RIGHTS OF TAXPAYERS SINCE 1994

Before the introduction of the interim constitution, the Commissioner could act against taxpayers without fear of judicial intervention. Under the interim constitution, the state was required to establish various bodies such as the commission for gender equality, the Constitutional Court, the Human Rights Commission and the Public Protector's Office to remedy any breach of the fundamental rights contained in the interim constitution. The introduction of the interim constitution made it necessary for the provisions of the Income Tax Act (58 of 1962), and indeed all fiscal statutes, to comply with the interim constitution (Croome, 2010e:5).

The Commissioner is empowered under the provisions of the Income Tax Act (58 of 1962) to conduct audits and investigations into a taxpayer's affairs and is conferred

various powers to ensure the collection and recovery of assessed tax. It is therefore important that taxpayers comply with their obligations under the provisions of the Act at the same time that the Commissioner complies with the procedural requirements contained in the Act and more importantly acts in accordance with the principles of administrative justice enshrined in Section 22 of the Constitution and as embellished on by the PAJA.

It must be acknowledged that, since 1994, and after the adoption of the 1993 Constitution, SARS has initiated various actions aimed at restoring, preserving and protecting taxpayers' rights in the country. Apart from the constitutional protection that taxpayers have been enjoying under the Bill of Rights in the Constitution through the courts, SARS, on its part, has attempted to introduce various measures to assist and protect taxpayers in their dealings with the Commissioner and his staff. Some of the measures adopted are now considered more closely.

2.10.1 The KATZ Commission

In 1994, the then Minister of Finance announced the appointment of a commission of inquiry into certain aspects of the tax structure of South Africa. The commission was tasked to inquire into the appropriateness and efficiency of the prevailing tax system and to make recommendations on its improvements, taking into account internationally accepted tax principles and practices. The commission made, among others, the following recommendations: -

1. The elimination of discriminatory provisions that contravene the constitution.
2. Discrimination based on sex or marital status was considered unconstitutional and was inappropriate in the South African income tax legislation. Thus followed the introduction of a unitary rate of tax for all persons, regardless of sex or marital status.
3. An investigation of incentives for small business, recognising the importance of promoting this sector of the South African economy so as to achieve the objective of growth and development.

4. The KATZ Commission's Interim Report dealt with the administrative practices adopted by the Commissioner. It also considered the impact of the taxpayers' rights to administrative action under Section 24 of the interim constitution.

2.10.2 The SARS's Client Charter

The SARS's Client Charter was released by the Minister of Finance in his budget speech in 1997 and sets out taxpayers' rights and obligations. The release of the Charter was intended to increase taxpayers' awareness of their rights and obligations and to create and improve the means by which the Commissioner and the revenue staff interact with taxpayers. Rigg (2008:65) commented that a taxpayer's charter is no substitute for the normal legal protections of taxpayers contained in the law, namely rights of appeal, rights to confidentiality of information, rights to be represented by tax advisors and other rights. The Charter is therefore a mere statement of intent by the Commissioner and does not alter the law in any way or does not confer greater rights.

2.10.3 The SARS's Service Charter

The Commissioner of SARS, on 19 October 2005, officially launched the SARS Service Charter and Service Standards in which the Commissioner commits SARS to clearly defined deliverables that were to be implemented by 2007. The Charter sets standards publicly, in the spirit of 'Batho Pele', which means 'people first', for the levels of service expected of SARS officials to taxpayers (Smulders & Stiglingh, 2008:608). The Charter is also a statement of intent through which SARS undertakes to uphold and respect the rights of taxpayers, to educate taxpayers about their tax obligations and to positively influence the compliance climate in South Africa by adhering to these service standards. The Charter is also a statement of commitment that sets performance targets that the organisation had to implement over the next 18 months and with which compliant taxpayers can judge the quality of SARS's processes, its integrity and its conduct.

Notwithstanding the developmental challenges, SARS is still confronted with transforming itself into a customer-focused and innovative revenue administration.

SARS's focus in terms of the Charter is to assist taxpayers in addressing issues relating to delays in processing returns, decision-making and correction of administrative mistakes, failure to provide reasons for making an adjustment to returns, failure to respond to queries, objections and appeals as well as the conduct and attitude of SARS staff.

SARS (2013:2) stated that, despite the fact that SARS subscribes to a Service Charter, taxpayers do not get the service they want. According to the findings from a survey conducted by Smulders and Stiglingh (2008:607), SARS, in terms of the provisions of its service charter standards, fell short in issuing registration numbers, pay-outs of refunds, and responding to taxpayers' written correspondence, but rather fared very well in the processing of tax returns, responding to objections, answering telephone calls, offering personal assistance, and addressing enquiries efficiently. The study concluded that the services rendered by SARS would continue to improve and that taxpayers would be willing to register and pay their taxes because they are satisfied with the service they receive from SARS.

2.10.4 The enactment of the revenue laws

The enactment of revenue laws includes the promotion of the Administrative Justice Act (3 of 2000) and the promotion of the Access to Information Act (2 of 2000). These documents have become useful tools to the taxpayers because they create a framework that taxpayers may use effectively against the Commissioner to access information and obtain administrative justice.

2.10.5 Advance tax rulings

Sections 76B to 76S were introduced into the Income Tax Act (58 of 1962) in November 2004 to establish a formal advance tax ruling system (hereinafter referred to as ATR) within SARS. The purpose is to promote clarity, consistency and certainty with regard to the interpretation and application of the Income Tax Act.

The provisions of the ATR apply to the following Acts administered by SARS:

1. Income Tax Act 58 of 1962 (ITA)
2. Value-Added Tax Act 89 of 1991 (VAT Act)
3. Transfer Duty Act 40 of 1949 (Transfer duty Act)
4. Security Transfer Tax Act 25 of 2007 (STT Act) (Huxham & Haupt, 2012:650).

2.10.6 Alternative dispute resolution

On 1 April 2003, a new legislation was enacted that introduced a process known as the Alternative Dispute Resolution (hereinafter referred to as ADR). This process accords to the taxpayer an alternative way of resolving disputes with SARS. The ADR process has been developed as a less formal, more cost-effective and speedier way to resolve tax disputes. It applies to all forms of taxes; Income tax, VAT, transfer duty, stamp duty, estate duty, donations tax, UIF contributions and skills development levies. It is opted for by the taxpayer at the stage that he/she submits a notice of appeal when his/her objection to the assessment is disallowed or allowed in part (Huxham & Haupt, 2012:661).

2.10.7 Interpretation notes

The purpose of the interpretation notes is to provide guidelines to SARS employees and taxpayers regarding the interpretation and application of the provisions of the various laws administered by SARS. The interpretation notes will ultimately replace all existing practice notes and internal circular minutes to the extent that they relate to the interpretation of various laws (Van der Merwe, 2006:1). The interpretation notes are amended in line with policy developments and changes in legislation.

Though the introduction of the practice notes is a step in the right direction, the specialised knowledge that is needed for taxpayers to understand and appreciate tax legislation is lacking because of inadequate tax education. Misra (2004:77) is of the opinion that issues relating to tax compliance evolve from a lack of interpretation and

understanding of tax legislation. Therefore, many taxpayers become disobedient, discouraged and disillusioned due to a lack of understanding of the tax obligations enforced on them.

2.10.8 Section 88D of the Income Tax Act 58 of 1962

According to Section 107A and Rule 7A of the Act, SARS and the taxpayer may settle a tax dispute in circumstances where they were unable to reach an agreement on the interpretation and application of the relevant tax law. Williams (2013:1) claims that tax legislation is notoriously complex and difficult to interpret, such that if no agreement can be reached between the taxpayer and the revenue authorities, the dispute must be resolved by the ordinary courts.

Part III A of the Act, however, allows the taxpayer and SARS to engage with each other in order to facilitate a compromise and settlement with regard to a tax dispute. The possibility of finding a solution to a dispute would invariably depend on the matter's appropriateness for settlement, which is guided by Section 88D of the Act. This section stipulates, among others, that the circumstances of settlement must be to the best interest of the state or be in the interest of good governance.

2.10.9 The SARS service monitoring office

The Minister of Finance, on 3 October 2002, launched the SARS Services Monitoring Office (hereinafter referred to as SSMO) during which he proudly announced another step in the development of his new service approach to the South African public. The Minister stated that the SSMO is intended to be a mechanism of last resort for the public and emphasised that his new approach will afford SARS the opportunity to effectively operate as an efficient tax administration. The SSMO is not supposed to be a point of first call, but is a tool that can be used by aggrieved taxpayers who are not satisfied with the service provided to them at SARS branch offices.

To approach the SSMO for assistance, the minister outlined a three-step approach that taxpayers will normally follow:

1. They will raise their issue with the person they have been dealing with or that person's immediate manager if they prefer.
2. If the issue cannot be resolved, they will contact the relevant branch manager, who will objectively review the matter.
3. If the taxpayers are still not happy, they will refer the matter to the SSMO.

The SSMO will function independently of SARS branch offices, and will report directly to the Commissioner, and maintain an objective perspective on the complaints it receives. The SSMO therefore does not replace existing channels and procedures. Rather, the office is to ensure that issues and complaints that could not be resolved at a SARS branch are properly recorded, monitored and resolved.

The Minister stressed that the creation of the office of the SSMO is a tangible evidence of SARS's commitment to the improvement of service delivery. The typical complaints that will be referred to the SSMO include:

1. Delays in processing returns, decision-making and the correction of administrative mistakes;
2. Failure to provide reasons for making an adjustment to a return;
3. Failure to respond to queries, objections, and appeals; and
4. The conduct and attitude of SARS staff.

The SSMO will not be responsible for:

1. Disputes in matters of law. These complaints will be handled in terms of the dispute resolution process that is available;
2. Matters that could be raised on appeal to a court or that have already been raised in an appeal; and
3. Complaints that have been referred to the public protector.

The introduction of the SSMO service is another step in SARS's delivery initiative to emulate international standards for an efficient tax administration. It is envisaged to benefit not only individual taxpayers who make use of it, but will also assist all taxpayers by improving SARS's internal processes and speeding up the clarification of uncertainties in the law (SARS, 2002).

2.10.10 Conclusion

Apart from the constitutional protection that taxpayers enjoy under the constitution, several non-constitutional and legislative avenues had been exploited by SARS to protect the rights of taxpayers. However, in as much as taxpayers can be said to be enjoying some sort of relief under both the constitutional and the non-constitutional protective measures from the state and the SARS, respectively, one can equally say that these 'protective measures' are not practically absolute because of certain weaknesses in the manner by which they were created or established. Taxpayers are still vulnerable to the maladministration and abuses by SARS and its corrupt officials (Habtemichael, 2009:14).

2.11 REASONS FOR THE FAILURE OF SARS TO ADEQUATELY PROTECT TAXPAYERS

In terms of Section 39 of the Constitution (1996), an aggrieved taxpayer may approach a court for relief in circumstances where he or she believes that his or her constitutional rights contained in the Bill of Rights have been tampered with.

Croome (2010e:307) said that it appears that a taxpayer's remedy for relief does not lie in seeking to strike down fiscal legislation. However, it may lie in challenging the procedure adopted by the Commissioner in exercising the powers available to him and the procedural rights of a taxpayer, namely the right of access to information, administrative justice and access to courts that may offer a more effective means of challenging the conduct of the Commissioner. In addition to this, the enactment of the

PAIA and PAJA, creates a framework that taxpayers may use effectively against the Commissioner to access information and for administrative justice.

The enforcement of taxpayers' rights through the legal means in the court usually involves massive costs. The implication is that the ordinary aggrieved taxpayers who have no financial resources to pursue their cases against the Commissioner can never be successful in enforcing their procedural rights and their rights in terms of PAIA and PAJA against SARS.

According to Lederman (as quoted by Croome, 2010e:308), in appropriate cases, taxpayers should have a right to recover costs and fees incurred to obtain relief, as well as monetary damages from the Inland Revenue Service (IRS) in the United States of America (hereafter referred to as USA) where no other relief exists. This statement should be welcomed as it seems appropriate to the circumstances currently prevailing in South Africa.

Interpretation of the tax laws: The purpose of the interpretation notes is to provide guidelines to SARS employees and taxpayers regarding the interpretation and application of the provisions of the various tax laws administered by SARS. Williams (1997:3) states that it is right that taxpayers should know with reasonable certainty whether, in terms of the applicable law, they are or are not liable for income tax, or will or will not be so liable if they adopt a contemplated course of action. Williams reiterated that in South Africa, as in many other tax jurisdictions, such certainty is an ideal that is often far removed from reality. Williams emphasised that, around the world, taxing statutes are notorious for their incomprehensibility and South Africa is no exception. Indeed, in South Africa, many key concepts and principles are completely absent from the Act, and are expressed only in judicial decisions of the domestic courts and courts of other countries particularly the UK and Australia.

Section 181 of the Constitution (1996) affirms the creation of various state institutions to support the democratic processes of South Africa. These bodies include the Public

Protector and the Human Rights Commission. These institutions are also available to taxpayers when seeking redress against the Commissioner. Unfortunately, as a result of a lack of effective tax education, taxpayers seldom approach the Public Protector for help due to the practical reason that most taxpayers regard the Public Protector's office as a watchdog for the government, which is responsible for the investigation of corruption within government departments. It is also worth commenting that the Public Protector and the Human Rights Commission lack staff with the requisite tax background and skills to appreciate taxpayers' problems and attend to it in a most efficient manner (Sekagga, 2004 as quoted by Peter, 2009:351).

During the launch of the SSMO in October 2002, the then Minister of Finance stressed that the SSMO was intended to be a mechanism of last resort for the public and that his new approach is to afford SARS the opportunity to effectively operate as an efficient tax administration. In contrast, however, the activities of the SSMO has been criticised by individual taxpayers, organisations, corporate bodies and tax consultants on the grounds that the SSMO that was established within SARS to perform a complimentary function to the Revenue Service lacks independence and the power to criticise the wrong practices and abuses within the operations of SARS. Rees (2011:1) alluded to the frustration of one small-scale farmer and pointed to a system where the complainant (the farmer) was disbursed by SSMO with a case number. She was asked to input that number, but to her astonishment, the number was rejected as being invalid. In reaction to this treatment, the complainant said "the complaint system established by the SSMO is entirely ineffective."

Retief (2010a) commented that the SSMO does handle customer complaints, but these are dealt with from the perspective of helping SARS to meet its service charter obligations. Retief explained that the SSMO is useful in escalating outstanding matters that require SARS's attention; however, it does not concern itself with the merits of a case but rather with whether or not a complaint is receiving SARS's attention.

Some of the reasons leading to the failure of the SSMO to effectively protect taxpayers' rights are as follows:

1. The SSMO's office is an integral part of SARS and is therefore not independent from SARS offices.
2. The SSMO does not report on its caseload on how it deals with complaints.
3. The SSMO cannot issue a taxpayer with an assistance order or award costs.
4. The SSMO will not investigate a taxpayer's complaint where the matter is before the court or where the taxpayer has complained to the Public Protector.
5. The SSMO cannot investigate complaints about government policy or the Commissioner's policy and will not investigate suggested changes to the legislation.
6. The office of the SSMO cannot initiate an investigation into how the Commissioner deals with taxpayers.
7. The SSMO is not required to submit an independent report on its work to Parliament.
8. The Commissioner's annual report does not incorporate comments on the complaints received by the SSMO and how the complaints are dealt with.

2.12 THE NEED FOR THE ESTABLISHMENT OF A TAX OMBUDSMAN'S OFFICE IN SOUTH AFRICA

In an attempt to uphold and preserve the dignity and respect that Section 2 of the Constitution accords to taxpayers, pressure has been mounting on the government to put plans in place to establish an impartial body such as a tax Ombudsman to handle disputes with the taxman. Croome (2010d:1) said that elsewhere in the world the tax Ombudsman had been effective in resolving taxpayers' complaints.

Findlay (2010:1) had this to say when addressing the South African Institute of Tax Practitioners' third national conference in Johannesburg: "A Tax Ombudsman will ensure that the South African Revenue service follows due process. A Tax Ombudsman will provide access for taxpayers and small businesses to have their matters resolved more efficiently. It will also be far more cost effective for small businesses if a Tax Ombudsman office was set up".

It seems that the creation of a tax Ombudsman office will play a very critical role in addressing taxpayers' problems. The decision to create a tax Ombudsman in South Africa must be welcomed and answers a call for its establishment made over many years by the commission of inquiry into the tax structure of South Africa, professional bodies and tax practitioners (Croome, 2010c:1).

Friedland (2010:2) stated that a tax Ombudsman would recognise the importance given to the development and consolidation of democracy and the rule of law as well as fundamental freedoms. Furthermore, it encourages civil society in democratic participation becoming an effective force for positive change. After all, one of the most complex relationships between the State and the individual is taxation; ensuring taxpayers' rights via an Ombudsman is therefore crucial in the advancement of a liberal democratic society.

2.13 CONCLUSION

From the above discussions it could be concluded that the failure of SARS to effectively protect taxpayers' rights could be largely attributed to the absence of the appointment of an independent state institution, such as a tax Ombudsman, to look after the interest of taxpayers. Though the news about the need for the establishment of an Ombudsman's office has been highly welcomed by all interested parties and individuals within the tax fraternity, the question of how the office will meet this need in South Africa, given its establishment within the framework of TAA, leaves much to be desired.

In terms of the TAA, the Ombudsman will be funded and staffed by the South African Revenue Service. The Ombudsman is to be appointed by the Minister of Finance and report to him. The TAA further proposes that the tax Ombudsman's rulings will not be binding on SARS or the taxpayer.

Tax practitioners and other tax experts have therefore questioned the independent status of the tax Ombudsman's office. In chapter 3, the content of the TAA regarding the

independence of the proposed tax Ombud's office will be discussed. A comparative study about the independence of the Ombudsmen in Canada, the UK and Australia will also be made in order to assist in making substantive and informed decisions about whether the Ombud's office would meet international standards and how effective it will be in meeting the hopes and aspirations of South African taxpayers.

CHAPTER 3

THE INDEPENDENT STATUS OF THE TAX OMBUDSMAN IN DEVELOPED COUNTRIES COMPARED TO SOUTH AFRICA

3.1 INTRODUCTION

Unlike other jurisdictions within the administrative set-up of South Africa, there was until recently no independent tax Ombudsman who specialised in tax matters and who could independently assess taxpayers' positions where they were dissatisfied with the treatment they received from the South African Revenue Service (SARS). The Ombudsman's role would ideally include, among others, acting as an advocate in the defence of individual taxpayers who feel disadvantaged by the tax system and assessing and evaluating the fairness and efficiency of the country's tax administration at a systemic level with appropriate reporting and recommendations for change to the fiscus. South African taxpayers should be entitled to expect that their rights are independently protected and that they are entitled to a swift, cost-free administrative appeals mechanism if they feel their rights are being infringed upon (Irish Taxation Institution, 2008:18). In terms of the long-awaited Tax Administration Act (28 of 2011) (hereinafter referred to as TAA), there now has to be provided for the establishment of the office of the tax Ombud in South Africa who is expected to provide direct intervention in any perceived administrative imbalance between taxpayers and SARS.

This chapter will briefly discuss the conceptual background of the term 'tax Ombud' as a new concept in the South African tax arena. It also investigates the independence of the tax Ombud through a comparative study regarding the independent status of the tax Ombudsman in Canada, the United Kingdom and Australia and will address the research objective as identified in par. 1.4 (ii) on p.4.

3.2 CONCEPTUALISATION

A successful state ought to have institutions that would promote and ensure smooth interactions between the citizens and state agencies. Volio (1999:1) contended that the establishment of control mechanisms over the powers exercised by state bodies such as SARS is vital for the consolidation of the South African democracy. Kapa (2009:3) maintained that the South African government has instituted checks and balances mechanisms monitored by bodies such as the Police Service and the Public Protector to restrain any forms of excesses and abuse regarding public interaction with government-established agencies. Kapa further reiterated that these systems of checks and balances are inadequate to safeguard public interest and human rights because of the general way in which they operate. Consequently, Kapa proposes the creation of a specific independent public institution such as the tax Ombudsman founded on good governance, respect for human rights, and adequate service provision as a remedy for administrative excesses.

Magnette (2003:678) maintained that the concept of Ombudsman in the latter half of the 20th century stemmed from the need to have an independent supervisory institution that would serve as pillar for the defence of the common man, mostly the deprived lot of the society, against violation of rights, administration excess, abuse of power, illegal acts, denial of justice, discrimination, unfairness and maladministration. Such a mechanism to regulate the administrative excesses in both the public and the private sectors would instil accountability and transparency, thereby creating trust, confidence and certainty. Magnette further submitted that the acceptability and popularity of the Ombudsman concept are judged from the fact that many countries in the world, including South Africa, have Ombudsmen institutions.

Donald (1962:2) claimed that, in the past, the courts were the force behind individual rights. However, the common law lost much of its flexibility and was no longer an effective instrument to solve the flaws of modern administrative practices. The courts are too costly, cumbersome and slow, and the extent of their power of review is not clear, and sometimes limited. Generally, they review decisions based on legal

technicalities, but may not look into the content, wisdom, or even the rationale behind the case that prompted the dispute.

South Africa is a democratic state, governed by the supreme law (which is founded on good governance, respect for human rights, and adequate service provision) of the Constitution and the rule of law. The rule of law that flows from the constitution refers to the principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to the laws that are made and enforced by the state (Eliason, 2004:1). The tax Ombudsman system in South Africa would be one of the institutions essential to a society under the rule of law, in which the fundamental rights and human dignities are respected. Gottehrer and Hostina (1998:9) claimed that it is neither the constitutions and legislations nor proclamations and declarations that protect human rights. Rather, human right protection is achieved through the availability of remedies. This view was shared by Dyzenhaus (2009:3-4) who emphasised that the constitution and the rule of law are not what makes the difference. Instead, what makes the difference is the ability of the state to transform the principles and rights enshrined in the constitution into practice so as to guarantee the rights and liberties of the residents of a state.

From the above argument, it could be inferred that the tax Ombudsman institution is essential to the South African democratic dispensation. The tax Ombud's office, to be established in terms of the TAA, would function to safeguard the rights, remedies and liberty of taxpayers. Doolan (2009:1) contended that the perception that the public has of a tax system could be crucial to ensure that they would voluntarily comply with the system. The appointment of an independent tax Ombudsman in South Africa could therefore provide taxpayers with an independent review that could provide the assurance that a taxpayer needs.

3.3 WHO IS THE TAX OMBUDSMAN?

The Ombudsman is an independent government official who receives complaints against government agencies and officials from aggrieved persons, who investigate, and who, if

the complaints are justified, make recommendations to solve the complaints (Gottehrer & Hostina, 1998:9).

Larkins (2006:1) defines an Ombudsman as “an individual who is skilled in dealing with reported complaints, operating in a neutral and confidential role, to help achieve equitable solutions”.

The Oxford Advanced Learner’s Dictionary (OALD) (2012:1024) defines an Ombudsman as “an official whose job is to examine and report on complaints made by ordinary people about companies, the government or public authority”.

From the above definitions, a tax Ombudsman can be perceived to be an independent, impartial person, who is skilful in receiving, examining, and reporting on complaints made by taxpayers with the view to finding appropriate and equitable solutions to such complaints.

Larkins (2006:1) identified two basic types of Ombudsman as the Classical Ombudsman and the Organisational Ombudsman. Larkins claimed that the Classical Ombudsman is a function that is created by law and usually appointed by the legislation to receive complaints about the administrative acts of government agencies. The Classical Ombudsman’s jurisdiction may be restricted to only certain agencies of a local or state government, for example SARS. On the other hand, the Organisational Ombudsman is a complaint-handler and dispute-resolver, communications channel, confidential and informal information source, and a person who helps an organisation work for change. An example of an Organisational Ombudsman would be the Banking Services Ombudsman in South Africa.

Taxation has for many years been one of the major contributors towards South Africa’s overall gross domestic product. This is because the South African government has endeavoured to exercise fiscal governance over its revenue collection. However, administrative capacity and performance of SARS remain the key determinant factors for

both fiscal space and effort (African Development Bank, 2010:vii). Yet, the manner in which taxpayers are treated by SARS in the course of trying to fulfil their national obligation leaves much to be desired.

It is rather unfortunate that bodies such as the Public Protector and the Human Rights Commission, established within the framework of the Constitution to protect taxpayers' rights, have not lived up to expectation; simply because of various historical and practical reasons; therefore, people are not aware of their very existence, let alone the role they play in the society (Brzeziński, 1988:19). Therefore, there is a need to protect the rights of taxpayers subject to systematic studies for a comprehensive view, and their multi-level rights.

Tax administrators follow a specific category of administrative proceedings in the collection of taxes. Administrative proceedings normally involve inequalities between the parties (Lehis, 1999:104). It is essential that the legislator pays particular attention to protecting the rights of the weaker party, in this case, the taxpayer. Brzezinski (1988:17) was of the view that, since the conduct of tax administrators' results in the imposition of monetary obligations upon citizens, any unlawful decisions and practices in the field of taxation may, besides anything else, cause material damage to the fiscus.

The introduction of a tax Ombud in the South African tax administration system is a welcome phenomenon that could influence the tax system in a positive direction, considering that certain provisions of the TAA continue to endow SARS with boundless powers that could grind down the rights of South African taxpayers. An example is the excessive powers that the TAA permits SARS to enter a business premises to conduct search and seizure procedures without a search warrant, where SARS is of the opinion that the issuing of a search warrant would endanger the objective of the search by reference to the tax at risk and the time involved in the whole process of tracking the tax offender (Ebersohn, 2012:12).

A tax Ombudsman is expected to deal with disputes arising between taxpayers and the tax authorities. The office of the tax Ombud will focus on service provision and the way in which SARS offices interact with taxpayers. The Ombud would provide redress to taxpayers against harassment from maladministration, abuse of powers, negligence and corruption of tax officials (Khan, 2010:2).

To be effective and responsive to the needs of the people for which it is created to serve, the office of the tax Ombud in South Africa should be independent of the government and the political process and not subject to pressure or influence from those who might have a perceived interest in the outcome of its complaint investigation. SARS (2011:2) has indicated that the best representation for the establishment of an effective tax Ombud in South Africa as contained in the TAA would be the one whose responsibilities, authorities and systems fit into the existing legal and constitutional dispensation. SARS furthermore asserted that the Ombud's office should align with international practices and provide extensive remedy to taxpayers in administrative and procedural matters. In order to substantiate this assertion, a comparison is made between the modelled international practices in countries such as Australia, Canada, and the UK regarding the extent of independence accorded to the offices of the tax Ombudsman in their respective jurisdictions. Butani (2007:1) claimed that the institution of the tax Ombudsman has comparatively stronger presences in these countries.

3.4 THE ADJUDICATOR'S OFFICE IN THE UNITED KINGDOM

The UK tax adjudicator's office was set up in 1993 by the Inland Revenue Department in response to the citizens' charter to provide an impartial review mechanism for complaints (Croome, 2012:4). It was also to help resolve complaints from individuals and businesses that are discontented about the way their affairs have been handled (SARS, 2011:2). Currently, the Adjudicator handles complaints involving:

1. Her Majesty's Revenue and Customs (HMRC) including the Tax Credit Office.
2. The Valuation Office Agency (VOA).
3. The Insolvency Service (The IS).

According to Gordhan (2008:24), the Adjudicator's office aims to improve the complaints handling management of the Inland Revenue Department by availing itself to the various state departments and the communities it serves. As a faithful provider of assurance and redress, it serves as an informed advocate to enhance service delivery.

Gordhan further indicated that the adjudicator's office considers complaints relating to mistakes, irrational delays, poor or misleading advice, inappropriate staff behaviour, and the use of discretion in addressing reported complaints. Gordon, however, stressed that the adjudicator's office does not handle issues involving the following contents:

1. Matters of government or departmental policy.
2. Matters that can be considered on appeal by independent tribunals.
3. Issues that the court has already considered or could have considered.
4. Complaints that have been seen or are being investigated by the Parliamentary Ombudsman.

Although the Adjudicator's Office's remits and service standards are set out in Service Level Agreements with the Commissioners of HMRC, it carries out its operations and functions independently from the HMRC and produces an annual report of its operations. In terms of the Service Level Agreements, the Adjudicator is granted the authority to consult with all relevant HMRC staff, to obtain every information and data necessary for any investigation and adjudication of complaints brought before her (SARS, 2011:3).

As a first stage alternative to the UK Adjudicator's office, a claimant can complain to the Parliamentary Ombudsman through his Member of Parliament (hereinafter referred to as a MP). Nonetheless, the Parliamentary Ombudsman will only investigate a discretionary decision if the complaint presents evidence of maladministration, such as the poor or wrong application of rules. The Parliamentary Ombudsman is financially independent from the Inland Revenue and its remits and remedies are similar to the Adjudicator's Office (Newth, 2002:8).

Since its inception in 1993, the UK Tax Adjudicators Office has worked conscientiously in trying to realise its vision of improving complaint-handling processes relating to tax matters. In 2011, the office recorded a remarkable achievement by adjudicating over 2000 cases, clearing 24% more cases than the previous year. By the end of the 2011 fiscal year, the office had cleared all outstanding cases, a feat that paved the way for the office to shorten its waiting time to six months (Clements, 2011:4).

3.5 THE AUSTRALIAN TAXATION OMBUDSMAN

Following the 1993 inquiry of the Joint Committee of Public Accounts and Audit (hereinafter referred to as JCPAA), the taxation Ombudsman was established in 1995 as a key mechanism in rectifying perceived imbalances between the powers of the Australian taxation office (hereinafter referred to as ATO) and taxpayers (McMillan, 2006:1). Therefore, the taxation Ombudsman was created within the current Commonwealth Ombudsman (Moss, 2003:3).

Due to the disparity between taxpayers and the ATO in relation to their formal rights and obligations, the committee recommended the following:

1. The government should consider establishing a taxpayer's charter.
2. A statutory position of Commonwealth Taxation Ombudsman should be created within the current common wealth Ombudsman's Office.
3. Resources should be provided to the Commonwealth Taxation Ombudsman to allow the Ombudsman to adequately investigate all complaints.
4. The role of the Problem Resolution Units in the ATO should be changed so that the staff of those units works directly for the Commonwealth Taxation Ombudsman.

Following the above recommendations, the Commonwealth Ombudsman's Act was amended in 1995 to enable the Commonwealth Ombudsman to be called the taxation Ombudsman if she or he so wishes.

In order to give effect to the recommendations by the JCPAA, resources were made available to the taxation Ombudsman to equip him or her to adequately investigate all complaints in the most efficient and responsible manner. It was envisaged that this measure and the allocation of additional resources to the Ombudsman for review of the ATO's action were directed at entrenching justice and fairness in the Australian taxation system.

The taxation Ombudsman as one of the agencies external to the ATO handles individual complaints about tax administration and the resolution of individual disputes. The taxation Ombudsman investigates and resolves complaints about tax administration from the perspective of administrative law rather than as tax law specialist. The taxation Ombudsman examines issues brought before him according to the standards set out in his legislation. Therefore, any suggestion in a particular matter that the ATO's action appears contrary to law, unreasonable, unjust, oppressive or improperly discriminatory soon gets the Ombudsman's attention (Australian Government, 2012:8).

According to McMillan (2008:1), the conventional Ombudsman role in general has centred on the investigation and redress of individual complaints and own motion. McMillan acknowledged that in terms of the 1976 Ombudsman Act, the Australian Taxation Ombudsman was accorded the authority to inquire about matters of administrative importance pertaining to a Commonwealth Agency without taking into consideration whether the complaint has been lodged at his office. Such own initiative investigations were referred to as "own motion investigation". McMillan further alluded that such investigations involve matters that may indicate underlying systemic or major service delivery issues. McMillan concluded that, with a developed complaint-handling system in place within institutions and organisations, Ombudsmen and other oversight bodies could have time to deal with more strategic problem areas in institutions and organisations where they have power of jurisdiction.

Moss (2003:3) admitted that in the past years, the taxation Ombudsman, through the special tax adviser and tax team, combined efforts and worked together assiduously to

effect significant changes to the tax system in Australia. In 2000, the ATO introduced and implemented a new tax system. It was inevitable that with the introduction of the new system the ATO caused some problems. However, this ill-fated situation incidentally paved the way for the Australian community to come into close contact with the ATO over a short period of time in an unprecedented manner. With the introduction of the new tax system, the taxation Ombudsman played an important role of ensuring that citizens' problems could be dealt with efficiently and effectively. Moss further was of the opinion that many of the complaints reflected issues such as initial confusion, difficulty in getting access to information, and delays in processing applications and refunds.

In Australia, the tax Ombudsman investigated the role of the ATO in handling thousands of taxpayers involved in mass marketed tax schemes. In its report from the investigation, the Ombudsman concluded that the ATO had to bear some responsibility for being too slow to react and that was partly the reason for the large interest bills borne by taxpayers. As a result of this independent investigation, settlements were reached with many taxpayers without penalties or interest and taxpayers were given an extended period to repay the taxes due (Doolan, 2009:3).

3.6 THE TAXPAYERS' OMBUDSMAN IN CANADA

Following the inauguration of the Taxpayers' Bill of Rights in 1985, the Canada Revenue Agency (hereinafter referred to as CRA) made a public pronouncement of its intention to appoint a new taxpayers' Ombudsman whose duties and responsibilities would be similar to the Internal Revenue Service's National Taxpayer Advocate. O'Connor (2008) contended that this public declaration was in keeping with the government's commitment to a sturdy accountability and tax fairness as a move to reinforce Canada's democratic institutions through increased transparency and assurance of equivalent treatment to all citizens.

The taxpayers' Ombudsman in Canada was established in 2007 within the CRA and is generally responsible for ensuring that the CRA respects the service rights as contained in the Taxpayers' Bill of Rights. Other responsibilities include:

1. Conduct impartial and independent reviews of service-related complaints about the CRA.
2. Facilitate taxpayer access to assistance within the CRA.
3. Identify and review systemic and emerging service-related issues within the CRA that have a negative impact on taxpayers.
4. Provide advice to the Minister of National Revenue about service-related matters in the CRA.

The taxpayers' Ombudsman, as an independent and impartial officer that is founded on good governance, respect for human rights, and adequate service provision, acts to provide speedy, free and accessible justice to taxpayers and benefits recipients (social grant recipients) who believe that they have been treated unfairly or unethically by the CRA. The breadth of the tax Ombudsman's remit therefore permits him to follow the principles of justice and fairness to settle tax disputes in an amicable manner between a complainant and the CRA office through mediation and negotiation rather than seeking to apportion blame (House of Commons Public Administration Select Committee, 2013:125). It is believed that the Ombudsman's office operates at arm's length from the CRA.

CRA is committed to exercise accuracy, professionalism, courteousness, and fairness in its dealings with taxpayers as contained in The Taxpayers' Bill of Rights. These rights are not executed to their fullest, due to a lack of awareness and an independent officer to uphold them and ensure that the CRA meets its obligations. The role of ensuring that the CRA fulfils its responsibilities is the tax Ombudsman's prerogative (CRA, 2013:1).

Dube (2009:16) claimed that the tax Ombudsman (hereinafter referred to as the TO) evaluates services that are offered to taxpayers by the CRA at his own ingenuity or upon

demand by taxpayers or their representatives with the aim of identifying systemic and up-and-coming service-related issues within the CRA. Consequently, the TO's office functions independently, without interference from the CRA, to make recommendations to the CRA, to improve its service delivery. Dube stressed that, for the purposes of safe guarding the TO's independence, the TO reports to the office of the Minister of National Revenue.

A systemic issue is an issue that, if not identified and appropriately addressed, has the potential to have a negative impact on taxpayers in general, to recur, and to generate complaints. According to Gordhan (2008:21), systemic issues may include the following:

1. The ability to access the CRA and get answers.
2. Delays in responses, decisions and information from the CRA.
3. Inconsistency in programme application.
4. Misallocation of payments.
5. Lack of procedural fairness.

The office of the TO was inaugurated in February 2008, and has since received many complaints from taxpayers who believe they have not received adequate service or fair treatment from the CRA. The office of the TO reviews these complaints, determines which service rights were infringed upon, and resolves the matter based on the evidence gathered from its complaint investigation. Among the complaints and enquiries received by the office of the TO are benefits suspension (Canada child tax benefit (hereinafter referred to as CCTB) and *per diem* allowances. These cases were identified as administrative errors made by the CRA, which had a negative impact on taxpayers (Office of the Taxpayers' Ombudsman, 2012:21).

The afore-mentioned cases are summarised as follows:

CASE I: A single mother who relied on the CCTB to make ends meet had her benefits suspended by the CRA. The CRA asked this taxpayer to provide documentary proof that her children were born in Canada. Letters from the family doctor who delivered the babies as well as from other people, who knew the

family, were provided but deemed insufficient proof by the CRA. The dispute went on for months and the taxpayer was facing foreclosure on her mortgage and the potential loss of her home. A complaint was made to the taxpayer's Ombudsman, who reviewed the matter (Dube, 2010:6).

Following the Ombudsman's intervention, the taxpayer was issued a \$38 000 CCTB payment and was able to keep her home.

CASE II: The operator of a special care home for adults received a '*per diem* allowance' for each of her residents from the provincial government. This allowance is a form of subsidy to the residents and is not considered taxable income for the owner of the home. The CRA officials who reviewed the owner's file were not aware that this revenue was tax-exempt and proceeded with collection action that included freezing the taxpayer's bank account and garnishing \$4 700. This resulted in considerable difficulties for the taxpayer. Once the ombudsman got involved, the CRA ceased its collection activities and released the taxpayer's bank account (White, 2008:4).

Though the Ombudsman was not obliged to make any recommendations, his involvement in the case reviews, by way of asking questions and providing alternatives on the apparent fairness of the level of service received by the taxpayer, paved the way for speedy resolution of the case. Bagget (2009:1) posits that the power of an Ombudsman is not to order the organisation(s) to act on the problem, but to assist the organisation to identify the problem from different perspectives.

3.7 THE SOUTH AFRICAN TAX OMBUD

The framework for the creation of the tax Ombud in South Africa is discussed in terms of Section 14 to 21 of the TAA. Section 14 of the TAA empowers the Minister of Finance (hereinafter referred to as the Minister) to have absolute authority to appoint the tax Ombud for a term of three years and to remove such a person for any reasonable

grounds that the Minister deems good and sufficient. With regard to the skills needed, the Minister must appoint a tax Ombud with a good background in customer service as well as in tax law. Any person eligible for the appointment as a tax Ombud may not have any criminal records against his reputation for the past five years prior to his appointment. The tax Ombud remuneration and allowances are determined by the Minister.

Informal cost-effective means of resolving taxpayers' administrative, procedural and service problems by reviewing and addressing issues emanating from the SARS's application of the tax Act. The tax Ombud's directive is therefore restricted to dealing with matters of disagreement involving procedural administration of the tax law, but not those concerning disagreements on the interpretation of tax law. The latter is dealt with by following the usual dispute resolution mechanism, namely objection and appeal, alternative dispute resolution, appeal to the tax board or tax court, and finally to the Higher courts (SARS, 2011:13). Section 18(4) of the TAA, however, indicates that taxpayers' complaints would only receive the attention of the tax Ombud provided the complainant has utilised or approached all of SARS's internal resolution mechanisms to settle the matter unless circumstances prescribe differently.

Section 17 of the TAA sets boundaries on the authority of the tax Ombudsman and inferred that the tax Ombud's power does not extend to the review of legislature and tax policy; a matter subject to objection and appeal under a tax act; decision of, and preceding in or matter before the tax court; or SARS policy or practice generally prevailing, except those relating to a service matter arising from the application of provisions of a tax act by SARS.

In terms of the provisions of Section 15(1) of the TAA, employees employed in accordance with the South African Revenue Service Act and seconded to the Ombud's office per consultative arrangement between the Commissioner of SARS and the tax Ombud would constitute the staff of the tax Ombud's office. According to SARS (2012:12), the TAA did not establish the tax Ombud to be a separate distinct unit from

SARS based on the consideration that close association between SARS and the Ombud's office would facilitate effective utilisation of SARS facilities and resources.

In terms of Section 19 of the TAA, the tax Ombud would prepare an annual report in which he would be expected to identify and review systemic and up-and-coming issues relating to service matters or the application of the provisions of the TAA that has the potential to negatively impact on the services that SARS renders to taxpayers. The tax Ombud reports directly to the Minister and the annual report that the tax Ombud submits to the Minister is laid before the National Assembly of Parliament. The Ombud could at any time during the course of the year, inform the Minister of any issue pertaining to his office. The tax Ombud is further obliged to submit a quarterly report to the Commissioner.

3.8 CONCLUSION

The establishment of the tax Ombudsman's office within the HMRC and CRA offices in the UK and Canada respectively seemed to be working well in the circumstances of their socio-economic and fiscal set up. In Australia, the TO is in-housed in the Commonwealth Ombudsman's office, thereby rendering it quite autonomous from the office of the ATO. The TO was established by the Ombudsman's Act of 1976. The UK and Canada's tax Ombudsman offices are independent, non-statutory organisations established within their respective revenue offices.

The UK has instituted a cost recovery legislation wherein compensation could be awarded to a taxpayer for the recovery of wasted cost in circumstances where the HMRC has erred in the following circumstances:

1. Inappropriate handling of complaint to cause undue worry and stress to the taxpayer.
2. Rendering of poor service
3. Giving misleading advice to taxpayers (Adjudicator's Office, 2012:12).

There is no cost recovery legislation in Canada. Being confronted with these two options, one would have expected that the TAA would have adopted the UK model of recovering cost from SARS in circumstances where the tax Ombud, based on his investigations and findings, concluded that the taxpayer has unfairly and unjustly been handled. Unfortunately, the TAA has rather adopted the Canadian style of non-recovery of cost without considering the financial and social circumstances of the ordinary South African taxpayers. It is high time that law and policy-makers became sympathetic to the plights and aspirations of the ordinary citizens who, because of poverty, may have no other alternative means of defending themselves than through a government instituted institution such as the tax Ombud.

Kleynhans (2012:2) claimed that the creation of the tax Ombud office to provide taxpayers with a low-cost administrative redressed mechanism to settle tax issues with SARS, would to a large extent assist in eliminating some of the administrative problems taxpayers encounter with SARS, provided such office is given sufficient authority and independence to act without any external interference.

Troskie (2010:1) was optimistic about the impact the establishment of a tax Ombud could have on taxpayers when making reference to the successful operations of ombudsmen offices that have been established in South Africa, such as in the banking and the motor industry. Troskie contended that the tax Ombud's office could make a difference if it is accorded sufficient power, responsibility and independence to formulate and pursue its own agenda geared towards achieving the stated mandate of defending taxpayers' administrative rights as embodied in the TAA.

The contentious issues that have been central in all the concerns expressed by the various tax practitioners and tax experts about the framework for the establishment of the tax Ombud have been the question about the independence and powers of the tax Ombud. The solution to this problem, according to my observation, would depend to a large extent on SARS's committed engagement with the various stakeholders within the tax fraternity. Though the establishment of the tax Ombud's office as contained in the

TAA may not be an ideal model, the call for South African taxpayers and other interest groups and individuals is to exercise the necessary restraint and patience to wait and see how it would work.

In chapter 4, the importance of independence and other factors essential to the establishment of the tax Ombud in South Africa as well as lessons drawn from other industries' experiences of establishing a tax Ombud will be discussed.

CHAPTER 4

THE IMPORTANCE OF INDEPENDENCE AND OTHER FACTORS INFLUENCING THE SUCCESS OF THE TAX OMBUDSMAN: COMPARISON TO OTHER INDUSTRIES

4.1 INTRODUCTION

Many state governments are currently under continuous pressure and increased scrutiny from their citizens to improve efficiency in service delivery and to become more cautious with their use of public funding. As a response to these phenomena, governments are increasingly implementing alternative models and approaches in tax collection to providing better services to their citizenry (Burns & Yeaton, 2008:6). SARS, as an agent of the South African government responsible for the collection of taxes, has proposed the establishment of a tax Ombud in terms of the TAA to deal with problems that taxpayers do encounter, such as a lack of legislative checks and balances and self-assessment tax systems. These problems are echoed by Mazansky (2011:1) in the following words: "When it comes to the assessment of tax returns, South African taxpayers have the worst of both worlds. They do not have the legislative checks and balances usually found in a self-assessment system and, in practice, are denied important protections inherent in the alternative. The reason is that South Africa has a de facto self-assessment system of tax, but that is not what the law provides".

In terms of the South African TAA, the Minister is responsible for the appointment of the tax Ombud. The TAA indicates that the Ombud's office will be housed within SARS, and all expenditure including staff salaries will be funded by SARS. It is also recommended that the staff of the Ombud's office be appointed by SARS and seconded to serve in the office of the tax Ombud. The tax Ombud will report directly to the Minister of Finance, but in terms of Section 20(2) of the TAA, both SARS and the taxpayer would not be bound by the recommendations of the tax Ombud.

According to Van der Walt (2013:4), the provisions of the TAA do not give any power to the office of the tax Ombud in terms of its mandate and power to compel SARS to carry

out its directives. Consequently, Van der Walt is of the view that taxpayers have no effective relief under the tax Ombud, as the only avenue available to them to force SARS to administratively comply with the law is by means of court action.

The issue about SARS's interference and the possible lack of independence in the operations of the tax Ombud is a dilemma in South Africans' experience of creating an effective and efficient tax Ombud who would stand against the odds to defend the plight of taxpayers. Brand (2012:3) supported the notion regarding the limited powers of the tax Ombud by arguing that such limited powers are compatible with other ombudsmen institutions around the world. According to the result from a survey conducted by International Tax Dialogue (2010:19), it came to light that certain revenue bodies in the sub-Saharan region of Africa have established internal structures for dealing with reported complaints from taxpayers. However, none of these revenue bodies have created an enthusiastic body such as the tax Ombud to specifically deal with complaints emanating from taxpayers' interactions with the revenue collecting agencies. Protection of taxpayers' rights should be a key tenet of sound tax administration as powers delegated to revenue authorities could be used excessively and coercively to the detriment of taxpayers. In view of this, Brand further contends that, notwithstanding the excessive powers granted to SARS, the introduction of the tax Ombud should be considered as a welcome development.

According to Allan (2007:2), in order to facilitate the proper creation and operation of an effective tax Ombud institution in a country such as South Africa, which is characterised by poverty, corruption, abuse and maladministration in all spheres of life, it would be vital for any restrictions imposed on the jurisdiction and power of the tax Ombud that have the potential to create hurdles in providing relief to taxpayers, are identified and appropriate measures taken to amend or remove them. In that sense, it could be perceived that the tax Ombud's office would be a useful adjunct to the SARS.

Gottehrer and Hostina (1994) claimed that the successful execution of the tax Ombudsman's mandate would restore the confidence and trust of the taxpayers in the

tax policy of the government. It is therefore vital that the office of the tax Ombud in South Africa becomes independent of the SARS over which it has jurisdiction. This claim can be achieved provided the Ombud's office is structured to guarantee independence from the subject of its investigations, particularly regarding the following:

1. The process of receiving complaints from taxpayers;
2. Decisions on whether or not to accept complaints as admissible or to conduct own initiative investigation;
3. Decisions on when and how to pursue investigations;
4. The manner in which evidence is gathered and processed to arrive at a decision; and
5. The drawing of conclusions in a manner that meets acceptable standards.

In this chapter, some of the key institutional drivers such as independence, neutrality, the review process and confidentiality, which are considered to be vital for the successful establishment of a tax Ombud in South Africa, are discussed against the background of the framework for its establishment as contained in Sections 14 to 21 of the TAA. Furthermore, a critical examination in respect of the successful functioning of some already established Ombudsmen institutions in industries such as the banking services and the motor industry in South Africa is made and will address the research objective as identified in par. 1.4 (iii) on p.4. It is hoped that lessons drawn from these selected Ombudsmen institutions would serve as a benchmark in drawing conclusions and recommendations for the successful creation of an effective and efficient tax Ombud in South Africa.

4.2 TAX OMBUDSMAN'S INDEPENDENCE: HOW IT COULD BE ACHIEVED

The success and the credibility of any Ombudsman scheme would to a large extent depend on the ability of the stakeholders of the scheme to promote and uphold the integrity of the scheme as well as the office bearers by protecting the independence of the officials mainly from those over whom the scheme has jurisdiction (O'Reilly, 2009:1). Both Hammarberg (2009:2) and McMillan (2008:5) claimed that independence is the

defining principle of any Ombudsman's office and as such a paramount feature for the legitimacy of the Ombudsman as a defender of citizens' rights.

One of the principal characteristics, among others, that the office of the tax Ombud in South Africa should possess in order to execute its mandate of reviewing and addressing taxpayers' complaints relating to service, procedural or administrative matters arising from the application of a tax act by SARS in a credible and efficient manner is for the tax Ombud to be and perceived to be independent both in theory and in practice. Mpabanga (2009:2) acknowledged that the most crucial consideration at the heart of any successful operation of an Ombudsman scheme is its independence from the government and the agency it is mandated to investigate.

The tax Ombud would interact with a host of stakeholders, for example SARS, taxpayers, and tax practitioners, on a daily basis, and this exposes him to a great deal of pressure. However, the ability of the Ombud's office to handle and manage such risks would assist in determining the extent of respect and the confidence that taxpayers repose in the office. According to Hammarberg (2009:1), many Ombudsmen institutions over the world have made a remarkable difference in the lives of people because the Ombudsman's integrity is respected by the people in authority. Genta (2013:2) reiterated that the tax Ombud should conduct his duties in the interest of both SARS and the tax contributors and should therefore refrain from acts incompatible with the office he occupies, such as engagement in any party politics, administrative or professional occupation.

The Ombudsman's independence is considered as the dominant attribute of an Ombudsman institution that envisions its freedom from control by the government, legislature, and the department or organisation over which it exercises power of jurisdiction. Field (2010:1) maintained that independence is the hallmark of effective Ombudsman institutions because it ensures that conclusions drawn from investigations are free from outside influence and interference. The Standard Committee of the United States Ombudsman Association (2003:1) claimed that in order for the tax Ombudsman's

office to operate as an impartial and critical body capable of reviewing complaints and making appropriate recommendations based on facts and law, the Ombudsman's office needs to be underpinned by structured guidelines and appropriate systems that guarantee the Ombudsman's office's independence in structure, function, and appearance. Such guidelines should consider the following:

4.2.1 The formation of the tax Ombud

To put the tax Ombud's office in its right perspective to maintain and safeguard its independence, it would be suitable that it be created by an act of Parliament or through a jurisdiction's constitution (Mpabanga, 2009:2). Mpabanga stressed that the act should make the tax Ombud a juristic personality with the independence of the office clearly articulated in the statutory basis on which it is established. The emphasis here is that legislative and legal protection of the tax Ombud's office would augment the objectivity of the Ombud in handling matters and giving recommendations without fear of criticism. In a similar vein, Gottehrer and Hostina (1998:1) were of the opinion that the enactment of the Ombudsman as a juristic person would render it difficult for any authority to amend the legal basis of its permanent existence. Their argument is on the basis that permanency enhances stability for the Ombudsman's office and would promote credibility among the public.

4.2.2 The tax Ombud's engagement and dismissal

For the effective engagement and dismissal of the tax Ombud, there is the need for a formally structured process to be instituted and approved by a parliamentary and a legislative body. A study showed that there is a need for super majority of both legislative and parliamentary bodies to spearhead the appointment and dismissal of the tax Ombudsman (Field, 2010). This was verified by Gottehrer and Hostina (1998:2) that to achieve an effective tax Ombudsman engagement and discharge, a nominating committee of the legislative body must present a candidate for Parliamentary approval. In this case, the tax Ombudsman would be appointed by a body not subject to its jurisdiction and does not have any operational or administrative authority over the

programmes that are subject to the Ombudsman's control (The Standard Committee of the United State Ombudsman Association, 2003:2).

Again, for effective engagement of the tax Ombud, there should be formal removal or dismissal processes. The dismissal or removal should not be politically motivated, but rather it should be the consequences of proven incapacity or as a result of unpleasant misdemeanours (Field, 2010:5). The emphasis here is that the removal or dismissal of the tax Ombud from office should not be based on an act of vengeance for carrying out unpopular investigations or making a forthright and critical report. In view of this, the removal of the Ombud from office should follow an independent, defined, transparent process and for a cause. These processes reduce the tax Ombud's susceptibility to castigatory or political retribution (The Standard Committee of the United States Ombudsman Association, 2003:2).

4.2.3 The tax Ombud's autonomy and guarantee of resources

In order to ensure the smooth and effective performance of the tax Ombud function in a credible manner to add value to the South African tax administration system, the tax Ombud should be autonomous from the government and the institution over which it exercises its jurisdiction and further be provided with sufficient resources. Hanusic (2012:17) maintained that the tax Ombud's autonomy would allow him to have adequate freedom to set his own priorities regarding distribution of resources in a way that would ensure efficient implementation of his programmes. It is envisaged that the allocation of resources to the tax Ombud without any possible interference by SARS would ensure the autonomy of the tax Ombud's office. Therefore, for the tax Ombud's autonomy to be guaranteed, he should be a Parliamentary officer and his office budget subject to approval by a Parliamentary oversight committee (Wood, 2011:4).

The British and Irish Ombudsman Association (2007:27) suggested that the tax Ombudsman scheme should be responsible for the utilisation and management of diverse resources: human-, financial-, material-, and information resources. According to

Latif, Bahroom and Fard (2010:2), resources such as a sufficient number of trained staff, modern information and communication technological systems and equipment are essential elements for an effective complaints management system. Hammarberg (2009:3) also maintains that the office of the Ombudsman should be adequately funded to allow it to be independent of the government and not subject to financial control that might affect its autonomy. In view of that, Hammarberg was of the opinion that there should be separate budgetary lines that guarantee the sustainability of available resources. On the other hand, Pettigrew (2011:1) contested that even in situations such as South Africa, where the TAA proposes the funding of the tax Ombud by SARS, the tax Ombud's independence can still be promoted provided the tax Ombud's office is permitted to prepare and submit its own budget and be accountable for its own expenditure. This means that the tax Ombud's budget could appear as a separate line item in SARS's annual budget submissions.

4.2.4 The tax Ombudsman remuneration

It is imperative that the remuneration, allowances and the terms of service conditions and benefits of the tax Ombud and his staff are carefully determined so as to be able to attract and maintain the relevant calibre of qualified officials and staff with the requisite qualifications and proficiency to deliver on their mandate to the public. Gottehrer and Hostina (1998:3) maintained that because the tax Ombudsman conducts inquiries on reported complaints as well as on systemic issues relating to the Revenue Agency's activities, and submits the report to the highest government official, the tax Ombudsman with his staff should be given remuneration commensurate to their assigned responsibilities. It is suggested that the tax Ombudsman's remuneration package should be located within the top government officials pay band, to align with the salary range of judges in the High Court and the Supreme Court to prevent any suspected top pay in the government public sector (The House of Commons Public Administration Select Committee, 2012:3). It is believed that aligning the salary of the tax Ombud to the judicial officials would be a good basis in determining the South African tax Ombud officials' salaries.

4.2.5 The location of the tax Ombud's office

For free access to the tax Ombud's office by the people to whom the office is meant to serve, it is imperative that adequate consideration be given to the structural and physical location of the tax Ombud to the extent that the independence of the office is not compromised. Field (2010:6) maintained that the placement of the tax Ombud as a line department within the structure of SARS, as in the case of SARS's Service Monitoring Office, is inappropriate, as such arrangements could prejudice the sovereignty of the tax Ombud. Manatt and Manatt (2008:26) contended that the location of the tax Ombudsman's office could influence public perceptions about the potency of the office to correct infringements. Manatt and Manatt argued that for complainants (taxpayers) to feel comfortable the office should be located away from SARS. This view was shared by the Standard Committee of the United States Ombudsman Association (2003:4) that the tax Ombudsman should be physically and organisationally detached from SARS. The detachment is meant for the tax Ombud not to compromise the confidentiality of complainants and witnesses; lessen protection given to the tax Ombud's confidential documentations and records; and give room for complainants, witnesses and other stakeholders to doubt the integrity and the capability of the tax Ombud to fulfil his duties. Jones and Cohn's (2005:3) view was in line in that separating the tax Ombud from SARS would place him in a higher pedestal to conduct independent surveillance over the activities of SARS. On the other hand, Jones and Cohn were of the opinion that the ability of the tax Ombud's office to promote organisational reforms within SARS would not necessarily depend on whether it is established farther from or within SARS. This contrasting view was supported by Pettigrew (2011:2) who observed that many Ombudsman offices are physically separated from those organisations they investigate. Pettigrew consequently cautioned that careful consideration should be given to placing the tax Ombud's office in an area that is not close to those who are directly responsible for the conduct the tax Ombud is responsible for reviewing.

4.3 THE NEUTRALITY OF THE TAX OMBUD

The tax Ombud in South Africa being independent, should as well be perceived to be neutral from the perspective of listening and understanding issues by remaining impartial to cases brought before him. Rowe (1987:128) maintains that the neutrality of the tax Ombud's office would depend to a large extent on the interpersonal relationship that exists between the tax Ombud and stakeholders such as SARS, tax practitioners and taxpayers. In this respect, the tax Ombud should serve as a neutral third party who represents neither the interest of taxpayers nor SARS, but rather acts as an advocate for principles of administrative fairness (Fowlie, 2006:41). Neutrality and impartiality are essential factors that entrench the legitimacy of the tax Ombud as an institution for the protection of taxpayers' administrative rights. To ensure the neutrality of the tax Ombud, Hammerberg (2009:1) suggested that the tax Ombud should regard himself as being impartial in all facets of his engagement by standing above partisan politics and other affiliations that have the potential to raise misgivings about his integrity.

Individuals and groups that have tax responsibilities should be educated to see the need to approach the tax Ombud with their problems without fear of intimidation. The education should also enlighten the complainants that the tax Ombud services are free of charge. Literature reveals that there must be a review machinery that empowers the tax Ombud and his staff to exercise their discretion as to which complaints to pursue (Richardson, 1984:2). Consequently, the tax Ombud's discretion as whether or not to hear a complaint should not be challenged in the court of law. Unlike the UK and France, where a complainant first goes to an MP to seek redress to his/ her complaints and may be referred to the country's Ombud, there should, however, be no limitation placed on the individual or groups who may want to complain directly to the tax Ombud (Gottehrer & Hostina, 1998:12; Oosting, 2000:12).

4.4 THE TAX OMBUD'S REVIEW PROCESS

The credibility of the review process of the tax Ombud's office would depend on how the office is seen to practise and maintain procedures that guarantee the utmost

administrative standards in relation to issues such as fairness, efficiency, and transparency. These standards should underscore the tax Ombud's core responsibility of resolving complaints between SARS and taxpayers in a credible manner. Initiative of Change UK (2011:2) emphasised that the tax Ombud ought to be responsive to dealing with individuals from diverse backgrounds and cultures. This can be done through the development of the alternative innovative conflict resolution procedures that are receptive to the differing needs of SARS and complainants. Mcfadyen (2008:4) maintained that the tax Ombud should have an extensive mandate to allow him to carefully consider and investigate cases presented by complainants. Mcfadyen was further of the opinion that the effective execution of the tax Ombud's assigned responsibilities would demand that his office is allocated with sufficient resources for the purpose of equipping the office with the relevant tools needed to conduct investigations in an efficient and timely manner. In order for taxpayers to have confidence in the tax Ombud, it is imperative that both the complainant and SARS are accorded equal opportunity to furnish the tax Ombud with information in the form of records, documents, as well as through telephone and personal interviews pertaining to a particular complaint (Bruneau, 2009:4). Gottehrer and Hostina (as quoted by Aufrecht, 1998:5) emphasised that the effective investigatory powers of the tax Ombud to review taxpayers' administrative rights, from the broadest perspective, with the aim of improving tax administration, could be addressed by considering the following:

1. The tax Ombud's jurisdiction must be clear in terms of who can file a grievance and the type of grievance that can be investigated.
2. The tax Ombud's office should have power to conduct own motion investigation.
3. There must be adequate access and cooperation in terms of the necessary subpoena power and ability to compel testimony.
4. The tax Ombud should follow due process in his investigation and reporting processes: SARS should be consulted and be given the chance to respond to the final report issued by the tax Ombud.
5. The tax Ombud should not enforce recommendation, but may persuade parties involved in the tax dispute for compliance.

4.5 THE TAX OMBUD'S CONFIDENTIALITY

In order to provide efficient and effective service to taxpayers and the people of South Africa as a whole, the tax Ombud in his neutral capacity should be mindful of maintaining strict confidentiality in respect of complaints brought to his attention unless he is authorised to do otherwise (Newhart, 2007:49). The implication of the tax Ombud's confidentiality means that he and his staff should be committed to the maintenance and development of a culture where ethical values and integrity are given the utmost priority. Grant (2000:1) acknowledged that confidentiality is one of the guiding principles of the tax Ombud's adjudication process because it fosters a relationship of trust between the Ombud and taxpayers. He reiterated that this relation of trust is imminent if the tax Ombud and his staff treat information in their possession or control in a confidential manner and shall not disclose information other than in circumstances in which the performance of duty or as the needs of justice require. In this way, vulnerable taxpayers would be safeguarded from fear of mistreatment and reprisal from the hands of staff of SARS.

Genta (2013:4) urged that the act establishing the tax Ombud's office should incorporate specific provisions that empower the tax Ombud to consult any document that he needs in the course of an inquiry by doing away with any restrictions, while clarifying and strengthening the provisions concerning the Ombud's duty to maintain the confidentiality of documents disclosed to him. The responsibility to protect and promote the confidentiality of taxpayers' information such as:

1. disclosure of complainant identity and identifying information;
2. disclosure of the tax Ombud's programme files and records;
3. accessing complainant records; and
4. reporting of abuse and mistreatment

need to balance the interest of the tax Ombud to access relevant information required to protect the legitimate interest of taxpayers, while at the same time safeguarding the confidentiality of taxpayers (Gurria, 2012:117). The central role that the tax Ombud plays in tax administration around the world cannot be overemphasised. However,

Spanheimer (2012:659) claimed that, despite the tax Ombud's duty under the TAA to maintain the confidentiality of complainants' communications, the courts may contend that such communications are not privileged (exempt) and might seek to rescind it. Therefore, it is essential that the issue of tax Ombud's privileged information is given much attention as confidentiality is vital to the tax Ombud's processes.

4.6 LESSONS FROM INDUSTRIAL OMBUDSMEN INSTITUTIONS IN SOUTH AFRICA

South Africa, as a new democratic state, has to realise that its legal systems are inadequate in providing protection and access to justice to the majority of its citizens in a meaningful way due to factors such as state-citizen relationship, as well as a history of political, racial and ethnic group conflicts (Weller, 2005:6). Weller emphasised that the tax Ombud institution would have special significance for the South African democracy because of its ability to offer a free, supple and less formal approach in resolving tax conflicts as well as providing remedies that a judicial system may not offer to taxpayers. McClelland (2009:1) claimed that justice institutions such as the tax Ombud accords citizens and for that matter taxpayers the opportunity to defend and protect their rights against infringements by SARS. The establishment of Ombudsmen institutions in the banking services and the motor industries brought about significant improvement in the level of customer care (Busa, 2011:4) and the complaint handling process (Melville, 2001:6), among others. It is believed that the proposed tax Ombud to be established would have much to learn from the successes and failures of these two established Ombudsmen institutions.

4.6.1 The banking services Ombudsman

The banking services Ombudsman was established in 1997 to facilitate the resolution of bank customers' problems and complaints in a fair, impartial, confidential and timely manner at no cost in an effort to influence the banking industry to improve service to customers (ABSA, 2013).

Cilliers (1999:3) provided a brief background about the formation of the Ombudsman for the banking industry. Cilliers stated that, in 1997, the Banking Council appointed the first independent Ombudsman for the banking industry. Soon after his appointment, the perception was widespread that because he was appointed by the banks, his independence and impartiality would to be compromised. Subsequently, the Ombudsman recommended the setting up of a body independent of the banks to be responsible for the appointment of the Banking Ombudsman and to define his terms of reference to the ombudsman's office. In response to the Ombudsman's recommendations, a steering committee was constituted to develop the structure and powers and the mode of appointment of the Banking Ombudsman. In a report entitled "The Structure and Powers of the Office of the Banking Adjudicator" the Banking Council in August 1999 acknowledged and sanctioned the proposal by the steering committee, of the establishment of a Section 21 company known as the Office of the Banking Adjudicator. Melville (2001:6) submitted that the aspiration to realise the principles of natural justice was not the only motivation for establishing the office of the Banking Services Ombudsman (hereinafter referred to as the OBS), but rather the banking industry in South Africa that suffered from poor public image and was under pressure from the government and the public to rationalise its operations.

According to Ombudsman for Banking Services (2006:4), the OBS was created as a Section 21 company with a board of directors (hereinafter referred to as the Board) led by a chairman who is independent of the banks. The independent stature of the OBS as a corporate body gives it the force to settle disputes in an impartial and objective manner. The Ombudsman for banking services reiterated that while the Board is responsible for the appointments and dismissals, the Ombudsman enjoys permanent status and his removal from office could only be triggered by an act of incompetence, gross misconduct, or inability to effectively perform his duties, but could not be dismissed for being out of favour with the banks or the consumers. This autonomy is strengthened by the fact that the Ombudsman and his employees are:

1. entirely responsible for the handling and determination of complaints;
2. accountable only to the Board; and

3. adequately resourced to carry out their respective functions.

The memorandum and articles of association of the office of the OBS make provision for the appointment of both a Board and Commission (John, 1999:2). The Board functions to ensure that the office of the OBS is administered on a sound financial basis, while the Commission determines the terms of reference and procedures of the office and also provides policy direction in respect of its function of mediation, investigation and adjudication. The budget of the office of the OBS is determined by the Board in consultation with the Commission. The Board receives funding from the banks to run the OBS office. Ombudsman for banking services (2006:5) maintained that it is deceptive for the public to conceive the idea that because the OBS office is funded by the banks, its independence would be compromised. The Ombudsman for banking's view was that the source from which income is derived to fund the OBS office is irrelevant provided it does not interfere with the operational activities of the Ombudsman. He admitted that neither the Commissioner nor the Board interferes with the OBS in the exercise of his discretion with regard to matters of operational issues.

According to Melville (2001:4), the OBS's office is located in the same building as the Banking Council. This arrangement about the location of the OBS raised concerns among individuals and customer groups about the freedom of the office to exercise independent judgement. Melville, however, contended that the Commissioner views the establishment of the OBS's office in the same vicinity as the Banking Council as posing no threat to the independence of the office, and advised that the Ombudsman rather focuses on building a character of independence through its conduct instead of its relocating to a different place.

The OBS is committed to the practice and observance of confidentiality or protection of complainant communication as an ethical requirement that underlines the Ombudsmen complaint resolution process, and without which effective dispute resolution would be jeopardised (Spanheimer, 2012:670). Ombudsman for banking services (2000:6) maintained that the OBS is empowered to decide which document under his custody to

release to either the bank or a complainant and that no party to a dispute could subpoena the Ombudsman to release documents in situations where a dispute has become the subject of a court case.

Melville (2011:6) acknowledged that the establishment of the OBS has brought about tremendous changes in the activities of the banks through the implementation of natural justice and enhancement of customer service. Melville emphasised that with the establishment of the Ombudsman in the banking industry, South Africa has aligned itself internationally with countries such as the USA, the UK, Canada and France in pursuit of the principles of natural justice in various sectors of governments and industries. According to Melville, the following are some of the achievements thus far recorded by the OBS office since its inception:

1. Improved services through customer protection against fraud and other related risks.
2. Courts have been relieved of the pressure of overloaded cases while average persons are given the opportunity to pursue their complaint against the banks free of charge.
3. It sets the tone for the regulation of the banking industry in South Africa, which previously suffered from poor public image.
4. It has enhanced the banks' renewed efforts to handle customer complaints in an effective and proficient manner.
5. Bank staff members are encouraged to play a proactive role by helping to resolve customers' problems with the aim of curbing the frequency of complaints arising.

ABSA (2013:1) stated that in instances where recommendations made to parties engaged in dispute have been rejected, the OBS may make a binding written determination based on the law of the state or the banking code to enforce such recommendation. According to ABSA, the OBS Office reports to the OBS Board, but not to the banks.

4.6.2 The motor industry Ombudsman in South Africa

The motor industry Ombudsman of South Africa (hereinafter referred to as MIOSA) was established in 1999 as an autonomous body by the South African motor manufacturers and importers to arbitrate and resolve differences arising between service providers within the industry and their customers (Vreden, 2011:1). Vreden maintained that the MIOSA complaint resolution procedure is meant to achieve objectivity, fairness, transparency and good engineering practices in the motor industry through the application of the South African Constitution (1996) and Section 82(3) of the Consumer Protection Act (68 of 2008) (hereinafter referred to as the CPA). Section 82(3) of the CPA is about the automobile industry of South Africa's code of conduct. The introductory part of Section 82(3) of the CPA states as follows: "The code, voluntarily established by the Automotive Industry of South Africa, shall regulate the interaction between the Automotive Industry and its consumers in relation to the matters dealt with in the code, as well as provide for alternative dispute resolution between the consumer and all participants in the industry through a scheme for alternative dispute resolution by an industry Ombud".

MIOSA (2004:1) admitted that its office was formed as an independent incorporated non-profit institution mandated to safeguard the independence of the office of the motor industry Ombudsman (hereinafter referred to as the MIO) through uninterrupted customer care improvement and fostering strong association among all stakeholders in the automobile industry. The Ombudsman further stressed that apart from his duties of making rulings in cases where parties have failed to reach an agreement, he educates motorists on the *modus operandi* regarding service, costs and the handling of complaints by means of printed media, radio and television.

According to Vreden (2012:1), MIO is funded by subscriptions received from manufacturers and importers as well as fees charged for on-site technical inspection. Vreden asserts that the financial support that the office enjoys from the manufacturers and the importers neither compromise their daily operations nor the rulings made by the motor industry. Vreden (2011:1) further reiterated that the MIO's method of funding has

not altered, but continues to ensure the independence of the office of the MIO. Busa (2011:4) acknowledges that the creation of MIOSA as an independent body to promote an accessible dispute resolution forum free of charge has improved the echelon of customer care and the plight of other stakeholders in the motor industry.

4.6.3 Lessons from the Office of the Public Protector

According to Musuva (2009:x), the office of the Public Protector and the SAHRC were established as democratic protection institutions together with other state establishments such as the Electoral Commission and the Auditor General to support and entrench constitutional democracy in South Africa. The responsibility of the Public Protector in terms of Section 182 of the Constitution is to examine and report on how the state conducts itself in respect of its dealings with the public in all spheres of government that are alleged to be inappropriate or result in an act of injustice (National Democratic Institute for International Affairs, 2000:4). The Public Protector, as a classical Ombudsman, therefore has a duty to safeguard and protect the residents of South Africa against violations of human rights, abuse of power, error, negligence, unfair decisions and maladministration in public administration. The office derives its powers from the Constitution. In adding to its powers emanating from the Constitution, it is given added powers and functions set by the national legislation such as the Public Protector Act (23 of 1994) and the Executive Members' Ethics Act (82 of 1998 as amended). Therefore, the legal framework of the Public Protector is built on the Constitution and the Public Protector's Act 23 of 1994. Musuva (2009:7) contended that both the Public Protector and his or her deputy are appointed by the President from a list of candidates presented by the National Assembly. The process of appointment involves the representation of all political parties and the preferred candidate enjoys majority support from the national assembly. Section 181(2) of the Constitution and Section 13(1) of the Public Protector's Act (23 of 1994) emphasise the independence of the Public Protector and states that: "The Public Protector must serve impartially and independently and perform his or her functions in good faith, without fear, favour, bias and prejudice".

Musuva (2009:7) maintained that despite the Public Protector's office's wider powers (including the power to resort to subpoenas) to request information from the public, it has no executive authority to enforce its judgement and recommendations. Rather, the office uses its persuasive and negotiation skills to resolve issues and to make its recommendations have effect. The office of the Public Protector has no control over its budget; instead the office is funded through the Department of Justice and Constitutional Development. Musuva (2009:17) stressed that this method of financing the office of the Public Protector jeopardises the independence of the office as the office is unable to motivate for its needs in order to carry out its mandate in a more efficient and responsible manner. The office reports to Parliament, but is also required to submit a written report to the National Assembly, at least once a year.

4.7 CONCLUSION

The importance of independence to the successful creation of a tax Ombud institution in South Africa cannot be overstated. Independence would ensure the proper creation and functioning of the tax Ombud through appropriate appointment procedure, location, funding, and staffing of the tax Ombud office. The other factors that are equally critical for the creation and implementation of the tax Ombud scheme worth consideration are neutrality, review process and confidentiality. These factors enhance the independence of the tax Ombud.

The sustainability and credibility of the tax Ombud scheme in South Africa would also depend largely on stakeholders' commitment to appreciate, respect and uphold the scheme's agenda. In other words, the structure and processes put in place must be respected and adhered to. For example, the tax Ombud's engagement and dismissal procedures should be observed strictly; the remuneration, allowances and the terms of service conditions and benefits of the tax Ombud and his staff should be attractive to the right calibre of official and staff.

It is clear that the full independence of the tax Ombud rests squarely on how it is resourced. Literature has revealed that the effective way that authorities are able to influence the activities of Ombudsman schemes in general is through inadequate provision of resources to the office. Wood (2011:4) maintained that the most practical way to curb the Ombudsman, other than revoking the legislation, is to starve the office of resources. If the tax Ombud in South Africa is to operate effectively, it should have its own budget and be liable to account for its expenditure.

To command the respect and trust of the people of South Africa, the tax Ombud should have the capacity to maintain strict confidentiality in respect of complaints brought to his attention, unless he is authorised by law to act otherwise. However, the extent to which confidential information in the possession of the tax Ombud should be exempted from disclosure (privileged) is yet to be determined by the courts. The practices and maintenance procedures of the tax Ombud, the guarantee of the utmost administrative standards in relation to issues such as fairness, integrity, efficiency, and transparency, are crucial for its success.

The banking services Ombudsman, as established in 1997, is to facilitate the resolution of bank customers' problems and complaints in an independent, fair, impartial, confidential and timely manner at no cost or less cost so as to improve services to customers. It is therefore appropriate that the motor industry Ombudsman of South Africa was also established in 1999 as an autonomous body by the South African motor manufacturers and importers to arbitrate and resolve differences arising between service providers within the industry and their customers (Vreden, 2011:1).

It is believed that the practice of independence, impartiality, confidentiality, fairness and credibility as a guiding principle by the tax Ombud's office in South would ensure the successful functioning of the office. The evaluation of the regulatory framework of the tax Ombud in South Africa will be discussed in chapter 5.

CHAPTER 5

EVALUATION OF THE REGULATORY FRAMEWORK OF THE TAX OMBUD IN SOUTH AFRICA

5.1 INTRODUCTION

This chapter evaluates and concludes on some provisions of the regulatory framework establishing the tax Ombud as contained in the TAA. The factors highlighted in chapter 4, namely independence, neutrality, review process, and confidentiality will be used as a benchmark in reference to the comments and submissions made by professional bodies and tax experts about the TAA in order to put the South African experience of creating an effective and dynamic tax Ombud institution within the right context and will address the research objective as identified in par. 1.4 (iv) on p.5.

It is worth mentioning that the South African socio-economic strength depends to a large extent on the proper functioning of government-established institutions such as SARS to interact with the citizenry in a more principled manner (Wakem, 2011:7). In light of this, the role of the tax Ombud in promoting a pleasurable relationship among SARS's stakeholders to provide independence and other mechanisms to resolve disputes speedily with less cost for taxpayers cannot be overemphasised. McMillan (2008:7) contended that the effectiveness of the tax Ombud's disputes resolution would be better determined by the office's adherence to the fundamental principles of the Ombudsman model, namely independence, neutrality, review process and confidentiality. This view was shared by Wakem (2011:7), who emphasised that the public confidence in the tax Ombud's office could be enhanced, provided it is perceived to have clearly articulated programmes coupled with the correct supportive structures such as the manner in which it is formed, the requisite staff component, sufficient allocation of financial and physical resources, procedure for appointments and dismissals, accessibility of the office, and transparent and robust public educational processes. These culminate into defining the independence of the tax Ombud in South Africa.

SARS (2010:2) claimed that the intention to establish an independent body such as the tax Ombud office to protect and defend taxpayers' rights was conceived as far back as 2003 when the new court rules and the SSMO were formed. The need for the introduction of the tax Ombud scheme in South Africa, according to the then Minister of Finance, Trevor Manuel, is to enable SARS to follow international practice of protecting taxpayers' administrative rights. However, this dream was delayed in order to allow for sufficient improvement in SARS's practices and procedures.

5.2 THE PUBLIC VIEW AND CRITICISM ABOUT THE TAX OMBUD'S OFFICE

According to Croome (2010d:1), the creation of the legal framework in terms of Sections 14 to 21 of the TAA for the establishment of the tax Ombud office in South Africa was well received by professional bodies, tax practitioners and individual taxpayers as being the response to a long anticipated call for its establishment years ago by the commission of inquiry into the tax structure of South Africa. Van Schalkwyk (2004:199) endorsed the establishment of a specialist tax Ombud office by arguing that although taxpayers currently have substantial evidence of SARS's commitment to the improvement of service delivery, the specialised nature of the knowledge and experience required to assist taxpayers in defending their constitutional rights would not be found in the SSMO.

Pickworth (2011:1) acknowledged that the activities of the tax Ombud would be of significant benefit not only to taxpayers in terms of relieving them of cost burdens, but also to provide the court with an alternative, speedy complaint resolution mechanism. In spite of Pickworth's argument about the positive effect the tax Ombud would hypothetically have on taxpayers, Pickworth is sceptical about the effective functioning of the tax Ombud's office because of the perceived lack of independence. Therefore, Pickworth tried to find answers to the following question: "How can, what is a division of SARS, ever decide in favour of the people it is trying to tax?" The TAA contains various requirements that might indicate that the tax Ombud would not provide a conclusive solution, nor exhaustively define the pathways for the varying taxpayers' administrative problems (McMillan, 2009b:2). Subsequently, it is imperative that robust engagement,

involving all stakeholders, is encouraged to find the right pathway on which the tax Ombud would be able to thrive and function efficiently.

The question at this juncture is, what is it that is lacking in the TAA that would not make the tax Ombud be the answer to all taxpayers' problems? There might not be a straightforward answer to the above question, but it is believed that references to the submissions, comments, queries and suggestions made about some provisions in the TAA by various professional institutions, tax experts, individual taxpayers and other interested parties within the tax fraternity would inform and aid people in drawing conclusions.

5.2.1 The legal framework for establishing a tax Ombud

The tax Ombud derives its legal base in terms of Sections 14 to 21 of the TAA. It is noted in the literature that in order to strengthen the stability of the existence of the tax Ombud's office to ensure its credibility among the public, it would be appropriate that it be created by an act of Parliament or through a jurisdiction's constitution (Gottehrer & Hostina, 2008:1). Mpabanga (2009:2), in support of the view expressed by Gottehrer and Hostina, added that such act creating the Ombud should establish the Ombud's office as a juristic person with the independence of the office clearly expressed in the statutory basis on which it is established. As discussed in chapter 4, Australia's tax Ombudsman was created in terms of the 1976 Ombudsman Act, which ensures its independence. In a similar way, both the South African Ombudsmen for banking services and the motor industry were created as Section 21-incorporated non-profit institutions in terms of the defunct Companies Act (61 of 1973) to ensure their independence. Therefore, to affirm the independence of the tax Ombud's office in South Africa, there is the need for the reconsideration of its legal base.

5.2.2 The appointment, dismissal and service conditions of the tax Ombud

In terms of Section 14 of the TAA, the Minister of Finance (hereinafter referred to as the Minister) is empowered to appoint, dismiss and determine the service conditions of the tax Ombud with regard to his or her remuneration and benefits. The tax Ombud will report to the Minister. Though this is an improvement over the previous situation where the SSMO was reporting to the Commissioner, this phenomenon still falls short of international practice. The power of the Minister to appoint and dismiss the tax Ombud without Parliamentary majority approval would undermine the independence and credibility of the tax Ombud's office. Studies show that there is need for super majority of both legislative and parliamentary bodies to spearhead the appointment and dismissal of the tax Ombudsman (Field, 2010:2).

Flanagan (2010:10) maintained that the effective operations of the tax Ombud's office towards the achievement of its mandate would depend to a large extent on its ability to act independently without fear of government interference. Within this context, the appointment and dismissal of the tax Ombud at the sole discretion of the Minister provokes the idea that the tax Ombud might be tempted to act on government opinions that could possibly interfere with the independence of the tax Ombud. In the case of Ombudsman for banking services, the appointments and dismissals are carried out by the Board to the effect that the Ombudsman enjoys permanent status.

The OBS's removal from office could only be triggered by an act of incompetence, gross misconduct, or inability to effectively perform his duties. Therefore, he cannot be dismissed for being merely out of favour with the banks or consumers. The tax Ombud is envisaged to be a public figure whose services would be of great value and importance to all people across racial, tribal and political lines. It is therefore naïve to state that the appointment to and removal from office of such influential personality is entrusted to the hands of a single Minister who might, most probably, be affiliated to a particular political party. For that reason, the tax Ombud would work according to the office's laid down terms of reference.

5.2.3 The infrastructure of the tax Ombud's office

Mulgan (1993:249) stated that the tax Ombud's office should be given sufficient infrastructure conducive for the smooth execution of its mandate, in particular, funding. The purpose of the adequate funding of the tax Ombud is to enable it to acquire its own building and staff in order to be independent of the government and the agency over which it exercises jurisdiction. In terms of Section 15 of the TAA, the expenditure of the tax Ombud's office will be paid out of SARS's funds and that the staff are employed by SARS and seconded to the tax Ombud's office (Flanagan, 2010:9). Flanagan submitted that this provision of the TAA in particular cast a shadow on the tax Ombud's integrity and independence. This view was supported by Mollagee (2011:1) who suggested that the cost of the tax Ombud's office be funded by the National Treasury to enable it to have control over its own budget as well as recruitment and dismissal of staff. In this way, the Ombud would be able to instil discipline among his staff to win public confidence.

Tomasek (2011:1) claimed that Canada, the United States of America and the UK had a tax Ombud that was funded by their respective tax offices. Tomasek echoed that these tax Ombudsmen were regarded as independent. Both Ombudsmen for the banking services and the motor industry are funded by the banking and motor industries, respectively; nonetheless, they are perceived to be independent (Ombudsman for Banking Services, 2006:5; Vreden, 2011:1). This creates the impression that SARS's funding of the tax Ombud might not be a problem. Rather, the contention is SARS's interference in the affairs of the tax Ombud's office that might prevent it from having direct control over its budget and be accountable for the use of its funds.

5.2.4 The situation of the tax Ombud's office

The TAA provides for the establishment of the Ombud's office within SARS under the pretence that such arrangement would curtail the practical difficulties relating to the protection of taxpayers' confidentiality and related matters. Flanagan (2010:9) questioned whether the Tax Ombud is a division of SARS or an extension of SSMO.

SARS's (2011:2) response is that the tax Ombud would be located between the SSMO and the Public Protector with the view to preventing the tax Ombud from intruding into the status of the Public Protector and the courts, while at the same time ensuring the tax Ombud's independence from SARS.

Manatt and Manatt (2008:26) maintained that locating the tax Ombud's office within SARS could adversely influence public perceptions about the ability of the office to correct violations. Manatt and Manatt argue that if complainants (taxpayers) are to feel comfortable the office should be located away from SARS. Jones and Cohn (2005:5) supported the views expressed by Manatt and Manatt and emphasised that separating the tax Ombud from SARS would place him on a higher stand to conduct independent review over the activities of SARS. On the other hand, Jones and Cohn hold a counter view that the ability of the tax Ombud's office to promote reforms within SARS would not necessarily depend on whether it is established farther from or within SARS. Denmark and Australia have their tax Ombudsmen located away from the revenue agencies' office. Contrarily, Canada and the United States of America have their tax Ombudsmen located within the revenue agencies' offices. Despite these countries using different location models, their tax Ombudsmen have operated well in their respective jurisdictions (Tomasek, 2011:1). From all indications, the location of the tax Ombud should not be the bone of contention. Instead, it should be how to support it by ensuring that it works for its intended purpose. In this case, it is worth noticing the Commissioner of the OBS's view, as quoted by Melville (2001:4), that the tax Ombud in South Africa should rather concentrate on establishing a moral fibre of independence through its dealings with taxpayers instead of its relocation to a different place.

5.2.5 The authority of the tax Ombud

In terms of Section 20 of the TAA, the tax Ombud's recommendations would not be binding on taxpayers or SARS. The TAA, however, challenges the tax Ombud's office to efficiently and effectively settle all complaints within its jurisdiction and, in so doing, endeavour to exchange information with a recognised SARS official. Klue (2011a:1) was

of the view that because of the draconian powers given to SARS by the TAA for the purpose of ensuring taxpayers compliance, it is essential that a watchdog body such as the tax Ombud is equally empowered to balance public perception on the fairness and effective workings of the tax system. To this end, Klue suggested that the tax Ombud's powers and recommendations should be binding. This view was supported by Retief (2011:1) who emphasised that the tax Ombud's decisions should have a binding authority subject to review by the courts if the tax Ombud office is to have 'teeth'. Flanagan (2010:10), on the other hand, doubted the wisdom in the establishment of the tax Ombud office if its recommendations and decisions are not binding on either SARS or the taxpayer. Should the public and for that matter taxpayers' justifiable expectations remain unfulfilled and the tax Ombud's recommendations not be implemented, the tax Ombud's office would be faced with the danger of losing its reputation of legitimacy (Kumar, 2003:282).

In order to preserve the unique benefit of the tax Ombud's flexibility in the conduct of investigations and in recommending solutions meant to promote justice between taxpayers and SARS, it is appropriate that the tax Ombud's powers do not conflict with the powers of the courts. Therefore, the tax Ombud has no binding powers. Chen (2010:24) maintained that the tax Ombud with binding decision powers would basically alter his remit into a mere administrative appeal exercise. Gottehrer and Hostina (1998:6) also submitted that the tax Ombud should not make binding decisions, rather by using his influence, the understanding of his proposals and views coupled with the nature and credibility of his office, he could have his recommendations accepted and acted upon. The tax Ombud, as a classical Ombudsman, is not bequeathed with the powers of making binding decisions. Instead, the office adopts the spongy powers of persuasion to influence parties engaged in tax disputes rather than the use of direct redress mechanisms. These persuasive powers could be effective given the ability of the tax Ombud to publicise the particulars of complaints and systemic issues in situations where an agency or the government has failed to execute recommendations prescribed by the tax Ombud (Reif, 2000:5). The above arguments therefore suggest that the

recommendatory jurisdiction of the South African tax Ombud under the TAA is founded on persuasion.

5.2.6 The power to grant compensation for taxpayers' losses

The dilemma about some of the provisions of the TAA regarding the office of the Ombud is that even though SARS admits the model for the tax Ombud is based on international practices and seeks to provide a substantial remedy to taxpayers in administrative and procedural matters, it has seemingly been selective in its application of some of these best international practices. This is because some crucial provisions that seem likely to address the cause of taxpayers' plight, such as compensation for distress caused to taxpayers and the power of the tax Ombud to compel SARS to act or not to act in a particular manner, have been overlooked.

While SARS has the power to recover losses from taxpayers in the form of interest and penalties, taxpayers are denied similar rights to recover losses from SARS in situations where a taxpayer has suffered detriment caused by the actions or inactions of SARS officials. Croome (2012:1) claimed that in other democratic countries such as the UK, specific legislation has been enacted that allows taxpayers in well-defined cases to be entitled to recover wasted cost from the HRMC's conduct or to receive a consolation payment in the form of a reimbursement for the sufferings caused to them by the revenue authorities. Henry (2004:74) claimed that if the TAA indeed seeks to provide substantial remedy to taxpayers in administrative and procedural matters in a democratic country, such as South Africa, then the tax Ombud needs to be given some measure of authority within which he could persuade or, in certain limited cases, compel SARS to provide compensation to taxpayers. Henry further contended that some taxpayers have suffered detriments as a result of the 'defective' actions or inactions of SARS.

Defective actions entail:

1. A specific and unreasonable lapse in complying with existing administrative procedure.
2. An unreasonable failure to institute appropriate administrative procedures.

3. An unreasonable failure to provide the proper advice that was within the official's power and knowledge to provide (or reasonably capable of being obtained by the official).
4. The provision of advice that was, in all the circumstances, incorrect or ambiguous (Henry, 2004:74).

South Africa in its current situation has no legal proclamation on taxpayers' rights to monetary reparations from SARS in circumstances where the conduct of an official of SARS has caused undue discomfort to a taxpayer. The only existing mechanism currently available to taxpayers to seek any form of compensation from SARS is through a mélange of judicial and customary avenues (Bevacqua, 2008:8). Bevacqua averred that none of these mechanisms are a sufficient alternative for a clear and apparent legal instrument, such as the TAA setting out rights to monetary compensation for taxpayers' losses caused by the inefficiencies of SARS officials. Bevacqua further reiterated that if the tax Ombud is to have 'teeth' in terms of the provisions of the TAA to restrain the eradication of taxpayers' rights to recovery of losses, the government has to wake up to the challenge of striking a balance between taxpayers' rights and SARS's ability to execute its tax administration mandate without any impediment, while at the same time empowering the tax Ombud.

McMillan (2009a:2) urged that the tax Ombud's statutory obligation is to report and make recommendations to SARS in circumstances where the need arises for certain steps to be taken to rectify the consequences of SARS's repressive and unjust conduct. This should also oblige the tax Ombud to advocate for taxpayers' compensation in cases where a taxpayer has experienced a detriment resulting from SARS defective administration. McMillan further believed that financial and other losses suffered by taxpayers necessitating compensation payment from SARS should be considered as a means of entrenching good governance founded on moral obligation into the South African tax system.

5.2.7 The power of the tax Ombud to intervene in the actions of SARS

Even though the TAA professes the tax Ombud to serve as the voice for the defence of taxpayers against SARS's abuses in situations where the SSMO has been unsuccessful in dealing with the needs of taxpayers, it does not grant the tax Ombud any authority to intervene in the actions of SARS (Brinker, 2010:2). There could be a situation where the tax Ombud perceives that a taxpayer is likely to suffer permanent injury with the potential to impact negatively on other taxpayers. In the USA, for example, the taxpayer advocate can issue 'taxpayer assistance orders' that can compel the Inland Revenue Services (hereinafter referred to as the IRS) to desist from proceeding to recover taxes from a taxpayer until the taxpayer advocate has resolved the problem with the IRS (Olso, 2010:1258). For the tax Ombud to have the necessary stature within the South African tax system to fully represent the interests and aspirations of the tax-paying public, his office should be given the appropriate authority and responsibility to issue taxpayer assistance orders (hereinafter referred to as TAO) in cases where, in the opinion of the tax Ombud, a taxpayer is enduring considerable deprivation from SARS's unfair administration and application of the provisions of the Act. Camp and Mahon (2010:1247) claimed that allowing the tax Ombud the power to issue TAOs would grant him the relevant tool to force SARS to release property of the taxpayer that has been attached; cease from any action, or take any legally permitted action related to the collection of taxes.

Giving the tax Ombud the power to assist taxpayers who are having problems with SARS would undoubtedly add to the independence and the effectiveness of the tax Ombud's office. Legislative council and joint fiscal office (2012:9) maintained that empowering the tax Ombud with TAO would present adequate leverage in assisting him to find an equitable settlement in a given complaint situation.

5.2.8 The disclosure of confidential information by the tax Ombud

Another contentious issue that might seem to threaten the powers and for that matter the independence of the tax Ombud is the confidentiality provision contained in Section 21 of

the TAA. In terms of Section 21(3), the TAA prohibits the tax Ombud or a person acting on his behalf from divulging any information pertaining to the tax Ombud's office to SARS, except in circumstances where such disclosure is deemed necessary by law for the execution of the tax Ombud's remit under the TAA. Brinker (2010:2) claimed that notwithstanding the general provision about the tax Ombud's confidentiality, the information is needed by the TAA and an act of Parliament. The question then is, where does the secrecy provision in terms of Section 71 of the TAA fit to address the issue of the tax Ombud's disclosure or non-disclosure of confidential information?

5.3 CONCLUSION

The need for the creation of a tax Ombud in South Africa stems from the realisation that the specialised nature of the knowledge and experience required to assist taxpayers in defending their constitutional and administrative rights would not be found in the SARS service monitoring office. The TAA sets out the framework for the establishment of the tax Ombud in South Africa modelled according to the UK tax adjudicator and the Canadian taxpayers' Ombudsman. Tax practitioners, tax experts, taxpayers and other groups and individuals within the tax fraternity have expressed concern about the ability of the tax Ombud to deliver on its mandate due to a lack of independence. Their concern centre around the arrangement with respect to the structure and powers of the tax Ombud's office as created by the TAA regarding:

1. the manner of appointing and dismissing the tax Ombud;
2. the method of funding the tax Ombud's office,
3. the procedure followed in appointing staff to the tax Ombud's office,
4. the location of the tax Ombud's office;
5. the tax Ombud's lack of power to order for compensation payment for distress caused to taxpayers and his inability to issue TAO; and
6. the tax Ombud's lack of 'privilege over confidential information.

With regard to the creation of the tax Ombud's office along the pathway of the UK and the Canadian tax Ombudsmen, one needs to be reminded that South Africa is still a developing third-world country that is far behind developed countries such as the UK, Canada and Australia in terms of education, technology, and the general standard of living. Approaching problems from the same angle in which these developed nations approach them, without taking into account the prevailing circumstances of the people, can sometimes prove to be very impractical and naive. In addressing a conference of the South African Ombudsmen, Ontario Ombudsman Jamieson quoted by National Democratic Institute for International Affairs ((2000:20) had this to say: "It would be a great disservice to your country, a great disservice to your people and to Africa, to import from Europe or North America or Australia a style of Ombudsman which may be perfectly appropriate there, but which is inappropriate and even irrelevant to your circumstances".

Jamieson's view about the tax Ombud was supported by Klue (2011b:2) when he stressed that the inclusion of some aspects of the TAA based on the premises that they represent international practice is baseless. Mashile (2011:2), on the other hand, questioned the legitimacy of the TAA to provide adequate protection to taxpayers by emphasising that, notwithstanding the fact that South Africa has a mixed economy, the TAA draws on the tax Ombudsmen of the Western capitalist states. Therefore, any future amendment to the structure of the tax Ombud should take into consideration the diverse cultural, political and ethnical background and the governmental structures of the country.

Just like Field (2010:4) was of the opinion that the basic principles underscoring the establishment of the tax Ombud in South Africa, namely independence, neutrality, review process and confidentiality are well founded. There is, however, no easy way in which these principles could be applied in practice, as problems are likely to arise even as the tax Ombud chooses to be adaptable and flexible in order to maintain his significance. It is worthwhile to agree with McMillan's view that the tax Ombud is a human institution and

that problems are likely to occur. Therefore, any difficult questions and issues pertaining to the tax Ombud's effectiveness need to be scrutinised and debated.

A summary of the research results and the conclusions, as well as recommendations made, will be discussed in chapter 6.

CHAPTER 6

SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

6.1 INTRODUCTION

In chapter 5, an evaluation of the regulatory framework of the tax Ombud in South Africa was presented. Chapter 6 deals with the summary of the findings, conclusions and recommendations regarding this study and addresses the research objective as identified in par. 1.4 (iv) on p.5. The study sought, as per the primary objective as identified in par. 1.4 on p.4, to systematically unpack the essential characteristics needed for the creation of a successful tax Ombudsman in South Africa for the protection of taxpayers' administrative rights. The problem statement, as identified in par. 1.3 on p.4, thereof was "What factors should be taken into consideration in order to establish an effective tax Ombud's office to successfully address taxpayers' problems in South Africa within the framework of the TAA?" The milieu of the study highlighted the tax system before 1994.

As per the first secondary objective as identified in par 1.4 (i) on p.4, certain findings were made. In the era leading to the enactment of the interim Constitution, South Africa was a parliamentary state by virtue of Section 34(3) of the Republic of South Africa Constitution Act (110 of 1983). The 1983 Constitution did not make any provision for the Bill of Rights. The courts, under such regime, did not have the ability to question the legitimacy of any legislation. Consequently, parliament could introduce any legislation that it deemed fit since the only way that legislation could be set aside was on the basis that it had not been introduced in accordance with the rules laid down by parliament. In light of the prevailing system, taxpayers in South Africa did not have the legal standing to contest the validity or otherwise of the tax laws in the country. The tax system was characterised by provision with gender and racial bias; non-appealable discretionary decisions vested in the Commissioner; provision that placed the onus of proof on taxpayers; draconian search and seizure; general imbalance of power regarding the taxpayer and the revenue authorities.

Section 7(2) of the Constitution places responsibility on state organs such as SARS to execute their duties by fulfilling the rights in the Bill of Rights. Therefore, SARS, as an agent of the state, is constitutionally bound to respect and protect the rights of taxpayers, including individuals and juristic persons. Taxpayers' protection within the context of democratic governance in South Africa includes, among others, the following:

1. Natural and juristic person's rights in terms of the Bill of Rights.
2. Equality and administrative rights of taxpayers.
3. Tax legislative enforcement and taxpayers' privacy.
4. The extent of taxpayers' rights and the power of SARS in terms of the Bill of Rights.

Taxpayer's rights under the Bill of Rights place the responsibility on SARS to safeguard the rights of taxpayers during tax collection and in all related tax administrative matters. At the same time, the fiscal statute of the country empowers the Commissioner to ensure proper and efficient collection of taxes. The application of the Commissioner's powers by SARS sometimes violates taxpayers' rights. This situation calls for efficient tax collection administration to ensure taxpayers' compliance with the tax laws, while at the same time encouraging revenue officials to meet the responsibility placed on them by the fiscus.

According to Manuel (2002:4), government's ability to plan and execute effective tax schemes would depend on the competence of the revenue authorities to administer the taxes. Manuel stressed that any administrative inadequacies in respect of tax legislation and revenue collection could hamper the integrity and reliability of any reform programme and the tax system. For these reasons, SARS has taken certain initiatives to safeguard the rights and protection of taxpayers since 1994. These included:

1. The setting up of the KATZ Commission to inquire into the tax structure of South Africa.

2. The establishment of SARS's Client Charter to promote taxpayers' awareness of their rights and obligations and also to create a cordial relationship between the revenue staff and taxpayers.
3. The establishment of the SARS's Service Charter by which SARS demonstrates its commitment to support and respect, educate and influence taxpayers about their obligations and the level of service they should expect from SARS.
4. The introduction of revenue laws; the promotion of the Administrative Justice Act (3 of 2000) and the Promotion of Access to Information Act (2 of 2000) as a framework by which taxpayers could access information and obtain administrative justice from SARS.
5. The introduction of alternative dispute resolution to afford taxpayers a different avenue of settling disputes with SARS.
6. The establishment of the SARS Service Monitoring Office to serve as the last channel for redressing SARS's administrative inefficiencies that affect a taxpayer or has the potential to affect other taxpayers in future.

Despite the protection accorded to taxpayers in terms of the Constitution and the various steps taken by SARS to ensure their security, taxpayers continue to encounter administrative challenges in accessing the law and the Act in resolving conflicts emanating between them and SARS. Currently, the only avenue available to taxpayers to seek assistance in defence of their rights in terms of the Constitution is through the court. Invariably, disputes between the taxpayer and SARS could end up in the judicial process to search for remedy or explanation. However, the enforcement of taxpayers' rights through the courts is usually lengthy and expensive. This often leaves aggrieved taxpayers without adequate financial resources to pursue their cases at the mercy of SARS to determine their fate. On the other hand, the office of the Public Protector and the SAHRC are perceived by the public as government watchdogs responsible for investigating government departments. The perception about these democracy-defending institutions is a result of the lack of education about their existence and duties.

Therefore, as per the first secondary objective as identified in par 1.4 (i) on p.4, it was found that SARS's attempts to protect taxpayers' rights have been met with failures in

one way or the other. Retief (2010b:1), for example, claimed that the SSMO does handle complaints not from the perspective of assisting taxpayers, but from the standpoint of helping SARS to fulfil its service obligations. This and other criticisms about SARS's failure to offer adequate protection to taxpayers have led to the call by taxpayers, tax practitioners and other professional institutions to add a voice in the call for the establishment of an independent state institution such as the tax Ombud. If instituted, the tax Ombud would deal with complaints from taxpayers relating to decisions, actions, or omissions of tax administration by SARS. The tax Ombud would therefore be responsible for the protection of taxpayers against violation of their rights, abuse of power, error, negligence, unfair decision and maladministration perpetrated by SARS against taxpayers.

6.2 SUMMARY

The conclusions and recommendations arrived at in this study are based on the literature gathered from the following sources as per the second and third secondary objectives of this study identified in par. 1.4 (ii) and (iii) on p.4. Australian and Canadian tax Ombudsman, the UK tax adjudicator, the South African motor industry Ombudsman, South African banking service Ombudsman, the South African Public Protector as well as the TAA were considered. Other popular scientific articles and reports on the introduction of the tax Ombudsman in South Africa were reviewed and analysed.

The core summary of the findings as discussed in the study in relation to the factors that are essential for the establishment of a successful tax Ombud in South Africa, as identified in the fourth secondary objective in par. 1.4 (iv) on p.5, include:

1. Tax Ombud's independence: therefore, the formation, engagement and dismissal, autonomy and guarantee of resources, remuneration and location;
2. The neutrality of the tax Ombud;
3. Review process; and
4. Tax Ombud's confidentiality.

The issue worth noting is that the tax Ombudsmen in developed countries such as Canada, the UK and Australia to some extent, serve as a model for developing countries such as South Africa. As indicated in the study, the TAA is structured based on the model of Canada and the UK tax Ombudsmen system, where the tax Ombud is housed, funded, and staffed by the revenue department. In contrast, the Australian tax Ombudsman is located within the Commonwealth Ombudsman's office and is provided with adequate resources and a separate budget for its proper complaint investigation. Therefore, the Australian tax Ombudsman is autonomous from the tax office. According to the literature consulted, these two contrasting models have worked well in the circumstances of their respective countries.

One of the crucial problems that most Ombudsmen institutions over the world do encounter is a lack of resources. Inadequate resources of the tax Ombud's office have the potential of subjecting the office to political and executive manipulations, thereby rendering the tax Ombud's office ineffective to pursue its agenda. Confidentiality is another factor that could entrench the credibility and independence of the tax Ombud's office. The tax Ombud's practice and maintenance procedures and the assurance of the high administrative standards concerning issues relating to fairness, integrity, efficiency, and transparency are crucial for its accomplishment. The success story about the Ombudsman for banking services, the motor industry Ombudsman and the Public Protector in South Africa could be attributed to the proper adoption and practice of the basic principle of independence, neutrality, confidentiality, and credible review process.

6.3 FINDINGS AND RECOMMENDATIONS

The study revealed certain practical issues pertaining to the tax Ombud's successful functioning, that warrant attention if the tax Ombud is to play a meaningful role in the lives of taxpayers. It is hoped that the following recommendations would enhance the successful creation of the tax Ombud's office in South Africa:

1. The study finds that the independence of the tax Ombud's office is being over emphasised, leaving other pertinent issues of equal importance, such as education and publicity, unattended to. Therefore, it is recommended that the tax Ombud rather focuses on building a character of independence through its conduct, while at the same time creating the awareness of its existence and activities through outreach programmes and other communication media, such as the television, radio, Facebook and Twitter, instead of dwelling too much on just one factor among the lot. It is believed that the approval and participation of the tax Ombud's programmes by the general public would foster discipline and trust in the tax Ombud and inculcate the principle of independence in its activities and procedures.
2. The study also revealed that the power of the Minister of Finance to appoint and dismiss the tax Ombud in terms of Section 14(1) in a manner consistent with the Constitution is unconstitutional, since such a procedure violates the rights of other political parties represented in Parliament. The study therefore recommends the appointment of the tax Ombud to be carried out by a parliamentary nominating committee involving representatives from the various political parties and probably headed by the Minister of Finance. The candidate appointed should enjoy a majority of Parliamentary votes.
3. The study further noted inadequate provision of funding and other resources to the office of the tax Ombud. The practice has been for the tax Ombud's office in other countries to be funded by the department over which the tax Ombud exercises its jurisdiction. This practice would impair on the tax Ombud's office's independence and particularly its ability to openly criticise the wrongs of the funding department for fear of reprisal in the form of budget cuts. It is therefore recommended that, irrespective of the source from which the tax Ombud's office is being financed, it should be allowed the freedom to motivate for its budget, be in charge of its expenditure; particularly regarding the hiring and dismissal of staff. The tax Ombud should report on its budget to Parliament.

4. The study furthermore identifies the tax Ombud's lack of power to compel SARS for the recovery of taxpayers' wasted cost or the payment of compensation to taxpayers in situations where a taxpayer has suffered detriment resulting from SARS's defective administration. This lack of power undermines the might of the tax Ombud's office to genuinely defend the plight of the taxpayer and could hamper the successful functioning of the tax Ombud's office towards the realisation of its set goals. The study therefore recommends that the tax Ombud be given the authority to recover wasted cost or compensation from SARS in cases where a taxpayer has suffered a detriment resulting from SARS's defective administration.

5. In terms of Section 21(3) of the TAA, the tax Ombud and his staff are not allowed to disclose any information obtained by them in the course of their interaction with taxpayers in pursuit of their duties to any third party. However, despite the tax Ombud's duty under the TAA to maintain the confidentiality of taxpayers' communications, the courts may challenge that such communications are not privileged (exempt) and might seek to revoke it. The question then is to what extent could the tax Ombud exercise the secrecy provision accorded to his office, as confidentiality is vital to his complaint resolution processes. The failure of the tax Ombud's office to protect complainants' confidential information could erode the trust and the confidence that taxpayers have in the office. With respect to the issue of confidentiality, the study recommends that the tax Ombud should be given the power of 'privilege' over confidential information held by him.

Based on this study, the researcher suggests three research areas for further studies. These include: the activities of the tax Ombud, particularly regarding the appropriate mode of funding and staffing the tax Ombud's office; the issue pertaining to taxpayers' entitlement to compensation in circumstances where a taxpayer has suffered detriment as a result of SARS officials' action or inaction; and the question of the tax Ombud's privilege over the disclosure of taxpayers' confidential information vis-à-vis the provisions of Section 4 of the Act.

6.4 CONCLUSION

The primary objective of this study, as identified in par. 1.4 on p.4, was addressed through this study. The necessary characteristics for the establishment of a successful tax Ombud's office were identified, as were the resultant weaknesses, from which stemmed the recommendations made, which resulted from the secondary objectives identified in par. 1.4 on p.4 and 5. It suffices to draw attention to the fact that a consistent view of the tax Ombud's office from the perspective of South Africa's developmental and social transformation goals would aid in addressing taxpayers' problems, while at the same time assisting SARS to create a sound tax administration system. It is hoped that the ability of the tax Ombud to identify and investigate systemic issues would add value to SARS's continuing efforts in ensuring taxpayers' service satisfaction and tax compliance. Furthermore, the tax Ombud's objectivity and independence would offer him a distinctive opportunity to play a constructive role in shaping taxpayers behaviour and guide tax administrative actions.

The primary objective of this study, identified in par. 1.4 on p.4, was addressed in this study by identifying and addressing the characteristics needed for the establishment of a successful tax Ombud's office, as discussed in chapters 4 to 5, but the question of the tax Ombud's independence and consistent legal framework that characterise the tax Ombud office's specific legislative framework, operational structure, mode of funding, SARS intentions, public perception, and other issues considered critical for the effective functioning of the tax Ombud, should continue to be the subject for public debate and deliberations. The National Democratic Institute for International Affairs (2000:21) emphasised that there is no structured way of guaranteeing the independence of the tax Ombud institution because different stakeholders in a given country follow different criteria to ascertain the tax Ombud's independence.

Hypothetically, the provisions of the TAA creating the tax Ombud scheme in South Africa might not fully guarantee the tax Ombud's independence to ensure its successful functioning. Nevertheless, it sets the tone for its implementation and opens the debate towards the creation of a better channel needed to address taxpayers' problems. As

noted in Visegrad Integrity System study (2012:9), the adherence to an adequate formal structure in the creation of a tax Ombud institution does not offer sufficient guarantee for the institution's success.

Therefore, the recommendation is that any future amendments to the provisions of the TAA about the tax Ombud should be informed by the diverse cultural, political and ethnical backgrounds as well as the governmental structures. It is believed that the appointment of a tax Ombud with the requisite qualities, such as leadership, honesty, integrity and courage, would ensure the application and practice of the principles of independence, neutrality, credible review process and confidentiality identified as important factors to be considered for the successful creation of a tax Ombud in South Africa.

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