A COMPARATIVE ANALYSIS WITH SELECTED JURISDICTIONS OF STRUCTURAL CHALLENGES FACING THE SOUTH AFRICAN OFFICE OF THE TAX OMBUD

A thesis submitted in partial fulfilment of the requirements for the degree of

MASTER OF COMMERCE (TAXATION)

RHODES UNIVERSITY

by

Boitumelo Charity Mothiba

MAY 2019

ABSTRACT

The Office of the Tax Ombud is critical in the protection of South African taxpayers' rights. The office has only been in existence for a little over five years and to ensure that it fulfils the purpose for which it was established, it must be properly structured. This includes that it ought to be independent from any external influence and manipulation. Any such external influence on the Tax Ombud creates the risk that the general public will lose confidence in the Tax Ombud as an independent recourse.

The study, therefore, is designed to review the structure relating to the independence and powers of the South African Tax Ombud. The study assesses and evaluates the legislative safeguards of the structure of the Tax Ombud office in order to determine whether the legislative framework (the Tax Administration Act) safeguarding the Office of the Tax Ombud is adequate to ensure its independence and also to ensure a strengthened structure, without interference in the decision-making process of the office. To achieve this, a comparative analysis was made with selected foreign institutions of Tax Ombudsmen, or equivalent institutions, in order to draw from the best international practice.

The study found that the structure of the Office of the Tax Ombud is relatively weak and does not fully provide the legislative powers to protect taxpayers from the well-resourced South African Revenue Service. The study also revealed that most of the institutional features in the structure of the South African Tax Ombud were found to be in line with standard international practice. The study has made recommendations aimed at strengthening the structure of the South African Tax Ombud by suggesting reforms in the legislative framework of the Tax Ombud.

KEYWORDS: Tax Ombud, Ombudsman, tax administration, taxpayer rights

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CHAPTER 1: INTRODUCTION

1.1 Research Context

Revenue authorities are, of necessity, in the unique position of being monopoly service providers to the community (Inspector General of Taxation, 2016: 1). There is also a perception of an information imbalance in that revenue authorities have collected or are able to collect a great deal of information about taxpayers, who often believe there is a lack of transparency in the way the collected information is processed and used in compliance activities (Inspector General of Taxation, 2016: 1). The government has greater access to the information relevant in resolving disputes that may arise and may also enjoy the discretion as to whether the information will be shared with the other party in a disagreement. A key element in preventing informational asymmetry of this nature is the creation of control mechanisms through a system of scrutineering functions on the exercise of power by the government.

The Taxpayer Advocate of the United States of America noted that there has been a gradual trend at both the federal and state levels to improve revenue service by creating advocate positions to assist on an individual and systemic basis (Taxpayer Advocate Report, 2012: 1). Moosa (2017: 1) observes that the South African Revenue Service (SARS) is imbued with statutorily conferred public powers which may encroach the taxpayer's rights in the Bill of Rights in the Constitution of the Republic of South Africa, 1996. South Africa is a democratic constitutional state and it is important that the protection of taxpayers' rights against maladministration is addressed in the context of public service by SARS.

The new South African government, which was ushered in in 1994, took the initiative to modernise the revenue administration through tax reforms. On 22 June 1994, the government announced the appointment of the Katz Commission of Inquiry into Taxation to study the South African tax system and make recommendations for its reform (SARS, 2011: 4). In its third interim report, the Katz Commission proposed the introduction of the first South African Tax Ombud to protect the rights of taxpayers and to mediate between taxpayers and SARS (Katz Commission, 1995: 3). The Office of the Tax Ombud was finally established in terms of Part F of the Tax Administration Act, 28 of 2011.

South Africa is a developing country and to ensure that the powers and duties of the South African Tax Ombud are on par with the rest of the world, the model adopted for the Tax Ombud was a hybrid of the Canadian and United Kingdom models (Mthimunye, 2013: 4). One of the key objectives in the establishment of the Tax Ombud was to achieve a balance between the powers and duties of SARS and taxpayer rights and obligations.

Although Croome (2002: 28) welcomed the proposal by the Katz Commission to have an oversight body such as the Tax Ombud, Du Preez (2011: Online) noted that some professional experts still criticized the model adopted for the South African Tax Ombud, particularly relating to the issue of its independence. There were several criticisms of the model that was adopted for the Tax Ombud, including that of PricewaterhouseCoopers (2012: 18) who also expressed the view that a potential problem with the model of the South African Tax Ombud might be the lack of independence from SARS.

In the Canadian case of *BC Development Corp v Friedman*, 1984 (2 SCR 447), it was stated (at 461) that "… the powers granted to the Ombudsman allow him to address administrative problems that the courts, the legislature and the executive cannot effectively resolve". This view is supported by the Davis Tax Committee (2017: 77) who stated that effective scrutineering functions must be appropriately structured and resourced otherwise they cannot fulfil public expectations of holding to account large and well-resourced revenue authorities. The legislation governing the Tax Ombud has since been amended by the Tax Administration Laws Amendment Act, 16 of 2016, to afford the Tax Ombud more powers and independence in order to support the Tax Ombud as an impartial officer.

Under the prevailing tax laws, the Tax Ombud suffers from challenges which, ultimately, may hinder its ability to be an effective protector of taxpayer rights (Moosa, 2017: 1). While the introduction of the Office of the Tax Ombud provides an excellent recourse to taxpayers and taxpayer representatives who are dissatisfied with the service provided by SARS, the office also faces challenges in carrying out its mandate. This was confirmed by the Tax Ombud, Retired Judge Bernard Ngoepe, in the Tax Ombud Strategic Plan for 2017 to 2022 (Office of the Tax Ombud, 2017: 2) when he indicated that the office still struggles with many issues that compromise the ability of the office to fully deliver on its mandate (Office of the Tax Ombud, 2017: 2).

Unlike the Public Protector, the Tax Ombud is not independently regulated by its own statute. Moosa (2017: 4) expressed the view that this is a cause for concern as to the Tax Ombud's potential efficacy in playing a meaningful oversight function that will shield taxpayer's rights from being mere "paper" ones. Undoubtedly, the legislation governing the Tax Ombud has many limitations and shortcomings.

The concept of the Tax Ombud is fairly new in South Africa and no extensive research has been conducted on the challenges faced by the Tax Ombud. The present study therefore aims primarily to identify the challenges faced by the South African Tax Ombud and seek the best solution in order to strengthen the position and function of the institution. The study analyses the model adopted by the South African Tax Ombud, which is then be compared to the United Kingdom Tax Adjudicator's Office, the Canadian Taxpayer's Ombudsman, the United States Taxpayers' Advocate, Mexico's Procuraduría de la Defensa del Contribuyente ("PRODECON") and the Inspector General of Taxation in Australia to determine whether they face the same challenges.

The choice of Mexico and the United States is based on having the perspective of both developed and developing countries' Ombud models in order, firstly, to compare the South African Tax Ombud model with its counterpart, Mexico's PRODDECON, which is also based in a developing country, secondly to compare it to the more developed Taxpayer Advocate Service of the United States of America, and then lastly, to assess what changes need to be made to the South African Tax Ombud model to provide for similar powers and duties of the Mexican PRODECON and the Taxpayer Advocate Service of the United States of America.

The PRODECON's mission is to ensure the right of taxpayers to receive justice in tax matters at the federal level, through the provision of free services of advising, counselling and promoting legal defence in courts (Davis Tax Committee, 2017: 90). The PRODECON has more widespread powers of acting as a taxpayer Ombudsman, public advocate and mediator in conclusive agreements than its South African counterpart. Although the Taxpayer Advocate in the United States of America is an independent organisation and is still situated within the Internal Revenue Service ("IRS"), the Taxpayer Advocate has powers to issue taxpayer assistance orders for administrative action that may violate taxpayers' rights (Fogg, 2017: Online).

Not only was the South African Tax Ombud partly modelled on a hybrid of the United Kingdom and Canadian models, the two countries together with Australia are also members of the Commonwealth Group, a group of nations that support each other and work together towards meeting international objectives (Commonwealth Network, 2015). The model of the South African Tax Ombud is therefore be similar to the Canadian Taxpayer Ombudsman model (SARS, 2011: 4). However, the South African Tax Ombud model did not adopt the Canadian and United Kingdom models in their entirety, and therefore the study explores other factors of these two models to evaluate if any lessons could be taken from adopting the factors that differ to the South African model. Croome (2012: 1), cited by Ofori-Boateng (2014: 81)) explained that in democratic countries such as the United Kingdom, specific legislation has been enacted that allows taxpayers, in well-defined cases, to be entitled to recover wasted costs resulting from the conduct of Her Majesty's Revenue and Customs ("HRMC"), or to receive a consolation payment in the form of a reimbursement for the suffering caused to them by the revenue authorities.

According to the Standing Committee on Finance (2011: 4), when the model for the South African Tax Ombud was considered Australia did not have a dedicated oversight for tax complaints. From 2015, tax complaints which were handled by the Commonwealth Ombudsman were transferred to the specific Australian Tax Ombud in the form of the Inspector General of Taxation (Commonwealth Ombudsman: Online). It is therefore important to determine whether the model adopted for the Inspector General of Taxation can offer an alternative to the South African Tax Ombud.

It appears appropriate to compare the challenges faced by the South African Tax Ombud to those in the five selected countries. From this comparative study, recommendations will be made on how the challenges faced by the South African Ombud can be addressed in order to adapt the South African Tax Ombud model.

The research question is therefore: What are the challenges in respect of the independence of the office impeding the efficacy of the South African Tax Ombud and are the challenges unique to South Africa or do Ombud offices in selected countries face similar challenges? Where this study refers to the "structure" of the Office of the Ombudsman, this relates to the institutional and regulatory framework within which the South African Tax Ombud operates.

1.2 Goals of the Research

The goal of this research is to compare the challenges inherent in the South African Tax Ombud model as it relates to the independence of the office to the Ombudsman models in the United Kingdom, Canada, the United States and Mexico, to seek the best solutions that can be adopted in the South African Tax Ombud model.

The primary goal of this study will be addressed by the following sub-goals:

- to discuss elements of an effective Ombudsman;
- to review the role of the South African Tax Ombud, including the legal framework of the Tax Ombud and the effect of recommendations by the Tax Ombud;
- to determine whether the challenges faced by the South African Tax Ombud are similar to challenges encountered in the selected foreign jurisdictions by comparing the models adopted in each country; and
- if the research reveals that the South African Tax Ombud does not effectively protect taxpayer's rights, to recommend whether an amendment should be made to the Tax Administration Act to grant more powers to the Tax Ombud.

1.3 Research Methods, Procedures and Techniques

A qualitative research method will be used in this study. Creswell (2003: 182) explains that qualitative research is fundamentally also interpretative. The aim of this research is not to support or reject any hypothesis, but to interpret data in a manner that will achieve a meaningful conclusion. This research method will assist the researcher to understand the impact the challenges have on the efficacy of the South African Tax Ombud. A comparative analysis will be performed of the South African Tax Ombud model with similar offices in selected foreign jurisdiction and the findings will be analysed to conclude whether the South African Tax Ombud has the necessary powers and is adequately resourced to fulfil his role as a protector of taxpayers' rights.

The data was derived from the literature to be reviewed, which included the following:

- the Constitution of the Republic of South Africa, 1996;
- legislation and relevant case law in South Africa and the selected foreign jurisdictions;
- articles and reports on the Ombud offices in South Africa, United States of America, Canada, and the Mexican PRODECON. The search engines mainly used for the articles and reports in the study were government websites from the selected countries as well as various journal platforms and Google Scholar.

1.4 Ethical Considerations

As all the data are publicly available, no ethical considerations arise in relation to their use. Interviews will not be conducted; opinions will be considered in their written form. The researcher will not exaggerate or filter the data or results to support a particular viewpoint. Content will not be withheld or altered. All sources of data will be appropriately acknowledged, and full references provided.

1.5 Overview of the thesis

This study is divided into five chapters as follows:

Chapter 1 serves as a guide to the research process and discusses the general background of the study, research context, research methods and goals of the research.

Chapter 2 discusses essential characteristics of an effective Ombudsman, which serves as a guide for the powers that an Ombudsman should possess in order to be effective.

In chapter 3, the background of the South African Tax Ombud is considered by measuring it against some of the essential characteristics identified in chapter 2 in an attempt to review the structure of the Tax Ombud against the identified norms.

A comparative study of the Tax Ombud with similar selected foreign jurisdictions is considered in chapter 4 to ascertain if any lessons can be adapted for the South African Tax Ombud model.

In chapter 5, the summary, findings, recommendations and conclusion of the study are presented, and the research question addressed whether the Tax Ombud has the necessary independence to be an effective protector of taxpayer rights.

CHAPTER 2: ELEMENTS OF AN EFFECTIVE OMBUDSMAN

2.1 Introduction

Administrative actions and the outcomes of decision makers affect everyone affected by the decisions. It is often presumed that public servants will at all times act in the public interest and that when they make decisions, such decisions will be fair and reasonable. However, corruption and maladministration are a common phenomenon in government departments across the world. The effects of corruption and maladministration can be seen in the economic and administrative inefficiency of a country. These actions of maladministration and corruption undermine democracy, stunt social and economic development and weaken government's efforts to deliver effective services to its citizens. Unfortunately, the citizens of a country are the victims of such actions by the government. Mpabanga (2009: 6) defined maladministration to include bias, adversity, ineptitude, inattention, rudeness, neglect, delay, arbitrariness and incompetence.

For the redress of administrative inefficiency by the government, the aggrieved party normally approaches the courts; however, the court procedures can be slow, lengthy and costly (Mthimunye, 2013: 1). Furthermore, the courts are often overburdened with normal litigation that is expensive, which results in administrative matters not being prioritised. This makes it difficult for the aggrieved party to get justice.

This raises concerns and the need for the establishment of specialised institutions to provide redress for people aggrieved by government administrators, without the associated expenses or formalities. All over the world, developed and developing countries took an interest in the concept of the Ombudsman. Ombudsman institutions differ from courts in that they have limited coercive powers and resolve disputes by means of arbitration and mediation. This control mechanism is a complement to the courts in providing quick remedies to litigants (Cheng: 1968).

The Office of the Ombudsman is established to protect the people against violations of human rights, the abuse of power by public institutions, error, negligence, unfair decisions and maladministration, in order to improve public administration with a view to making

governments responsive to people's needs and public servants more accountable to members of the public (Mpabanga, 2009: ix).

The purpose of this chapter is to discuss the uniqueness of the office of the Ombudsman as a mechanism of administrative control over bureaucracy. Through this discussion, it is necessary to examine the history of the origin of the office of the Ombudsman offices internationally. This will take into account the elements that make an Ombudsman office effective.

2.2 What is an Ombudsman?

According to the American Bar Association resolution (2004: 1), an Ombudsman is categorised as an independent, impartial and confidential complaint handler who serves as an alternative means of dispute resolution. The International Bar Association (1974) defines the Ombudsman as an office provided for by the constitution or by action of the legislature or parliament and headed by an independent high-level public official who is responsible to the legislature or parliament to receive complaints from the aggrieved against government agencies, officials and employees or who act on their own motion, and who have the power to investigate, recommend corrective action and issue reports.

The African Ombudsman and Mediators Association (Online: 1) describes an Ombudsman as an independent, impartial public official with authority and responsibility to receive and investigate the complaints of ordinary citizens about the actions of government departments and institutions, and, when appropriate, arrive at findings and make recommendations.

Broadly speaking, the office of the Ombudsman has a mandate to conduct investigations concerning instances of maladministration by the government in accordance with complaints received from citizens. The Ombudsman office serves as a major role player in safeguarding human rights and assisting citizens to obtain the much-desired redress in cases of maladministration in the activities of the government.

The American Bar Association (2001: 1) identified five types of Ombudsman as the classical, legislative, executive, organisational and advocate Ombudsman. The most common

Ombudsmen are the Classical and Organisational Ombudsmen. Larkins (2006: 1) described the classical Ombudsman as a function that is created by law and is usually appointed by the legislation to receive complaints about the administrative acts of government agencies. Ofori-Boateng (2014: 41) explained that the organisational Ombudsman is a complaint handler and dispute resolver who helps an organisation work for change.

2.3 Ombudsman History

2.3.1 Origin of Ombudsmen

Conway (2013) observed that knowing and disseminating the history of the Ombudsman helps the institutions to better understand the distinct nature of the role and how to fulfil its promise.

According to Newhart (2007:4), the word "ombudsman" has its roots in Sweden and the world's first parliamentary ombudsman was appointed by the Swedish Parliament in 1809. The functions of the institution were to supervise the courts and other public authorities, to deal with complaints from citizens, to prosecute officials and government ministers who behaved unlawfully and to safeguard the rights of the citizens (Reif, 2009, p. xiii). Loosely translated, the word Ombudsman means agent or representative and originates from Swedish (American Bar Association: 2001).

The Swedish Ombudsman came about as a doctrine of separation by dividing state powers between the King and his Council, Parliament and the Courts. In balancing the wide powers afforded to the King and his Council, the parliament was given far-reaching means to exercise control over government activities. This power included, amongst others, the appointment of an Ombudsman who would be responsible for ensuring that the laws were adhered to by various administrative authorities and by the courts (Gammeltoft-Hansen, 2009: 3).

There has since been a worldwide resurgence of interest in establishing Ombudsman institutions to keep governments in check and ultimately ensure that government institutions are open and responsive to the needs and rights of citizens. The Ombudsman institution is now present in over 130 countries (McMillan, 2004:1). According to Osakede and

Ijimakinwa (2014: 121) Tanzania was the first African country to establish an Ombudsman institution in 1966.

Although ombudsman models vary significantly, with countries adopting different forms and names such as the South African Public Protector, Zambian Investigator General, and Taxpayer Advocate Services in the United States of America, the existence of the various Ombudsman models reflect commitment in assisting citizens who seek redress against maladministration by providing or recommending remedial action (Mukoro, Online: 5).

2.3.2 The Ombudsman in South Africa

In South Africa the concept of the Ombudsman was entrenched before 1994 when the country became a democratic state and the concept of an Ombudsman has therefore existed for many years in South Africa. The predecessors of the Public Protector were the Advocate General and the Office of the Ombudsman both of which get their powers under the Ombudsman Act, 118 of 1979 (Mbiada, 2017: 6). The Office of the Ombudsman in South Africa was first established in the form of the Advocate General in 1979 which was later renamed as the Ombudsman in 1983 (Montesh, 2009: 195). Since then the concept has been changed twice to Advocate General and the Public Protector.

The Ombudsman institution in South Africa is currently referred to as the Office of the Public Protector which was established under chapter 9 of the Constitution of the Republic of South Africa, 1996 (‘the Constitution’) to strengthen constitutional democracy in the country. In terms of section 182(1) of the Constitution, the Public Protector is mandated to investigate the actions of the government, government departments, government agencies and government officials that are alleged to be improper or to result in any impropriety or prejudice; to report on that conduct; and to take appropriate remedial action, but it excludes the judicial functions of courts or the private sector. The issue of lack of independence does not arise for the Public Protector as it has a legal footing provided by the Constitution. Its term of appointment is also fixed, and the appointment of the Pubic Protector is approved by the majority of the joint sitting of the National Assembly.

The third interim report by the Katz Commission of Inquiry into Taxation (1995: 28) recognised that, while the role of the Public Protector as ultimate watchdog over taxpayer and other rights should be recognised and strongly encouraged, the underlying foundation of trust between taxpayers and authorities would be better served by the more direct mediatory role of a Tax Ombudsman or Adjudicator along the lines of the United Kingdom example. In an attempt to uphold and preserve the dignity that section 2 of the Constitution accords to taxpayers, pressure was 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 (Ofori-Boateng, 2014: 35).

Until 2013, taxpayers had no independent redress outside of the Public Protector and the courts once all the mechanisms had been exhausted with SARS. The Office of the Tax Ombud, which aligns with the role of the Public Protector, was then established on 1 October 2013 under section 259 of the Tax Administration Act, 28 of 2011, to investigate maladministration in SARS through complaints lodged at the request of a complainant. This office also eases pressure on the Public Protector in terms of matters relating to taxation.

2.4 Essential elements

The design of the Ombudsman office differs widely by factors such as jurisdiction, social, economic and political context and complaint handling. However, there are essential elements for the existence of all Ombudsman offices. While Ombudsman institutions cannot be standardised, there are common features amongst Ombudsmen. This section attempts to identify universally recognised essential features in the framework of Ombudsman institutions.

Several studies on the Ombudsman institution have identified a list of fundamental features and characteristics that are common amongst Ombudsmen and also essential to the unique role of the Ombudsman. Stuart (1974: 147), as cited by Sudhankitra (2015: 63) identified the characteristics of an Ombudsman as "(1) an independent and non-partisan officer of the legislature, provided for in the constitution or by law who supervises the administration; (2) he deals with specific complaints from the public against administrative injustice and

maladministration and; (3) he has the power to investigate, criticise and publicise, but not to reverse, administrative action."

The American Bar Association definition (2004:2) of an Ombudsman recognises three commonalities for an Ombudsman to work effectively. These are independence, impartiality and confidentiality. Gregory (Online, 9) described the effectiveness of the Ombudsman institution based on independence and impartiality, visibility and access, wide jurisdiction and competence, extent of non-statutory practices and procedures, speed, adequacy of remedial action secured and effectiveness in obtaining compliance with recommendations.

The basic characteristics for an Ombudsman to effectively function can therefore be inferred from the various definitions of an Ombudsman as independence, fairness, impartiality and confidentiality.

2.4.1 Independence

The principle of independence is central to the effectiveness of the Ombudsman institution. This makes independence the most fundamental value in the effectiveness of an Ombud institution. According to Ruppel-Schlichting (Online, 227), independence describes the state of not being controlled by other people or things. Independence is an essential element in ensuring the citizens' confidence and trust in the Ombudsman's complaint handling. People are more willing to complain to an independent office where they will not be subjected to victimisation. Independence is a cornerstone upon which an Ombudsman's work is built and without which its work would not be credible (Field, 2010:3).

Independence is a condition for any fair trial. In its basic understanding, independence in the context of an Ombudsman refers to taking decisions free from any external pressure or manipulation. Independence is the precondition for impartial decision making. An institution can therefore not be impartial if it is not independent. Field (2010:1) described independence as being free from the control of others in what you do. He further explains that in the case of government, independence usually refers to being independent of the government. This includes the capacity to administer an institution's own budget and to make employment decisions without direction.

The American Bar Association (2004:3) defines independence in the context of an Ombud that the Ombud is and appears to be free from interference in the legitimate performance of duties and independent from control, limitation, or a penalty imposed for retaliatory purposes by an official of the appointing entity or by a person who may be the subject of a complaint or inquiry. In assessing whether an Ombud is independent in structure, function, and appearance, the following factors are important: whether anyone subject to the Ombud jurisdiction or anyone directly responsible for a person under the Ombud jurisdiction (a) can control or limit the Ombud performance of assigned duties or (b) can, for retaliatory purposes, (1) eliminate the office, (2) remove the Ombud, or (3) reduce the budget or resources of the office.

Ofori-Boateng (2014: 43) argued that the effectiveness and responsiveness of the Ombudsman institution relies on the office being independent of the government and the political process and not subject to influence by those with a perceived interest in the outcome of an investigation such as those under the scrutiny of the Ombudsman.

Sudhankitra (2015: 65) recognises that there are two types of independence: institutional and functional independence.

Institutional independence

Institutional independence is achieved by arranging the Ombudsman office in an external position in relation to the executive bodies that are subject to its scrutiny and also placing it in the machinery of state at a sufficiently high level. Independence must be guaranteed by the law or through the constitution as this will dictate that there will be no interference in the activities or decision-making of the Ombudsman.

Functional/operational independence

This refers to the ability to decide which matters to pursue free from interference by other organisations. This includes;

- The ability to carry out systemic investigations, which are known as own motion investigations, without the request by a complainant or without requesting prior approval from any executive. If the Ombudsman has capacity to initiate own investigations, activities of the office would not be contingent upon approval of any party.
- Access to information – it is imperative for investigation by an Ombud that the organisation under the scrutiny of the Ombud is legally bound to supply the Ombud with documents requested to conduct full investigation with no grounds for refusal.

Over and above the independence of the Ombud from other state bodies, the Ombud should have an obligation to ensure his or her own independence. This can be highlighted through issues such as how the Ombudsman will recuse himself or herself from activities that give rise to a conflict of interest that would compromise his or her independence. That is, he or she must not engage in professional activities outside his or her office. He or she should not hold membership of a political party, should not hold state positions and should set out clearly how a conflict of interest will be managed.

Components contributing to independence

There are several factors which serve to secure the independence of an Ombudsman institution, for example, the appointment, budget and legal framework.

Positioning within the legal framework

To be credible and effective in the review process, the Ombudsman office must be independent in its structure (American Bar Association, 2004). The Ombudsman's positioning within the legal framework is fundamentally important to its independence. The Ombudsman's independence is enshrined in the legislation that creates the office. The Ombud must be anchored on a statutory or legal footing with the legislation articulating a clear mandate and stating the powers of the Ombud in exercising his mandate.

Ruppel-Schlichting (Online, 277) notes that an Ombudsman can only be established by law or by way of a jurisdiction's constitution. The establishment of the institution through the

constitution creates a sense of permanence as the constitutional amendment process is designed to prevent frequent amendment. Sudhankitra (2015: 65) explains that amongst constitutional watchdogs, the Ombudsman is the one most at risk of abolition on political grounds. He further suggests that an effective way to mitigate such risk is to enhance the institution's legal status by incorporating it in the constitution. An Ombudsman that is independent is difficult for others to control.

The Constitution is the supreme law of the country and thus by integrating the Ombudsman office in the Constitution its permanence is underlined. Therefore, an institution's anchorage in the constitution supports its independence by underlining the permanent nature. This creates stability and credibility as the Ombudsman is free to investigate complaints without fear of the office being closed down. The position of an Ombudsman is strengthened by its existence which is governed by the Constitution. An attempt to dissolve an Ombudsman institution that is governed by the Constitution will be difficult as it will require a change in the Constitution.

The procedure followed in amending the Constitution is significantly different from one that is followed to pass or amend ordinary legislation. A change in the Constitution in South Africa is provided for in section 74(2) of the Constitution and requires a two-thirds majority of the members of the National Assembly, as well as supporting vote of at least six out of the nine delegations in the National Council of Provinces. This process was designed to prevent and reduce frequent and unnecessary changes or amendments to the Constitution. The existence of an Ombudsman in the form of an Act will be easy to dissolve because to change a law in South Africa is achieved through a simple majority. Integration into the Constitution thus removes the office from the political sphere and uplifts the profile of the Ombudsman institution.

An Ombudsman that does not report directly to Parliament has its independence compromised (Mpabanga, 2009: xvii).

Appointment and removal of the Ombudsman

Field (2010: 5) suggests that the appointment and dismissal of an Ombudsman should ideally require a supermajority of the legislative and parliamentary bodies. He further reiterates that the dismissal should not be politically motivated but rather be as a consequence of incapacity.

Independence is strengthened when the Ombudsman is appointed or confirmed preferably by a supermajority of all members of a legislative body or entity other than those the Ombudsman reviews. Therefore, to guarantee the independence of the Ombudsman, the appointment or removal by a majority of the legislative body is important as political appointments could jeopardise the independence of the Ombudsman. By tradition, all important political parties in parliament will reach an agreement on the appointment (Stuart, 1974: 3). This strengthens the public confidence in the Ombudsman's political independence in that the Ombudsman's decisions are made without any regard to political pressure.

Lebotse (2000) as quoted by Mpabanga (2009: 20) suggested that the Ombudsman should be appointed and answerable to Parliament and not to the executive. This will ensure that his or her independence is not compromised. Field (2010: 3) expressed the view that the Ombudsman should be removed from office for proven incapacity or misconduct. He further explains that this should only be undertaken by the Parliament.

Tenure of office

An additional dimension of institutional independence is the term of office for each Ombudsman. In order to safeguard the institutional independence of an Ombudsman, setting a clear tenure of office is of importance. Ruppel-Shlichting (Online: 271) states that Ombudsmen enjoy a fixed long term of office, which in most cases comes with the option of reappointment.

Budget autonomy

Another area of significant importance in the independence of the Ombudsman institution is the budget and provision of adequate resources for the Ombudsman to fulfil his mandate. The legal framework that governs the institution of the Ombudsman should seek, amongst others, its budgetary independence, which is essential so that the Ombudsman can completely fulfil the function of overseeing the public administration (Volio, Online). To put the Ombudsman office in perspective to add value to a country's administrative system, the office ought to be autonomous from the government.

It is important that the Ombudsman is adequately resourced to enable him or her to fulfil the role without any constraints. The Ombudsman should therefore not be left at the mercy of the government agencies the office is overseeing to provide financial resources for the purposes of carrying out its mandate. It is crucial for the independence of the Ombudsman that the office is adequately allocated with a budget that is sufficient to carry out the mandate that is prescribed by the law. If this were not the case, the Ombudsman would be incapable of carrying out the necessary investigations resulting in a situation that may weaken the independence of the institution. The Ombudsman should be accorded the opportunity to propose a budget sufficient to carry out the functions set out by the law.

Financial independence allows the Ombudsman institution to obtain and manage its funds without interference from executives of the state institutions that the Ombudsman oversees. This suggests that if an Ombudsman was to rely on funding from an organisation of which it is a watchdog, this could compromise the independence of the Ombudsman. The organisation in charge of the Ombudsman budget may limit resources in order to restrict the Ombudsman in performing his duties. It is not desirable for the Ombudsman financing to be at the mercy of a state organisation under its jurisdiction.

Pettigrew (2011: 1) argues that where the Ombudsman institution is funded through the agency over whom the Ombudsman has jurisdiction, the Ombudsman independence can be promoted if the Ombudsman is permitted to prepare and submit his or her own budget and account for it. In addition to submitting the budget to the parliament, the Ombudsman should be able to spend the funds allocated to the office at his or her own discretion without requesting prior approval.

Appointment and dismissal of staff

Independence can prevail if the office of the Ombudsman is not politicised. The Ombud should have sole discretion to appoint and dismiss his or her staff. The underlying rationale for independence in the context of an Ombudsman institution is that an Ombudsman must be capable of conducting fair and impartial investigations, credible to both complainants and the authorities that may be under the Ombudsman's review. Independence is a prerequisite for the Ombudsman office to function properly. Ombudsmen should therefore be independent of the entity they serve. Ombudsmen are independent in nature and, if not independent, such

institutions cannot be classified as Ombudsmen (Gidoomal, 2014). Without independence, there can be no confidence that the Ombudsman investigations have not been tainted by influence.

2.4.2 Fairness

Fairness is an essential criterion in the framework of the Ombudsman institution. While impartiality connotes the absence of bias, fairness relates to the state of arriving at decisions that are fair and considered fair. Reif (2009) explained that fairness is the requirement that decisions are based on the information before the institution and by having specific criteria upon which its decisions are based.

Those adversely affected by decisions have to be provided with reasons for decisions taken, for example, to explain why a complaint will not be investigated, why a complaint does not fall within ambit of the Ombudsman, and allowing the agency under the Ombudsman scrutiny to respond to the allegations or findings made (Wheeler, Online: 65). The rationale is for both parties to be entitled to fairness in that an equal opportunity to respond is afforded in both cases.

Conduct is seen to be fair if it is perceived to be morally right, free from prejudice, favouritism or self-interest (Wheeler, 2014: 2). Morality is a subjective matter and what is seen as entirely fair at one end of the spectrum can manifestly be unfair at the other. Ombudsmen are therefore obliged to adopt objective standards regarding what is fair.

Fairness of an Ombudsman allows a common citizen to question a well-resourced powerful government agency. Ombudsman Saskatchewan (2012: 1) explains the dimensions of fairness as follows:

1. procedural fairness, which relates to how a decision is arrived at;
2. relational fairness, which refers to how a person is treated; and
3. substantive fairness, that is the fairness of the decision made.

Ofori-Boateng (2014: 16) describes substantive and procedural fairness as follows:

Substantive fairness – entails laws permitting, restricting and regulating individual activities and behaviour applied uniformly to all individuals.

Procedural fairness – suggests that enforcement of the law should be evenly applied.

2.4.3 Impartiality

The American Bar Association (2004:3) described the impartiality of an Ombud as conducting inquiries and investigations in an impartial manner, free from initial bias and conflicts of interest. Impartiality does not preclude the Ombud from developing an interest in securing changes that are deemed necessary as a result of the process, nor from otherwise being an advocate on behalf of a designated constituency. However, the Ombudsman must preclude himself from involvement where a conflict of interest may exist.

Touchie (2001) suggests that for a decision to be impartial, it must be replicable by other decision makers. This raises the question of whether other decision makers will reproduce the same result given the same facts and consistently come to the same decision.

An Ombudsman ought to instil confidence in the general public of his or her impartiality in holding to account the government by exercising functions without favouritism or prejudice. This can be achieved by appointing the Ombud in a highly respected position amongst political groups; appointment through majority votes. Remac (2013: 62) observes that on certain occasions, an Ombudsman institution has been included in the legal systems of a country whose legal conscience was not and sometimes is still not prepared for the soft law character of the Ombudsman institution.

Genuine impartiality is possible once an Ombudsman is perceived to be and is independent (Howard & Smith, Online). An Ombudsman should act without bias or conflict of interest. Where conflict of interest arises, there should be measures in place to deal with this.

Although an Ombudsman investigates complaints regarding an agency at the request of the complainant, he or she is not an advocate of the complainant nor the defender of the government agency. Ombudsmen must be careful not to create an impression of advocacy for

complainants or bias towards the government department. Impartiality refers to a state of unbiased behaviour towards the parties involved. Impartiality is a crucial element for the Ombudsman, it helps the Ombudsman to earn respect and creditability from the government department and the complainants (Gottehrer, 1998: 2).

Sudhankitra (2015: 70) emphasized the impartiality of the Ombudsman institution as a crucial key to getting the Ombudsman findings and recommendations implemented. An Ombudsman lacks coercive power by its nature and the perception of being impartial earns such institutions trust in the public and state eye. Findings that are perceived to be biased are more likely to be rejected, whilst government or private departments being reviewed by an unbiased oversight body are likely to support the Ombudsman office if it can be assured that unmeritorious and baseless complaints will be dealt with fairly. It is imperative that Ombud is viewed to be impartial and neutral as the acceptance of his findings and decisions rely on this perception by the public or public agency.

An Ombudsman should be perceived as impartial in the review of cases brought before his or her attention by acting as an advocate of maintaining principles of administrative fairness. Hammarberg (2009: 1) suggests that this can be achieved by the Ombudsman distancing himself or herself from partisan politics or any affiliations that can raise concerns about his or her integrity.

2.4.4 Confidentiality

Confidentiality in the context of an Ombudsman means that identities and communication with the Ombudsman are shielded (Howard & Smith, Online). An Ombudsman does not disclose confidential information unless there is an imminent risk of serious harm. Exceptions may exist at the Ombudsman's discretion for disclosing non-confidential or confidential information that cannot be traced back to an individual or the source identified (American Bar Association, 2004).

The Ombudsman should have the privilege and discretion to keep confidential or release any information related to a complaint or investigation. This standard balances the need to protect sensitive information so that a complainant can come forward and witnesses, and subjects can

speak openly, with the need to disclose information as a part of an investigation or public report (United States Ombudsman Association, 2003:2). This protects the complainants from fear of victimisation by the government agency.

Confidentiality is a crucial principle as it fosters a trust relationship between the complainant and Ombudsman. Grant (2000: 2) maintained that an Ombudsman's failure to uphold confidentiality can result in irreparable harm for both the complainants and the Ombudsman office.

2.5 Conclusion

From the above discussion, it can be concluded that Ombudsman institutions are an important pillar of democracy. Democracy is concerned with the welfare of the people and this requires increased interaction between the government and the citizens. The institution of the Ombudsman is a unique mechanism of administrative bureaucracy with a redress mechanism to address unfair administrative decisions. A successful state ought to have institutions that would promote and ensure smooth interactions between the citizens and state agencies (Ofori-Boateng, 2014:39).

The Ombudsman's jurisdiction is one of the important factors in the effectiveness and credibility of the Ombudsman's office. To ensure permanency of the operations of the Ombudsman, the Ombudsman should preferably be established through an Act of Statute, ideally the Constitution of the country. Issues such as the autonomy and tenure of office should be clearly established to avoid undue political interference in the procedures of the institution. This will ensure that the Ombudsman's independence is strengthened.

This chapter found that the independence, impartiality, fairness and confidentiality of an Ombudsman are important factors in ensuring the efficacy and effectiveness of an Ombudsman. These elements create a position of trust and confidence in the Ombudsman system.

In chapter 3, some of the essential factors are applied in the context of the South African Tax Ombud in order to assist in making a substantive conclusion on whether the office of the Tax Ombudsman complies with international norms for Ombudsmen.

CHAPTER 3: THE SOUTH AFRICAN TAX OMBUD AND OTHER AVAILABLE COMPLAINT MECHANISMS FOR TAXPAYERS IN SOUTH AFRICA

3.1 Background

This chapter outlines the background to the establishment of the Office of the Tax Ombud and investigates the structure of the Tax Ombud to establish whether the current model of the Tax Ombud complies with international best practice and defines the legal framework of the office.

The South African Revenue Service (SARS) was established as an autonomous revenue collection agency through the South African Revenue Service Act, 34 of 1997, to amalgamate the Inland Revenue and Customs and Excise departments. The purpose of the amalgamation was to ensure efficient and effective administration of the tax collection (Dwyer, 2004: 5).

In terms of section 195 of the Constitution, public administration must be governed by the democratic values and principles enshrined in the Constitution, including a high standard of professional ethics; efficient, economic and effective use of resources; provision of impartial, fair and equitable service; transparency and accountability. According to section 239 of the Constitution, an institution is an organ of state if it exercises public power in terms of legislation. Moosa (2017: 1) explained that tax administration, which is exercised by SARS, falls within the rubric of public administration. It is therefore submitted that SARS is an agent of public administration and this necessitates that SARS acts in the public interest as bound by this Constitutional mandate. As a creation of statute, SARS is imbued with statutorily conferred public powers, some of which are provided for under the Tax Administration Act, 28 of 2011 (the "Tax Administration Act") (Moosa, 2017: 1). Moosa (2017: 1) submitted that SARS may encroach on taxpayer's rights contained in the Bill of Rights while exercising these powers.

One of the key objectives of the Tax Administration Act is to achieve a balance between the powers and duties afforded to SARS, on the one hand, and taxpayer obligations and rights on the other (SARS, 2013: 4). This balance between SARS and taxpayers will enhance the

degree of equity and fairness in applying tax administration. International practice has demonstrated that if taxpayers perceive and experience the tax system as fair and equitable, they will be more inclined to voluntarily comply with the tax system (Faber, 2015). It can be maintained that the creation of an independent recourse for taxpayers that will deal with procedural and administrative matters would support the objective of the Tax Administration Act and reflect international best practice.

The third interim report of the Katz Commission of Inquiry into Taxation (1995: 27), in support of international best practice, recommended that an independent Tax Ombud is appointed to protect taxpayer's rights and mediate between taxpayers and revenue authorities. While this was not immediately welcomed, a second proposal for the creation of the Tax Ombud was made in the second draft of the 2010 Taxation Laws Amendment Bill. Pursuant to this, the Tax Administration Act, which became effective on 1 October 2012, required that the Tax Ombud be established within one year of the Act. As a result, the Office was established in October 2013 by the Minister of Finance in terms of the section 259 of the Tax Administration Act. The mandate of the Office, in terms of section 16(1) of the Tax Administration Act, was to review and address complaints by any taxpayer regarding a service, procedural or administrative matter arising from the application of the provision(s) of a tax Act by the South African Revenue Service. While the introduction of the Tax Ombud was widely welcomed by academics and tax experts, reservations have also been expressed regarding the model adopted for the office. Ofori-Boateng (2014: 59) criticised the manner in which the Tax Ombud was established, suggesting that, for a strengthened independent Ombud, it would have been preferred that the Tax Ombud be created by an Act of Parliament and not by the Tax Administration Act. This view was supported by Mpabanga (2009:2) adding that the Act establishing the Ombud should establish an independent Ombud office with the independence of the office being clearly articulated.

3.2 Dispute Mechanisms in South Africa

In 2002, the then Minister of Finance, Trevor Manuel, announced in a Media Statement (National Treasury, 2002: 4) a new dispute resolution process as a result of interpretation of the tax laws, referring to the following avenues for resolving disputes; objections, Alternative Dispute Resolution, the Tax Board, the Tax Court and the normal court system.

At the same time, it was recognised that the mechanisms for resolving disputes of an administrative or procedural nature needed improvement. As a result, the SARS Service Monitoring Office was established to provide an internal recourse for taxpayers in terms of disputes of a service, procedural or administrative nature. This office is now referred to as the SARS Complaint Management Office from October 2015. The SARS Guide to the Complaints Functionality on Efiling (SARS, 2015: 3) states that the new complaint process will facilitate how taxpayer complaints are lodged, tracked and resolved through electronic channels. While this was an improvement, this was an office within SARS and could not be perceived as independent as it reports to the same Commissioner to whom SARS reports.

Dwyer (2004: 102) recognises the three dispute avenues for taxpayers when dealing with SARS as non-constitutional, administrative and constitutional avenues. The non-constitutional avenue is provided for by the revenue legislation to address instances where taxpayers are aggrieved by the tax liability on assessment (Mthimunye, 2013: 11). The Tax Administration Act in this regard provides for the dispute resolution process under Chapter 9 in the form of objections, appeal, Alternative Dispute Resolution ("ADR"), the Tax Board, the Tax Court and the High Court. With reference to the administrative avenue, this is provided for under the Promotion of Administrative Justice Act, 3 of 2000 (the "PAJA"). This avenue provides the taxpayer with the opportunity to take the Commissioner's decision on judicial review. Dwyer (2004: 108) described the constitutional avenue as the avenue whereby the taxpayer who challenges the constitutionality of a provision of legislation approaches the High Court to seek redress.

3.3 Other available complaint remedies in South Africa

The other available complaint remedies include the PAJA, the Public Protector and SARS' internal remedies.

3.3.1 Promotion of Administrative Justice Act remedies

The PAJA was promulgated in terms of section 33 of the Constitution to give effect to the right to just administrative action (Dwyer, 2004: 109). Section 1 of the PAJA defines an "administrative action" as:

> *any decision taken, or any failure to take a decision, by-*
> *(a) an organ of state, when-*
> *(i) exercising a power in terms of the Constitution or a provincial constitution; or*
> *(ii) exercising a public power or performing a public function in terms of any legislation; or*
> *(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,*
> *which adversely affects the rights of any person and which has a direct, external legal effect…*

Section 3 of the PAJA requires that: *"Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair."*

The provisions of section 7(2) of the PAJA require that where a person is aggrieved by a decision of any organ of state, such person must first exhaust the available internal remedies before taking the matter on review by the High Court. The Supreme Court of Appeal in *DDP Valuers (Pty) Ltd v Madibeng Local Municipality* [2015] ZASCA 146, described the internal remedy as a platform, in the same organisation, whereby an aggrieved person has the opportunity to be heard by another forum or a tribunal which has the powers to vary, substitute or confirm the decision taken by the organisation at a lower level. The court held that these internal remedies, which are part of our law, are designed to help a public body to correct its mistakes before they get to the courts or a tribunal. Only once these remedies have

been exhausted can an aggrieved party apply to have a decision by the state organ reviewed or set aside by a court of law in terms of section 6(1) of the PAJA. Decisions by SARS that could be referred to the High Court for review under section 6(1) of the PAJA include a decision by SARS not to issue a reduced assessment under section 93 of the Tax Administration Act or a jeopardy assessment issued under section 94 of the Tax Administration Act. Section 94 clearly provides an automatic right for a taxpayer to take a decision of SARS on review and states that:

> *(2 In addition to any rights under Chapter 9, a review application against an assessment made under this section may be made to the High Court on the grounds that—*
>
> *(a) its amount is excessive; or*
>
> *(b) circumstances that justify a jeopardy assessment do not exist.*

On the other hand, the internal dispute resolution process is not available in terms of a request for a reduced assessment made under section 93 of the Tax Administration Act. In other words, there are no internal remedies that a taxpayer would need to exhaust under these circumstances before a decision can be taken on review by a High Court. The Tax Ombud does not have jurisdiction to consider matters that are with the courts and would therefore not be able to interfere in matters such as reviewing SARS decision to grant or decline to grant a reduced assessment in terms of section 93 of the Tax Administration Act.

The PAJA refers to an administrative action, while the Tax Administration Act refers to an administrative matter in relation to the Tax Ombud. It is imperative that the meaning of these concepts is explored in order to understand the relationship between the PAJA and the Tax Ombud. While the Tax Ombud provides a function similar to ensuring administrative fairness, the Tax Ombud can only do so to the extent that it falls within the ambit of tax administration. Therefore, the Tax Ombud cannot be involved in reviewing the PAJA requests.

3.3.2 The Public Protector

The third interim report of the Katz Commission of Inquiry into certain aspects of taxation (1995) recommended the establishment of a Tax Ombud, which is to be situated between the Public Protector and the Courts. The report clearly suggested that the Tax Ombud should be carefully modelled in order not to interfere with the roles of the courts and that of the Public Protector.

The Office of the Public Protector was established through section 181(a) of the Constitution to support and entrench constitutional democracy in South Africa (Mbiada, 2017:7). Therefore, the office derives its powers from the supreme law of the country and is accountable only to Parliament. In addition to its powers emanating from the Constitution, the Public Protector derives its powers and functions from the Public Protector Act, 23 of 1994. In terms of chapter 9 of the Constitution, the Public Protector's mandate is to investigate any conduct in the state affairs or in the public administration in any sphere of government that is alleged or suspected to be improper or to result in any impropriety or prejudice, to report on that conduct and to take appropriate remedial action. The Public Protector's jurisdiction is quite wide as it covers all spheres of government, including SARS as an organ of state, which provide an administrative function. The Tax Ombud on the other hand can only act as a watchdog to SARS in accordance with the powers conferred by the Tax Administration Act.

In terms of section 193 of the Constitution, the President appoints the Public Protector on the recommendation of the National Assembly, which comprises representation of all political parties.

Ofori-Boateng (2014:72) explains that the budget of the Public Protector is funded through the Department of Justice and Constitutional Development, stressing that this jeopardises the independence of the office, since the office is unable to motivate for its needs in order to effectively carry out its mandate.

As an office modelled on the Ombudsman office, the recommendations of the Public Protector are not binding on the state organisation or the official, and therefore rely on persuasive authority. However, the recent court judgement in *South African Broadcasting Corporation Limited and Others v Democratic Alliance*, 2015, 1 SA 551 (WWC), signifies that the Public Protector's remedial action cannot simply be ignored unless set aside by a court of law.

According to Carstens (2016: 23), where complaints that are lodged with the Tax Ombud are not resolved to the taxpayer's satisfaction, the taxpayer may then pursue any other avenue for redress, which includes escalating the complaint to the Public Protector. The Public Protector has wider powers and exerts more independence than the Tax Ombud. In terms of section 181(2) of the Constitution and section 13(1) of the Public Protector Act, the Public Protector must serve impartially and independently and perform his or her functions in good faith, without fear or prejudice. The independence of the Public Protector is clearly articulated through the Constitution and the Public Protector legislation, whilst it is submitted that the independence of the Tax Ombud remains questionable.

While debating on the positioning of the Tax Ombud, the Katz Commission (1995) argued that in most instances the Public Protector might be viewed as too adversarial to deal with minor taxpayer disputes with SARS. As a result, a direct mechanism such as an Ombud was required. It is therefore questionable whether the Public Protector would be an effective mechanism to approach for complaints that do not fall within the ambit of the Tax Ombud or where SARS does not accept recommendations of the Tax Ombud, as provided under section 20 of the Tax Administration Act.

3.3.3 SARS' Internal remedies

The Complaints Management Office is the SARS internal complaint mechanism available to taxpayers, it operates independently of the branch offices and reports directly to the Commissioner for SARS (Croome & Olivier, 2015:640). According to Croome and Olivier (2015: 640), the mandate of the Complaints Management Office does not include:

- the merits of disputes as to the amount of the assessments or schedules;

- complaints that have been referred to the Public Protector; and
- matters that have been or are before the Tax Court.

The Complaints Management Office, initially referred to as the SARS Service Monitoring Office, was launched with a view to assisting taxpayers facing administrative difficulties with SARS. The SARS website indicates that, prior to a complaint being lodged with the SARS Service Monitoring Office, taxpayers are required to give the SARS branch office or contact centre that is responsible for their affairs an opportunity to deal with an issue before raising it with the SARS Service Monitoring Office. Thus, the taxpayer is required to log a complaint with the SARS contact centre, and, if that does not resolve the matter within a reasonable time, to then request that the SARS Service Monitoring Office investigates the matter.

SARS was established in terms of section 2 of the South African Revenue Service Act. SARS is established as an organ of state within public administration but as an institution outside of the public service (Moosa, 2016: 159). In accordance with the amendment to the South African Revenue Service Act in 2002, the Commissioner is now appointed by the President of the Republic under section 6 of the Act (Moosa, 2016: 159). The President appoints the Commissioner for SARS and only the President can dismiss him/her. The Presidential appointment is not beholden to Parliament nor does he/she have to act in concurrence with the Minister of Finance (Davis Tax Committee, 2017: 7).

When the South African Revenue Service Act was passed in 1997, section 7 (1) of the Act provided:

> *(1) The Minister must appoint a person as the Commissioner for the South African*
> *Revenue Service.*
> *(2) The Minister must consult both the Cabinet and the board before appointing a person as the Commissioner. The appointment would be for an agreed term not exceeding five years, which is renewable.*

While section 7 of the South African Revenue Service Act empowers the Minister of Finance to appoint a person as an acting Commissioner for SARS, the South African Revenue Service

Amendment Act, 46 of 2002, amended the manner of appointment of the Commissioner to the current status which requires that the President of the Republic appoints the Commissioner. In particular, section 6(1) of the South African Revenue Service Act was amended to provide that the President must appoint a person as the Commissioner for SARS who will hold office for an agreed term not exceeding five years, but which is renewable.

The appointment of the Commissioner for SARS is protected by legislation as it is a parliamentary appointment, as opposed to the appointment of the Tax Ombud for whose appointment power is solely placed with the Minister of Finance.

In addition, section 3(1) of the Tax Administration Act stipulates that SARS administers the Tax Administration Act under the control of the Commissioner for SARS. This implies that the same Act establishing the Tax Ombud and his office are under control of SARS. Accordingly, this raises concerns, as the Tax Ombud is meant to be an oversight body for SARS but instead the Act that establishes the Tax Ombud is governed by SARS.

Section 22 of the South African Revenue Service Act provides that the Commissioner is an accounting authority of SARS for the purposes of Public Finance Management Act of 1999.

3.4 The South African Tax Ombud

In considering the best model to be adopted for the South African Tax Ombud, the criteria includes ensuring that the Tax Ombud's responsibilities and powers fit into the country's constitutional dispensation while still being aligned with existing international precedent (SARS, 2011: 2). The provisions creating the Tax Ombud are found in sections 14 to 21 of the Tax Administration Act. The main aim of the Tax Administration Act was to consolidate the various administrative provisions which were duplicated in different tax legislation into one piece of legislation (SARS, 2009: 4) and thus subject to review by the Tax Ombud. The Katz Commission recommended that the Tax Ombud be situated between SARS and the Public Protector (Standing Committee on Finance: 2011). In accordance with the recommendations made by the Katz Commission, a Tax Ombud with less far-reaching powers than the Public Protector was created (Standing Committee on Finance: 2011).

3.4.1 The Mandate of the Tax Ombud

The Tax Ombud was appointed with the mandate to review and address any taxpayer complaint regarding a service, procedural or administrative matter arising from any application of the provision of a tax Act by SARS in terms of section 16(1) of the Tax Administration Act. The Tax Administration Laws Amendment Act, 16 of 2016, broadened the mandate of the Tax Ombud through section 16(1)(b).

Section 16(1)(b) of the Tax Administration Act empowers the Tax Ombud to:

> *review, at the request of the Minister or at the initiative of the Tax Ombud with the approval of the Minister, any systemic and emerging issue related to a service matter or the application of the provisions of this Act or procedural or administrative provisions of a tax Act.*

The mandate of the Tax Ombud recognises three categories of the complaint to be reviewed by the Tax Ombud as follows:

1. a service matter;
2. a procedural matter; and
3. an administrative matter.

One challenge faced by the Tax Ombud with regard to the above categories of complaints was the lack of a Service Charter against which the Tax Ombud could review a SARS service delivery failure. With effect from 1 July 2018, the *SARS Service Charter* (SARS, 2018) was published, following the long delay since its basic charter which was issued in 2007. Amongst the standard of service and the timeframes provided for, the *SARS Service Charter* outlines taxpayer rights and obligations. According to Businesslive (2018), the CEO of the Tax Ombud, Advocate Eric Mkhawane, said the office has been pushing for the release of a Service Charter since the office was established in 2013. Clearly, this is an important stride forward towards improved tax administration as SARS can now be measured against clearly defined objectives and taxpayers are clear about what to expect from interactions with SARS.

The Tax Ombud does not have authority to investigate the substance of the complaints as the mandate of the Tax Ombud only authorises the Tax Ombud to ensure that administrative procedures have been complied with.

In discharging the mandate, section 16(2) of the Act prescribes the manner in which the Tax Ombud is to carry out this mandate:

(a) resolve complaints through mediation and conciliation;
(b) act independently in resolving a complaint;
(c) follow informal, fair and cost-effective procedures to resolve complaints;
(d) inform taxpayers of the Ombud's mandate, and complaint process;
(e) facilitate taxpayer's access to SARS' internal complaints resolution; and
(f) identify and review service-related systemic and emerging issues that negatively impact taxpayers.

3.4.2 Limitations on the Ombud's Mandate

While the mandate of the Tax Ombud was amended by the 2016 Tax Administration Laws Amendment Act, no changes were made to the limits of the mandate. Section 17 of the Tax Administration Act prohibits the Tax Ombud from reviewing the following matters:

(a) legislation or tax policy;
(b) SARS policy or practice generally prevailing, other than to the extent that it relates to a service matter or a procedural or administrative matter arising from the application of the provisions of a tax Act by SARS;
(c) matters subject to objection and appeal under a tax Act, except for an administrative matter relating to such objection and appeal; or
(d) a decision of, proceeding in or a matter before the tax court.

3.4.3 Complaint process

Section 18(4) of the Tax Administration Act indicates that the Tax Ombud may only review a request if the available internal complaint mechanisms within SARS have been exhausted,

unless there are compelling circumstances which render it unnecessary to go through all the internal complaint mechanisms within SARS. Although the Tax Administration Act does not provide an indication of what the complaint mechanisms within SARS are or the process to exhaust such mechanisms, the Tax Ombud issue 7 newsletter (Office of the Tax Ombud: 2018) provides the steps that can be taken by the taxpayer before approaching the Tax Ombud to file a complaint as required by section 18(4) of the Tax Administration Act. These steps include that the taxpayer must first lodge a complaint with the SARS Complaint Management Office. According to the South African Institute of Tax Professionals ('SAIT') (2015), a complaint with the Complaint Management Office may only be lodged where there is an existing case which SARS is failing to resolve or fails to resolve within the set timeframes. The *SARS Service Charter* sets out the timeframe of 21 business days for any service request with SARS. This suggests that a complaint in terms of normal service requests can only be lodged on the lapse of the 21 business days or the earlier time upon which SARS considers the matter resolved. However, in terms of other matters such as dispute resolution timeframes, the complaint will only be lodged on the lapse of the timeframes provided for in the Dispute Resolution Rules or in the Act. According to Lamprecht (2013: 1), the Complaints Monitoring Office undertakes to resolve a complaint within 21 business days and a complaint may then be lodged with the Tax Ombud if SARS fails to resolve the complaint within this timeframe or does not resolve it to the satisfaction of the taxpayer.

The Office of the Tax Ombud newsletter (2018: 17) states that the main purpose of exhausting the SARS complaints processes is to afford SARS an opportunity to resolve the matter before approaching an external body (the Tax Ombud in this case) to assist in resolving the matter.

The factors to be considered when determining whether the taxpayer has compelling circumstances and will thus not need to exhaust all the SARS internal complaint mechanisms, are prescribed in section 18(5) of the Tax Administration Act as follows:

(a) the request raises a systemic issue;
(b) exhausting the complaints resolution mechanisms will cause undue hardship to the requestor; or

(c) exhausting the complaints resolution mechanisms is unlikely to produce a result within a period of time that the Tax Ombud considers reasonable.

The Act, however, fails to provide definitive guidance of the factors which indicate compelling circumstances. The Tax Ombud list of systemic issues Office of the Tax Ombud (2018:1) describes systemic issues as a particular matter that can be regarded as the underlying cause for a complaint that affects or will affect a number of taxpayers in the tax system. This could be policies, systems or procedures and practices by the revenue agency.

Wiener (2012: 50) in his definition of systemic issues characterised it to have all or most of these characteristics:

- they always affect multiple taxpayers;
- they impact segment of the taxpayer population, locally, regionally and nationally;
- they relate to the Internal Revenue Service ("IRS") systems, policies and procedures;
- they require study, analysis, administrative changes or legislative remedies;
- they involve protecting taxpayer rights, reducing or preventing taxpayer burdens, ensuring equitable treatment or providing essential service to taxpayers; and
- they are not a question of substantive tax law.

The other two factors under section 18(5)(b) and section 18(5)(c) of the Tax Administration Act concerning whether compelling circumstances exist, remain at the discretion of the Tax Ombud as the Act is silent on what constitutes undue hardship and what time is considered a reasonable time for the purpose of complaints being lodged with the Tax Ombud. This indicates that taxpayers to whom these factors apply, are able to lodge a complaint directly with the Tax Ombud without exhausting the SARS internal complaint processes.

3.5 Formation and Structure of the Office of the Tax Ombud

The Tax Administration Act, which establishes the Office of the Tax Ombud and the Tax Ombud, creates the formation and structure for the office.

3.5.1 Accountability

The independence of the Tax Ombud and the office of the Tax Ombud depends on the freedom the institution has concerning its budget and personnel matters. Section 14(5)(a) of the Tax Administration Act stipulates that the Tax Ombud is accountable to the Minister of Finance and, accordingly, must report to the Minister under section 19(1)(a) of the Tax Administration Act. This section further provides that the Minister will also determine the remuneration and the allowances of the Tax Ombud.

According to Moosa (2017: 2), while the Tax Ombud is appointed by the Minister and is accountable to the Minister, section 15 affords the Tax Ombud the powers to appoint the staff of the Office of the Tax Ombud, making the staff of the office of the Tax Ombud accountable to the Tax Ombud.

3.5.2 Budget Autonomy

The Office of the Tax Ombud (2016) Strategic Plan for 2016 to 2020 identified that the method of funding of the Tax Ombud functions and the appointment of the staff of the Tax Ombud were some of the shortcomings experienced by the office. These shortcomings are structural challenges which challenge the notion of the Office of the Tax Ombud as an independent institution outside of SARS.

Historically, the Tax Ombud did not have a separate budget allocation from Parliament and therefore expenditure connected with the functions of the office of the Tax Ombud was paid out of the funds of SARS (Croome & Olivier, 2015: 78). As a result, the Tax Administration Laws Amendment Act, 16 of 2016, amended this provision to allow the Tax Ombud to have and control of his or her own budget, which is approved by the Minister of Finance.

Currently, section 15 of the Tax Administration Act provides that the expenditure connected with the functions of the Office of the Tax Ombud will be paid in accordance with a budget approved by the Minister of Finance. This gives the office the much-desired financial independence as the Office of the Tax Ombud has its own budget which is controlled by the office. In other words, the office can now determine its operational needs and expend the funds provided accordingly.

3.5.3 Manner of Appointment

3.5.3.1 Appointment of the Tax Ombud

Section 259(1) of the Tax Administration Act, which applied from 1 October 2012, empowers the Minister of Finance to appoint a person as the Tax Ombud under section 14 of the Act within one year of the commencement of the Act (Croome and Olivier, 2015:555). Consequently, the Tax Ombud may only be removed by the Minister of Finance for misconduct, incapacity or incompetence in accordance with section 14(2) of the Tax Administration Act. Moosa (2017: 2) argues that the cumulative effect of the provisions regulating the appointment, employment, removal and accountability of the Tax Ombud reflects an unacceptably high level of governmental executive control over the Tax Ombud and the Office of the Tax Ombud.

Where the Tax Ombud position is vacant due to temporary absence or inability by the Tax Ombud to perform his duties, the Tax Ombud may designate a person within the office of the Tax Ombud to act as the Tax Ombud for a period not exceeding 90 days, in terms of section 15(2) and section 15(3) of the Tax Administration Act.

3.5.3.2 Appointment of the personnel of the Office of the Tax Ombud

Section 15 of the Tax Administration Act provides that:

> *(1) The Tax Ombud must appoint the staff of the office of the Tax Ombud who must be employed in terms of the South African Revenue Service Act.*
> *(2) When the Tax Ombud is absent or otherwise unable to perform the functions of office, the Tax Ombud may designate another person in the office of the Tax Ombud as acting Tax Ombud.*

Section 18(1) of the South African Revenue Service Act only provides that SARS is to determine the terms and conditions of persons employed in terms of the South African Revenue Service Act. Nowhere in the South African Revenue Service Act is provision made for the discretion of the Tax Ombud to apply his or her own terms and conditions of

employment while employing his staff under the South African Revenue Service Act. This ultimately implies that the staff of the Tax Ombud are subject to the terms and conditions of employment similar to those applicable to the staff of SARS.

Historically, section 15(1) of the Tax Administration Act provided that the staff of the office of the Tax Ombud must be employed in terms of the South African Revenue Service Act and be seconded to the office of the Tax Ombud at the request of the Tax Ombud in consultation with the Commissioner for SARS. The Tax Ombud did not have the power to employ his or her own staff and this had implications for the perceived independence of the Tax Ombud as an impartial officer, creating an impression that the Tax Ombud would be biased towards SARS at the expense of taxpayers. In the Office of the Tax Ombud (2016) 2015/2016 annual report, the Tax Ombud states that the office still lacks independence from SARS as he can only employ his staff through the South African Revenue Service Act in consultation with SARS. It is submitted that this gave SARS the power to employ the staff of the office of the Tax Ombud. According to the Davis Tax Committee (2017: 82), the Commissioner could refuse to employ a recruit to be seconded to the office of the Tax Ombud for whatever reasons, including the person being pro-taxpayer or anti-SARS.

The Tax Ombud (2016: 20) argued that the office drives its selection process in the recruitment of staff and enjoys full control of the employees. Office of the Tax Ombud (2016: 20) argued that the employment of the Tax Ombud staff under the South African Revenue Service Act in consultation with the Commissioner was to ensure that the secrecy provisions are observed over taxpayer information.

Clearly this created bias in favour of SARS, rather than taxpayers, or at the very least created an impression of lack of independence from the SARS by the staff of the Tax Ombud (Davis Tax Committee, 2017: 81).

In the case of the Tax Ombud, he or she is answerable to the Minister who is responsible for the appointment as well as the terms of employment and this raises concerns for his or her independence.

The manner of appointment of the Tax Ombud and the staff of the office of the Tax Ombud has been widely criticised by industry experts, on the one hand, and welcomed by other

industry experts on the other. In the South African Tax Guide, Faber (2013) expressed concerns over the accountability of the Tax Ombud to the Minister and claimed that the Tax Ombud has a vested interest in ensuring that the Minister is satisfied with his work. He argued that, as the Minister oversees both SARS and the office of the Tax Ombud, this would undermine the independence of the Tax Ombud as any report of unlawfulness on the part of SARS would reflect badly on the Minister. Retief (2013) submitted that, despite the manner of appointment of the staff of the office of the Tax Ombud compromising his independence, he appreciated that a SARS official has a better understanding of the internal systems, policies and procedures used by SARS. The Davis Tax Committee (2017: 80) commended the fact that the Tax Ombud is not accountable to the Commissioner for SARS.

The amendment of section 15(1) of the Tax Administration Act through the 2016 Tax Administration Laws Amendment Act has improved the independence of the office of the Tax Ombud by removing the requirement that the staff must be appointed in consultation with the Commissioner for SARS, strengthening the independence of the Tax Ombud.

3.5.4 Term of Office

Section 14 of the Tax Administration Act initially empowered the Minister of Finance to appoint the Tax Ombud for a renewable term of three years. However, the Tax Administration Laws Amendment Act 2016, promulgated on 17 January 2017, increased the term of office to a renewable fixed term of five years.

It was stated in *Justice Alliance v President of the Republic of South Africa and others, 2011 (5) SA 338 (CC) (at 73*) that:

> *It is well established that a non-renewable term of office is a prime feature of independence…Non-renewability fosters public confidence in the institution of the judiciary as a whole, since its members function with neither threat that their terms will not be renewed or any inducement to seek to secure renewal.*

Similar reasons were given in this case regarding the *Judges Remuneration and Conditions of Employment Act 47 of 2001,* which ensures that the Executive branch of government does not

affect the independence of the judiciary by determining their remuneration and benefits (PricewaterhouseCoopers 2012: 17).

According to Personal Finance (as quoted by the Davis Tax Committee, 2017: 80), Judge Ngoepe said that the request for an increased term of office was based on a study of similar institutions within and outside South Africa, which found that, in most cases, Ombudsmen were appointed for five years and that the longer term will make it easier to recruit people with the right qualifications to the position.

3.5.5 Legal framework of the Tax Ombud

The Davis Tax Committee (2017: 77) states that effective scrutineering functions ought to be appropriately structured and resourced, otherwise they cannot fulfil the public expectations of holding to account large and well-resourced revenue authorities. This implies that institutions such as the Tax Ombud must have a strong organisational structure, which will ensure independence of the institution as custodians of the rights of members of the public.

The existence of the office of the Tax Ombud is regulated by the Tax Administration Act which establishes the office. In the hierarchy of legislation in South Africa, the Constitution is the supreme law of the country, implying that the Tax Administration Act is subject to the Constitution. The office is therefore not created by the Constitution and does not have its own statute. This means that the existence of the office of the Tax Ombud is weak in terms of legislation. According to Gottehrer and Hostina (1998: 1), it would be appropriate for an Ombudsman office to be created by an Act of Parliament such as the Constitution. If the Tax Ombud is governed by the Constitution, its position will be very strong as it will be difficult to dissolve the Tax Ombud office. To dissolve a Constitutional institution, as discussed in chapter 1, requires a change in the Constitution, which in turn requires a two-thirds of majority of the National Assembly. Moosa (2017: 4) supported the view that in order for the Tax Ombud to play a meaningful oversight function, it should be an independent functionary regulated by its own statute, similar to the Public Protector of South Africa who is a product of section 181 of the Constitution and has its own statute. The office of the Tax Ombud is thus not a juristic person in its own right and it lacks the legal capacity to act as an entity with its own rights and obligations. Based on this, the office of the Tax Ombud cannot enter into

contracts, own moveable and immovable property, sue or be sued, or act as an accounting authority in terms of legislative regulations.

Whilst Moosa (2017:3) claims that the structural dependency of the office of the Tax Ombud on SARS for sourcing of the staff created an unhealthy state of affairs, the argument by SARS that such deployment and other services was a matter of operational expediency appears justifiable on the basis that the Tax Ombud is not a juristic person and as such would not be able to enter into such contracts.

3.5.6 Enforceability of the Tax Ombud recommendations

Ombudsmen by their nature cannot enforce their recommendations or impose sanctions for non-compliance with the recommendations and this has been widely discussed as a disadvantage of the Ombudsman institutions (Toka, 2009). This lack of enforcement powers accentuates the argument that Ombudsman institutions have "a big mouth but very short hands" (Elcock, 1997: 376). Apart from the capacity to impose sanctions, Ombudsman institutions must have extensive powers of investigation and inspection, such as access to records and premises (Gottehrer & Hostina, 1998: 409).

In terms of section 20(2) of the Tax Administration Act, the Tax Ombud recommendations are not binding on a taxpayer or SARS, but if not accepted by a taxpayer or SARS, reasons for such a decision must be provided to the Tax Ombud within 30 days of notification of the recommendations and may be included by the Tax Ombud in a report to the Minister or the Commissioner under section 19 of the Tax Administration Act.

The existing legislation does not provide the Tax Ombud with coercive powers to enforce recommendations made to SARS, except for the amendment brought about by the Tax Administration Laws Amendment Act which requires that SARS provide reasons where SARS is not in agreement with the recommendations of the Tax Ombud. This empowers the Tax Ombud to exert pressure by reporting the non-compliance by SARS in the report that goes to Parliament and also informing the public of the misconduct or violation of taxpayer rights by SARS. In other words, although the Tax Ombud recommendations are not binding on SARS or the taxpayer, in terms of this section of the Tax Administration Act, if SARS

partly implements or does not implement the Tax Ombud recommendations for unacceptable reasons, the Tax Ombud may publish this in the report to the Minister as required by section 20(2) of the Tax Administration Act. Section 19 of the Act provides for the Tax Ombud reports to the Minister which ultimately must be tabled before the National Assembly by the Minister.

This differs from the powers afforded to the Public Protector. While the Public Protector is an Ombudsman institution, suggesting that his or her findings and recommendations are not binding on any party, there were divided views on whether these findings could simply be ignored. This was the case when the South African Broadcasting Commission failed to implement the remedial action of the Public Protector prompting the Public Protector to file an affidavit requesting the court to assess whether her report on the matter was legally valid, binding and enforceable (Mbiada, 2017:11). In *The South African Broadcasting Corporation Limited and Others v Democratic Alliance*, 2015,1 SA 551 (WWC), the Supreme Court of Appeal relied on *Oudekraal Estates (Pty) Ltd v City of Cape Town*, 2004 (6) SA 222 (SCA), that the effect of an administrative decision stands until it is set aside, similar to the findings of the Pubic Protector (Mbiada, 2017: 12). Accordingly, in the absence of a review application to have the Public Protector findings set aside, his or her remedial action is to be implemented.

According to Pillay (2015:47), the provisions of section 20(2) of the Tax Administration Act raise the question whether the Tax Ombud will provide an effective and timeous remedy to taxpayers, as the non-binding recommendations by the Tax Ombud in his dealings with SARS suggests that taxpayers will still need to approach courts to obtain remedial action. Pillay (2015: 47) points out that other Ombudsmen in South Africa, like the Ombudsmen for Short-term Insurance, Long term Insurance and Banking Services, operate independently with authoritative powers in terms of recommendations made to the respective agencies governed by the Ombudsman.

Although the Act does not directly provide for any administrative sanctions, it is submitted that the provisions of section 20 of the Tax Administration Act will compel SARS to apply its mind to the recommendations of the Tax Ombud before rejecting them, for fear of public dissemination.

An analysis of the Office of the Tax Ombud Annual Report indicates that the effectiveness of the Tax Ombud recommendations is still high, as indicated by the participation by SARS in implementing the recommendations (Office of the Tax Ombud: 2015). This occurred even before the amendment of section 20 of the Tax Administration Act.

3.5.7 Lack of a National footprint

Carr (2018) notes that one of the main challenges for the Office of the Tax Ombud is the unfamiliarity of the office. The Tax Ombud currently operates from one office in Pretoria as an oversight office on SARS, which has a national footprint. The Tax Ombud lacks adequate resources as a scrutiny function to a fully equipped SARS.

3.6 Confidentiality of the Tax Ombud

Section 21(3) of the Tax Administration Act provides that the Tax Ombud and any person acting on behalf of the Tax Ombud may not disclose any information obtained or prepared from information obtain by or on behalf of the Tax Ombud to SARS, except to the extent required for the purpose of the performance of functions and duties of resolving the matter. This implies that the identities and communication of taxpayers with the Tax Ombud are shielded by this provision as it allows the Tax Ombud the discretion to share information to a certain extent only, ultimately shielding complainants from victimisation.

It is further submitted that chapter 6 of the Tax Administration Act regarding confidentiality of information in possession of the Commissioner or anyone acting on behalf of the Commissioner is applicable to the Tax Ombud and his staff as they are equally bound by the secrecy provisions which apply to SARS by virtue of being employed under the SARS Act.

3.7 Fairness of the Tax Ombud

It can be argued that the confidentiality provision in section 21 of the Tax Administration Act supports the fairness of the Tax Ombud by allowing the Tax Ombud access to the SARS information relating to any particular complaint, thus affording the Tax Ombud the ability to make a fair and accurate decision by considering all the relevant information applicable.

3.8 Impartiality of the Tax Ombud

Howard and Smith (Online) highlighted that impartiality of an Ombudsman is possible once an Ombudsman is viewed and perceived to be independent. In the case of the Tax Ombud, it still struggles with most of the factors of its independence, which essentially affects the public view of the Tax Ombud as an impartial institution.

3.9 Conclusion

Independence is pivotal for an Ombudsman institution to carry out its legislative mandate. The Tax Ombud, it is submitted, ought to maintain a strong structural independence. Structural independence includes responsibility for its own budget allocation and control over its own administrative policies (Davis Tax Committee, 2017: 15).

By granting the Minister of Finance an unfettered discretion to appoint and dismiss the Tax Ombud, this could result in the Minister interfering in the activities of the Tax Ombud.

Furthermore, the current position of the Tax Ombud is somewhat uncertain in relation to his or her independence and that of the office. The Tax Ombud, who acts as a watchdog on SARS, reports to the Minister of Finance, who reports to the President to whom the Commissioner of SARS reports. This relegates the reporting line of the Tax Ombud to a lower authority compared to that of SARS. The appointment of the Tax Ombud by the Minister and the appointment of the SARS Commissioner by the President are not conductive to a responsive and an accountable SARS office, as the Commissioner could undermine the authority of the Tax Ombud. The current structure of the Tax Ombudsman does not enhance the independence of the office. It is submitted that the Tax Ombud runs the risk of interference by the Minister of Finance, who has the power to appoint and dismiss the Tax Ombud.

While it is clear in terms of the mandate of the Complaints Monitoring Office that the office may not deal with matters that have already been referred to the Public Protector, the Act is silent regarding whether the Tax Ombud may deal with matters already referred to the Public Protector. The limitations on authority of the Tax Ombud only prohibit the Tax Ombud from reviewing matters before the Tax Board and the Tax Court. Croome and Olivier (2015: 642)

note that the Public Protector is perceived only to investigate corruption in government and not tax issues, which results in taxpayers seldom lodging tax complaints with the Public Protector.

In addition, adequate financial resources are generally perceived as a means to secure the autonomy and independence of the Ombud from governmental control. Diamond (2007: 7) argues that officials of accountability agencies (like the Tax Ombud) must be appointed, funded and supervised in ways that cannot be subverted or suborned. This implies that sufficient funding prevents Ombud institutions from being exposed to particularistic interests. It is clear from the above that financial independence is arguably correlated with the effectiveness of the institution.

It can be confirmed that the Tax Ombud can be considered to be effective when it comes to the factors of confidentiality and fairness, which is provided for by the Tax Administration Act. The Tax Ombud still lacks independence and the guarantee of impartiality. In chapter 2, it was observed that for an Ombud to be considered effective, the factors of independence, impartiality, fairness and confidentiality should all be present. It can be argued that the Tax Ombud is not yet effective and can draw lessons from other Ombud institutions to achieve full effectiveness.

Chapter 4 discusses the structures of the Tax Ombudsman institutions in the United States, the United Kingdom, Canada, Mexico and Australia. to draw upon lessons that can be implemented in the Tax Ombud model.

CHAPTER 4: TAX OMBUDSMEN IN SELECTED FOREIGN JURISDICTIONS

4.1 Introduction

The Office of the Tax Ombud in South Africa has been modelled on the Tax Ombudsman in Canada and the Taxpayer Adjudicator in the United Kingdom (Croome, 2013). Thus, the mandate of the Tax Ombud in South Africa is very similar to that conferred on the Tax Ombudsman in Canada and the Taxpayer Adjudicator in the United Kingdom. However, there are still a few differences which specifically describe the South African context.

The Office of the Tax Ombud Strategic Plan 2016-2021(2016: 20) has emphasized its priority to address shortcomings in the Tax Administration Act so as to assure optimal institutional independence for the Office. To achieve this, the Tax Ombud has conducted a benchmarking visit to the United Kingdom, United States of America and Canada to acquire information on international best practice of the Tax Ombud or equivalent institutions in order to improve and strengthen the Office. This chapter seeks to review the models adopted by the Tax Ombudsman institutions in Canada, United Kingdom, United States, Australia and Mexico to assess whether there are lessons to be drawn on to strengthen the structure and powers of the South African Tax Ombud. The basis of comparison will focus on the organisational, structural and operational activities of each of the selected countries. A comparative study, final conclusion and possible recommendations on the lessons that can be adapted into the South African Tax Ombud model will only be addressed in chapter 5 in order to allow for the discussion of the international Ombudsmen to be completed.

4.2 United States of America

In the United States of America (the "USA"), the National Taxpayer Advocate Service came into effect in 1996 to replace the Taxpayer Ombudsman that was created in 1979 (Taxpayer Advocate Service: Online). According to Croome (2010: 295), the office was established with the purpose of resolving administrative complaints by taxpayers against the Internal Revenue Service (the "IRS"). It is clear that the National Taxpayer Advocate

of the USA was created to assist taxpayers in the USA in their dealings with the IRS. Taxpayers in the USA enjoy rights set out in the Taxpayer Bill of Rights.

4.2.1 Mandate of the Taxpayer Advocate Service

The Internal Revenue Service (2015) provides that the mandate of the National Taxpayer Advocate is to assist taxpayers in resolving disputes with the IRS, including identifying problems experienced by taxpayers when dealing with the IRS and proposing changes to mitigate the problems. In addition, the National Taxpayer Advocate may propose legislative changes necessary to mitigate problems (Internal Revenue Service: 2015). The National Taxpayer Advocate, Nina Olson, explained in an interview that the National Taxpayer Advocate has two distinct functions: casework advocacy on one hand and systemic issues on the other (Cumming, Raleigh & Washington, 2002: 20).

The Taxpayer Advocate is divided into the National Taxpayer Advocate and local taxpayer advocate. Casework advocacy is handled by local taxpayer advocate and their employees in the field and on university campuses. The request comes from a taxpayer or representative for assistance in resolving an IRS case. Systemic advocacy is provided by the National Taxpayer Advocate and applies where taxpayers have problems working with the IRS; it offers solutions to change administrative practices by proposing or recommending legislative remedies.

4.2.2 Enforceability of the recommendations

The National Taxpayer Advocate operates in terms of the Ombudsman model and may therefore not make recommendations that are binding on the IRS (Croome, 2012). However, the National Taxpayer Advocate has wide powers in protecting taxpayer rights, as the National Taxpayer Advocate can issue Taxpayer Assistance Orders when taxpayers suffer unjust deficiencies in the application of tax law by the IRS. Greenbaum (1998: 352) reports that this practice of issuing taxpayer assistance orders was created by the National Taxpayer Advocate in the USA. In addition to taxpayer assistance orders, the National Taxpayer Advocate also has the authority to issue taxpayer advocate directives.

The Taxpayer Advocate Annual Report to Congress (Internal Revenue Service: 2015) differentiates between a taxpayer assistance order and a taxpayer advocate directive as follows:

(i) taxpayer assistance orders provide relief to an individual taxpayer who is affected by the decision of the Internal Revenue Service; and
(ii) taxpayer advocate directives afford relief to a group of taxpayers.

Croome and Olivier (2015: 641) contend that these methods will prevent the Commissioner of the IRS from taking collection steps or action against a taxpayer if such conduct constitutes a flagrant violation of the law, in the view of the National Taxpayer Advocate.

It is submitted that taxpayer advocate directives can be used to address identified systemic issues. In other words, the National Taxpayer Advocate is able to note matters that affect a wide number of taxpayers and issue taxpayer directives. Croome (2010:295) argues that the taxpayer assistance orders could be a valuable measure in protecting South African taxpayers' rights.

Taxpayer assistance orders may be provided to taxpayers who are experiencing economic harm or significant costs or have experienced a delay of 30 days in resolving their tax matters. The Internal Revenue Service (2015) states that once taxpayer assistance orders have been issued, such an order can only be modified or rescinded by the National Taxpayer Advocate and the Commissioner of the Internal Revenue Service. Furthermore, any rescinding or modification of the taxpayer assistance order by any other party must be accompanied by written reasons and will form part of the National Taxpayer Advocate report to Congress (Internal Revenue Service: 2015).

4.2.3 Structure of the Taxpayer Advocate Service

The establishment of Taxpayer Advocate Service in the Restructuring and Reform Act 1998 was aimed at creating an independent reporting structure. The IRS Oversight Board (2002: 1) notes that the office of the Taxpayer Advocate is a functional, independent unit of the IRS that is headed by the National Taxpayer Advocate. The establishment of the long-standing

Taxpayer Advocate through its own Act is one of the strengths of this office, which differentiates it from its South African equivalent which is established by an Act administered by the revenue authority over which the Tax Ombud has oversight.

4.2.4 Appointment of the National Taxpayer Advocate

According to the IRS Oversight Board (2002: 5), the National Taxpayer Advocate is appointed by the Secretary of the Treasury. However, in coming to a decision on the appointment, the Secretary should decide in consultation with the Oversight Board and the Commissioner of the IRS. The appointing decision, however, lies with the Secretary. Congress modified section 7803(c)(1) of the Restructuring and Reform Act of 1998 to provide that the National Taxpayer Advocate is appointed by the Secretary of Treasury and reports only to the Commissioner of the Internal Revenue Service (Camp, 2010: 1248). It also provided for the separation of management, control, facilities and careers.

According to Camp (2010: 1250), in creating separate management control, Congress made significant changes which imposed employment restrictions that require that a person appointed as the National Taxpayer Advocate should not have worked for the Internal Revenue Service for two years before such an appointment and five years after the appointment. In addition to this, a communication system separate from the Internal Revenue Service was created, which mandated that the taxpayer be informed that the Taxpayer Advocate Service operates independently of Internal Revenue Service and reports directly to Congress through the National Taxpayer Advocate.

4.2.5 Appointment of the staff of the National Taxpayer Advocate

The employees of the National Taxpayer Advocate Service are appointed through the Internal Revenue Service (Standing Committee on Finance: 2011). The employees of the Taxpayer Advocate Service report to one official, the National Taxpayer Advocate who in turn reports to the Commissioner (Kagan: 2018). While the appointment of the staff in the Taxpayer Advocate appears to indicate shortcomings in the reporting line, this is protected by the reporting line to Congress, which protects the National Taxpayer Advocate from any bias in favour of the Commissioner of the Internal Revenue Service.

4.2.6 Budget Autonomy

According to IRS (2015), the funding of the National Taxpayer Advocate comes from within the Internal Revenue Service. It is submitted that this compromises the independence of the Taxpayer Advocate as the IRS could restrict the budget of the Taxpayer Advocate Office. The South African Ombudsman, on the other hand, is in a much better position, as the Tax Administration Act provides for the expenditure of the office to be in accordance with the budget approved by the Minister of Finance and not by SARS.

4.2.7 Accountability of the National Taxpayer Advocate

To ensure independence of Taxpayer Advocate Service, the National Taxpayer Advocate submits annual reports to Congress (The Idaho Legislature, 2013: 31). The Idaho report stressed that the Taxpayer Advocate Service report is not reviewed by the Internal Revenue Service, Treasury or the Office of Management and Budget. The report to Congress includes identifying the most common and serious problems facing taxpayers and outlines key areas that require policy change. Conoboy (2000: 1409) expressed the view that the independence of the National Taxpayer Advocate is upheld by the fact that the annual report is submitted directly to Congress.

4.2.8 Location of the Taxpayer Advocate Service

The Idaho Legislature Report (2013: 31) reports that the Taxpayer Advocate Service is located within the Internal Revenue Service and operates in more than 70 local taxpayer advocate service offices.

4.2.9 Term of Office

The National Taxpayer Advocate is appointed on a permanent basis (Jagoda: 2019: Online). It is submitted that a longer serving term for an Ombud ensures greater independence with less interference from external forces.

4.2.10 Complaints process

DeNicola (2019: Online) explains that a taxpayer would need to do the best to first address problems with the IRS before contacting the Taxpayer Advocate Service. This is the case in South Africa, where taxpayers are required to attempt to resolve complaints through regular SARS channels before attempting to approach the Tax Ombud.

DeNicola (2019: Online) provides some of the instances in which the Taxpayer Advocate may assist a taxpayer:

- You are facing a time-sensitive financial hardship due to the tax situation.
- You are working with multiple IRS units and need help dealing with all the parts.
- The IRS is not responding to you or working with you in a timely manner.
- The IRS is threatening immediate adverse action against you.
- You have a unique situation and the IRS is not recognizing the specifics of the situation.
- Your case is referred to the TAS by a congressional office.

4.3 United Kingdom Tax Adjudicator's office

The United Kingdom Tax Adjudicator was created through a decision by Her Majesty's Revenue and Customs ("HMRC"), the Valuation Office Agency ("VOA") and the Insolvency Service ("IS") to introduce a third, independent tier in the complaints handling process (Tax Adjudicator's Office, 2013: 6). HMRC established the Taxpayer Adjudicator's Office in 1993 to investigate complaints concerning HMRC (OECD, 2013: 49). Croome (2012: 4) stressed that the Tax Adjudicator's office is a response to the Citizens' Charter for an impartial complaint review mechanism.

4.3.1 Mandate of the Tax Adjudicator

According to the Davis Tax Committee (2017: 72), the primary function of the Tax Adjudicator in the United Kingdom is to act as an impartial referee where taxpayers believe that they have been badly treated by HMRC. The Tax Adjudicator's office was thus established to investigate complaints about the work of HMRC. This may include making

suggestions for service improvements where the recommendation could be beneficial to the wider public.

The Tax Adjudicator can only consider complaints regarding the following matters originating from HMRC, VOA and IS (Tax Adjudicator's office, 2013:6):

- mistakes;
- unreasonable delays;
- poor and misleading advices;
- inappropriate staff behaviour or;
- the use of a discretion.

The Adjudicator will not deal with the following matters (Tax Adjudicator: Online):

- matters of governmental or departmental policy;
- complaints where there is a specific right of determination by any court, tribunal or other body with specific jurisdiction over the matter;
- valuation decisions of Statutory Officers in the VOA;
- complaints about instances where HRMC or the VOA have complied with the Freedom of Information Act, 2000, and the Data Protection Act, 1998;
- complaints about an ongoing investigation or enquiry; and
- complaints that have been investigated by the Parliamentary Ombudsman.

4.3.2 Enforceability of the recommendations

Like the South African Tax Ombud, the Tax Adjudicator does not have the power to compel HMRC to act on the adjudicator's recommendations. HMRC is not bound to accept recommendations by the Tax Adjudicator, but HMRC has contracted to implement the recommendations of the Tax Adjudicator, unless in rare circumstances where the recommendations may be rejected (Katz Commission: 1995). However, the United Kingdom Tax Adjudicator has the power to order costs or payment of direct costs to be reimbursed to a taxpayer for the distress caused as a result of HMRC's conduct, abuse of power, inefficiency or wasted costs (Croome: 2012).

The Tax Adjudicator provides a resolution by mediation and recommendations. HMRC have undertaken to follow the Adjudicator's recommendations "in all but exceptional circumstances". According to Freedman and Vella (2012), any failure or refusal by HMRC to follow a recommendation will result in the Tax Adjudicator requesting reasons for such refusal and in some instances, publishing each such case in the annual report.

On the other hand, if the Adjudicator has considered a complaint, there is no bar to a dissatisfied taxpayer referring his or her case to the Parliamentary Ombudsman. 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).

HMRC also issues codes of practice in terms of which HMRC may make reparation to a taxpayer by paying interest, not collecting outstanding tax, or refunding a taxpayer's costs where there have been serious delays or mistakes by HMRC (Murasbakerjones, 2019).

4.3.3 Structure of the Tax Adjudicator

The Tax Adjudicator's Office (Online) stated that the funding, as well as the appointment of the staff of the Tax Adjudicator's office, is provided by HMRC. The staff of the Tax Adjudicator are the staff of HMRC. HMRC also provides accommodation, equipment and other materials as stated in the Service Level Agreement to the Tax Adjudicators Office. In terms of the Service Level Agreement, the staff of the Tax Adjudicator's office must have access to all the relevant information and data required to solve a taxpayer dispute.

Mthimunye (2013: 52) states that the Tax Adjudicator's office operates independently from HMRC, VOA and IS. However, the Service Level Agreement provides that the Tax Adjudicators' office is a unit within HMRC and will comply with all the relevant HMRC policies, guidelines, processes on finance, personnel and data security (Tax Adjudicator's Office, Online).

4.3.4 Appointment of the Tax Adjudicator

The Tax Adjudicator is appointed through service level agreements in the form of a contract between HMRC and the Tax Adjudicator (HMRC: 2011). It is submitted that the appointment of the Tax Adjudicator is under the control of HMRC. While this threatens the independence of the Tax Adjudicator from the control of HMRC, the Permanent Secretary for Tax has an executive oversight over the operations of the Tax Adjudicator (HMRC: 2011).

Bradley (2018) claimed that the adjudicator is independent of HMRC, but the service level agreement between the adjudicator's office and HMRC includes these points:

- HMRC will provide funding to cover agreed operational costs and provide relevant performance data for forecasting purposes;
- in keeping with HMRC's commitment to continuous improvement, the Adjudicator's Office will seek to improve business performance in service delivery and value for money; and
- the staff in the Adjudicator's Office are HMRC employees.

4.3.5 Appointment of staff

Bradley (2018: Online) explains that the service level agreement between the HMRC and the Tax Adjudicator provides the staff for the Tax Adjudicator. This means that the staff of the Tax Adjudicator are employees of HMRC and subject to the conditions and policies applicable to the staff of the HMRC.

4.3.6 Budget Autonomy

The service level agreement between the Tax Adjudicator and HMRC provides that HMRC will provide funding to cover agreed upon operational costs and provide relevant performance data for forecasting purposes (Bradley, 2018: Online).

4.3.7 Accountability

According to the service level agreements, the Tax Adjudicator operates independently from HMRC. The Standing Committee on Finance (2011) expressed the view that since the Tax Adjudicator was established as a unit within HMRC and the office relies on the revenue agency for funding and staff, the model of the Tax Adjudicator does not safeguard the independence of the office. The Tax Adjudicator therefore relies on the provision of its operational needs by HMRC, which ultimately instills doubt in the public with regard to the neutrality of the Tax Adjudicator.

4.3.8 Location of the Tax Adjudicator's office

According to HMRC (2011), the Tax Adjudicator is a unit within HMRC, and it has to comply with HMRC policies and guidelines.

4.3.9 Term of Office

According to the Tax Adjudicator's Office (Online), the Tax Adjudicator is appointed on a 7-year term.

4.3.10 Complaint Process

Similar to institutions built on the Ombudsman model, the Tax Adjudicator's Office (2013: 8) states that the Tax Adjudicator's Office is unable to consider a complaint until such a time as the taxpayer has exhausted all the available complaints mechanisms within HMRC. The Taxpayer Adjudicator is precluded from conducting an investigation where the complainant already has a remedy available that has not been exhausted (Leyland & Anthony, 2013: 133). Generally, HMRC should be given the opportunity to settle complaints through their own complaints procedures before taxpayers may approach the Tax Adjudicator. Freedman and Vella (2012: 86) note that complainants should have exhausted HMRC complaints procedures and have received a final response before proceeding to the Taxpayer Adjudicator. However, in appropriate cases, such as where there are compelling

circumstances, the Tax Adjudicator may consider a complaint where the full revenue agency complaints mechanisms have not been exhausted.

Having gone through HMRC's internal procedures, a taxpayer may then make use of the further protections provided by the Adjudicator and the Parliamentary and Health Service Ombudsman (Freedman & Vella, 2012: 86).

These internal complaint mechanisms within HMRC are outlined by Tax Adjudicator (2013: 8) as follows:

1. The first point of contact in instances of alleged misuse of discretion by HMRC is the local HMRC offices.
2. Where the taxpayer is not satisfied with the first point of contact, a second internal review may be requested from HMRC.
3. Once the first two avenues have been exhausted and a decision made, a complaint may be submitted to the Tax Adjudicators Office.
4. Taxpayers who remain unhappy following a decision by the Tax Adjudicator may then approach the Parliamentary Ombudsman.

The complaints mechanisms in the United Kingdom clearly articulate the next available avenue for taxpayers whose complaint is not resolved by the Tax Adjudicator. Taxpayers have an option to approach the Parliamentary Ombudsman. Maer and Priddy (2018:4) explain that the role of the Parliamentary Ombudsman is to investigate complaints from members of the public who believe that they have suffered injustices due to maladministration by government departments or certain other public bodies.

4.4 Canadian Office of the Taxpayer's Ombudsman

The Ombudsman's job is to uphold taxpayer rights and provide an independent and impartial review of unresolved complaints from taxpayers about service or treatment they have received from the Canadian Revenue Agency (Fekete: 2016).

The Canadian Taxpayer's Ombudsman was created by former Prime Minister Stephen Harper in 2007 to enforce Taxpayer Bill of Rights, which was also launched by the

Conservatives in the same year and also to provide an impartial review of unresolved taxpayer complaints (Alini: Online).

4.4.1 Mandate of the Taxpayer's Ombudsman

The mandate of the Ombudsman shall be to assist, advise and inform the Minister about any matter relating to services provided to a taxpayer by the Canada Revenue Agency (Taxpayer Ombudsman: 2011). Limitations apply to the mandate. The Ombudsman shall not review:

(a) the administration or enforcement of program legislation other than to the extent that the review relates to service matters;
(b) Government of Canada legislation or policy or Agency policy, other than to the extent that the legislation or policy relates to service matters;
(c) a request for a review arising from the application of a provision of the Taxpayer Bill of Rights
(d) the provision of an administrative interpretation by the Agency of a provision set out in the program legislation;
(e) any decision of, proceeding in or matter before, a court;
(f) legal advice provided to the Government of Canada; and
(g) confidences of the Queen's Privy Council for Canada.

4.4.2 Enforceability of recommendations

The Order in Council (2007) states that the Ombudsman's recommendations are not binding on the Revenue Agency. Accordingly, the Ombudsman may request a management response from the Agency that indicates what action is contemplated or being taken with respect to the recommendations or explains why the recommended action will not be taken. If the management response is considered unacceptable or is not received within a reasonable time, the Ombudsman may submit a report to the Minister or to the Minister and the Chair of the Board of Management.

Alini (Online) notes that the Ombudsman does not have the power to force the Canadian Revenue Agency to take action, however an exception exists in cases of financial hardship.

4.4.3 Structure of the Taxpayer's Ombudsman

The Office of the Taxpayer's is structured in such a way that the office operates at arm's length with the Canadian Revenue Office (Taxpayer Ombudsman: 2011).

4.4.4 Appointment of the Ombudsman

The Ombudsman shall be appointed by the Governor in Council for a term of five years, which term may not be renewed, and may only be removed for cause by the Governor in Council (Government of Canada: Online). This appointment is made on advice by the Cabinet (Taxpayer Ombudsman: 2011). Consequently, the appointment of the Taxpayer Ombudsman may only be terminated by the Governor in Council on good cause (Taxpayer Ombudsman: 2011).

4.4.5 Appointment of Staff

According to the Government of Canada (Online), the staff of the Office of the Taxpayers' Ombudsman shall be employed pursuant to the *Canada Revenue Agency Act,* 17 of 1999, and shall be within the Agency. Whilst there is a close link between the appointment of the staff of the Taxpayer Ombudsman and the Canadian Revenue Agency, the Taxpayer Ombudsman asserts that his office operates independently (Taxpayer Ombudsman: 2011).

4.4.6 Budget Autonomy

The Office of the Taxpayers' Ombudsman (Online) explains that the funding approved by the Treasury Board of Canada Secretariat for the operation of the Office of the Taxpayer's Ombudsman is part of the allocation of the Canadian Revenue Agency. Therefore, the use of the budget allocated to the Office of the Taxpayer's Ombudsman is subject to the same policy frameworks that govern the Canadian Revenue Agency.

4.4.7 Accountability

The Taxpayer's Ombudsman is an independent and impartial officer who will operate at arm's length from the Canadian Revenue Agency and report to the Minister of National Revenue (Taxpayer Ombudsman: 2011). The Ombudsman reports directly to the Minister of National Revenue and makes recommendations to the Minister on any matter that falls within the mandate. He submits an annual report to the Minister, which the Minister then tables in Parliament. Accordingly, this implies that the Taxpayer's Ombudsman does not have the power to report directly to Parliament.

4.4.8 Location

The Office of the Taxpayer's Ombudsman is located separately from the Canadian Revenue Agency (Taxpayer Ombudsman: 2011).

4.4.9 Term of Office

The Canadian Taxpayers' Ombudsman is appointed for a term of five years (Government of Canada: Online).

4.4.10 Complaint process

Section 7(1) of the Order in Council stipulates that the Taxpayer Ombudsman may only consider a complaint if the complainant has exhausted all the available remedies in the Canadian Revenue Agency (Taxpayer Ombudsman: 2011). An Order in Council is a legislative instrument generated by the Governor in Council and constitutes a formal recommendation of Cabinet that is approved and signed by the Governor General (Forsey, 2013: Online). The Queensland Parliament (Online), describes the Governor in Council as a governor acting with the advice of the Executive Council. However, a departure from the norm is made in exceptional circumstances where there are compelling circumstances and the complaint may be entertained without the taxpayer having to exhaust the internal complaint mechanisms within the Canadian Revenue Agency (Taxpayer Ombudsman: 2011).

4.5 Mexico Procuraduria De La Defensa Del Contribuyente

The tax ombudsman in Mexico is referred to as Procuduria de la Defense del Contribuyente ("PRODECON"). The Prodecon is a decentralised Mexican government organisation that acts as the Ombudsman of Mexican taxpayers, providing advice and issuing recommendations to the tax authorities (PWC Mexico: Online).

Based on international best practice, Mexico implemented the tax ombudsman concept through an independent public organisation in September 2011 (Lopez & Valenzuela, 2014: 2). This follows as a consequence of the 2004 Fiscal Reforms which resulted in amendments in the Federal Tax Code to include a provision under article 18-B that ultimately gave birth to the PRODECON. According to the PRODECON Organic Law, the PRODECON arises from the need to strengthen the relationship between tax authorities and taxpayers, creating a neutral space for meetings, agreements and mutual trust.

The Fiscal Reform of 2004 established that the defence of taxpayer rights and interest of taxpayers in tax matters would be the responsibility of the PRODECON. The PRODECON emerged by Law Decree when the 2006 PRODECON Organic Law was published.

Article 1 of the Organic Law provides that:

> *This Law is of public order, for application in the entire domestic territory, having as purpose to regulate the structure and faculties of the Taxpayer Advocacy Agency in order to assure the taxpayers' right to receive justice in tax matters, at the federal level, by providing advisory, representation and defense, resolution of Complaint Procedures and if proceeds, be competent to issue recommendations to tax authorities in the terms established by this law.*

4.5.1 Mandate of the PRODECON

The PRODECON has the following main and substantive powers (Bernal, Online: 34):

1. to counsel and advise taxpayers facing authorities' actions;

2. to provide legal defence in courts when the tax debt quantity does not exceed a certain limit;
3. to receive any type of complaint against actions of tax authorities;
4. to provide tax, legal and specialized consultation;
5. to investigate and identify the systemic problems of the taxpayers and to propose to the Revenue Body suggestions for their improved solutions;
6. to issue its opinion about the meaning and interpretation of tax regulations at the request of the Revenue Body;
7. to propose to such Body the proper amendments to its internal strategies;
8. to call senior tax officers to hold meetings with taxpayers' organizations in order to discuss and propose different kinds of solutions to their main problems;
9. to propose before the Tax Legislative Committee of the Federal Congress amendments to tax regulations; and
10. to act as an intermediary and even as a public witness in the Conclusive Agreement procedures in order to settle, in an alternative way, the tax conflicts that may arise between audited taxpayers and tax authorities.

4.5.2 Enforceability of recommendations

Bernal (Online: 34) emphasized that PRODECON does not have the supremacy of an authority. In other words, the PRODECON does not have coercive powers. Bernal further states that taxpayers can approach the PRODECON to request conclusive agreements. This is the first means to Alternative Dispute Resolution in the Mexican tax system and could result in the suspension of audit proceedings. Lopez and Valenzuela (2014: 2) submit that the PRODECON recommendations are observed by the tax agency in terms of ethical principles. The PRODECON Organic Law also provides that the Agency may not annul, amend or render null resolutions or acts against which a complaint or claim was filed.

According to Lopez and Valenzuela (2014: 2), the PRODECON is authorised to impose penalties where authorities:

(i) do not provide a formal report on time according to procedural timing;
(ii) do not provide supporting evidence in a complaint procedure;

(iii) do not speak against or support recommendations issued by the PRODECON or;

(iv) refuse to implement a recommendation addressed by PRODECON on an act declared void by complete lack of legal basis.

4.5.3 Structure of the PRODECON

Valenzuela and Lopez (2014: 2) note that from inception of the PRODECON, special attention was brought to bear, amongst other things, on its legal nature, functions and independence.

4.5.4 Appointment of the Tax Ombudsman

The appointment of the Tax Ombudsman in Mexico is made through a proposal by the President and appointment by Senate in accordance with Organic Law (Bernal, Online: 27).

4.5.5 Appointment of staff

The Taxpayer Advocacy Agency will have the necessary professional, technical and administrative career personnel required to carry out its functions and, therefore, the number of staff in the organization and rules for its operation will be issued by the Agency´s Organic Statutes (Organic Law, 2006: 135).

4.5.6 Budget Autonomy

The PRODECON forms part of the Mexican state structure but has its own functional and operational autonomy and patrimony (Lopez & Valenzuela, 2014: 2). This allows the PRODECON to act independently without any interference from the government. According to the Organic Law (2006: 134), the budget of the PRODECON is prepared by the revenue agency subject to the Federal Treasury Preliminary Budget and Accountability. The Organic Law also provides that once the budget of the PRODECON has been approved, the PRODECON has full and free exercise of the budget. The budget of the PRODECON may also not be lower than prior years (Organic Law, 2006: 135).

4.5.7 Accountability

The PRODECON is an organ of the Mexican State but with its own patrimony and, as such, is not an agency that is accountable to the Department of the Mexican Government ((Lopez & Valenzuela, 2014: 2).

4.5.8 Location of the office

Lopez and Valenzuela (2014: 2) explain that the PRODECON is an office with its own functional and operational autonomy. This means the offices operates independently and outside of the government.

4.5.9 Term of Office

In terms of the Organic Law (2006: 149), the term of office is four years which may be ratified for a second term of office.

4.5.10 Complaint process

Taxpayers may approach the PRODECON at any time when they feel affected by any action coming from the tax offices (Bernal, Online: 35). This is a different process from other Ombudsman institutions, which require the taxpayer to have exhausted all the internal complaints resolution process of the relevant revenue agencies.

4.6 Australian Inspector General of Taxation

Previously, Australia did not have a dedicated administrative complaints Ombudsman for tax matters; all the complaints were dealt with by the Commonwealth Ombudsman. The Commonwealth Ombud was established by the Ombudsman Act, 181 of 1976, to investigate administrative matters brought to the Ombudsman's attention.

The function of dealing with complaints relating to tax administration in Australia was then transferred to the Inspector General of Taxation from May 2015 (Commonwealth

Ombudsman: Online). According to the Inspector General of Taxation (2015: 35), this follows the government's decision aimed at enhancing the systematic review role of the Inspector General of Taxation to provide taxpayers with a more specialised and focused complaint handling mechanism for tax matters. The Inspector General of Taxation is an independent scrutineer agency specific to the Australian Taxation Office and the Tax Practitioners Board (Inspector General of Taxation, 2015: 35).

4.6.1 Mandate of the Inspector General of Taxation

The mandate of the Inspector General of Taxation is provided for under section 7(1) of the Inspector General Act, 28 of 2003, and provides that the Inspector General of Taxation has the power to investigate actions performed by a tax official relating to administrative matters under a taxation law following a request made by a particular entity. Section 7 of the Inspector General Act also affords the Inspector General of Taxation the powers to investigate systems established by the Australian Taxation Office or the Tax Practitioners Board in relation to administrative matters under a taxation law.

Furthermore, section 8 of the Inspector General of Taxation Act grants the Inspector General of Taxation the power to identify and investigate systemic issues. Such a review and investigation may be by the own motion of the Inspector General of Taxation in accordance with section 8(1) of the Inspector General of Taxation Act, or at the request of the Minister of Finance in terms of section 8(2) of the Inspector General of Taxation Act. Section 8(3) of the Inspector General of Taxation Act also states that the review into systemic issues may be made at the request by the Minister of Finance, the Commissioner of the Australian Taxation Office or Tax Practitioners Board, a resolution of either House or both Houses of the Parliament, or a resolution of a Committee of either House or both Houses of the Parliament. However, in terms of section 8 of the Inspector General of Taxation Act, the Inspector General of Taxation is not obligated to comply with the request.

4.6.2 Enforceability of recommendations

The Inspector General of Taxation makes determinations which are persuasive but not binding on the Australian Tax Office or the Tax Practitioners Board (Inspector General of

Taxation, Online). The recommendations made by the Inspector General of Taxation must be publicly reported and may be made to Government in relation to policy matters or to the Australian Taxation Office (ATO) on administrative issues (Inspector General of Taxation, 2015:2).

4.6.3 Structure of the Inspector General of Taxation

The Inspector General of Taxation was established by the *Inspector-General of Taxation Act, 28 of 2003,* as an independent specialist scrutineer for the tax administration system.

4.6.4 Appointment of the Inspector General of Taxation

Section 28(1) of the Inspector General of Taxation Act provides that the Inspector-General is to be appointed by the Governor-General of Australia by written instrument. Like the South African Tax Ombud, the appointment of the Inspector General of Taxation is not a matter for Parliament and remains a government matter.

Removal of Inspector General of Taxation

Section 35 of the Inspector General of Taxation Act provides for the conditions under which the Governor General may terminate the appointment of the Inspector General of Taxation. These conditions include, but are not limited to, grounds of misbehaviour or physical or mental incapacity

4.6.5 Appointment of the personnel of the Inspector General of Taxation

Section 36 of the Inspector General of Taxation Act provides that the office of the Inspector General of Taxation is staffed under the Public Service Act, 147 of 1999. In addition, the Inspector General of Taxation may arrange for secondment of employees in consultation with the Agency Head within the meaning of the Public Service Act. Therefore, it follows that the terms and conditions regarding the employment of the staff of the Inspector General of Taxation are determined by the Public Service Act as opposed to the revenue agency, as is the case in many countries, including South Africa, where the staff of the Tax Ombud are

appointed under the SARS Act. In terms of section 20 of the Australian Public Service Act, the agency head has the full powers and rights of an employer in respect of the staff of the agency.

Therefore, the Inspector General of Taxation has full control over the staff of his or her office and may dictate the terms and conditions of such employment. It also follows that the Minister will have no control over the staff of the Inspector General of Taxation as section 19 of the Public Service Act explicitly limits ministerial directions to the Agency head in respect of particular individuals under the supervision of the Inspector General of Taxation.

4.6.6 Budget of the Inspector General of Taxation

Section 30 of the Inspector General of Taxation Act provides that the remuneration of the Inspector-General is to be determined by the Remuneration Tribunal. The Remuneration Tribunal is, in turn, an independent statutory body that was established by the Remuneration Tribunal Act, 1973, to determine, report or provide advice about remuneration for various office holders such as Parliamentarians, Ministers and Parliament office holders as well as judicial and non-judicial officers of federal courts and tribunals (Davis Tax Committee, 2017: 102).

4.6.7 Accountability

The Inspector General of Taxation submits an annual report to the Minister of Finance in accordance with section 41 of the Inspector General of Taxation Act. The Minister of Finance will then table the report by the Inspector General of Taxation before the House of Assembly.

4.6.8 Location of the Inspector General of Taxation

The Inspector General of Taxation (2015: 35) explains that the Inspector General of Taxation is a separate entity from the Australian Taxation office and that such structural separation provides for an increased level of independence and public confidence.

4.6.9 Term of Office

In accordance with section 28 of the Inspector General of Taxation Act, the appointment of the Inspector General of Taxation will be on a full-time basis for a period specified in the written instrument of appointment. However, in terms of section 28 of the Inspector General of Taxation Act, such a period may not exceed 5 years.

Section 29 of the Inspector General of Taxation Act provides for the Minister to appoint a person to Act as the Inspector General of Taxation during a vacancy in the office or at any period when the Inspector General of Taxation is absent from duty or for any reason unable to perform the duties of the office.

4.6.10 Complaints process

In terms of section 7(2) of the Inspector General of Taxation Act, the Inspector General of Taxation may not investigate the following matters:

(a) rules imposing or creating an obligation to pay an amount under a taxation law; and
(b) rules dealing with quantification of such an amount.

The above provision is the same as the South African Tax Administration Act prohibition on the Tax Ombud from reviewing matters that are subject to objection and appeal.

4.7 Comparison of the Ombudsman offices in selected countries

Table 1: Comparison of tax Ombudsmen in selected countries

Country	Enforceability of recommendations	Legal Framework	Location of office	Accountability
South Africa	Non-binding recommendations	Within tax legislation	Separate Office	Minister of Finance
United	Non-binding	Own Act	Within the	Commissioner of IRS and

States	recommendations		IRS	report to Congress
United Kingdom	Non-binding recommendations	Within tax legislation	Within HMRC	HMRC with oversight by Permanent Secretary for Tax
Canada	Non-binding recommendations	Within tax legislation	Separate Office	Minister of National Revenue
Mexico	Non-binding recommendations	Own Act	Separate Office	Not accountable to the government
Australia	Non-binding recommendations but published.	Own Act	Separate Office	Minister of Finance

4.8 Conclusion

This chapter considered the Tax Ombudsman models adopted in the United Kingdom, United States of America, Canada, Mexico and Australia. The main focus of the review was on the organisational, structural and operational autonomy of these institutions in order to establish the extent of independence or reliance the offices have on the revenue agency or the government as a whole. The chapter also reviewed the mandate of the Ombudsman and the complaint review process to be followed.

From the above discussion, it was observed that the independence of Ombudsman institutions, specifically those with oversight of the tax authority, differs from country to country. This comes as a consequence of the manner in which countries locate the Ombudsman institution, taking into consideration the legal dispensation as well as socio-

economic and fiscal characteristics of the country, in order to avoid duplication of remedies and other functions already provided for.

The above discussion of the Ombudsman models in the five countries suggests that, while in some countries such as Mexico the model is appropriately configured to ensure clear independence, the independence of some countries remains compromised by the lack of structural autonomy of the institution, which allows high levels of ministerial control over the function of the institution. For example, it has been noted that the USA Taxpayer Advocate is housed within the Internal Revenue Service which makes the Taxpayer Advocate vulnerable to interference by the revenue agency. Independence or the lack of it is normally influenced by the legal framework establishing the office, which ultimately affects the appointment and the reporting channel of the Tax Ombudsman equivalent.

This chapter reviewed the Ombudsman institutions in the USA, United Kingdom, Canada, Australia and Mexico against the Ombudsman model that was adopted for South Africa to investigate any changes that can be implemented in South Africa. The following chapter will provide a conclusion, summary of the findings and recommendations for the necessary changes that can be applied to the South African context.

CHAPTER 5: SUMMARY, FINDINGS, RECOMMENDATIONS AND CONCLUSION

5.1 Introduction

This chapter provides a conclusion regarding the general research question posed in chapter one, which asks whether the Tax Ombud has been structured in a manner that ensures the independence of the Tax Ombud enabling an effective protection of taxpayers' rights. If the answer to the question is negative, the thesis will seek to make recommendations on whether an amendment is required to the Tax Administration Act or suggest a model that can be adopted from the selected foreign jurisdictions.

The South African Tax Ombud model is primarily based on the best international practices of similar institutions in Canada, the USA and the UK. However, there remain a few differences that specifically describe the context of the South African Tax Ombud. In comparing the Ombudsman models in the selected countries, the study considered the differences in territorial sovereignty. Thus, certain models adopted in other countries may not always be fit for South Africa, considering the legal landscape of South Africa.

5.2 Summary

It has been observed throughout the study that the independence of the Tax Ombud is important in ensuring an effective Ombud. Chapter 1 of the study discussed the research methods, context and the goals of the research. In chapter 2, the study discussed the important elements necessary for an effective Ombud structure. The study then reviewed the legislation providing for the Office of the Tax Ombud in chapter 3, which compared to the powers and duties of Ombudsmen in selected countries in chapter 4 to determine whether any lessons could be drawn for implementation in SA.

The review of the South African Tax Ombud structure in chapter 3 revealed that the Tax Ombud is not well equipped in terms of the founding legislation. The office lacks a constitutional identity. Based on the findings of this study, it was shown that oversight bodies for tax in the countries selected for the present study are susceptible to be abolished as the

legal framework of these institutions is seldom provided for in the Constitutions of these countries.

Chapter 4 analysed the models of the Ombudsman institution in the USA, the UK, Canada, Mexico and Australia. The analysis demonstrated that, while the introduction of a Tax Ombud is a fairly new concept, substantial progress has been made towards ensuring effective protection of taxpayer rights.

The present chapter makes recommendations for an improved model based on the findings of the Ombudsman models in the selected countries.

5.3 Findings and comparison

The thesis demonstrates that the organisational structure of the South African Tax Ombud is such that the office is not sufficiently independent to fulfil its mandate effectively and efficiently.

To support these findings, the following factors were considered:

- the ability of the South African Tax Ombud to independently perform its functions and duties; and
- the alignment of the South African Tax Ombud office with international practice in order to draw on the experience of the selected countries.

The Tax Ombud was established by the Tax Administration Act and derives its powers solely from the Act. This includes the powers to appoint staff as well as investigation of the complaints.

5.3.1 Enforceability of recommendations

Recommendations made by the Tax Ombud are not binding on taxpayers or SARS. This provision, set out in section 20 of the Tax Administration Act, has been criticised by some commentators on the basis that the Tax Ombud "lacks teeth" and that the recommendations

of the Tax Ombud will not necessarily be followed by SARS. It is submitted that the fact that the recommendations of the Tax Ombud are not binding on SARS is a safeguard which assists in ensuring that the recommendations of the Tax Ombud are fair.

In the selected foreign jurisdictions, the revenue oversight offices do not have the power to compel the revenue authority to adhere to the recommendations made by the Tax Ombud. This is true in the case of the Tax Ombudsman in Canada, the Taxpayer Adjudicator in the UK, the Taxpayer Advocate Service in the USA, Mexico's PRODECON and the Australian Inspector General.

The fact that Tax Ombud does not have the power to make binding or enforceable recommendations to remedy instances of wrongdoing by SARS means that SARS can decide whether the recommendations made by the Tax Ombud will be complied with or not. However, the Tax Administration Laws Amendment Act (2017) resulted in an amendment that requires SARS to inform the Tax Ombud within 30 business days where his or her recommendations will not be complied with. Previously, the Act did not allow for this and SARS could simply disregard the Tax Ombud's recommendations without providing any reasons and there were no legal sanctions for the non-compliance with the Tax Ombud's findings and recommendations.

While it is evident that Ombudsman institutions do not have coercive powers, taxpayers in certain foreign jurisdictions are entitled to recover damages and wasted costs where the revenue authority has abused its powers, resulting in the taxpayer incurring wasted expenditure. For example, the Taxpayer Advocate in the USA can issue taxpayer assistance orders while the Taxpayer Adjudicator in the UK may compel HMRC to pay costs. The South African Tax Administration Act, on the other hand, does not provide taxpayers with a legal basis to recover costs from SARS.

5.3.2 Appointment of the Tax Ombud

The manner of appointment of the Tax Ombud in South Africa fails to promote the constitutional values of accountability and transparency. The Katz Commission of Inquiry into Taxation (1995) called for an independent Tax Ombud, but the current

manner of appointment does not enhance good governance in the structure of the Tax Ombud. Despite the proposal by the Katz Commission that the Tax Ombud should not be positioned in a way that would erode the powers of the Public Protector, it is unclear why the Tax Ombud cannot be appointed in the same manner as the Public Protector. It has been submitted in previous chapters that the Public Protector seems to be required to act in a wide scope to include dealing with matters such as tax disputes. The appointment of the Public Protector is provided for by the Constitution, thus it becomes difficult to interfere in such process. The provisions in the Tax Administration Act in terms of the appointment of the Tax Ombud, however, imply a great deal of ministerial control of the Tax Ombud, which also restricts its independence.

5.3.3 Structure/Legal Framework

The study found that the primary shortcoming in the legal framework governing the Tax Ombud is that the Tax Administration Act does not provide explicitly for the independence of the Tax Ombud. In fact, nowhere in the Act is the word "independent" or "independence" mentioned in relation to the Tax Ombud. It follows then that the legal framework of the Tax Ombud is not adequate to strengthen the safeguards that guarantee the independence of the Office. Furthermore, the Tax Ombud is not a juristic person and may not enter into contracts, own moveable or immoveable property, sue or be sued, or act as an accounting office for legislative prescripts.

The absence of the word "independent" in the Tax Administration Act, the law governing the Tax Ombud, restricts the degree of independence enjoyed by this office in comparison to institutions established under chapter 9 of the Constitution, which includes the Public Protector. Section 181(2) of the Constitution expressly states that the Public Protector is independent and subject only to the Constitution and that the decisions must be applied with impartiality and without fear, favour or prejudice. The lack of independence and accountability negatively influence the effectiveness of the Tax Ombud's operations (Muntingh, Redpath & Petersen, 2017:7).

5.3.4 Term of Office

The Tax Ombud was initially appointed for a three-year renewable term. This term was relatively short in comparison to the selected foreign jurisdiction. The term was extended to five years, which may be renewed. The term of office of the Tax Ombud, following the 2016 Tax Administration Laws Amendment Act, is on par with the countries selected for this study.

5.3.5 Accountability

The Tax Ombud is appointed by the Minister of Finance who may also remove the Tax Ombud on account of misconduct, incompetence or incapacity. The Tax Ombud therefore remains accountable to the Minister of Finance. The National Taxpayer Advocate in the USA reports directly to Congress, which is equivalent of Parliament. This guarantees impartiality despite the high level of involvement by the Internal Revenue Service.

The power afforded to the Tax Ombud by the Tax Administration Act does not include accounting authority over administrative and operative functions required for the Office of the Tax Ombud to deliver its services. Therefore, the Tax Ombud relies on SARS to provide these functions in its structure. It is submitted that this position compromises the autonomous functions of the Office of the Tax Ombud.

5.3.6 Lack of a footprint

The Taxpayer Advocate, created to assist taxpayers in the USA in their dealings with the Internal Revenue Service, and similar bodies in Canada and the UK are located within the revenue service to simplify administration and preserve secrecy in so far as taxpayer affairs are concerned. The Taxpayer Advocate in the USA has a presence in each state. South Africa, on the other hand, only has one national office. This makes it burdensome for taxpayers to use the services of the Tax Ombud as there is only one office serving the whole country.

5.3.7 Budget of the Tax Ombud

The practice in Ombud institutions in the selected foreign jurisdictions is that the funding of the Ombudsman comes from the agency over which the Ombudsman has oversight. While this is international practice, it is submitted that this practice is to the disadvantage of the Tax Ombud institution. The legislature in SA acceded to the public request that the Tax Ombud would be in charge of his or her own budget.

5.3.8 Appointment of the Tax Ombud staff

The staff of the Tax Ombud is appointed by the Tax Ombud in terms of the provisions in the SARS Act. This has an unintended effect of SARS control over the staff of the Tax Ombud and attracts a negative perception of the impartiality of the Tax Ombud by the public. The appointment of the Tax Ombud staff creates an overlap between SARS and the Tax Ombud internal operations, which creates an impression that the Tax Ombud will be biased towards SARS as they find support functions from SARS.

5.3.9 The mandate

The mandate of the Tax Ombud is in line with the mandate of the other Ombud institutions and the limitations on the mandate are justifiable. In addition, the Tax Ombud's mandate is wide and allows for investigation of certain issues, in the form of systemic issues, in the administration of tax by SARS, without a formal complaint by a taxpayer with the approval of Minister of Finance.

5.3.10 Location

The Tax Ombud is a separate office from SARS and this can be confirmed by the separate location of these offices. This provides for a much stronger model than the Taxpayer Advocate Service which is housed within the IRS. The location of the Tax Ombud suggests independence and other Ombud models can draw from this model in this regard.

5.4. Recommendations

The following recommendations flow from the analysis in the previous chapters in this study. In order to strengthen the Tax Ombud, the structural deficiencies set out below should be addressed by the legislature.

5.4.1 Enforceability of Tax Ombud recommendations

It is recommended that the provisions of section 20 of the Tax Administration Act that the Tax Ombud recommendations are not binding on either the taxpayer or SARS, should retained and that SARS should continue to provide reasons where such recommendations are not accepted. However, the Tax Ombud should be empowered to recover costs on behalf of taxpayers where the actions of SARS result in the taxpayer incurring unnecessary costs. South Africa currently has no legal provision regarding taxpayers' rights to monetary reparations from SARS in circumstances where the conduct of an official of SARS has caused undue discomfort to a taxpayer (Ofori-Boateng, 2014: 82). For example, in the USA, the National Taxpayer Advocate does not make recommendations that are binding on the Internal Revenue Service, but may issue taxpayer assistance orders which require the Internal Revenue Service to desist from proceeding to recover taxes from a taxpayer until the Taxpayer Advocate Service has resolved the taxpayer's issue with the Internal Revenue Service.

The decision to make the recommendations of the Tax Ombud binding would be inconsistent with the status of an Ombudsman and would essentially convert the Office of the Tax Ombud into another court of law. Keith (2005: 22), as quoted by Chen (2010: 732), contends that if Ombudsmen have to resort to coercive powers too often, their power to persuade may be eroded.

Moreover, making recommendations of the Tax Ombud binding would negatively affect his role as a mediator between SARS and taxpayers and considerably reduce the effectiveness of the office. An Ombudsman is an independent and impartial officer and it is therefore important for the Tax Ombud to enjoy the trust of all stakeholders. Although the Tax Ombud deals with two bodies, SARS and the public, he is, however, not representing SARS or the taxpayers. He is not an advocate of the taxpayer or defender of SARS. Remac (2013: 62)

observes that, on certain occasions, an ombudsman institution has been included in the legal systems of countries whose legal conscience was not and sometimes is still not prepared for the soft law character of the institutions.

An Ombudsman should thus rely on persuasive authority to have his recommendations implemented, as opposed to making legally enforceable recommendations, which could result in the Tax Ombud interfering with the courts. An Ombudsman is designed to be a cost-effective complaint mechanism and therefore interfering with the courts could result in high costs of litigation.

It is also recommended that a Parliamentary Select Committee should be established to follow up on the implementation of the Tax Ombud's recommendations, particularly in relation to systemic issues. An analysis of the Annual Reports of the Office of the Tax Ombud indicates certain issues that were already identified in 2015/2016 Annual Report still persist, such as SARS' failure to assist victims of identity theft. This should be a task placed under the responsibility of Minister of Finance to whom the Tax Ombud reports. This will persuade SARS not only to accept recommendations of the Office of the Tax Ombud, but to review its operating procedures to make improvements in the tax administration systems that will ultimately result in more effective changes to its policies. This would result in a balance between SARS' powers and taxpayer rights.

Where SARS rejects the recommendations of the Tax Ombud, the Select Committee should determine whether the Tax Ombud's recommendations to remedy a service procedure or administrative matter were correct and should be implemented. This can be achieved by calling on the Tax Ombud official and SARS to explain their respective positions. In investigating systemic issues, the Tax Ombud should meet with SARS to highlight the investigation and underscore that a collaborative effort is preferred and obtain SARS' input and commentary.

5.4.2 Appointment of the Tax Ombud

Although the Tax Ombud appointment process is not provided for in the Constitution, such a process would provide far greater confidence in the appointment of the Tax Ombud. The

office of the Tax Ombud plays an extremely important role in the development of democracy by virtue of the protection it affords to taxpayers and providing remedial measures to ensure that SARS complies with the law. Therefore, the existence of the Tax Ombud ensures that the extremely wide powers granted to SARS are not abused and as a result it becomes necessary that the Tax Ombud is adequately resourced. It is thus recommended, in the absence of a separate Tax Ombud Act or establishment of the Tax Ombud under the Constitution, the right to appoint the Tax Ombud be retained by the Minister of Finance, subject to recommendations of a suitable Advisory Board, such as in the case of the USA, where the National Taxpayer Advocate is appointed by the Secretary of Treasury in consultation with the Oversight Board, or the manner of appointment of the Procurator of Mexico who is appointment based on the President's proposal to the Senate.

5.4.3 Structure/Legal Framework of the Tax Ombud

The following measures are recommended for strengthening the legal framework of the Tax Ombud:

- the Tax Ombud could be modelled along the lines of Chapter 9 institutions such as the Public Protector, the Human Rights Commission and the Auditor General, to ensure independence of the office, as the law governing these institutions clearly articulates their independence; and
- the introduction of a Tax Ombud Act along the lines of the Inspector General of Taxation of Australia or, alternatively, the establishment of the Tax Ombud to be governed by the Constitution; this will not only greatly aid in amending the process of appointment and removal of the Tax Ombud but an enabling legislation will provide the Tax Ombud with full accountability for his powers and functions.

5.4.4 Term of Office

It is recommended that the term of five years which is renewable be retained as this adheres to international norms.

5.4.5 Accountability

While certain countries such as the USA table the report directly to Parliament, this is not recommended in the South African context, as the Tax Ombud's legal status is not provided for in the Constitution.

5.4.6 Lack of a footprint

It is recommended that, for the Tax Ombud to be able to fully serve the large number of taxpayers, the footprint of the office is extended across the country. This can also be achieved by opening more facilities in provinces with a high taxpayer population. This would adhere to international best practice, as countries such as the USA has local taxpayer advocates in each state.

5.4.7 Budget of the Tax Ombud

It is recommended that the budget of the Office of the Tax Ombud be motivated for and managed by the Tax Ombud, as opposed to the Minister of Finance as is currently the case.

5.4.8 The appointment of the Tax Ombud staff

The hiring of the staff of the Office of the Tax Ombud staff should not be in terms of the SARS Act as this gives SARS control over the staff and may result in their adhering to SARS policies. The staff of the Tax Ombud should be exclusively appointed by the Tax Ombud. While Ombudsman institutions in the USA, the UK and Canada are sourced from the revenue agency, South Africa can adopt the appointment manner of the Australian Inspector General of Taxation and the PRODECON in Mexico. The staff of the Inspector General of Taxation is appointed in terms of the Public Service Act.

5.5 Conclusion

The study examined the structure of the South African Tax Ombud against selected countries and the study contends that the structure and independence of the Tax Ombud office can be

improved. The main reason is that the legislative framework needs to be amended to ensure that the impartiality and accountability of the Tax Ombud is not questionable. Importantly, the study identifies that including the Tax Ombud as an organ of state established by the Constitution will help to strengthen the Tax Ombud and ensure that it is free from any political interference, including abolishing the office. However, despite the structural challenges, the study contends that the establishment of the South African Office of the Tax Ombud is comparable with international best practice. In some cases, the South African Tax Ombud is stronger, for example the Tax Ombud in the USA and the UK are units within the revenue agencies, while the South African Tax Ombud is an institution outside of SARS.

While the Tax Ombud is arguably independent of SARS, it is submitted that administratively the office operates as a unit within SARS. The office is not a legal entity in its own right, and SARS retains responsibility over its budget and the appointment of staff.

The Tax Ombud cannot enter into contracts, for example a rental contract and the office depends on SARS for office accommodation, security, human resources and information technology, etc. The Office of the Tax Ombud therefore does not have control over its own performance as SARS has full responsibility for all administrative support functions. This has the potential to negatively impact on the performance of the Office of the Tax Ombud.

Despite the amendment in the 2016 Tax Administration Laws Amendment Act regarding the appointment and recruitment of the staff of the Tax Ombud, the staff of the Tax Ombud remain governed by SARS Act. While experts have argued that this is a critical enabler of access to taxpayer data through SARS systems for the purpose of investigating complaints, this is one of the major compromises of the independence of the Tax Ombud. Other countries, such as Australia, have a stringent process for the appointment of the Inspector General of Taxation staff through the Public Service Act.

The offices of the Tax Ombud and the Public Protector signed a memorandum of understanding on 9 April 2019 after the present research was completed (Office of the Tax Ombud, 2019: Online). In terms of the memorandum of understanding, the two offices will work together in resolving taxpayers' complaints against SARS through cross-referral of complaints between the two offices, with the Public Protector being the complaints body of last resort.

In other words, complaints that are not service related, procedural or administrative matters in the application of any tax Act will be referred to the Public Protector if they fall within the ambit of the Public Protector where there is alleged or suspected improper conduct, which may result in prejudice, and those that fall within the mandate of the Tax Ombud will then be referred to the Public Protector.

The office of the Public Protector has wider powers to investigate any conduct in state affairs in terms of section 182(1) of the Constitution and section 6 of the Public Protector Act. While the Public Protector has wider powers, as indicated in chapter 2, the Public Protector is normally occupied with other matters of political interest which results in fewer taxpayers exercising this option.

It has always been clear that a taxpayer who was not satisfied with how the Tax Ombud has dealt with a complaint was not precluded from approaching the Public Protector and therefore this Memorandum of Understanding has no implications for the recommendations made in this study but will make more taxpayers aware of the option to approach the Public Protector in certain instances.

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