

ANALYSIS OF THE SOUTH AFRICAN TAX OMBUD

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ANALYSIS OF THE SOUTH AFRICAN TAX OMBUD

CHAPTER 1

INTRODUCTION

1.1 BACKGROUND

Maladministration and arbitrary actions by the government administrators and revenue administrators are common phenomena in government organisations/departments (International Policy Fellowship, nd). People who are unhappy with the administrator normally approach the court to address their grievance. The court procedure is, however, usually very slow, lengthy and costly. In order to deal with the slow procedure, special institutions have been established. The court is usually burdened with other matters, such as civil, criminal and constitutional matters, resulting in a very low priority being given to dealing with personal grievances arising from maladministration, arbitrary application of rule, regulation and unlawful procedures (International Policy Fellowship, nd).

The establishment of the Danish Ombudsman in 1955 started a worldwide interest in the Ombudsman mechanism. According to Dr Pickle, the Director General of the Office of the Ombudsman in Australia, “the introduction of an Ombudsman in New Zealand, which is the first country to introduce the Ombudsman, formed an interest in the world about the Ombudsman concept” (International Policy Fellowship, nd).

South Africa became part of the countries that were interested in the Ombudsman system that would be dedicated to tax related matters. This was evident when the Katz Commission announced that in addition to identifying the important role of the Public Protector, an independent South African Tax Ombud should be created to also serve as the secondary protector of taxpayers' rights and facilitator between taxpayers and the South African Revenue Service (SARS) (National Treasury, 1996:27).

Croome (2002:28) supports the implementation of a South African Tax Ombud under the legislation administered by SARS as well as the recognition of taxpayers' rights and the

enforcement of these rights, as currently implemented in certain countries, including the Organisation for Economic Co-operation and Development (OECD) countries.

Croome (2002:28) is of the view that the introduction of the South African Tax Ombud would provide an effective solution to addressing and resolving taxpayers' administrative difficulties, in conformity with certain countries.

The Taxation Committee of the South African Institute of Chartered Accountants (SAICA, 1997:66) has recognised that the function of the South African Tax Ombud is to ensure that the provisions of the tax legislations are not applied unfairly to taxpayers and that SARS acts in a procedurally fair manner.

SARS issued a Media Statement noting that that the Tax Administration Bill (TAB) would be promulgated into law on 4 July 2012 as the Tax Administration Act 28 of 2011 (TAA). The TAA contains a provision which creates the South African Tax Ombud (SARS, 2012).

According to Brincker (2010), the legislator at last succumbed to pressure from taxpayers by introducing the South African Tax Ombud. This follows from years of lobbying in order to introduce the South African Tax Ombud in circumstances where the SARS Services Monitoring Office (SSMO) has seemingly failed to address the needs of taxpayers.

The Office of the SSMO was introduced to the National Assembly by Trevor Manuel (Minister of Finance) in the 2002 Budget. The SSMO was announced as a Complaints Office that would be independent of SARS's branch office and deal with taxpayers' complaints. The Office of the SSMO reports directly to the Commissioner of SARS and to the National Treasury (Intergritax, 2002b).

In the briefing note prepared by SARS for the Standing Committee on Finance on the TAB it was indicated that although the SSMO currently provides an internal recourse for taxpayers, the South African Tax Ombud is generally regarded as a more effective and independent remedy to address complaints or enforce taxpayer rights (SARS 2011a:2).

Section 15 of the TAA provides that SARS employees will be seconded to the South African Tax Ombud, that the Office will be funded from SARS's budget, and that the South African Tax Ombud will continue to operate independently of SARS.

Section 18 of the TAA provides that the South African Tax Ombud resolves issues by way of investigation, mediation and recommendation. Section 18 of the TAA further provides that the South African Tax Ombud should entertain a complaint only if the taxpayer has used all the available forums to address complaints within SARS, except where there are compelling circumstances before the Ombudsman is approached, including the SSMO.

Professor Osman Mollagee, a tax director at PricewaterhouseCoopers, is of the view that even though the South African Tax Ombud is appointed by the Minister of Finance and also reports to him, it can be considered a slight improvement on the SSMO. The South African Tax Ombud would not be truly independent if SARS is responsible for the budget to manage the South African Tax Ombud and the employees of the South African Tax Ombud were employed by SARS (Taxgram, 2011).

The South African Institute of Chartered Accountants (SAICA), the South African Institute of Professional Accountants (SAIPA), and the South African Institute of Tax Practitioners (SAIT) have also suggested and raised concerns about the model adopted for the South African Tax Ombud, but no research has been conducted on the model.

This study will critically analyse the model adopted for the South African Tax Ombud. The model will be compared to the United Kingdom's Tax Adjudicator's Office (UK's AO), Canada's Taxpayers' Ombudsman, the United States' Taxpayers' Advocate Service, the Australian Commonwealth Ombudsman, Botswana's Office of the Ombudsman, New Zealand's Ombudsman Office and Sweden's Parliamentary Ombudsman.

The study will also analyse the potential problems with the South African Tax Ombud, which will be compared to the problems experienced in the countries listed above.

1.2 PROBLEM STATEMENT

The model adopted for the South African Tax Ombud is a hybrid of the UK's AO that was set up in 1993 and the Canadian Taxpayers' Ombudsman which was set up in 2008. The model of the South African Tax Ombud model will be more similar to the Canadian Taxpayers' Ombudsman model (SARS, 2011a:4).

The South African Tax Ombud has been introduced to provide the public an opportunity to seek protection from SARS more quickly and at a lower cost than through the court should the public disagree with SARS's administrative actions (Retief, 2010:35).

The UK's AO requires of the complainant to firstly contact the local revenue office of the department and ask for a review of the complaint if it has not been resolved. Secondly, the complainant must contact the department's internal review team and ask for a second review of the complaint. Should the complaint not be resolved, the Tax Adjudicator's Office should be contacted (Adjudicator's Office, nd).

The Canadian Taxpayers' Ombudsman requires of the complainant to firstly exhaust all the internal complaint mechanisms that are available within the Canadian Revenue Agency (CRA) prior to contacting the Canadian Taxpayers' Ombudsman. The process requires that the complainant first approach the employee that the complainant was dealing with, and if the complaint has not been resolved, the complainant may approach the manager of that employee. If the problem is still not resolved, a formal complaint should be lodged with the CRA (Taxpayers' Ombudsman, 2010a).

For taxpayers in South Africa to reach the South African Tax Ombud, taxpayers should firstly lodge a complain to SARS that they dealt with at the relevant branch office, and should SARS be unable to resolve the complaint, it may be referred to the SSMO (Intergritax, 2002a). The taxpayer may only contact the South African Tax Ombud after he has exhausted all the internal resolution processes at SARS (Section 18 of the TAA).

A potential problem with the model of the South African Tax Ombud might be the lack of independence (actual and perceived) from SARS, as pointed out by PWC (2012:18).

1.3 PURPOSE STATEMENT

The primary purpose of the research is to compare the models of the Ombudsman offices in Australia, Botswana, Canada, New Zealand, Sweden, the United Kingdom (UK) and the United States of America (USA) with the South African Tax Ombud and to determine whether it can be successfully adopted in South Africa.

The model adopted for the South African Tax Ombud is a hybrid of the UK and Canadian models. Countries that were also considered by SARS for the South African Tax Ombud model were Australia, Botswana, Canada, New Zealand, Sweden, the UK and the USA (SARS, 2011a:4).

Secondly, this study aims to examine the process to be followed prior to contacting the South African Tax Ombud in comparison with the process to be followed prior to contact with the Ombudsman of the countries selected. The types of complaints that can be directed to the Ombudsman will be examined.

The third purpose of this study, from an academic point of view, is to provide valuable insight into the model adopted for the South African Tax Ombud as well as insight into the models of other countries which formed the basis for the South African Tax Ombud. Extensive research has revealed that no significant academic research has been conducted with a focus on the model of the South African Tax Ombud.

From a practical point of view, this study will be helpful in assisting SARS and taxpayers to identify possible gaps in the model adopted for the South African Tax Ombud. This study will also point out the potential shortcomings of the South African Tax Ombud which might prevent it to meet its strategic objectives.

1.4 RESEARCH OBJECTIVES

The research objectives of this study are:

- to discuss the complaint measures available in South Africa;
- to analyse the model adopted for the South African Tax Ombud in order to determine when and how a taxpayer would approach the South African Tax Ombud;
- to examine the models adopted for the Ombudsman in the following countries: Australia, Botswana, Canada, New Zealand, Sweden, the UK and the USA; and
- to compare the South African Tax Ombud's model with the models adopted in the countries listed above in order to determine the similarities and the differences.

1.5 DELIMITATIONS AND ASSUMPTIONS

1.5.1 DELIMITATIONS

This research contains the following delimitations relating to its context, constructs and theoretical perspective:

- The research does not discuss the correctness of the model of the Ombudsman opted by South Africa.
- The research does not discuss the academic qualifications and experience required of the Tax Ombud as well as the academic and experience required to the Office of the Ombud.

1.5.2 ASSUMPTIONS

This research assumes that the provision applicable to the Tax Ombud in the TAA will remain unchanged.

This research also assumes that the countries selected will not change any other rules regarding the operation of their Ombudsman.

1.6 DEFINITION OF KEY TERMS AND ABBREVIATIONS

This research contains several key concepts. The ways in which these key terms have been used in this study are defined as follows:

Australian Ombudsman: This refers to the Australian Ombudsman's Office that came into force under the Australian Ombudsman Act of 1976 to review and investigate complaints, perform audits and inspections, encourage good administration, and carry out specialist oversight tasks (Commonwealth Ombudsman, nd).

Botswana's Office of the Ombudsman: The Ombudsman was established by a 1995 Act of Parliament and started operating on 1 December 1997. The Ombudsman is an official who is appointed by the President in consultation with the Leader of the Opposition in Parliament. His duty is to investigate the administrative actions or decisions taken by public institutions or the officials of such institutions. He investigates upon receipt of complaints from members of the public or, in some cases, of his own motion and, in either case, may make recommendations for remedial action if he considers it necessary to do so (Office of the Ombudsman, 2011).

Canadian Taxpayers' Ombudsman: The Ombudsman acts as an advocate for taxpayers. The mandate of the Ombudsman is to assist, advice and inform the Minister about any matter relating to services provided to a taxpayer by the Canadian Revenue Agency (Taxpayers' Ombudsman, 2010a).

Her Majesty's Revenue and Customs (HMRC): This refers to a non-ministerial department of the UK government responsible for the collection of taxes, the payment of some forms of state support and the administration of other regulatory regimes, including the national minimum wage. HMRC was formed by the merger of the Inland Revenue and Her Majesty's Customs and Excise, which took effect on 18 April 2005. (HM Revenue and Customs, nd)

Katz Commission: This refers to the Commission of Enquiry into certain aspects of tax structures of South Africa established in terms of the Constitution (South Africa Government Online, 2012).

New Zealand's Ombudsmen Office: This refers to New Zealand's Ombudsmen Office established in terms of The Ombudsmen Act of 1975. The Ombudsman's function is to investigate and review complaints about decisions made by Ministers of the Crown and central government agencies on requests for information (Gillian, 1998: 15).

Ombudsman: An official appointed to investigate individuals' complaints against maladministration especially that of public authorities, but with a significant degree of independence, who is charged with representing the interests of the public by investigating and addressing complaints of maladministration or violation of rights (The New Oxford Dictionary of English, 2001).

SARS Services Monitoring Office: This refers to the office established by SARS to fast-track and follow up on complaints on procedural and services matters that cannot be resolved at branch-office level (SARS, 2002).

Swedish Parliamentary Ombudsmen: This refers to the Parliamentary Ombudsmen (JO) that is part of the parliamentary control. The task of the Ombudsmen is, on behalf of the Riksdag (the Swedish Parliament) and independent of the executive power, to review the implementation of laws and other regulations in the public sector (The Parliamentary Ombudsmen, 2012).

United Kingdom's Adjudicators Office: This refers to the office of the adjudicator who acts as a fair and unbiased referee looking into complaints about HMRC across the UK. (Adjudicator's Office, nd)

United States' Taxpayer Advocate Service: This refers to the Taxpayers' Advocate Service which was established in terms of Section 7803(c)(2) of the Internal Revenue

Code to ensure that every taxpayer is treated fairly, and knows and understands his rights (Internal Revenue Service, 2013a).

Table 1: Abbreviations used in this document

Abbreviation	Meaning
ADR	Alternative Dispute Resolution
AO	Adjudicators Office
ATO	Australian Tax Office
CIR	Commissioner of Inland Revenue
CRA	Canadian Revenue Agency
HMRC	Her Majesty's Revenue and Customs
IRD	Inland Revenue Department
IRS	Inland Revenue Service
ISO	International Organisations for Standardisation
JO	The Justice Office of the Parliamentary Ombudsmen
OECD	Organisation for Economic Co-operation and Development
PAJA	Promotion of Administrative Justice Act
SAICA	South African Institute of Chartered Accountants
SAIPA	South African Institute of Professional Accountants
SAIT	South African Institute of Tax Practitioners
SARS	South African Revenue Service
SCA	Supreme Court of Appeal
SSMO	SARS Service Monitoring Office
TAA	Tax Administration Act 28 of 2011
TAB	Tax Administration Bill
TAO	Taxpayer Assistance Orders
TAD	Taxpayer Advocate Directive
TCO	Tax Credit Office
TAO	Taxpayers' Advocates Services
UK	United Kingdom
USA	United States of America
VOA	Valuation Office Agency

1.7 OVERVIEW OF CHAPTERS

The study will be presented using the following structure:

Chapter 1 deals with the model which was previously adopted for the SSMO and was not addressing the needs of the taxpayers (Brincker, 2010; SARS, 2011a:2) as there was a need for the Tax Ombud. This chapter also deals with the independent Ombudsman that has been requested by the taxpayer since the recommendation of the Katz Commission in 1996. It is still not clear whether the Ombudsman introduced in the TAA will address the needs of the taxpayers.

Chapter 2 investigates the dispute resolution avenues that were available when a taxpayer had a dispute with SARS, prior to the new TAA, namely the SARS internal service issue resolution, SSMO, the Public Protector and the objection and appeal process, i.e. the normal court process. This chapter also analyses the model that has been adopted for these dispute resolution avenues.

Chapter 3 analyses the new rules that came into operation with the TAA dealing with the South African Tax Ombud, as well as the model that has been adopted.

Chapter 4 provides an analysis of the models adopted for the Ombudsman of the following countries: Australia, Botswana, Canada, New Zealand, the UK, the USA and Sweden. The analysis provides the model adopted for each Ombudsman, the independence of the Ombudsman from the revenue office, as well as the types of complaints that are submitted to the Ombudsman and the process followed to submit such complaints.

Chapter 5 provides a comparative analysis of the Ombudsman systems analysed in chapters 3 and 4, as well as the similarities and differences.

Chapter 6 concludes this study by addressing the research objective, providing recommendations and ideas for future research.

CHAPTER 2

DISPUTE RESOLUTION IN SOUTH AFRICA

2.1 INTRODUCTION

The ineffectiveness of the SSMO in dealing with taxpayers' administrative disputes resulted in the legislators introducing the new South African Tax Ombud. In this chapter, the dispute resolution avenues that are currently available when a taxpayer has a dispute with SARS are discussed, as well as the functioning of these dispute resolution avenues.

According to the former Commissioner of SARS, Mr Oupa Magashula, SARS generally faces two types of disputes:

- The first dispute relates to problems regarding the interpretation of the law, where the normal dispute resolution processes in the form of objections, appeals with an option either an alternative dispute resolution or an appeal to the Tax Board or the Tax Court are available.
- The second relates to failures in the administration of tax legislation where the administrative resolution channels that a taxpayer can use are the internal service resolution, the SSMO and the Public Protector before the normal court system is used (Bell dewar, nd).

Section 105 of the TAA provides that “a taxpayer may not dispute an assessment or decision as described in Section 104 of the TAA in any court or other proceedings, except in proceedings by way of objection and appeal or the other forms of dispute resolution provided for in Chapter 9 of the TAA or by application to the High Court for review”.

Dwyer (2004:102) is of the view that the available reliefs and remedies for the taxpayer or any person, from the actions of SARS, exist in three separate avenues and these must, normally, follow in order. These could be termed non-constitutional, administrative and constitutional avenues.

Disputes relating to procedural aspects are also referred to as administrative avenues and disputes relating to an assessment are referred to as non-constitutional avenues. The disputes relating to non-constitutional avenues will be discussed in the following sections. Disputes relating to the constitutionality of the legislation administered by SARS will not be discussed in this study.

2.2 LEGISLATION/NON-CONSTITUTIONAL DISPUTES

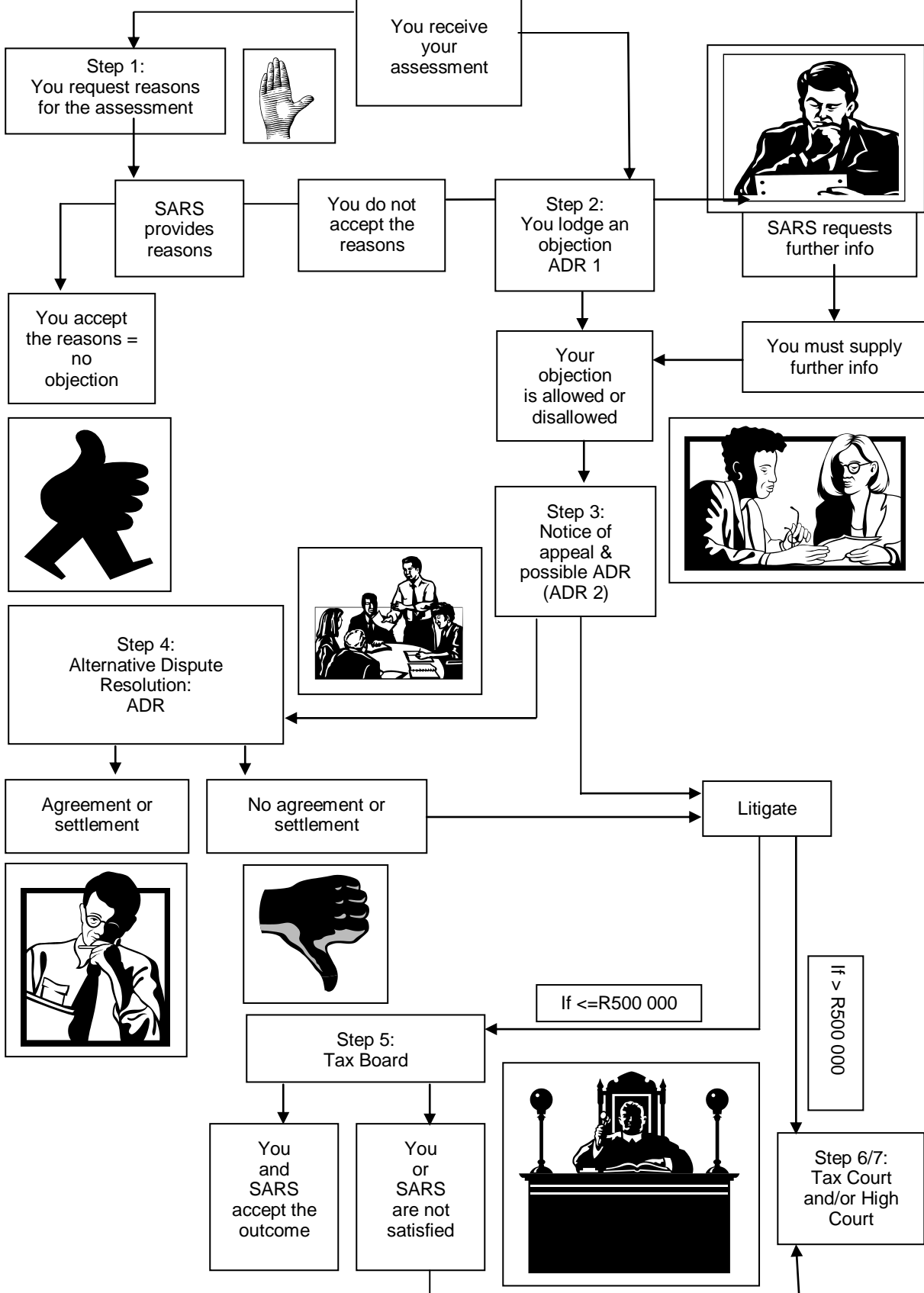
The first dispute resolution avenue to be discussed is the non-constitutional avenue – that which is provided for by the revenue legislation itself. This normally occurs where SARS, under Section 104 of the TAA, determines a taxpayer's liability for tax by virtue of an assessment.

According to SARS (2005:3), the reason for the review of the objection and appeal procedures is that there have been numerous complaints from taxpayers that tax disputes take extended periods of time to be resolved. A particular area of concern was that the period between the lodging of the objection by the taxpayer and the time it takes for the objection to be allowed or disallowed was too long. The new rules are much more formalistic and driven by time limits within which a matter must be attended to once an objection has been lodged.

In *Rossi v Commissioner for South African Revenue Service* (2012) 8 SATC 387, Satchwell J expressed agreement with the decision in *Van Zyl NO v The Master* 49 SATC 165 in which it was held that “the only way in which an assessment can be contested is in the manner provided for in the Income Tax Act (and now provided for in the TAA) by lodging an objection and then, if the objection is turned down, appealing to the Tax Court in terms of Section 83 of the Income Tax Act No 58 of 1964”.

Stiglingh, Koekemoer, Schalkwyk, Wilcocks, De Swardt & Jordaan (2012:1027) suggest that the taxpayer can follow the following steps in resolving a tax dispute (Diagram 1):

Diagram 1: HOW TO GO ABOUT RESOLVING A TAX DISPUTE:



Source: Stiglingh *et al* (2012:1027)

If the taxpayer still feels aggrieved by the assessment or the reasons provided he may object to it (step 2 in Diagram 1) and if not successful, appeal (Dwyer 2004:103).

The following section will discuss the process followed when a taxpayer has lodged an objection.

2.2.1 OBJECTION

From its inception, South Africa's income tax legislation recognised a taxpayer's right to dispute the correctness of an assessment with the tax authorities. That is, of course, a right that derives from the rule of law itself, for tax is levied in terms of legislation and is not imposed at the whim of the revenue authorities (Williams, 2013:24).

This is the first step by the taxpayer indicating that he disagrees with an assessment issued by SARS.

The taxpayer may submit a written notice to SARS requesting reasons which explain how SARS calculated an assessed amount, and the notice should be delivered to SARS before the expiry of 30 days from the date on which an assessment was issued. SARS does not have a prescribed method or form to request reasons for an assessment. SARS has 60 days from the date of the request to provide the taxpayer with such written reasons for the assessment. Where adequate reasons for the assessment have already been provided, SARS has 30 days to inform the taxpayer in writing that adequate reasons have already been provided by SARS (SARS, 2011b:2).

Any taxpayer may object to an assessment issued by SARS in which the taxpayer has an interest. If the relevant legislation provides a taxpayer with a right to objection and appeal, a taxpayer may also object to any decision made by SARS in respect of that legislation. Once a taxpayer has objected, a dispute will exist between the taxpayer and SARS (SARS, 2005:5).

An objection to an assessment must be submitted in writing and must specify the grounds of objection in detail. A verbal objection will not be accepted, but if a person should personally produce an assessment notice and call attention to an obvious error which does not involve any question of principle or interpretation of the law, a written notice may be dispensed at the discretion of a responsible officer on the staff of the assessing office (Zulman, Preiss and Silke, 2012).

Section 104 of the TAA provides that “a taxpayer who is aggrieved by an assessment made in respect of the taxpayer may object to the assessment. The taxpayer may object and appeal against the following decisions:

- a) a decision by a senior SARS official not to extend the period for lodging an objection;
- b) a decision under Section 107(2) of the Act not to extend the period for lodging an appeal; and
- c) any other decision that may be objected to or appealed against under a tax act”.

A taxpayer may rely on his own mistakes as a basis for objecting to an assessment (ITC 1785 67 SATC 98).

The meaning of "aggrieved" was clarified in the case of Administrator, TV and First Investments (Pty) Ltd v Johannesburg City Council 1971 (1) SA 56 (A) 60, where it was held that:

“In reference to some English statutes where the rights of a 'person aggrieved' fell for interpretation, the English courts generally took the view that to be 'aggrieved' a person must not merely be dissatisfied with or even prejudiced by an act or decision performed or taken under statutory powers. He must be deprived of something to which he was legally entitled or he must have been subjected to a legal burden (e.g. a duty to pay cost or execute works). The English courts have generally denied *locus standi* to persons claiming to be 'aggrieved' by a decision unless they have been able to point to an encroachment on vested rights or the imposition of a new legal obligation.”

In terms of the rules, a taxpayer has 30 days to lodge an objection, that the objection should be lodged on an ADR 1 form, and that the taxpayer should receive feedback within 30 days after lodging the objection.

An objection delivered after 30 days may be accompanied with reasons for late submission. For SARS to consider any reasons for a late objection, the taxpayer must submit facts and arguments, supported by documentation, as required in terms of rule 4 of the rules (Klue, Arendse & Williams, 2012).

When exercising his discretion to condone the late objection, the senior SARS official must act in compliance with Section 33 of the Constitution of the Republic of South Africa, which requires procedural fairness.

Section 104(5) of the TAA also provides for circumstances where a late objection will not be considered.

In terms of Section 104(5) “the period for objection must not be extended for a period exceeding 21 business days, unless a senior SARS official is satisfied that exceptional circumstances exist which gave rise to the delay in lodging the objection or if more than three years have lapsed from the date of assessment or the ‘decision’ or if the grounds for objection are based wholly or mainly on a change in a practice generally prevailing which applied on the date of assessment or the ‘decision’”.

SARS has 60 days to inform the taxpayer that an objection is invalid if the taxpayer has delivered an objection that is not in the correct form, or the grounds of objection were not specified, or an address was not supplied or was not signed by the taxpayer. The taxpayer has ten days to correct the mistakes that rendered the objection invalid (Stiglingh, et al., 2013:1027).

SARS may reduce or alter the assessment, withdraw or change the decision, or disallow the objection. SARS must inform the taxpayer in writing as to the outcome of the objection (Intergritax, 2002b).

The following section will discuss the process that is followed when SARS has disallowed an objection in full or in part and the taxpayer is still not satisfied with the assessment.

2.2.2 APPEAL

The taxpayer may appeal against the decision of the Commissioner for disallowing the objection. The taxpayer has two choices that are available, namely the Alternative Dispute Resolution (ADR) process or the litigation process. The litigation process involves an appeal to the Tax Board where the amount of tax in dispute on the assessment is less than R500 000, or to the Tax Court if the assessment in dispute exceeds R500 000 or the taxpayer chooses this course (Stiglingh, et al., 1027).

A taxpayer who is not satisfied with the decision of SARS regarding the objection has 30 days to appeal to the Tax Court. An appeal to the Tax Court is in essence a hearing *de novo* and not an appeal in the strict sense of the word (ITC 1777 66 SATC 328).

In *CSARS v Levue Investment (Pty) Ltd* [2007] 3 All SA 109 (SCA) the court held that the mere fact that an appeal may be successful in itself is not sufficient reason for a court to condone the later filing of an appeal.

The following requirements must be met for a valid appeal:

- The ADR2 form must be completed comprehensively.
- The taxpayer must state his grounds of appeal.
- The ADR2 form must be signed by the taxpayer or his representative (Stiglingh et al, 2012:1027).

In terms of Rule 10 of the rules promulgated by Section 103 of the TAA (hereinafter referred to as the rules) a taxpayer has an option in his notice of appeal (ADR2) to make use of the ADR procedures, if available.

2.2.2.1 ALTERNATIVE DISPUTE RESOLUTION (ADR)

The ADR procedure is a formalised settlement procedure, without prejudice to the rights of the taxpayer or SARS, should either of them not accept the recommendation of the facilitator (Bakker & Levey 2011:571).

After a taxpayer has indicated his willingness to participate in ADR proceedings in a notice of appeal (ADR 2 form), SARS has 30 days after receiving the notice of appeal to inform the taxpayer whether the appeal is suitable for ADR or not (Rule 13 of the rules).

SARS's reason for introducing the ADR process was that it had received numerous complaints from taxpayers regarding the lengthy period taken to resolve objections to assessments. Of particular worry to SARS was the length of time taken between the lodging of an objection by the taxpayer and the response to the objection. SARS is notorious for taking a year or more to make a decision regarding an objection. The ADR process allows taxpayers to resolve disputes outside of the courts and court processes (Dwyer, 2004:104).

SARS must give the taxpayer an option in writing on whether or not to resolve the dispute by way of the ADR process and if the taxpayer has not opted that the dispute be dealt with in an ADR process, SARS may still propose to the taxpayer that the ADR process be followed (Stiglingh, et al., 2012:1027).

According to SARS (2005:4), "the ADR process is a new procedure creating a structure with the necessary checks and balances within which disputes may be resolved or settled. In the past, SARS could settle disputes, but without such specific structures. The ADR process will be less formal and expensive than the court process and will allow for disputes to be resolved within a much shorter period. It was introduced in pursuance of enhancing SARS's client services by introducing a more cost-effective remedy for resolving tax disputes".

SARS (2005:13) suggests that during the ADR process a facilitator should facilitate the discussions between the taxpayer and SARS. The parties may first try to reach an agreement whereby either SARS or the taxpayer would wholly or partly accept the interpretation of the facts or the law as interpreted by the other party. Where SARS and the taxpayer are unable to reach such an agreement and SARS believes that there is a possibility that the dispute can be settled, the matter may be pursued so as to settle it in terms of the ADR process. The ADR process must be finalised within 90 days, or more should SARS agree to extend the period (Rule 7 of the rules).

SARS will appoint a facilitator and normally it is an employee of SARS who during the process of facilitation must follow a Code of Conduct as set out in the rules (SARS, 2005:14).

The objective of the facilitator is to resolve a dispute between the taxpayer and SARS in a fair, equitable and legal manner. The facilitator must record the terms of any agreement or settlement at the conclusion of the ADR process and if no agreement or settlement is reached, that must also be recorded (SARS, 2005:14).

The ADR process as provided for in Rule 7 of the rules is a process to resolve disputes during which the settlement provisions may be applied in an attempt to settle the matter. These settlement provisions may only be applied if the circumstances of the matter comply with these regulations. The settlement provisions therefore provide guidelines as to the circumstances when it would be appropriate and when it would be inappropriate to settle.

Section 145 of the TAA provides for situations where SARS will not settle disputes and Section 146 of the TAA provides for situations where SARS may settle disputes. SARS may, if it is to the best advantage of the state, settle a dispute, in whole or in part, on a basis that it is fair and equitable to both the person concerned and to SARS, having regard to certain circumstances contained in Section 146 of the TAA.

Should a matter be inappropriate for settlement in terms of Section 145 of the TAA or the parties in dispute are unable to settle a matter due to other reasons, the matter would proceed to the Tax Court or the Tax Board, depending on the amount of tax in dispute.

2.2.2.2 TAX BOARD

If the ADR process is not pursued or is unsuccessful, the taxpayer's appeal will continue with the normal appeal procedure. The appeal will first be heard by the Tax Board where:

- the amount of tax (i.e. excluding interest and penalties) involved does not exceed a fixed amount (R500 000);
- the parties agree that dispute be referred to the Tax Board; or
- none of the parties object to the matter being heard in the Tax Board (SARS, 2005:16).

The Tax Board is established by the Minister of Finance under Section 108 of the TAA and may hear tax appeals involving dispute of an amount determined by the Minister of Finance on a Public Notice under Section 109(1)(a) of the Income Tax Act No. 58 of 1962 (the Act).

The Tax Board proceedings are not available to members of the public and the Board's decisions are not published by SARS. The decisions of the Tax Board are binding on the parties, but have no precedent value (SARS, 2013).

The Tax Board proceedings are heard by an advocate or attorney as the chairperson and if the chairperson, SARS or the taxpayer is of the view that the dispute requires an accountant or a representative of the commercial community to be appointed a co-chair of the Tax Board, the chairperson will appoint either of them or both as co-chair of the Tax Board. The Commissioner determines the sittings of the Tax Board and this sitting is mostly situated in the taxpayers' closest place of residence, unless the parties agree that the Tax Board sittings should be held at another place. The Tax Board is administered by a clerk of the Board, who is a SARS employee at the relevant SARS Branch Office. (SARS, 2005:16).

Rule 11 of the rules provides that the appeal must be placed before the Tax Board within 30 days after the ADR process was terminated, or where there was no ADR, after the taxpayer has delivered a notice of appeal (ADR2) to SARS.

The clerk of the Tax Board must with 21 days inform the taxpayer of the venue and the date of the sitting of the Tax Board (Rule 26(3) of the rules).

The procedure before the Tax Board is generally inexpensive and informal. The taxpayer may represent himself in the Tax Board proceeding or appoint a representative, and with the permission of the chairperson, the taxpayer may choose an attorney or an advocate to represent him. SARS will be represented by a senior SARS official. In the normal proceedings of the Tax Board, the normal rules of evidence are not strictly adhered to. Both the taxpayer and SARS may submit documents as evidence (SARS, 2005:17).

Depending on the complexity of the dispute, and if in the opinion of SARS or the chairperson the appeal is suitable to be heard at the Tax Court, the matter will be referred to the SARS Head Office to be heard in the Tax Court. The hearing before the Tax Court will then start afresh (SARS, 2005:16).

The chairperson will hear the case and has 30 days to deliver the ruling. The clerk of the Tax Board has ten days to deliver the Tax Board ruling to SARS and the taxpayer after the chairperson has made a ruling.

The chairperson has 60 days to prepare a decision of the Tax Board in a written format and the decision must include:

- the findings of the facts of the case; and
- the reasons for the decision (Section 114 of the TAA).

The clerk of the Tax Board will submit the decision of the Tax Board to SARS and the taxpayer or his representative (Section 114 of the TAA).

Section 113(2) of the TAA provides that the Tax Board proceedings may not be recorded.

Section 115 of the TAA states that if the taxpayer or SARS does not accept the ruling of the chairperson of the Tax Board, the person who is not satisfied with a ruling of the

chairperson has 21 days to notify the clerk of the Tax Board about his intention to proceed to the Tax Court with an appeal.

2.2.2.3 TAX COURTS

If the ADR process is not pursued or no settlement or agreement could be reached, the taxpayer may proceed to the Tax Court with the dispute.

The Tax Court is a court established in terms of an Act of Parliament as provided for in Section 166(e) of the Constitution of the Republic of South Africa, 1996 (the Constitution). The Tax Court is established by the President of the Republic of South Africa (hereinafter referred to as the President) (Section 116 of the TAA). The Tax Court hears tax appeals lodged under Section 107 of the TAA and may also hear interlocutory applications relating to objections and appeals.

The Tax Court may hear an interlocutory application relating to an objection or appeal and may decide on a procedural matter as provided for in the rules (Klue et al., 2012).

The President has under Proclamation R.27 in Gazette 24639 of 1 April 2003 established the Tax Courts in Cape Town, Grahamstown, Port Elizabeth, Kimberly, Bloemfontein, Durban, Pretoria and Johannesburg.

The court held in CIR v Taylor 7 SATC 18 that the Tax Court is a “creature of statute” and consequently may only act according to limits provided by the enabling statute.

In CIR v City Deep Ltd 1 SATC 18 the court held that “the Tax Court is not a court of law at all”. In ITC 1687 62 SATC 474 the court held that “it seems that the Tax Court can accurately be described as being merely a court of revision with powers to investigate the matter before it and hear evidence thereon”. SARS is not bound by the reasoning of the Tax Court in relation to the affairs of another taxpayer (Intergritax, 2006).

An appeal may be heard in the Tax Court if the amount of tax in dispute is more than R200 000 or cases where important tax principles are involved. The Tax Court is a formal

court process and the taxpayer can represent him- or herself or can be represented in court by a legal representative, or any other person with the necessary power of attorney signed by the taxpayer concerned (SARS, 2005:17).

The appeal goes through several pre-hearing stages, which are set out in rules 31–39 of the rules. The steps are set out below:

- Limitation of issues in dispute meeting (Rule 9 of the rules)
- Statement of grounds of assessment (Rule 10 of the rules)
- Statement of grounds of appeal (Rule 31 of the rules)
- Statement of grounds of opposing appeal (Rule 32 of the rules)
- Reply to statement of grounds of opposing appeal (Rule 33 of the rules)
- Issues in appeal (Rule 34 of the rules)
- Amendments of statement of grounds of assessment or statement of grounds of appeal (Rule 35 of the rules)
- Discovery of documents, information or things (Rule 36 of the rules)
- Pre-trial conference (Rule 37 of the rules)
- Set down of appeal for hearing before tax court (Rule 38 of the rules)
- Dossier to tax court (Rule 39 of the rules)

The Tax Court is generally not open to members of the public, although the president of the Tax Court may allow a sitting to be public, on application by any person (Klue et al., 2012).

The Tax Court consists of a judge of the High Court, as well as an accountant and a commercial member selected from a panel of members selected by the President of the Republic. The Tax Court may also, in matters involving more than R50 million assessments in dispute, consist of three judges of the High Court and the two members (SARS, 2005:18).

The judgments of the Tax Court are published for general information, but if the sitting was not open to members of the public, the publication of the judgment may not reveal the taxpayer's identity. A taxpayer or SARS may appeal against the Tax Court's judgment to High Court or to the Supreme Court of Appeal (SCA). The judgments of the Tax Court are

binding on the parties in the matter and of persuasive value in other Tax Courts, the High Courts and the SCA (SARS, 2005:18).

Where the Tax Court has reserved its judgment, the Registrar of the Court will inform all parties as to the time and place when the Court will deliver its judgment. The Tax Court can in its judgment either confirm the assessment or compel SARS to further investigate the assessment or order SARS to set the assessment aside and to issue a new assessment in line with the judgment of the Court (SARS, 2005:22).

The Tax Court may, upon application by an aggrieved taxpayer and subject to certain circumstances, grant an order for costs. SARS or the taxpayer may appeal the Tax Court judgement to a full bench of the High Court or the Supreme Court of Appeal (SARS, 2005:25).

2.2.2.4 HIGHER COURTS

Section 133 of the TAA provides that the taxpayer or SARS may appeal the decision of the Tax Court. Section 134 of the TAA requires any of the parties who want to appeal to deliver a notice of his intention to lodge an appeal to the registrar of the High Court and the party that wants to oppose the appeal has 21 days to inform the registrar of the High Court of the intention to oppose the appeal.

In *Hicklin v SIR 41 SATC 179* it was held that an appeal to the High Court is a rehearing of the case in which the Appeal Court, while paying due regard to the findings of the Tax Court on the facts and the credibility of witnesses, is not bound by such findings.

2.3 ADMINISTRATIVE DISPUTES

The second avenue, which is the administrative avenue, is the one provided for under the Promotion of Administrative Justice Act No 3 of 2000 (PAJA) (Dwyer 2004:103).

Before the Constitution came into place in South Africa, taxpayers had no right to just administrative dealings with SARS. Taxpayers were not entitled to expect SARS to comply

with the principles of administrative law, comprising the principle of *audi alteram*, that is, to hear the other side and the common law principle of judicial review of administrative acts. It would appear that taxpayers did not challenge the exercise of SARS's powers on administrative grounds prior to the introduction of a right to administrative action. SARS was not obliged to supply reasons to taxpayers for decisions as long as the decisions were reached in accordance with SARS's wide legislative powers (Croome & Olivier, 2010:21).

PAJA was passed in 2000 by the parliament to enact legislation that would effectively apply Section 33 of the Constitution, which provides anyone with the right to administrative action that is lawful, reasonable and procedurally fair (Keulder, 2011:13).

Any administrative action that materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair under Section 3 of PAJA. PAJA affords any person administrative actions that affect his rights to be fair and should the administrator fail to provide such administrative actions; the person must rely on the courts to resolve any administrative actions that are not fair as provided by Section 6 of PAJA.

Section 1 of PAJA defines administrative actions as "any decision taken, or any failure to take a decision, by an organ of the state, when exercising a power in terms of the Constitution or a provincial constitution or exercising a public power or performing a public function in terms of any legislation or any natural or juristic person when exercising a public power or performing a public function in terms of an empowering provision".

Section 33 of the Constitution, and PAJA, has the purpose of reconciling the state system with the necessary measures to govern and regulate these measures in order to prevent abuse (Keulder, 2011:13).

From that time onward, tax administration has had to take account, not only of a taxpayer's right to challenge the revenue authority's assessments to tax on the merits, by way of objection and appeal against an assessment, but also of taxpayers' rights to challenge the validity of legislative provisions and the conduct of officials of the revenue authorities as an organ of state (Williams, 2013:24).

Although the Parliamentary Justice Portfolio Committee submitted that the provisions of PAJA would hamper SARS in the collection of tax (Fine 1999), the Act was passed, with all organs of the state, including SARS falling within the ambit of the Act as performing administrative actions. The court in *Carlson Investment Shareblock (Pty) Ltd v Commissioner for the South African Revenue Service 2001 (3) SA 210 (W)* confirmed that SARS does indeed perform administrative acts as described in Section 33 of the Constitution.

The following sections will discuss the order of the steps that a person needs to follow when they are not satisfied with any administrative-related matter dealt with by the Commissioner. This includes the situation where a taxpayer is dissatisfied with the manner in which his or her objection and/or appeal is being dealt with (SARS, 2005:5).

2.3.1 SARS COMPLAINT SERVICES

In the past, the two parties at loggerheads over unpaid tax, or refunds due, were at the mercy of a largely uncoordinated means of dealing with such disagreements. For one thing, there was no simplified, cohesive process in place which ensured that all taxpayers were treated objectively. Frustrated (or frightened) taxpayers would fall at the feet of any senior SARS official and beg for mercy, but whether or not you received pardon for your sins or sympathy for your cause was dependent on an individual's interpretation of the situation (Intergritax, 2006).

A taxpayer who is dissatisfied with the way that SARS has dealt with his affairs must initially lodge a complaint with the SARS employee that dealt with his affairs, or that person's manager. Where a person remains dissatisfied, he must complain to the call centre, which will supply a reference number recording a complaint. If the complaint remains unresolved, the taxpayer may lodge a complaint with SSMO (Croome, 2010:309).

2.3.2 SARS SERVICE MONITORING OFFICE (SSMO)

SARS recognised that the mechanism for resolving disputes of an administrative or procedural nature needed improvement. This led to the creation of the SSMO in

October 2002. At the launch of the SSMO, the then Minister of Finance announced that; “Once SARS’s processes and procedures have improved sufficiently, the next important step that will be taken in emulating international standards will entail an important role for a South African Tax Ombud” (SARS, 2011a:1).

In 2002, the then Minister of Finance, Mr Trevor Manuel, indicated in the Budget speech that “SARS will be launching a complaints office that will operate independently of branch offices, and small businesses will benefit from the simplification of tax forms and more accessible contact centres” (National Treasury, 2002:25). The SSMO was officially launched on 3 October 2002 (Intergritax, 2002a).

Before the introduction of the SSMO, SARS did not have a system prescribing the manner in which taxpayers should deal with administrative disputes that they may have with the local SARS Branch Office, and therefore the creation of the SSMO was supported (Intergrita, 2002a).

The SSMO is a special office operating independently of SARS branch offices. The SSMO facilitates the resolution of complaints of a procedural nature (i.e. complaints about the manner in which a taxpayer or a matter is being dealt with by SARS). The SSMO reports directly to the Commissioner of SARS and provides regular reports to the Minister of Finance (SARS, 2005:1).

According to Croome (2010:309) the SSMO is a SARS complaint office that reports to the Commissioner and it is not independent of the Commissioner. Ideally the SSMO should comply with the International Organisations for Standardisation (ISO), including the quality management, customer satisfaction, and guideline for complaint handling in organisations, as is the case in Australia. Thus far SARS has not published a report detailing the number of complaints received, the nature of complaints received and the method used to resolve the complaints.

The SSMO was established to deal with issues of a non-constitutional nature as well as issues that have not already been referred to the Public Protector.

Retief (2010:35) is of the view that there is still currently no effective recourse, other than the courts, for people who wish to contest SARS's administrative actions. The SSMO does handle customer complaints, but these are dealt with from the perspective of helping SARS to meet its service charter obligations.

According to Retief (2010:35), "what this means is the SSMO is useful in escalating outstanding matters that require SARS's attention, however, it does not concern itself with the merits of your case, but rather with whether or not your complaint is receiving SARS's attention. The SSMO has been a valuable resource, but still has limited scope of application".

The Katz Commission proposed that the South African Tax Ombud be located between the SSMO and the Public Protector (SARS, 2011a:2). In doing so the Katz Commission recognised the role of the Public Protector, and should the matter remains unresolved after the SSMO, the next section will discuss the Public Protector.

2.3.3 PUBLIC PROTECTOR

The Constitution makes provision for the Public Protector under Section 181, whereby the Public Protector shall be subject only to the Constitution and the law. The Public Protector must be impartial and must exercise his/her powers and perform his/her function without "fear; favour or prejudice". No person or organ of state may interfere with the functioning of the Public Protector's office.

The Public Protector has the power to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice either on his/her own initiative or by complaint (Section 182 of the Constitution; the Public Protector Act).

A search of documents was done from the published documents on the Public Protector's website, which shows that since the establishment of the Public Protector in 1993, no investigation has been done and published against the actions the actions of SARS. This

highlights that the Public Protector is not used by taxpayers who are not satisfied with any administration-related matter dealt with by SARS.

2.3.4 REVIEW TO THE HIGH COURT

Many aggrieved taxpayers and SARS officials may regard the Tax Court as the only mechanism to resolve a tax dispute. Yet this is not the only course of action open to SARS. Other options are, however, not subject to objection and appeal, and therefore oblige an aggrieved taxpayer to explore alternative legal means to deal with SARS (Kotze, 2010).

In *Pepkor Retirement Fund v Financial Services Board* 2003 (6) SA 38 the court held that, "a material mistake of fact should be a basis on which a court can review an administrative decision. Consequently, a person who has a duty to make decisions in the public interest should do so on the basis of the relevant material facts. If that person made the decision in ignorance of those facts, the High Court has the power to review that decision".

Kotze (2010) is of the view that an alternative means of resolving a dispute is to approach a court by notice of motion for a declaratory order. Declaratory orders are far from common. Even so, it is worth noting that in each of the following cases SARS has argued that this is the domain of the Tax Court, implying that a taxpayer may not directly approach the High Court for a declaratory order.

In *Shell's Annandale Farm (Pty) Ltd v CSARS* 2000 (3) SA 564 (C) the court held that "the Tax Court was not the only competent authority to decide on tax issues. Where the question was simply one of law, that is, the facts are not in dispute then the matter could be resolved by the High Court by way of a declaratory order and the court had discretion to consider such an application".

In *Grain SA v Commissioner for South African Revenue Service* (unreported Case 434/2010) the court accepted that the dispute between the taxpayer and SARS was appropriate for a declaratory order.

According to Kotze (2010:8) a declaratory order has several benefits, among them:

- it is quick, since the parties' arguments are based on affidavits without having to deal with evidence and witnesses in court; and
- costs follow the suit, whereas in the Tax Court a taxpayer may amongst other only be granted a cost order against SARS if SARS has been unreasonable.

In *Rossi v Commissioner for South African Revenue Service* (2012) 8 SATC 387 the court held that it has jurisdiction in tax matters where the relief sought is of an interlocutory nature, and where the High Court does have jurisdiction, it is confined to issues of law and not fact.

In *ITC 1697 63 SATC 146* the court described the well-established difference between an appeal and a review. The court held that an appeal is a process whereby the court is entitled to consider the correctness of the conclusion reached and to interfere, if that conclusion is wrong, by substituting its own decision, and on the other hand, a court's power of review, which really means nothing more than judicial scrutiny, does not arise from statute. It arises from a court's general or inherent power to prevent illegalities.

In *Pering Mine v Director-General, Mineral and Energy Affairs and Others* 67 SATC 317 the court highlighted the principles relating to the review of an administrative action, as distinct from an appeal.

In *Smartphone SP (Ltd) v ABSA Bank Ltd and other* 66 SATC 241 the court held that no relief will be granted in the form of, for example, an interdict or a declaratory order, if a taxpayer has not used the remedies provided for in the Act, i.e. objection and appeal. This also holds true for legal proceedings against individuals based on actions by SARS.

The fundamental distinction between appeal and review is that, in an appeal, the appellant contends that the disputed decision was wrong on the merits (*Intergritax*, 2006). In terms of the appeal procedure under the TAA, the Tax Court then rehears the whole matter from scratch and substitutes its own decision for that of the Commissioner (*Rand Ropes (Pty) Ltd v CIR* 13 SATC 1).

The Tax Court is not a court of appeal in the ordinary sense, but is a court of revision (Bailey v CIR 6 SATC 69). Ordinarily, a court of appeal does not rehear the evidence and confines itself to examining and hearing an argument on the record of the proceedings in the court below.

By contrast, in a review, the taxpayer contends that the decision was arrived at improperly. Therefore, SARS's decision will be set aside on review where the Commissioner has not applied his mind to the facts, where SARS acted arbitrarily, or where the Commissioner has misdirected himself in law by applying a wrong principle (Shidiack v Union Government 1912 AD 642). The evidence that is admissible in review proceedings is confined to the grounds of review and thus to the facts that have been laid before SARS and to the knowledge he possessed at the time (ITC 1601 58 SATC 172).

After a series of conflicting decisions, it now seems that the Tax Court has the power to review SARS decisions, and that the power of review is not vested solely in the High Court (Intergritax, 2006). In KBI v Transvaalse Suikerkorporasie Bpk 49 SATC 11 the court held that the Special Court is competent to hear review proceedings but, on appeal, the issue was left open by the Appellate Division. In ITC 1601 58 SATC 172 the Special Court exercised a review jurisdiction. It was also held that "in as much as no procedure has been laid down for this purpose, the normal appeal procedure should be followed but the hearing will proceed as if the matter had been taken on review".

Meyerowitz (2000:34) is of the view that the High Court has inherent jurisdiction to review decisions of SARS and the Tax Court. It seems that the provisions of the Act in regard to the finality of assessments where there is no appeal do not negate this inherent jurisdiction.

Review by the High Court can thus take place in terms of its inherent powers at common law or in terms of that Act, since the coming into force of the PAJA (Intergritax, 2006).

At common law, an application for review must be brought within a reasonable time, and this principle continues to apply to reviews, notwithstanding the enactment of the Constitution (*Bellochio Trust Trustees v Engelbrecht and Another* 2002 (3) SA 519 (C)).

If an application for review is upheld by the court, the decision in question is set aside.

2.4 CONCLUSION

This chapter provided an overview of the dispute resolution mechanism that are available for taxpayers when the taxpayer has a dispute with SARS, regardless of whether the dispute is the subject of the assessment or an administrative related dispute.

The following chapter will analyse the new rules that came into operation with the TAA dealing with the South African Tax Ombud as well as the model that has been adopted for those newly established dispute resolution mechanism of the administrative related dispute.

CHAPTER 3

THE SOUTH AFRICAN TAX OMBUD

3.1 INTRODUCTION

The TAA introduces the Office of the South African Tax Ombud. According to Section 14 read with Section 259 of the TAA, the Minister of Finance must appoint someone as Tax Ombud within one year after the commencement date of the TAA, which was on the 1 October 2012. The Tax Ombud was appointed on 3 October 2013 in the person of retired Gauteng Judge President Bernard Ngoepe.

The TAA creates the legal structure for the creation of the South Africa Tax Ombud that will provide simple remedies to taxpayers affected by failures by SARS to fully respect taxpayers' rights (Croome, 2013:3).

The concept of a South African Tax Ombud was firstly proposed in South Africa in the Third Interim Report of the Katz Commission in 1997, which recommended 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" (SARS, 2011a:1).

In ordinary language, the term "Ombudsman" (derived from the Swedish term meaning "legal representative") can be defined as "an official appointed to investigate individuals' complaints against maladministration, especially that of public authorities" (The New Oxford Dictionary of English). With its origins in Scandinavian history, it is generally accepted that the modern Office of the Ombudsman derives from the Swedish Office of the Parliamentary Ombudsmen which was set up in 1809 by the Swedish legislature and was given a wider interest by the introduction of the Danish Ombudsman in 1955. The main purpose of this institution was to protect the rights of the people by way of a

supervisory agency which was completely independent and could contend with complaints submitted by the general public regarding administrative matters (Katzke, 2012:36).

3.2 THE MODEL ADOPTED FOR THE SOUTH AFRICAN TAX OMBUD

The South African Tax Ombud's responsibilities and powers must fit into South Africa's existing legal and constitutional dispensation and the South African Tax Ombud's Office should be aligned with existing international precedent, so that the experience of other countries can be drawn upon (SARS, 2011a:2).

The Katz Commission proposed that the South African Tax Ombud be located between the SSMO and the Public Protector. Law makers were concerned that in doing so care should be taken that the Tax Ombud does not intrude on the role or status of the Public Protector or the courts. As an example, a separate South African Tax Ombud with the same powers and responsibilities as the Public Protector would conflict with the constitutional assignment of those powers and responsibilities to the Public Protector. Care must equally be taken that the South African Tax Ombud is independent of SARS (SARS, 2011a:2).

SARS employees must be seconded to the South African Tax Ombud's Office in consultation with the Commissioner and the employees of the South African Tax Ombud must be employed in terms of SARS Act (Section 15(1) of the TAA).

According to Croome (2011), some people take the view that the South African Tax Ombud should be totally separate from SARS. This is, however, not done internationally and most of these offices are within the offices of respective revenue services, but the Ombudsman is given a degree of independence in terms of reporting lines.

The South African Tax Ombud will not intrude on the role of the Public Protector or courts (SARS, 2011a:3), as it will be the last resort, after the SSMO, for the taxpayer before he can approach either the Public Protector or the courts.

Section 20 of the TAA provides that recommendations made by the South African Tax Ombud are neither binding on taxpayers or SARS, and Section 21 of the TAA further states that the South African Tax Ombud or its employees are bound by the secrecy provision contained in this section.

Section 20 of the TAA provides that the South African Tax Ombud or his employee may disclose information that does not, directly or indirectly, reveal the identity of the taxpayer to whom it relates; and must disclose information if required by the TAA or an Act of Parliament, but only in accordance with and for the purposes of such acts.

SAICA submitted to the finance committee that in order for the taxpayer go directly to the South African Tax Ombud, the SSMO should be removed (SAICA, 2011).

3.3 FUNCTION OF THE SOUTH AFRICAN TAX OMBUD

The mandate of the South African Tax Ombud is to review and address complaints by a taxpayer regarding a service or a procedural administrative matter (Section 16 of the TAA).

The South African Tax Ombud must review a complaint lodged by a taxpayer and resolve it either through mediation or reconciliation, and must act independently in resolving taxpayers' complaints. The South African Tax Ombud is required to follow informal, fair, and cost-effective procedures in resolving taxpayers' complaints. The creation of the South African Tax Ombud is to be supported in that it creates a mechanism for complaints to be dealt with by a formalised procedure, despite that the South African Tax Ombud will be located within the SARS structure (Croome, 2013:3).

Section 17 of the TAA makes it clear that the South African Tax Ombud may not review or deal with:

- a) any legislation or tax policy, or
- 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, or
- c) any matter that is subject to objection and appeal under a fiscal statute, or

d) any decision which is before the Tax Court.

In those overseas countries where South African Tax Ombud offices have been created, the resolution of legal disputes falls outside the jurisdiction of the South African Tax Ombud and, in this respect, South Africa is adhering to the international norm (Croome, 2013:3).

In terms of Section 18 of the TAA, once the South African Tax Ombud has received a complaint that falls within the South African Tax Ombud's mandate, the South African Tax Ombud may decide how the complaint must be treated. Section 18 of the TAA further provides that the South African Tax Ombud may only deal with a complaint if the complainant has exhausted all the complaints mechanisms available in SARS, unless there are compelling circumstances.

To determine whether there are compelling circumstances in terms of Section 18(5) of the TAA, the South African Tax Ombud must consider whether:

- (a) the request raises systemic issues;
- (b) exhausting the complaints resolution mechanisms will cause undue hardship to the requester; or
- (c) exhausting the complaints resolution mechanisms is unlikely to produce a result within a period of time that the South African Tax Ombud considers reasonable.

The South African Tax Ombud has a duty to submit reports to Parliament on an annual basis, and to identify those issues which are causing problems for taxpayers. It is hoped that this will ultimately enhance tax administration in South Africa and reduce the administrative burden faced by taxpayers (Croome, 2013:4).

3.4 CONCLUSION

This chapter has provided a general overview of the newly established dispute resolution mechanism of the administrative-related dispute, as well as the model and functions of the South African Tax Ombud.

The following chapter will provide an analysis of the models adopted for the Ombudsman of the following countries, Australia, Botswana, Canada, New Zealand, the UK, the USA and Sweden. The analysis will also provide the models adopted for each Ombudsman, how independent the Ombudsman is of the revenue office, as well as the types of complaints that are submitted to the Ombudsman and the process followed to submit such complaints.

CHAPTER 4

ANALYSIS OF THE OMBUDSMAN APPLICATION IN OTHER COUNTRIES

4.1 INTRODUCTION

In this chapter an analysis will be done on the models adopted by the following countries: Australia, Botswana, Canada, New Zealand, Sweden, the UK and the USA, and the functioning of the respective offices of the Ombudsmen. The chapter will be structured in the following sequence: firstly the general overview of the respective Ombudsmen will be discussed, secondly the role and the functioning of the respective Ombudsmen will be discussed and thirdly the types of complaints that each Ombudsman can investigate will be analysed.

4.2 THE AUSTRALIAN OMBUDSMAN

The Ombudsman Act 1976 (Ombudsman Act) established the Office of the Australian Commonwealth Ombudsman which started operating in July 1977. The Ombudsman may be called:

- Immigration Ombudsman;
- Taxation Ombudsman; or
- Law Enforcement Ombudsman (Fitzroy Legal Service, 2013).

The Australian Commonwealth Ombudsman is independent and impartial, appointed for a renewable term of five years by the Governor-General and subject to removal only following a vote of both Houses of Parliament. This impartiality contributes to the Ombudsman's approach to investigation; the office is an advocate for neither complainants nor the agencies about which they complain (Fitzroy Legal Service, 2013).

The Australian Commonwealth Ombudsman protects the citizens of Australian when dealing with the government entities (Commonwealth Ombudsman, nd).

This section will only focus on the Taxation Ombudsman, who is part of the Australian Commonwealth Ombudsman, which will be referred to as the Taxation Ombudsman.

4.2.1 FUNCTIONS AND ROLE OF THE TAXATION OMBUDSMAN

The role of a Taxation Ombudsman is to review complains about any tax administrative action by the Australian Taxation Office (ATO) (Fitzroy Legal Service, 2013).

The aim of the Taxation Ombudsman is to provide an effective compliant resolution mechanism. In situations where the Taxation Ombudsman is unable to resolve a particular complaint, an explanation as to why will be provided, as well as suggestions for other avenues that are available for resolving the complaint (Commonwealth Ombudsman, nd).

The Ombudsman refers simple complaints, with consent from the complainants, to the organisations for direct reply. The Ombudsman then monitors the reply and intervenes only when the organisation has failed to address and/or resolve the complaint satisfactorily (Stodulka, 1998:29).

“Most complaints to the Ombudsman are resolved without the need of a formal report. The Ombudsman can, however, culminate an investigation by preparing a report that contains the opinions and recommendations of the Ombudsman. A report can be prepared if the Ombudsman is of the opinion that the administrative action under investigation was unlawful, unreasonable, unjust, oppressive, improperly discriminatory, or otherwise wrong or unsupported by the facts; was not properly explained by an agency; or was based on a law that was unreasonable, unjust, oppressive or improperly discriminatory. A report can also be prepared to describe an investigation, including any conclusions drawn from it, even if the Ombudsman has made no adverse findings” (Australian Tax Office 2010).

The Ombudsman submits the report to the ATO and the Governor-General. In the instances where the ATO does not agree with the recommendation, the report is thereafter

submitted to the Prime Minister or Parliament. The Ombudsman is subject to statutory secrecy provisions, and therefore does not make all the reports accessible to the public and publish other reports in an edited format (Australian Tax Office, 2010).

4.2.2 THE MODEL ADOPTED BY THE TAXATION OMBUDSMAN

The Taxation Ombudsman is accountable to and reports to the Parliament (SARS 2011a:4) and to the public at large; as a result, the investigation is conducted at no cost to the complainants and the ATO (Fitzroy Legal Service, 2013).

The Taxation Ombudsman may initiate an investigation where the Taxation Ombudsman is of the view that a problem persists or where the Taxation Ombudsman wants to review whether the ATO's complaint mechanisms are effective (Fitzroy Legal Service, 2013).

4.2.3 TYPES OF COMPLAINTS INVESTIGATED BY THE TAXATION OMBUDSMAN

Complaints related to tax administration by the ATO are investigated by the Taxation Ombudsman. The Taxation Ombudsman investigates complaints lodged by complainants where the complaint relates to, amongst others, debt recovery actions; decisions regarding bankruptcy, the conduct of audits, provision of advice, methods of handling enquiries, remission of penalties, handling of correspondence, delays in decision-making, handling of private and public rulings, and superannuation guarantee audits. Complainants should try to resolve a complaint with the ATO prior to contacting the Taxation Ombudsman (Commonwealth Ombudsman, nd).

4.3 BOTSWANA'S OFFICE OF THE OMBUDSMAN

Botswana's Ombudsman Act of 1995 created the Office of the Ombudsman and the first Ombudsman of Botswana was appointed in 1997 (EISA, 2009). The appointment of Botswana's Office of the Ombudsman is done by the President of Botswana after consultation with the Leader of the Opposition in the National Assembly (Quansah, 1995:220).

Botswana's Office of the Ombudsman does not have a separate office or a separate institution for tax-related administrative complaints.

4.3.1 FUNCTIONS AND ROLE OF BOTSWANA'S OFFICE OF THE OMBUDSMAN

The role of Botswana's Office of the Ombudsman is to review complaints and to make recommendations to the appropriate authority on the complaints lodged by the citizens of Botswana regarding the injustice or maladministration by the Public Service organisations and their employees (including bodies corporate) (EISA, 2009).

Botswana's Office of the Ombudsman may make a recommendation if the complaints submitted are valid and in some instances, mostly where serious non-compliance by the Public Service organisations or their employees exists, it must provide a National Assembly with a special report. The powers of Botswana's Office of the Ombudsman have been extended to enable it to summon any person to provide any evidence under oath or affirmation (EISA, 2009).

In certain circumstances, the Ombudsman Act of 1995 provides Botswana's Office of the Ombudsman discretion to conduct an investigation without any person lodging a complaint on the basis that a person may have suffered an injustice (Quansah, 1995:220).

Section 4(a) of Section 4(i) of the Ombudsman Act of 1995 provides a list of certain complaints that Botswana's Office of the Ombudsman may not investigate. These include complaints relating to matters certified by the President of Botswana or a minister that deals with relations between the government of Botswana and governments of other countries, security-related matters, the commencement or conduct by the courts of criminal proceedings, issues related to civil service appointments, matters affecting the defence force and the police, the granting by the President of honours, awards or privileges, contractual and commercial dealings, and actions taken by external officers representing government (Mpabanga, 2009:7).

4.3.2 THE MODEL ADOPTED FOR BOTSWANA'S OFFICE OF THE OMBUDSMAN

Botswana's Office of the Ombudsman handles issues that cannot be resolved by the Botswana Unified Revenue Service. These issues are resolved by way of investigation and recommendation. Botswana's Office of the Ombudsman is accountable and reports to the President of Botswana. Botswana's Office of the Ombudsman presents its annual report and/or any other reports to the Parliament (SARS, 2011a:4).

The fact that Botswana's Office of the Ombudsman is appointed by the President of Botswana affects its independence (Mpabanga, 2009:38). Lebotse (2000) suggests that an appointment and the responsibility of Botswana's Office of the Ombudsman must be delegated to the Parliament and not only to the executive of Parliament.

Lebotse (2000) also has concerns that the Ombudsman Act of 1995 is unclear about which actions the Parliament should take after the report has been submitted to them.

The responsibility of the funding of Botswana's Office of the Ombudsman lies with the Minister of Presidential Affairs and Public Administration in the course of the combined fund and its budget is voted on separately. The process followed to allocate funds to Botswana's Office of the Ombudsman is the same process followed to allocate funds to the normal government department during the budget cycle (Mpabanga, 2009:22).

4.3.3 TYPES OF COMPLAINTS INVESTIGATED BY BOTSWANA'S OFFICE OF THE OMBUDSMAN

Botswana's Office of the Ombudsman is precluded from conducting an investigation into any action in respect of which the person aggrieved has or had:

- right of appeal, reference, or review to or before a tribunal constituted by or under any law in force in Botswana; or
- a remedy by way of proceedings in any court of law (Quansah, 1995:220).

Botswana's Office of the Ombudsman has discretion to investigate complaints even if the complainants have not exhausted all available resources, provided it was unreasonable to

expect the complainant to have exhausted all the available remedies. It may still conduct an investigation even if a complainant has recourse in the High Court for review (Quansah, 1995:220). It is prohibited from investigating any state-related action or investigating crimes (EISA, 2009).

4.4 THE CANADIAN TAXPAYERS' OMBUDSMAN

The Ombudsman offices in Canada are available in most departments of the federal government and some provincial and municipal governments, as well as any other organisation controlled by the Crown, such as the Canadian Broadcasting Corporation and Canada Post. Some of the offices of the Ombudsman which are available in Canada are the following:

- the Office of the Department of National Defence and the Canadian Forces;
- the Office of the Procurement Ombudsman;
- the Office for the Ombudsman for the Victims of Crimes;
- the Office of the Taxpayers Ombudsman; and
- the Office of the Veterans Ombudsman (Forum of Canadian Ombudsman, 2011).

The Office of the Canadian Taxpayers' Ombudsman was established and began operation on 21 February 2007. The introduction of the Canadian Taxpayers' Ombudsman's will give effect to the already existing service complaint processes within the CRA, such as the CRA Service Complaints initiative (Taxpayers Ombudsman, 2007).

4.4.1 FUNCTIONS AND ROLE OF THE CANADIAN TAXPAYERS' OMBUDSMAN

The duty of the Canadian Taxpayers' Ombudsman is to give effect to the CRA's responsibility and accountability when providing its services to the taxpayers by independently and impartially engaging in reviews of the taxpayers' complaints (Taxpayers Ombudsman, 2010b:iv).

The Canadian Taxpayers' Ombudsman is independent of the CRA, is not a representative of the taxpayer and also not a protector of the CRA. He acts with equity and justice (Taxpayers Ombudsman, 2010b:iv).

He may review administrative complaints submitted by the taxpayers and may sometimes review complaints from his own initiative (Taxpayers Ombudsman, 2011).

The Canadian Taxpayers' Ombudsman shall only investigate a complaint if the requester has used all the avenues regarding complaints that are available to resolve administrative disputes within the CRA, unless there are compelling circumstances to directly approach him. The recommendations made by the Canadian Taxpayers' Ombudsman are not binding to the complainant or the CRA (Taxpayers Ombudsman, 2011).

Before the Canadian Taxpayers' Ombudsman may review a complaint lodged by the taxpayer, the following steps should be followed:

- The complainant must try to resolve the issue with the CRA employee that dealt with matter.
- If the complainant is not satisfied, the complainant must talk to the employee's supervisor.
- If the complainant is still not satisfied with the way the issue is being handled, the complainant must file a formal complaint with the CRA – Service Complaints (Taxpayers Ombudsman, 2011).

4.4.2 THE MODEL ADOPTED FOR THE CANADIAN TAXPAYERS' OMBUDSMAN

The Canadian Taxpayers' Ombudsman is located between the CRA's Service Complaints Office and the Courts (SARS, 2011a:3).

The appointment of the Canadian Taxpayers' Ombudsman is done by the Governor in Council of Canada for a renewal period of five years and he may only be removed by the Governor in Council of Canada (Governor in Council Appointments, 2013).

The Canadian Taxpayers' Ombudsman reports directly to and is accountable to the Minister of National Revenue. He reports his annual activities to the Office of the Minister of National Revenue. The Minister of National Revenue submits the annual report to be tabled in each House of Parliament (Taxpayers Ombudsman, 2011).

Paragraph 127.1(1)(c) of the Public Service Employment Act gives the Governor in Council of Canada the power to appoint a special advisor to a minister and if necessary the special advisor may act as the Canadian Taxpayers' Ombudsman for taxpayers as provided for in Section 3 of the Public Service Employment Act. The employees of the Canadian Taxpayers' Ombudsman are employed in terms of the CRA Act and remain employees of the CRA.

Certain types of complaints cannot be reviewed by the Canadian Taxpayers' Ombudsman, such as complaints that are not service related (Taxpayers Ombudsman, 2011).

4.4.3 TYPES OF COMPLAINTS INVESTIGATED BY THE CANADIAN TAXPAYERS' OMBUDSMAN

The Canadian Taxpayers' Ombudsman can only review complaints that are related to services provided by the Canada Revenue Agency (CRA). A service-related complaint includes:

- mistakes, which refer to misunderstandings, omissions, or oversights;
- undue delays;
- poor or misleading information;
- unfair treatment; and
- staff behaviour (Taxpayers Ombudsman, 2010c).

The Canadian Taxpayers' Ombudsman does not deal with any service-related complaint which started more than a year prior to the establishment of the Office of the Taxpayers' Ombudsman, i.e. a service-related complaint started prior to 21 February 2007, unless the Minister of National Revenue requests that the Canadian Taxpayers' Ombudsman investigates the matter (Taxpayers Ombudsman, 2011).

4.5 NEW ZEALAND'S OMBUDSMAN

The Parliamentary Commissioner (Ombudsman) Act 1962 (The Ombudsman Act) established the Office of the Ombudsman during the same year. The Ombudsman is

referred to as an "officer of parliament" by New Zealand's Parliamentary Commissioner (Ombudsman) Act, but may not be a member of parliament or engage in any other occupation. The appointment of the Ombudsman is done by the Governor-General of New Zealand on the recommendation of New Zealand's parliament (Sawer, 1968:62).

The Ombudsman Act gives the Ombudsman the power to encourage compliance with his recommendations through indirect means. He can do this by making recommendations and thereafter requiring the department or organisation to provide feedback to him on the measures taken to improve the services provided to the citizens of New Zealand. The Ombudsman must submit reports to the relevant minister of the recommendations made regarding the complaints lodged against the relevant department or organisation. The Ombudsman may take the matter to the Prime Minister and/or to parliament should the relevant department or organisation makes no effort to respond to his recommendations (Office of the Ombudsman, nd).

4.5.1 FUNCTIONS AND ROLE OF NEW ZEALAND'S OMBUDSMAN

The Ombudsman's main function is review service complaints against New Zealand's government agencies. His responsibility is extended so as to defend whistle-blowers and he may also review the administration of prisons and other places of detention (Office of the Ombudsman, nd).

The Ombudsman deals with complaints relating to the administrative conduct of government agencies (Office of the Ombudsman, nd).

4.5.2 THE MODEL ADOPTED FOR NEW ZEALAND'S OMBUDSMAN

"New Zealand's Ombudsman shall be appointed by the Governor-General on the recommendation of the House of Representatives, as officers of parliament and Commissioners for Investigations" (Section 3 of the Ombudsman Act).

The aim of the investigation done by the Ombudsman is to determine whether the decision made or the services that were provided were contrary to law; "unreasonable, unjust,

oppressive, or improperly discriminatory", based on whether the decision was a mistake of law or fact; made for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations; in the case of a discretionary power, given without reasons when they should have been given; or "wrong" (Sawer, 1968:66).

The Office of the Ombudsmen handles issues that cannot be resolved by New Zealand's Inland Revenue Complaints Management Service. These issues are resolved by way of investigation and recommendation. The Ombudsman is accountable and reports to parliament (Office of the Ombudsman, nd). The Ombudsman must present an annual report to parliament (Sawer, 1968:68).

4.5.3 TYPES OF COMPLAINTS INVESTIGATED BY NEW ZEALAND'S OMBUDSMAN

The Ombudsman can investigate complaints about the Inland Revenue Department's (IRD) administrative conduct under the Ombudsman Act, and the IRD's decisions to refuse to provide official information under the Official Information Act (Office of the Ombudsman, nd).

Any committee of parliament may at any time refer to an Ombudsman for investigation and report back to the committee any petition that is before the committee, and the Ombudsman can investigate the matter as far as it is within his jurisdiction (Chen, 2010:741).

4.6 THE SWEDISH TAX OMBUDSMAN

A Parliamentary Ombudsman (JO) Office has been in existence since 1882 in Sweden. The Parliamentary Ombudsman is elected by the Swedish parliament to ensure that public authorities and their staffs comply with the laws and other actions governing their actions (Nykiel and Sęk, 2009:342).

The JO and his deputy are elected to four-year terms by a special committee of 48 members of the parliament (Jägerskiöld, 1961:1081).

In the event where there are administrative errors by the authorities and those errors cause disagreement between taxpayers and the tax authorities, taxpayers may lodge a complaint with the JO to investigate the errors. The JO has the authority to prosecute the tax officer before the court in the circumstances where the JO finds that the tax authority made errors. The JO develops guidelines on how the tax authority should treat similar cases in the future. The guidelines are published in the JO's Yearbook and constitute administrative practices that may be referred to as taxpayers' rights during administrative proceedings (Nykiel and Søk, 2009:342).

4.6.1 FUNCTIONS AND ROLE OF THE SWEDISH TAX OMBUDSMAN

The JO is responsible for receiving and hearing complaints from Swedish citizens and to institute proceedings before the appropriate court, against any public official or employee, who, in his judgment, acted illegally in the execution of his official duties or has failed to perform them in an appropriate manner (Rosenthal, 1964:228).

The JO uses three sources of information in performing his functions, which are, inter alia:

- complaints received from citizens;
- articles appearing in the public press or reports from organisations or activity; and,
- public deliberations or decisions, even including the meetings of the Supreme Court and the Supreme Administrative Court (Rosenthal, 1964:228).

The JO has wider powers. The JO may investigate complaints concerning officials at local, regional, or central levels of administration. The JO is empowered to request the assistance of all public officials in an investigation and to have access to all files and documents in the course of his inquiry.

The JO may initiate the prosecution of any administrative official or judge, and reports to both the Riksdag (the parliament) and the King (the central government) any deficiencies in existing legislation (Rosenthal, 1964:228).

The JO may use the technique of warning an official or requesting corrective action, rather than prosecutions, if in his judgment this would be more appropriate in a particular case (Rosenthal, 1964:228).

4.6.2 THE MODEL ADOPTED FOR THE SWEDISH TAX OMBUDSMAN

The JO is connected with parliament and independent of other state organs. The JO is elected by parliament and accountable only to the parliament and appointed to make sure that the state administration and administration of justice have respected civil rights and liberties, which are easily accessible to ordinary citizens (Arcimowicz, 2002:432).

The JO may take a matter to court and has the power to act as a prosecutor on issues where a direct violation of a law has been identified. In other circumstance, the Ombudsman may make a recommendation for a disciplinary action to the disciplinary entities such as the Government Disciplinary Board, which decides on disciplinary action against high-level state employees like director-generals or professors, including warning, suspension, or salary deductions (Levin, 2009:41).

The role of the JO is not comparable to a defender or an advocate, but more to a judge. The parties in dispute are treated with the basic principle of fairness, adopted from the court process. The fact that the JO may sometimes appear to be a defender or an advocate as well is connected with his well-known lack of authority to make binding decisions (Gammeltoft-Hansen, 2009:7).

4.6.3 THE TYPES OF COMPLAINTS INVESTIGATED BY THE SWEDISH TAX OMBUDSMAN

The JO does not investigate a complaint lodged anonymously and complaints that date back to more than a year prior to the establishment of the JO (Parliamentary Ombudsman, 2012).

The JO can investigate administrative actions of:

- government agencies (including courts of law and administrative courts);

- local government agencies;
- officials employed by the state or by local government; and
- others who are entrusted to exercise public authority (Parliamentary Ombudsman, 2012).

The JO cannot investigate:

- the government or an individual minister;
- members of parliament (Riksdag);
- members of local councils or county councils; and
- the Chancellor of Justice (Parliamentary Ombudsman, 2012).

4.7 THE UNITED KINGDOM'S OMBUDSMAN

In the UK, the Ombudsman is an officer in the House of Commons and his duty is to investigate complaints referred by the Westminster Members of Parliament which relate to the workings of central government and other non-departmental government bodies. As a complaint investigator, the Ombudsman is vested with formidable investigation powers which include the capacity to scrutinise internal workings of departments, which might mean requiring officials to provide evidence and produce documents, but unlike tribunals or courts the Ombudsman is not able to take remedial action directly. (Leyland and Anthony, 2013:126).

After completing an investigation, the Ombudsman reports back to parliament and if the complaint of maladministration is sustained, a recommendation will usually be made, including the payment of compensation if this is deemed appropriate. Generally the Ombudsman's recommendations are followed, but there is no legal requirement for civil service departments or other public bodies to comply with such recommendations (Leyland and Anthony, 2013:126).

The Ombudsman requires a complainant to raise the complaint with the organisation and give the organisation an opportunity to resolve the dispute and provide a final decision prior to approaching the Ombudsman, (Ombudsman, 2012). The Ombudsman does not

have a dedicated division to deal with tax complaints, even though he deals with any matter arising from civil service departments.

The Ombudsman does not have a separate office for tax-related administrative complaints, and therefore the commissioners of the HMRC established the Adjudicator's Office (AO) in 1993 to investigate complaints made concerning the HMRC (OECD, 2013:49).

The AO's remit and service standards are set out in "service level agreements" with the commissioners of the HMRC. However, it functions independently, and annual reports of its operations are produced. The AO deals with complaints submitted for a lack of services that relate to unreasonable delays, poor or misleading advice, inappropriate staff behaviour, and the use of discretion (OECD, 2013:49).

4.7.1 FUNCTIONS AND ROLE OF THE UNITED KINGDOM'S ADJUDICATORS OFFICE

The AO must investigate and resolve any complaint in a fair and unbiased manner arising from citizens of the UK about any administrative issue dealt with by the HMRC, the Tax Credit Office (TCO) and the Valuation Office Agency (VOA) (Adjudicators Office, nd).

The AO's mandate is to determine whether the HMRC, the VOA or TCO dealt with the complaint appropriately and have provided reasonable decisions for any complaints lodged by the citizens. Should the AO be unable to resolve any complaints brought to their attention, the AO will make a recommendation on what needs to be done to put matters right. This may include making suggestions for improvement in service by the HMRC, the VOA or TCO if such improvement would benefit the public (Adjudicators Office, nd).

4.7.2 THE MODEL ADOPTED FOR THE UNITED KINGDOM'S ADJUDICATORS OFFICE

The AO is located between the HMRC complaint-handling service and the Ombudsman.

The HMRC funds the AO and provides staff, accommodation, equipment and materials as stated in the service level agreement. However, the AO operates independent of the HMRC, the VOA and the TCO it monitors. The service level agreement also provides that the employees of the AO must have a right to all the relevant information and data required to resolve the dispute (SARS, 2011a:4).

The services level agreement further provides that “the AO is a unit of HMRC and will comply with all the relevant HMRC policies, guidelines and processes on finance, personnel, data security, is subject to the same assurance processes, including HMRC Internal Audit, as other HMRC offices, and is entitled to the same level of office support as other HMRC offices e.g. provision of IT support, access to the Solicitor’s Office for legal advice, access to the Press Office, etc.” (Adjudicators Office, nd).

4.7.3 TYPES OF COMPLAINTS INVESTIGATED BY THE UNITED KINGDOM’S ADJUDICATORS OFFICE

The AO may review complaints relating to mistakes, unreasonable delays, poor or misleading advice, inappropriate staff behaviour and the use of discretion by the HRMC, the TCO and the VOA. The AO may not review a complaint lodged against the government or departmental policy, complaints that relate to matters which can be appealed against to any independent tribunals, disputes with the VOA about property valuations, and complaints that have been lodged or where the Parliamentary Ombudsman has already embarked on the investigation (Adjudicators Office, nd).

The AO is also precluded from conducting an investigation where the complainant already has a remedy available that has not been exhausted (Leyland and Anthony, 2013:133).

4.8 THE UNITED STATES’ TAXPAYERS ADVOCATE SERVICES

In terms of Section 101 of the Taxpayer Bill of Rights II Act (TABOR Act), the United States’ Taxpayer Advocate (US Tax Advocate Services) is also known as the National Taxpayer Advocate, is the head of the Office of the Taxpayer Advocate within the Internal

Revenue Service (IRS), and is appointed by and reports directly to the Commissioner of Internal Revenue.

The US Tax Advocate Services is an independent organisation within the IRS located in each and every state in the US (Pistone, 2009:188).

The US Tax Advocate Services protects taxpayers' rights and ensures that the burdens of taxpayers' are reduced. It identifies and resolves taxpayers' problems with the IRS. The US Tax Advocate Services assists taxpayers that seek to resolve tax problems which were not resolved through normal IRS complaints procedures or channels (Pistone, 2009:188).

4.8.1 FUNCTIONS AND ROLE OF THE UNITED STATES' TAX ADVOCATE SERVICES

The US Tax Advocate Services' function is to safeguard the taxpayers that are treated unfairly and also to make sure that the taxpayers know and understand their rights. The US Tax Advocate Services also assists taxpayers in understanding the process of resolving service-related complaints that remain unresolved by the IRS (Internal Revenue Service, 2013b).

According to Nykiel and Şek (2009:142), the US Tax Advocate Services participates in tax policy. This procedure is called systematic advocacy and it aims at detecting legislative, organisational, dysfunctional or obstacles and thereafter, to propose reforms or new solutions to the IRS and the Congress.

The US Tax Advocate Services can issue directives and have two instruments:

- the Taxpayer Advocate Directives (TADs): through the TAD, the US Tax advocate services can ask the IRS for a special administrative act to protect the taxpayers' rights, to prevent improper tax obligation and to secure equal treatment; and
- the Taxpayer Assistance Orders (TAOs): aims to order the IRS to secure a tax collection interruption or suspend any other administrative action that may violate the taxpayer's right (Nykiel and Şek, 2009:142).

4.8.2 THE MODEL ADOPTED FOR THE UNITED STATES' TAX ADVOCATE SERVICES

There is no federal Ombudsman in the US and therefore the US Taxpayer Advocate Services is located between the IRS's Problem Resolution Program and the courts. The appointment of the National Taxpayer Advocate is done by the Secretary of the Treasury and the National Taxpayer Advocate reports directly to the Commissioner of the IRS (SARS, 2011a:4).

“The US Taxpayer Advocate Services acts as an Ombudsman for the taxpayer, and in addition to the duties as the head of the office, the Advocate is responsible for submitting annual reports on their objectives and recommendations to the Committee on Ways and Means of the United States House of Representatives and the Committee on Finance of the United States Senate. The reports are submitted without any prior review or comment from the Commissioner, the Secretary of the Treasury, any other officer or employee of the Department of the Treasury, or the Office of Management and Budget” (TABOR Act).

4.8.3 TYPES OF COMPLAINTS INVESTIGATED BY THE UNITED STATES' TAX ADVOCATE SERVICES

The US Tax Advocate Services helps taxpayers to resolve disputes with the IRS. In order to be assisted by the US Taxpayer Advocate Services, a complainant must have incurred considerable expenses or have experienced economic impairment, or the failure by the IRS to respond or provide a decision on the problem on the agreed date (Taxpayer Advocate Service, 2013).

4.9 CONCLUSION

This chapter has provided an analysis of the models adopted for the Ombudsman of the following countries: Australia, Botswana, Canada, New Zealand, Sweden, the UK and the USA. The analysis provided the models adopted for each Ombudsman, discussed how the Ombudsman is independent of the revenue office, as well as the types of complaints that are submitted to the Ombudsman and the process followed to submit such complaints.

The following chapter will provide an international comparison of the ombudsman application regarding the countries discussed in this chapter.

CHAPTER 5

INTERNATIONAL COMPARISON OF THE OMBUDSMAN APPLICATION

5.1 INTRODUCTION

This chapter will provide a comparative analysis of the Ombudsman systems adopted by countries discussed in Chapter 4. It will further look at the different countries' special institutional arrangements for dealing with taxpayers' complaints and compare the application with the application adopted in South Africa.

5.2 COMPARISON OF THE APPLICATION

Governments in many countries have established special bodies e.g. an Ombudsman's Office, to handle individual complaints concerning government agencies (including revenue bodies) in their dealings with citizens and business. In some countries, an agency dedicated to dealing only with tax-related complaints from citizens and business arising from actions or inactions of the revenue body has been established e.g. an Office of Tax Ombudsman (OECD, 2013:38).

The primary purpose of this sort of arrangement is to ensure that citizens and businesses have an opportunity to raise matters where they were treated unfairly or harshly and to have these matters handled independent of the agency to which the matter relates (OECD, 2013:38).

Table 2 provides a summary of the special institutions established by various countries to deal with taxpayers' complaints.

Table 2 : A comparison of the special institutions established by various countries

Country	Institution within the revenue	Special institutional	Parliamentary institution	Reporting	Binding effect of the special institutional
Australia	None	None	Taxation Ombudsman	Report to the Parliament	Recommendations not binding, but are available in full or in an abridged version
Botswana	None	None	Office of the Ombudsman	Report to the Parliament	Recommendations not binding nor published
Canada	None	Office of the Taxpayers' Ombudsman	None	Submit annual report to the Minister of National Revenue	Recommendations not binding
New Zealand	None	None	Parliamentary Commissioner (Ombudsman)	Report to the Parliament	Recommendations not binding
Sweden	None	None	Parliamentary Ombudsman	Report to the Parliament	The Ombudsman may institute proceedings before the appropriate court
South Africa	SSMO	South African Tax Ombud	Public Protector	SSMO report to SARS and the Tax Ombud reports to the Minister of Finance	Recommendations not binding
The United Kingdom	AO	None	Parliamentary Ombudsman	AO report to the HRMC and the Parliamentary Ombudsman to the Parliament	Recommendations not binding
The United States	US Tax Advocate Services	None	None	Commissioner of Internal Revenue and submits report to Parliament	Recommendations not binding

Table 2 provides an overview of the institution available as administrative complaint mechanism in the selected countries prior to the complainant approaching the court to resolve the administrative complaint.

The table provides for three types of institutions, namely institutions within the revenue authorities, special institutions and parliamentary institutions. The table also provides for the reporting obligations for these intuitions as well as the binding effect of the recommendations made by these institutions.

The institutions for administrative complaint in the selected countries are highlighted as each country's institution is classified in the relevant type of institution and also the table shows the reporting line as well as the binding effects of each country's institution.

Based on Table 2 it can be noted that recommendations made by those various institutions regarding a complaint are not binding, except for the Swedish Tax Ombudsman, who may prosecute any relevant person at fault in court (Levin, 2009:41). As a result, countries choose to either have one institution within the revenue authorities to resolve administrative disputes or a parliamentary institution that oversees the administrative dispute across their respective government agencies due to the non-binding recommendations that are issued by the institution after the investigation.

From the table it can be established that countries are reluctant to have more institutions for administrative complaints as this might frustrate the complainant.

5.3 COMPARISION OF THE COMPLAINTS

This section will provide a comparison of the type of complaints that may be dealt with by a relevant institution of the selected country.

The Taxation Ombudsman of Australia may review any tax administrative complaints submitted by the public.

Botswana's Office of the Ombudsman may review any administrative complaints arising from the government or government department of Botswana. Botswana's Office of the Ombudsman is not limited to reviewing tax administration complainants.

The Canadian Taxpayers' Ombudsman may investigate service complaints submitted against the service provided by the CRA.

New Zealand's Parliamentary Commissioner investigates any complaints against government agencies, including the IRD, and also reviews any rule, enactment or practice, whether it is in itself reasonable, serves justice, is not oppressive, or is not improperly discriminatory, and may make recommendations on those as well (Sawer, 1968:67).

The South African Tax Ombud may investigate any administrative complaint lodged by a taxpayer against SARS.

The Swedish Ombudsman reviews complaints raised by the citizens of Sweden on any administrative errors by the tax authorities.

The AO investigates any complaint against the HMRC, the TCO and the VOA for any unfair and biased conduct that may have arisen while conducting their duties (Adjudicators Office, nd).

The US Tax Advocate Services may review any complaint by a taxpayer whereby a taxpayer may have experienced economic harm or incurred significant cost arising from the IRS. The US Tax Advocate Services also participates in tax policy, where it aims to detect legislative, organisational dysfunction or difficulties and propose any reform or new solutions to the IRS.

The AO, Canadian Taxpayers' Ombudsman, the South African Tax Ombud, the Taxation Ombudsman of Australian and the US Tax Advocate Services may only investigate complaints lodged against the relevant tax authorities. The Ombudsman of Botswana, New Zealand and Sweden are not only Ombudsmen dedicated to investigating complaints arising from the tax authorities.

The Ombudsman may only investigate complaints about administrative disputes and not those relating to the amount of tax payable or relating to an assessment. The legislation provides for a process to be followed for complaints relating to the amount of tax payable or relating to an assessment.

The Ombudsman may not investigate any complaint where a right of appeal is provided in the relevant legislation or may be reviewed by another institution. The Ombudsman may also not review a complaint where the complainant has not exhausted all the available complaint processes.

5.4 CONCLUSION

This chapter has provided an analysis of the models adopted for the Ombudsman of the following countries, Australia, Botswana, Canada, New Zealand, Sweden, South Africa, the UK and the USA. The analysis has provided the models adopted by each country in respect of their Ombudsman and how independent he is of the revenue office, as well as the types of complaints that are submitted to him, the process followed to submit such complaints as well as the similarities and the differences.

The following chapter will provide a conclusion as well as the summary of the findings.

CHAPTER 6

CONCLUSION

6.1 INTRODUCTION

The purpose of this chapter is to present the research findings and conclusion. The primary objective of this research study was to make a comparative study of the models adopted for the Tax Ombudsman offices in the selected countries.

6.2 SUMMARY OF THE FINDINGS

The primary purpose of this study was to provide a comparative study of the models adopted for the Tax Ombudsman offices in Australia, Botswana, Canada, New Zealand, Sweden, the UK, the USA and South Africa, and to determine whether they can be successfully adopted in South Africa.

The research objectives of the study were summarised as follows:

- to discuss the complaint measures available in South Africa;
- to analyse the model adopted for the South African Tax Ombud in order to determine when and how a taxpayer would approach the South African Tax Ombud;
- to examine the models adopted for the Ombudsman in the following countries: Australia, Botswana, Canada, New Zealand, Sweden, the UK and the USA; and
- to compare the South African Tax Ombud's model with the model adopted in the countries listed above in order to determine the similarities and the differences.

The findings of the abovementioned research objectives will be discussed in the following sections.

6.2.1 DISCUSSION OF THE COMPLAINT MEASURES AVAILABLE IN SOUTH AFRICA

The dispute resolutions mechanisms available in South Africa were analysed in Chapter 2, which highlighted different types of disputes as well as different methods of addressing and resolving the different types of disputes. The findings of this study highlighted that disputes were classified as administrative disputes as well as disputes arising from an assessment issued by SARS.

The analysis in Chapter 2 has also demonstrated the process followed for administrative disputes and also SARS disputes that are not of an administrative nature. Administrative disputes may be addressed with an employee of SARS, a SARS branch manager or SSMO. With the implementation of the South African Tax Ombud, administrative disputes can now be escalated. Disputes relating to an assessment can be resolved through an objection and appeal process provided for the TAA.

6.2.2 ANALYSIS OF THE MODEL ADOPTED FOR THE SOUTH AFRICAN TAX OMBUD

Chapter 3 has provided an overview of the model adopted by the South African Tax Ombud, highlighting, amongst others, the person delegated to appoint the South African Tax Ombud, the powers of the South African Tax Ombud, as well as disputes that can be brought to the South African Tax Ombud.

The South African Tax Ombud will be located between SARS and the Public Protector or the court and also the TAA provides that the South African Tax Ombud will be independent from SARS, even though the employees of the South African Tax Ombud will be from SARS and transferred to work for the South African Tax Ombud. Although, the independence of the model adopted for the South African Tax Ombud has been questioned by many tax professionals, such as Professor Osman Mollagee (Taxgram, 2011), the TAA provides that the South African Tax Ombud will be independent from SARS and will report directly to the Minister.

6.2.3 EXAMINATION AND COMPARISON OF THE MODELS ADOPTED FOR THE OMBUDSMAN IN THE SELECTED COUNTRIES TO THAT OF SOUTH AFRICA

Chapter 4 examined the models adopted in the selected countries, the examination was conducted by analysing functions, role, and types of complaints for each country's Tax Ombudsman as well as the model adopted by those countries to also determine the independence of such Ombudsman.

A comparison of the Ombudsman was also conducted to determine the similarities and the differences of the model adopted in the Ombudsman.

A Comparison of the Ombudsman as well an examination of the Ombudsman for the countries mentioned above highlighted, amongst others, which Countries that do not have a special institution to lodge a complaint about any tax administration, instead have a Parliamentary Ombudsman that reports directly to Parliament.

The comparison has established that the selected countries opted that the Ombudsman must report directly to parliamentary and in order for the complainants to reach the Ombudsman quicker and the complaint to be resolved quicker. Should the complaint remain unresolved the complainants may approach the Court for a binding decision.

6.3 FINAL CONCLUSION

This study has provided an analysis of the South African Tax Ombud and also compared the model adopted for the South African Tax Ombud with the models of the countries taken into consideration when developing the model to be adopted for the South African Tax Ombud.

The introduction of the South African Tax Ombud has been praised (Croome, 2002:28) and also criticised by some professionals (Taxgram, 2011). It is still unclear whether the South African Tax Ombud will be more effective than the SSMO or whether the model adopted will be effective. The South African Tax Ombud has been appointed in the person

of retired Gauteng Judge President Bernard Ngoepe. This study cannot conclude whether the model adopted will be effective or not as the Tax Ombud was only recently appointed.

SARS (2011b:4) has stated that the model adopted for the South African Tax Ombud is a hybrid of the UK's AO that was set up in 1993 and the Canadian Taxpayers' Ombudsman which was set up in 2008, and according to SARS (2011b:4) the model of the South African Tax Ombud will be similar to the Canadian Taxpayers' Ombudsman model.

Table 2 indicated that the UK's AO is a dispute institution that is located within HRMC, which is similar to the South African SSMO, and the UK also has a Parliamentary Ombudsman set up by the Parliament, which is similar to the Public Protector in South Africa.

6.4 RECOMMENDATION

After the inclusion of the South Africa Tax Ombud, South Africa currently has three complaint mechanisms regarding an administrative dispute with SARS, and all the complaint mechanisms must be used before the complainant can approach a Court (Section 7 of PAJA).

An administrative dispute with SARS is not motivated by any monetary gain or loss, but it is based on constitutional values whereby an administrator must treat each dispute in a procedurally fair manner regarding any administrative action. Thus, the complainant is not prepared to knock into four doors, that is, including the SARS branch office and all the complaint mechanisms, to seek for a redress of a procedurally fair administrative action at his own expense, should the matter remain unresolved.

A recommendation has already been submitted by the Katz Commission (South Africa Government Online, 2012) that a separate office be implemented within the Public Protector to deal with complaints arising from the tax administration.

6.5 FUTURE RESEARCH

Table 2 has also indicated that the Canadian Taxpayers' Ombudsman is the only institution available for complaints after the CRA prior to court and comparing the Canadian approach to South Africa. South Africa the institutions that are available after SARS are the SSMO, South African Tax Ombud and the Public Protector.

Further research should therefore be conducted to identify whether taxpayers should use all available complaint mechanisms with regard to an administrative dispute where no monetary gain or loss is at stake.

Alternatively, future research is needed to identify whether there still is a need for the SSMO including the presence of the South African Tax Ombud.

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