Appraisal of Ethiopian Tax Dispute Resolution System at the Review Department (of the Ministry of Revenue) and at Federal Tax Appeal Commission.⇒

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Abstract

Tax disputes are inherent parts of a tax system, and require resolution mechanisms that effectively regulate and protect the interest of disputing parties. Commonly, countries provide for several layers of dispute resolution schemes. The schemes comprise internal review and external dispute resolution mechanisms that include quasi-judicial tax tribunals, courts and different kinds of Alternative Dispute Resolution methods. Ethiopia has made successive reforms on the laws and institutions pertaining to taxation and tax dispute resolution procedures. Despite successive reforms in the substantive content of tax laws, the dispute resolution system by and large remained the same. The 2016 reform, one of the latest reform moves, maintained much of

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Acronyms: TAP-Tax Administration Proclamation; TAC-Tax Appeal Commission; FDRE-Federal Democratic Republic of Ethiopia; ADR-Alternative Dispute Resolution Mechanisms.

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the dispute resolution institutions with some changes in the details. The failure or success associated with these reforms and the overall application of tax dispute resolution system in the country has not been sufficiently studied. Using a qualitative research approach, this research thoroughly examined the Ethiopian law and the practice pertaining to the prevailing tax dispute resolutions system at Review Department of the Ministry of Revenue and the Federal Tax Appeal Commission. The research found out several legal and practical limitations regarding geographical accessibility, independence, legal certainty and access to justice. Thus, the existing tax dispute resolution system of Ethiopia needs to be re-visited so that the Country will have a tax dispute resolution system that balances the interest of the public and taxpayers.

Keywords: *Tax dispute; Review department; Tax Appeal Commission; Ethiopia***.**

Introduction

Tax disputes are inevitable aspect of tax systems. They are said to occur when taxpayers disagree with the decision of tax authority in respect of the taxpayer's liability, entitlements and related issues.[1] Effective and efficient tax dispute settlement mechanism is an important part of a good tax system.[2] The availability of a fair, impartial and independent mechanism for resolving tax disputes between taxpayers and the tax authority is one of the indicators of a well-developed or advanced the tax system.

Commonly, countries grant taxpayers the legal right to challenge alleged errors in tax administration or improper decisions by the tax authority. The mechanisms for that include internal review mechanisms, and external tax

[1] Michael Walpole and Binh Tran-Nam, Access to Tax Justice: How Costs Influence Dispute Resolution Choices, *School of Taxation and Business Law, The University of New South Wales,* p. 17.

[2] Binh Tran-Nam and Michael Walpole, Tax Disputes, Litigation Costs and Access to Tax Justice, *eJournal of Tax Research (2016), Vol 14, No.2*, pp. 319-336.

dispute resolution (involving Administrative Appeals Tribunal), the courts, and different kinds of Alternative Dispute Resolution methods).[3] An internal review can enable the tax authorities to swiftly identify and correct mistakes at a minimal fiscal cost at administrative level while external review mechanisms are necessitated for their neutral adjudication.[4]

As in any other system, tax disputes are common in Ethiopia. Since the 1940s, the Ethiopian tax system has made successive reforms on the laws and institutions pertaining to taxation and tax dispute resolution. The latest significant reform on substantive and administrative aspects of tax laws of Ethiopia was undertaken in 2016. Proclamation No. 983/2016 (TAP)[5], one of the major outcomes of this reform, lays down the rules for tax dispute resolution system at federal level. The system comprises[6] the internal review process at the level of Ministry of Revenue; appeal to the Tax Appeal Commission (quasi-judicial Administrative tribunal for tax); and a last resort to regular courts by way of appeal and cassation.[7]

As such, the new tax administration law came up with major improvements including the establishment of Federal Tax Appeal Commission as an independent dispute settlement organ; changes regarding advance payment calculation requirements to take a case for appeal; the change on the period of limitation to file objection before internal review department, etc. However, there are still concerns over handling of tax grievances and adjudication of tax

[3] See Simon Whitehead (ed.), Tax Disputes and Litigation Review, Law and Business Research, 2018.

[4] World Bank Group, The Administrative Review Process for Tax Disputes: Tax Objections and Appeals in Latin America and the Caribbean; a Toolkit (hereinafter, World Bank), p.18.

[5] Federal Tax Administration Proclamation No. 983/2016, Federal *Negarit Gazette*, Extraordinary Issue, Year 22, No 103. (hereinafter TAP), Art 55.

[6] Id.

[7] Id.; The Constitution of Federal Democratic Republic of Ethiopia, Proclamation No.1/1995, *Federal Negarit Gazetta*, (1995) (hereinafter FDRE Constitution), Article Art 80(3). Pursuant to Art 80(3) of the FDRE constitution, the Federal Supreme Court has a power of cassation over any final court decision containing a basic error of law.

disputes. Particularly, many question the accessibility and independence of tax adjudication institutions (Review Department at the Ministry of Revenue and the Tax Appeal Commission); transparency and fairness of procedural rules (due process), the impartiality and competence of adjudicators. Therefore, it is imperative for this country to examine the law pertaining to handling of tax grievances and adjudication of tax disputes. This article takes a theoretical and practical perspective to look into the legislative contents and practice of tax dispute resolution processes.

The investigation specifically targets tax dispute settlement system at the Review Department of the Ministry of Revenue and the Tax Appeal Commission at federal level. The Tax Appeal Commission is just a single institution located in Addis Ababa while the Review Departments are established at 12 branches of FDRE Ministry of Revenues, five of which are in Addis Ababa and seven in regional branches. Each branch has a review department, a total of 12 Review Departments Nationwide. The Figure below shows the braches/review departments across the Country.

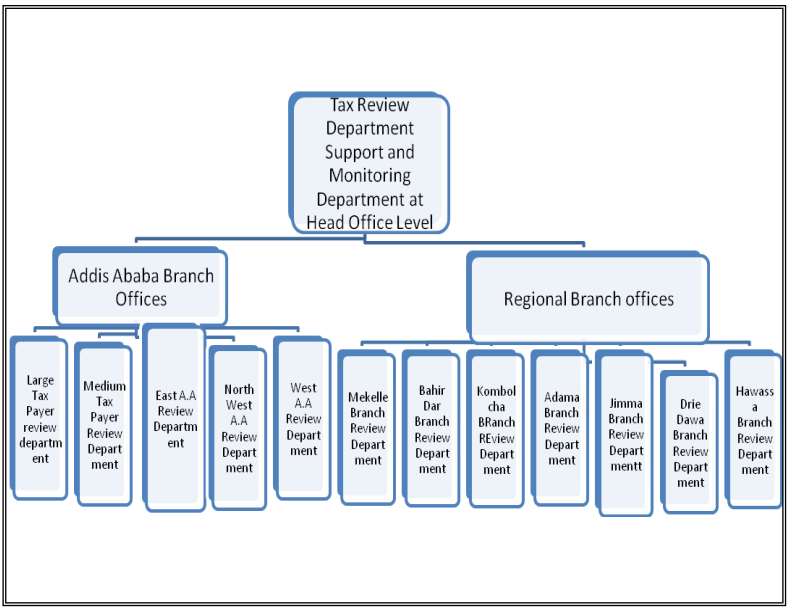

Figure 1: **Distribution Review Departments across the Nation and Samples selected**

The study employed qualitative research method, in which both primary and secondary qualitative data are collected and interpreted. Participants experiencing the operation of the institutions were selected as sources of primary data. Notably, experts involved at the stage of internal review, and members of tax appeal commission were primary respondents. Head/officers of these two institutions were involved as key informants. Essential secondary data (in the form of reports, and other documents) has also been generated from secretaries/registrars of these two institutions. Taxpayers and lawyers having pending cases in the institutions (those who appeared during the data collection process) were interviewed as source of primary data. We also held short observation at the Tax Appeal Commission hearings.

Regarding sampling, the Tax Appeal Commission is taken for granted as it is the sole institution of its kind. But from the review departments, we selected

samples purposively. All the branches at the Ministry of Revenue are part of the same institution sharing same working rules and instructional culture. Due to this, and partly induced by time and resource limitation, we are convinced that undertaking the research at some of the branches in Addis Ababa would be representative. Of the five branches in Addis Ababa, we purposively chose to collect data from the three review departments in Addis Ababa: Review Department for Large Taxpayers; the Review Department for Medium Taxpayers; and the East Addis Ababa Small Taxpayers Review Department. We have also collected supplementary data from the review department at Bahir Dar Branch. The table below summarizes data sources and data collection instruments used.

Table 1 Data Sources and Data Collection Instruments Used:

S.N	Participant category	Data collection instrument used
1	Head/Officers of Review Departments	Key Informant Interview Qs.
2	President of Tax Appeal commission	Key Informant Interview Qs.
3	Members of Review Departments	Interview/Group Interview-FGD/
4	Members of tax appeal commission	Interview
5	Taxpayers and Lawyers	Interview
6	Proceeding/hearing at TAC	Non-participant observation
7	Secretaries/registrar	Forms to be filled/documents collected

We categorised the primary and secondary data into thematic areas using content analysis techniques. In addition, where possible, any information obtained in the interviews was cross-validated against secondary data in reports of institutions. Finally, the findings were synthesized. The study found out several legal and practical institutional limitations.

The contents are organized in four sections. Section one provides general background on the research issue, the scope, and methodology of the

research. The second section offers a brief overview of tax dispute settlement methods across various jurisdictions. The third section analyses the legal framework and practical realities of the Ethiopian tax dispute resolution mechanisms at the Review Department of the Ministry of Revenue and at the Tax Appeal Commission. Finally, the last section provides the summary of findings and recommendations for institutional actions.

3. Tax Dispute Resolution Mechanisms: An Overview

Tax disputes are disagreements between a taxpayer and a tax author regarding the taxpayer's tax liabilities or entitlements or other related issues.[8] It occurs when a taxpayer holds a view that differs from that of the tax administration and decides to take action as a result of this disagreement.[9] It is vital that taxpayers trust the system. They always would like to see a system that is not arbitrary, unfairly harsh, and one with a process in place to review contentious rulings of tax authority.[10] A well-functioning tax regime meets such expectations of taxpayers. While tax dispute resolution mechanisms vary across countries, they all can be categorized into either of the three: administrative review, courts and alternative dispute resolution mechanisms.

3.1. Administrative Review

Administrative review of tax grievance is a case in which the taxpayers can request for review of the decisions of the tax authority by itself or agencies other than courts with a special jurisdiction to review tax decisions.[11] The international practice shows that there are differences in the institutional

[8] Tran-Nam and Michael Walpole, "Independent Tax Dispute Resolution and Social Justice in Australia", *UNSWLJ,* Vol.35, No.2, (2012), P. 477.
[9] Id.
[10] Deloitte Consulting LLP, systems Approach Policy Value Chain Analysis: Tax Dispute Resolution (TDR) Reform, (2020), P. 2, (hereinafter Deloitte), available at https://pdf.usaid.gov/pdf_docs/PA00XJ7P.pdf , last accessed on March 16, 2022.
[11] World Bank, *supra* note 4, P.22.

arrangements for administrative review. [12] Yet, the scope of the review covers both matters of fact and matters of law in most countries. The reviewers are public officials who are bound by both the standard civil-service regulations and the specific procedural rules of the agency charged with internal tax reviews. The administrative review can be done by the tax authority itself (internal) or by a separate authority (external).

At the primary level, the taxpayer can file an objection to the tax authority itself to review its own decisions.[13] In most cases, the review can be done by the same official or unit that issued the objected decision or separate official or specialized unit within the tax authority.[14] The tax objection can be reviewed again by another entity independent from the tax authority.[15] The authority may be tax-review agencies or board that are somewhat independent of the main tax authority.[16] For instance, in New Zeeland, it is a division within the tax administration.[17] The cases in Malaysia, Myanmar, and Singapore are also different as the review authorities are found within the Ministry of Finance.[18] In South Korea, the Tax Tribunal is established under the Prime Minister's jurisdiction.[19]

1.2. Alternative Dispute Resolution Mechanisms (ADR)

Although there are variations among jurisdictions on the modality of adopting ADR, , there is a wider tendency to use this institution for tax dispute

[12] Id.
[13] Satoru Araki and Iris Claus, 'Comparative Analysis of Tax Administration in Asia and the Pacific', Asian Development Bank, Mandaluyong City, Philippines, (2014), p. 60.
[14] World Bank, *supra* note 4, P.22.
[15] Jamaica, Argentina, Mexico, and Panama are countries which have such type of internal review arrangement.
[16] Araki & Claus, *supra note* 13, P.60
[17] Id.
[18] World Bank, *supra note* 4, P.60.
[19] Id.

resolution purposes.[20] The use of ADR for such ends may take the form of an administrative mediation or independent mediation. Administrative mediation is a type of mediation in which the process involves a mediator who belongs to the tax administration.[21] Independent mediation is different from administrative mediation as it allows recourse to an independent mediator who does not belong to the tax authority.[22]

In some jurisdictions[23] domestic arbitration of tax disputes is allowed. In these countries, arbitration is typically allowed only after exhaustion of all available remedies within the tax authority. Domestic arbitration procedures may be provided by law as a right or may be available through agreements with the tax authority with respect to a specific case if both the taxpayer and the tax authority agreed to do so.[24] In most cases, the domestic arbitration of tax disputes is restricted to questions of fact such as the valuation of an asset.

1.3. Courts

The courts, both ordinary and tax courts, may have the first-instance and appellate jurisdiction to adjudicate tax disputes. There are jurisdictions in which, once the remedies at the tax authority are exhausted, review is made by the first-instance ordinary courts. It is done without having other tax dispute-settling organs in between. In this regard, the Russian experience is mentionable.[25] In some others, the complexity of tax law forced countries to

[20] Victor Thuronyi & Isabel Espejo, How Can an Excessive Volume of Tax Disputes Be Dealt With?, IMF, 2013, available at https://www.imf.org/external/np/leg/tlaw/2013/eng/tdisputes.pdf, last accessed June 30, 2022.

[21] United Nations, United Nations Handbook on Dispute Avoidance and Resolution, (New York, United Nations), 2021, (hereinafter United Nations), Dispute Avoidance and Resolution English.pdf (un.org), last accessed on March 16, 2022, p. 93.

[22] Id., P.104.

[23] Id. In this regard, Portugal is the notable one.

[24] United Nations, *supra* note 21, P.105

[25] Yana Proskurina and Maria Mikhaylova, Russia, in Simon Whitehead ed., The Tax Disputes and Litigation Review,7thed, Gideon Roberton Publisher, UK, (2019), P.291.

establish a specialized court or quasi-judicial tribunal whose jurisdiction is limited to the adjudication of tax disputes. Judges of these specialized courts and tribunals are usually well aware of tax issues and are thus in a better position to settle disputes involving these issues.[26] Tax-specialized courts are found in many jurisdictions. For example, in South Africa, there is a specialized tax court called Special Income Tax Court. In Indonesia a tax dispute settlement agency which was affiliated with the Ministry of Finance is replaced by a specialized tax court with a view to provide fairer dispute resolution.[27]

4. The Ethiopian Tax Dispute Resolution System at the Review Department and Federal Tax Commission

4.1. Brief Historical Account of Tax Dispute Resolution System of Ethiopia.

Ethiopia has undertaken successive reforms on the laws and institutions pertaining to taxation, and a tremendous change has been made on the substantive content of tax laws including the types of taxes, the tax bases, jurisdictional reach etc.[28] However, the dispute resolution system, by and large, remains the same, and consists of internal review (review department) by the tax authority, appeal to tax appeal Commission, and review by regular courts on question of law. For instance, as early as 1961, the Ethiopia income tax law[29] had envisaged a similar tax dispute resolution mechanisms: Tax

[26] United Nations, *supra note* 21, P. 98

[27] Araki &Claus, *supra note* 13, P.65.

[28] For a comprehensive review of history of Ethiopian tax reforms, see Taddese Lencho, Towards Legislative History of Modern Taxes in Ethiopia, (2008), available at https://journals.co.za/doi/pdf/10.10520/AJA00220914_78 Last accessed ….

29 See Ethiopia Income Tax Law, Proclamation No. 173 / 1961, Articles 49-61. Proclamation No. 173 of 1961 had envisaged a Tax Appeal Commissions to be appointed by the government to deal with appeals against tax assessments made by the Income Tax Department of the Ministry of Finance; and Tax Appeal Commissions may be established for Provinces, or, in case of need, for certain local offices. In case the Income Tax Authority or the appellant is dissatisfied with the decision of the Tax

Appeal Commissions (empowered to deal with appeals against tax assessments made by the Income Tax Department of the Ministry of Finance); and the High Court of Appeal (in case the Income Tax Authority or the taxpayer is dissatisfied with the decision of the Tax Appeal Commission).

The subsequent legislation, Proclamation No. 233/2001, that repealed Proclamation No. 173 of 1961, simply reshaped Tax Appeal Commissions into the Federal Tax Appeal Tribunal, whose decision may be appealed to the Federal High Court.[30]

The Income Tax Proclamation No.286/2002[31] and Value Added Tax Proclamation No.285/2002 also maintained similar institutions for tax dispute resolution. These legislations had envisaged tax dispute resolution system that consists of a Review Committee[32], a Tax Appeal Commission, and the appeal

Appeal Commission, either party may appeal, within thirty days, to the High Court of Appeal by sufficiently establishing the grounds for its grievances

30 See generally Federal Tax Appeal Tribunal Establishment Proclamation No. 233/2001. Federal Tax Appeal Tribunal Establishment Proclamation No. 233/2001 repealed the provisions of Proclamation No. 173 of 1961 dealing with dispute resolution. In doing so, it established The Federal Tax Appeal Tribunal as an autonomous public body of the Federal Government with legal personality accountable to the Prime Minister. The institution has its head office in Addis Ababa and possibly branch offices in other places. Among others, it is mandated to examine and decide on appeals lodged by the tax payers against tax assessment made by the Authority, whose decision may be appealed to the federal High Court on grounds of error of law upon payment of 75% disputed tax. Federal Tax Appeal Tribunal Establishment Proclamation No. 233/2001 repealed the provisions of Proclamation No. 173 of 1961 dealing with dispute resolution. In doing so, it established The Federal Tax Appeal Tribunal as an autonomous public body of the Federal Government with legal personality accountable to the Prime Minister. The institution has its head office in Addis Ababa and possibly branch offices in other places. Among others, it is mandated to examine and decide on appeals lodged by the tax payers against tax assessment made by the Authority, whose decision may be appealed to the federal High Court on grounds of error of law upon payment of 75% disputed tax.

31 See Income Tax Proclamation No.286/2002, Articles 104-115; Value Added Tax Proclamation No.285/2002, Article 40-43.

32 Id. Yet, one major departure in these legislations is that they introduced Review Committee, a grievance review committee within the tax authority. The ministry of revenue or appropriate regional authority appoints members of the Review Committee.

to Regular Courts on grounds of error of law. The Review Committee is empowered to provide recommendations to the head of tax authority that may approve or render an alternative verdict. Then, grievances may be taken to the Tax Appeal Commission[33] after payment of 50% of disputed tax, and an appeal from the decision of the Tax appeal commission may taken to the regular courts but only on question of law.

The latest reform, launched in 2016, encompasses substantive and administrative aspect of tax laws. Along with the reforms on the substantive content of the tax laws, a separate legislation, specifically dedicated to administrative and dispute resolution aspects of all federal taxes, has been enacted.[34] This is a major departure from previous approaches where each tax legislation used to provide its own section on tax administration and dispute resolution. It sustained the three dispute resolution institutions in of the legislations it repealed: Review department within the tax authority, a Federal Tax Appeal Commission, and the appeal to Regular Courts. Yet, the new tax administration proclamation purports to be comprehensive and revisited the institutional structure and status of these dispute resolution institutions. Indeed, the new tax administration law came up with changes including the constitution of review department, procedures it follow, the re-establishment of Federal Tax Appeal Commission as an independent dispute settlement organ, changes regarding advance payment requirements to take a case for appeal, etc.

33 Id. Tax Appeal Commission was supposed to be established at Federal, Reginal, Zonal, and Woreda Level. Members of the Tax Appeal Commission were to be appointed by the Minister of Justice or the appropriate city administration, regional, zonal or woreda executive organ. Members serve for a period of 2 years and they are entitled to attendance fees for their service. The review committee and the Tax Appeal Commission were not institution with legal personality status. the status of members of the Review Committee and Tax Appeal Commission were similar to ad hoc committee, as opposed to fulltime employees.

34 See TAP, *supra note* 5.

The reforms brought through this legislation and their practical application regarding the tax dispute resolution system has not been empirically studied. The subsequent sections examine the law and the practice in the current Ethiopian tax dispute resolutions landscape at Review Department and the Federal Tax Appeal Commission.

4.2. Tax Dispute Resolution System at the Review Department (Internal Review): Appraisal of the Law and Practice

Following the 2016 reform on tax administration, a Review Department is established within the Tax Authority. It is meant to undertake an independent review of notices of objections filed by the taxpayers. This section explores the success or otherwise of the Review Department in discharging its duties.

4.2.1. Organizational Structure and Accessibility of the Review Department

The organizational structure of the Review Department is detailed by a directive.[35] Unlike the previous one, as of 2016, it is reorganized as a permanent office. Further, as per Article 4 (1) of the directive, the Department is required to be established in all branches. Accordingly, there are five Review Departments in Addis Ababa and 7 Review Departments in different regional states.[36] The Review Departments are accountable to their respective Branch General Manager.[37] , and the decision of the Review Department will

[35] The Revised Ministry of Revenue Directive enacted to determine the working procedures of the Review Department, Directive No. 171/2021 (hereinafter Revised Directive).

[36] Interview with Mr. Dereje Bana, Head, Ministry of Revenues Review Departments Support and Monitoring Office, *on the organizational structure of the review department*, Addis Ababa, Ethiopia, 11 December 2022. There used to be a Review Departments at the head office as well but as of December 2020 there is no a Review Departments at the head office level; rather a new office is established whose main function is to support and monitor Review Departments established at branch offices across the country.

[37] Revised Directive No. 171/2021, *supra* note 35, Art. 6(1).

not have effect unless approved by the Branch General Manager who has the power to either fully or partly endorse the recommendation, reject or remand the case for reconsideration by the Review Department.[38]

The organizational structure of the internal review varies from jurisdiction to jurisdiction. In many jurisdictions, it is the head of the tax administration authority that has the power to review tax objections. In this regard, the experience of Nigeria, Kenya and Australia are worth mentioning. In these countries, it is the Commissioner General who has the power to make the first review on the objections of the taxpayers.

In other jurisdictions, the internal review power is given to a department within the tax administration but a department different from the one that makes the assessment. For instance, in Canada the Appeals Branch of the Canada Revenue Authority reviews a taxpayer's objection.[39] The Dispute Review Unit of New Zealand Inland Revenue's National Office is another jurisdiction under this block. The Disputes Review Unit performs the internal review function.[40] It is distinct from the audit/investigation role, and it is concerned with examining the disagreement from a new perspective to render an objective and unbiased judgment on the objections brought by taxpayers. Structurally, the Review Department of Ethiopia can be grouped under this category.

Turning to the Ethiopian practice once again, the Review Department is established at every branch office of FDRE Ministry of Revenues at the selected sites throughout the country. However, in this vast nation, there are only 12 branch offices. For instance, the Jimma Branch Office covers the whole of South West Ethiopia which includes South West and West Oromia,

[38] Id., Art. 11 (4) and 6 (2)

[39] Jacques Bernier and Mark Tonkovich, 'Canada' in Simon Whitehead (eds),*The Tax Disputes and Litigation Review* , Law Business Research Ltd, London, (2015), pp. 73-74.

[40] Geoffrey Clews, 'New Zealand' in Simon Whitehead (eds), The *Tax Disputes and Litigation Review* , Law Business Research Ltd, London, (2019), pp. 223-224.

Southern Ethiopia Regional State, Gambela Regional State and some parts of Benishangul Gumuz Regional State. A taxpayer residing in one of the peripheral areas of either Gambela or Benishangul Gumuz Regional State has to travel hundreds of miles to bring his case to the Review Department at the city of Jimma. This costs the taxpayers much in terms of money and time. Thus, the current geographical distribution of the revenue department has a serious accessibility problem. From the focus group discussions held with members of the Review Department, electronic tax dispute settlement is recommended as a solution to alleviate the problem of accessibility.

4.2.2. Institutional Independence of the Review Department

4.2.2.1. Institutional Structure of the Review Department

Independence refers to the administrative distance between the office that made the tax decision and the department in charge of reviewing that decision.[41] Ensuring the independence of the reviewing institution is one of the international good practice principles of internal review mechanism.[42] Yet such endeavour is subject to influence of variables such as structural arrangements within the institutional hierarchy, the rules and procedures of appointment of its members, etc.[43]

In Ethiopia, the Review Department is part of the Ministry of Revenues, which is the tax collection and administration wing of the executive. The audit department makes the assessment and the Review Department review grievances against such assessment. Though the audit department and the Review Department are different departments, still they are under the same supervisor, the Branch General Manager who may reverse or partially accept

[41] World Bank, Toolkit on the Administrative Review Process for Tax Disputes: Tax Objections and Appeals in Latin America and the Caribbean, World Bank Group, p.27. (Hereafter, World Bank, Toolkit on the Administrative Review Process for Tax Disputes)
[42] Id.
[43] Id.

the recommendation or remand the case to the Review Department. Several members of the Review Department voiced their concern over such a stretched discretionary power vested in the office of the branch manager. The Branch Manager's decision may not be free from bias and venality. No mechanism is set in place to contain the counter effects of such bias, for example, if she reverses the recommendation even without reasons. Furthermore, the members of the Review Department stated that dissenting opinion of any member of the review panel is not in practice included in the decision handed to the tax payer. Instead, it is withheld as a file in the Review Department.[44] This is contrary to the common practice of adjudication that allows any dissenting opinion from the decision of the majority to be part of the decision. Such clear lack transparency in the institution is a manifestation the jeopardy happening against the independence of the members of the Review Department.

4.2.2.2. Recruitment, Composition and Tenure Security of Members of the Review Department

The appointment of members of the Review Department is one of the key factors with strong relevance to the independence of the internal review. The Review Departments is structured as having a head, professional staff, a secretary and other administrative staff.[45] In recruiting such personnel for the Department, the branch revenue office should checks and verifies whether the candidate has the required education preparation, skills and work experiences,[46] and candidates will be assigned if these requirements are met.[47]

[44] Interview with members of Review Department of Bahir Dar Branch, Bahir Dar, Ethiopia, June 15, 2022.
[45] Revised Directive No. 171/2021, *supra* note 35, Art. 4(1).
[46] Id., Article 7(1).
[47] Id. Personal independence is another point of contention in this institution. The law permits the department to recruit members from the pool of personnel in the Ministry of revenue who could have worked as auditors, tax officers or legal officers. This would have a direct effect on the personal independence of members of the Review Department. First, as the reviewer previously worked in either the audit or tax

Candidates could be recruited from the audit department or other units involved in tax assessment. There are no rules that limit and regulate conflict of interest after the officers are appointed. For instance, a member of the review department may review a tax objection in which he already knows in his tax assessor or auditor capacity. Some countries have a clear law that regulates such issues. For instance, in Australia and the US, the relationship and interaction of the assessing unit and review unit is seriously regulated.[48]

Still on the composition of personnel, the law requires the Review Department to have at least a lawyer and an accountant.[49] Yet it is silent about the number and composition of the remaining members. Also, there is no career path within the review department. Key informants from the Review Department expressed that they have doubt on their job security.

4.2.3. Proceedings at the Review Department

4.2.3.1. Preliminary issues

Where a taxpayer disagrees with the tax assessment of the authority, there shall be held discussion with the tax auditor which is known as the exit

assessment department of the Ministry, he or she is likely to be familiar with the auditor who made the audit and naturally their willingness to challenge their colleague is susceptible. Second, it's unjust to be conscious of the audit and tax assessor mindset that members of the RD have established over the course of their careers as auditor and tax assessor. They carry out the task of review with the mindset of being suspicious of the taxpayer as tax avoiders. Third, the problem related to the tenure of the reviewer will have a direct impact on their personal independence.

[48] World Bank, Toolkit on the Administrative Review Process for Tax Disputes, *supra* note 41, p.33.

[49] Revised Directive No. 171/2021, *supra* note 35, Article 7(4). One of the benches at Large Taxpayer Branch office has only three members. In practice, there is a difference from branch to branch. For instance, in the majority of the branches, the maximum numbers of member are five. Finally, even though Article 7(2) of the Revised Directive allows the application of the appropriate guidelines and organizational studies on the transfer, assignment and promotion of staff of the Ministry to members of the Review Department, there is no career path within the review department. Key informants from the Review Department expressed that they have doubt on their job security.

conference. The TAP under Art. 55 (1) stated that a taxpayer who wishes to dispute a tax decision can file a notice of objection to get the decision reviewed by the Review Department. The law listed the conditions for a notice of objection to be valid including payment of the undisputed amount of tax or evidence that shows his agreement to pay it;[50] objections should be submitted within 21 days after the service of the notice of the tax decision.[51]

With respect to pleading, as stated under the TAP, a notice of objection or pleading shall be instituted to the Review Department in written form.[52] The notice should state precisely the grounds of objection, the amendments required to be made to correct the decision, the reasons for the amendments, and ensure that all relevant documents relating to the objection have been submitted.[53] Where the Review Department believes that the notice of objection has not met the procedural requirements, it should immediately serve written notice on the taxpayer, which contains the reasons why the notice of objection is not validly filed.[54] In practice, largely, Review Department just see whether the objection is submitted within 21 days. Panellists of the Review Departments stated that, although the objection does not clearly put the grounds of objections, the department accepts it and the grounds will be discovered during oral presentation.[55]

After ascertaining the validity of the notice of objection, the RD would send to the tax auditors to appear on the date fixed for defence. Although, the forum is an internal review medium, as we noticed from the practical scenarios, the tax authority (particularly the tax audit department) should be required to produce a statement of defence so that it would be easy for the

[50] The same condition is provided under Art. 8 (4) of the Revised Directive No. 171/2021, *supra* note 35.
[51] TAP, *supra* note 5, Art. 54.
[52] Revised Directive No. 171/2021, *supra* note 35, Art. 54.
[53] Id.
[54] Id., Art 54(4).
[55] Interview with Mr. Fikadu Getachew, Member of Review Departments, at Large taxpayers Branch. Addis Ababa, Ethiopia, April 15, 2022.

Review Department to identify issues. This is particularly important to minimize the contact of parties for longer period of time. In practice, the Review Department hears the parties individually at different time to frame issues.[56] Had the tax authority submitted a statement of defence, the department would have easily framed issues and handle the hearing process within a short period of time.

Under the Ethiopian tax administration system, tax agents can represent taxpayers in their dealings with the Authority, including at the internal review process. The fact that tax agent appear at the internal review is also expressed under the working procedure of Review Department.[57] Hence, they can prepare notices of objection on behalf of taxpayers.[58] The tax authority as a defendant is represented on internal review by tax auditors. In practice, taxpayers may appear through an authorised representative, which is understood, under the law, as anyone who can bring a power of attorney from the concerned justice office. Besides, they can be represented by lawyers. Members of some Review Departments have concerns in relation to who should really appear before the internal review as a principal actor. Since a tax suit concerns individual interest/ right, internal review departments need to make sure that the petitioner is a real party on the action/objection. Practically, the owner of the business, general manager, accountant, lawyer, tax agent even family members appear at the hearing. As the interviewees confirmed, the Review Department would hear such persons even without possessing a power of attorney as long as they come with the manager of the company.[59] Some tax administrations may choose to rely on the rules of representation that apply in other administrative or civil litigation. However, in this regard, the tax procedure law of Ethiopia is not clear.

[56] Interview with Mr. Desalegn Chekol, Chairman of Tax RD of Bahir Dar Branch. Bahir Dar, April 8, 2022.
[57] Revised Directive No. 171/2021, *supra* note 35, Art 15(3)
[58] TAP, *supra* note 5, Art 95.
[59] Interview with Melese Wondimagegn, a member of Review Department, at Medium Taxpayers' Branch, Addis Ababa, Ethiopia, April 14, 2022.

4.2.3.2. The Hearing Process

As an adjudicative body, the Review Department needs to follow certain procedures of the fair trial process. The right to be heard is one of the most important elements of procedural due process of law recognized in various jurisdictions. The TAP, at least tacitly, recognizes the right to be heard for taxpayers in stating the fact that "the Tax Authority is duty-bound to issue a directive specifying the procedures for reviewing an objection including hearings and the basis for making recommendations to the authority and the decision-making procedure."[60] However, the Directive issued is silent with respect to hearing process in the internal review. As a tax procedure law, the Directive as well as TAP should have expressly recognized this right for aggrieved taxpayer. On its face, it seems that this right of the taxpayer has been left as optional or something to be executed on the blessing of the Review Department.

In practice, after the submission of notice of objection, Review Departments hear parties over the tax objection. Accordingly, parties shall attend in person or through their respective agents or pleaders and the suit shall then be heard.[61] As many members of the Review Department stated, the silence of the working procedure rules on the effect of non-appearance has been creating difficulties in the internal adjudication system. Panellist of the Review Department reported that parties frequently failed to appear on the date fixed for hearings,[62] yet they will not lose anything because of their failure of appearance. Commonly, if one of the parties appears, the Review Department hears the party appeared on the date fixed and the other party would be heard on another day separately.[63] In rare cases, some Review Departments

[60] TAP, *supra* note 5, Art 54(2).
[61] Interview with Fikadu Getachew, *supra* note 55.
[62] Id.
[63] Interview with members of Tax Review Department of East Addis Ababa Small Taxpayer's Branch, Medium Taxpayer's Branch and Large Taxpayers Branch, Addis Ababa, April 11, 2022

postpone the hearing for another day if both of the parties failed to appear on the first hearing. But, if either party fails to appear for the second time, the proceeding will be held ex parte.[64] Yet, the party whose case has been heard ex parte can present his/her oral argument at another date even without showing good cause for non-appearance.[65] Besides, if both of the parties failed to appear on the actual hearing time, the Review Department will reschedule it to another day.[66] In effect, cases have been delaying for a long period of time. Although some level of flexibility is required in the quasi-judicial review systems, particularly, the effect of non-appearance should have been regulated.

4.2.3.3. Issues Related to Evidence.

As can be understood from the tax procedure laws, the Review Department may use testimonial evidences and documentary or other kind of evidence provided it is relevant to the matter.[67] However, the procedures of witness examination is neither regulated under the tax procedure laws nor well guided in the review process. As we noticed from the proceedings, largely, the panellists have substantial role in witness examinations. Besides, in practice, witnesses do not take oath before testimony. More importantly, most of the interviewees have a concern in relation to the time limit when certain evidence shall be presented in the internal review proceedings. In practice, because of the absence of time limit under the law, parties can bring any evidence at any time.[68] First, it is not clear as to whether evidence, to be adduced at the trial, should be annexed to the notice of objection under the tax procedure laws of Ethiopia. Second, whether evidence which was not presented at the tax audit department can be adduced at the Internal Review Department is not clear either. As a result, practically, the Review Department

[64] Interview with Mr. Desalegn Chekol, *supra* note 56.
[65] Id.
[66] Id.
[67] Revised Directive No.171/2021, *supra* note 35, Article 12.
[68] Interview with Mr. Mebit Ayehu, Attorney, Addiss Ababa, Ethiopia, April 14, 2022.

accepts any evidence at any stage of the proceeding. However, as we noticed from the views of different lawyers, unrestricted permission of evidence presentation makes the proceeding informal.[69]

4.2.3.4. Burdon of Proof

The tax procedure law of Ethiopia provides that the burden of proof in relation to objection of tax decisions, except in some limited instances, is largely imposed on the taxpayer.[70] In other jurisdictions, generally, the burden of proof lies with the party normally in possession of the relevant evidence. For example, the tax department would have the burden of proof in matters such as comparable gross profits ratios. Therefore, like other states, it is commendable to make the tax payer bear the burden of proof, limiting the exception to circumstances where the tax department has sole access to the necessary evidence.[71] For example, in some countries, in disputes requiring whether the determination of transfer pricing is consistent with the arm's length principle, the government is obligated to prove this fact.[72]

4.3. Tax Dispute Resolution System at the Federal Tax Appeal Commission: Appraisal of the Law and Practice

Beyond the administrative remedies, taxpayers have the right to access an independent and impartial adjudication, a power which normally rests with the courts. As noted earlier, tax authority's decision may be neutrally

[69] Id.

[70] TAP, *supra* note 5, Art 59. It states that "in any proceeding under this Part in relation to a tax decision, the burden shall be on the taxpayer to prove that the tax decision is incorrect. "

[71] Richard K. Gordon, Law of Tax Administration and Procedure, Tax Law Design and Drafting (volume 1; International Monetary Fund; Victor Thuronyi (ed.), (1996), p.12.

[72] Eduardo Baistrocchi, Tax Disputes under Institutional Instability: Theory and Implications, The Modern Law Review, July 2012, Vol. 75, No. 4 (July 2012), pp. 547-577

evaluated either by a general court of law or a special court or tribunal empowered to dispose tax disputes.[73]

Specialized tax tribunal reviewing administrative decision of the tax authority has been a hallmark of Ethiopian tax dispute settlement system since the 1940s.[74] The Federal Tax Administration Proclamation (TAP)[75] established the Federal Tax Appeal Commission (TAC)[76] as an autonomous entity with its own responsibility and budget, entrusted with the function of adjudication of tax disputes by way of appeal from decisions of tax authority. The commission has a president and other members for the adjudication function, as well as administrative/secretarial staff including the registrar.

The Commission's function is analogous to judicial function of the court. The FDRE Constitution does not expressly recognize tax appeal tribunals. But the legitimacy of quasi-judicial bodies such as the Tax Appeal Commission is drawn from Articles 37 and 78(4) of the FDRE Constitution that envisages the establishment of institutions legally empowered to exercise judicial functions, along with the regular courts.

4.3.1. Scope of Jurisdiction of Commission

Article 2(2) of TAP impliedly defines the jurisdiction of the TAC in what it calls appealable decisions". Appealable decision constitutes what the law described as "objection decision" and "any other decision of the Authority made under a tax law", excluding *tax decisions* and decisions in the course making a tax decision.[77] In other words, the jurisdiction of the commission extends over every decision of tax authority but not on tax decisions and

73 World Bank, *supra* note 4, P.20.
74 Aschalew Ashagrie, The Tax Appeal Proceedings Before The Federal Tax Appeal Commission In Ethiopia, Critical Reflections, *Mizan Law Review*, Vol:14:2, P.203.
75 TAP, *supra* note 5.
76 Id., Art.86 ff.
77 Id., Art.2.

decisions ancillary to it.[78] These excluded decisions are not appealable while any other decision of the tax authority could be appealed.

This conclusion must be read with caution. Particularly, it does not mean that the Commission will never have a chance to review tax decisions; rather the law dictates that such decisions are not yet mature to be reviewed. Tax decisions must pass one more stage to be appealable; that they must be reviewed by the Review Department that provides recommendation to the concerned officer of the tax authority for final decision; or that the authority must have failed to review and decide during the legally specified period.[79] It is only then that tax decisions would take the label "objection decision"[80] instead of tax decision, and then become mature for appeal to TAC.

At this juncture, it is important to observe that the law confined the scope of jurisdiction of the Review Department to tax decisions that would later develop into objection decisions while the scope of jurisdiction of the commission extends to objection decisions plus "any other decision of the Authority made under a tax law". The phrase "any other decision of the Authority made under a tax law" encompasses every decision the taxpayer is

78 The scope of this exclusion hinges on what amounts to tax decision. A tax decision, as per art. 2(34) of TAP, comprises;

- tax assessment decisions[78] of the tax authority;
- decision of the tax authority allowing a request to amend the self-assessment or a refusal thereto;
- Determination on the amount of unpaid tax and the tax that will become payable by the taxpayer whose assets are under the control of the receiver;
- Determination of a secondary liability(such as where a tax representative shall be personally liable) or the amount of tax recovery costs payable;
- Determination of late payment interest payable;
- Decision regarding an application for a refund of overpaid tax(be it about eligibility or amount);
- Determination that renders either the supplier or purchaser liable for the amount of unpaid withholding tax under Article 92 (3) of the Federal Income Tax Proclamation;

[79]Id., Article 55(7).

[80] Id., Article 55(4).

aggrieved of, and tax law is defined, broadly,[81] as inclusive of the whole set of substantive and procedural rules governing direct and indirect taxes within the jurisdiction of the federal government.

Then, what decisions, other than objection decisions, would the tax authority render and then the commission would review? Obviously, there would arise multitude of issues between the taxpayers and the tax authority whereby the latter renders administrative decisions that might displease the former. For instance, there could be instances where the tax Authority revokes a license for an alleged or real failure to use sales register machine as per Regulation No: 139/2007, and so on.

In a nutshell, the commission is empowered to review every decisions of the tax authority that would constitute administrative decisions. Allowing a space of revision for all grievances against the tax authority is the logical extension of the fact that TAC is the institution specialized in tax matters. On the contrary, to encumber TAC with all the routines from tax authority deprives the time and energy to focus on the major issue of objection decisions.

To explore issues related to such concerns, the researchers held interview with legal experts of the tax authority. However, the experts revealed that they have never thought of such extended power of the TAC, and they did not experience grievances other than objection decisions being lodged to TAC so far.[82] One may even wonder whether this broad empowerment is what the legislature intended to. The power of TAC to review every decisions of the tax authority may also be in contradiction with Federal Administrative Procedure Proclamation (FAPP)- Proc. No.1183/2020,[83] which provides that

[81] Id., Art. 2(36).

[82] Interview with Mr. Yilkal and Co, Legal Experts at Ministry of Revenue, Bahir Dar branch, on 25 June, 2022.

[83] Federal Administrative Procedures Proclamation, Proc. No.1183/2020, Federal *Negarit Gazette*, Year 26, No.33. See also Aschalew, *supra* note 74, pp.212-213.

anyone aggrieved with a final administrative decision has the right to appeal to the Federal High Court (FHC)[84] for judicial review.

4.3.2. Accessibility of the Commission.

The commission is established as the first hand tribunal to review decisions of the tax authority, on federal tax matters, located in the capital, Addis Ababa. Ethiopia is a federal state. Accordingly, the FDRE Constitution divided power to levy and collect taxes between the two layers of government. The tax jurisdiction of the Federal government spans all over the nation's territory, and its tax subjects are spread as such. As noted earlier, in an attempt to ensure its accessibility and minimize compliance cost, the tax authority has about twelve branches in Addis Ababa and regional states. However, taxpayers aggrieved by the decision of regional branch tax authorities must travel to the capital to get their case reviewed by TAC. Thus, the commission's accessibility is seriously questioned.

The legislature did not envisage possibilities for opening branches for TAC but contemplated delegation of the commission's authority to a Regional Tax Appeal Commission.[85] Members of the commission pointed out regional governments do not have tax appeal commissions and thus delegation proved untenable so far due to the differing institutional arrangements.[86] A lawyer interviewed at the TAC remarked "for instance, my customer is from Somalia region, Jigjiga; He had to travel to the capital to explain the facts and deliver necessary documents to me, and he incurred significant cost in this process"[87].

The centralized nature of the TAC has also negatively affected access to judicial review of the Commission's decision. In principle, state supreme courts can entertain jurisdiction of federal high court via delegation. That

84 .Id., Art. 52; Interview with Mr. Yilkal and Co, *supra* note 82.
[85] TAP, *supra* note 5, Art.90(4).
[86] Interview with Belay Wodisha, presiding Judge at @Tax Appeal Commission, Addis Ababa, Ethiopia. April 13, 2022.
[87] Interview with Taddele Tesfaye, Attorney , Addis Ababa, Ethiopia, April 13 2022.

implies taxpayers within the jurisdiction of federal government but residing in the regions could have lodged their appeal to the state supreme court when they are dissatisfied with decision of the commission. Yet, the taxpayers are less likely to bounce back and restart the litigation at regional supreme courts once the lawyers and other expertise, as well as other logistics have been channeled to/sourced out from Addis Ababa in the course of their submission to the Commission in Addis Ababa. They would rather continue their case at the Federal High Court in Adds Ababa. Thus, the centralized nature of the TAC has also indirectly hampered, or at least made it impractical, the access to judicial review by the nearest Court. Members of the Commission as well as the customers unanimously underlined this drawback. Circuit Tribunal and ICT options are under consideration to ameliorate this limitation, according to key informants. [88]

4.3.3. Institutional Independence of the Commission

I. Members Appointment: Process and Selection Criteria

Tribunals are established to provide justice, sharing judicial power with courts. International and national legal instruments including the Ethiopian Constitution recognize access to an independent and impartial judiciary as one of the fundamental human rights.[89]Accordingly, tribunals must demonstrate independence and impartiality similar to the courts.[90] While this principle is widely accepted, strict application of the judicial independence to tribunal does not seem feasible.[91] The ideal model could be distancing it, as far as possible, from the executive which is perceived to be the most dangerous

[88] Interview with Mr. Mulugeta Ayalew, President of Federal Tax Appeal Commission, Addis Ababa, Ethiopia. April 13, 2022.
[89] FDRE Constitution, *supra* note 7, Art .37.
[90] Pamela O'Connor, Tribunal Independence, (The Australasian Institute of Judicial Administration Incorporated), 2013, p.12
[91] Peter Cane, *Administrative Tribunals and Adjudication* (Hart Publishing, 2009), as cited in O'Connor, Id., p.7.

threat to judicial and tribunal independence.[92] The executive undertakes key decisions on matters directly affecting the financial and career interests of members of the tribunal including their appointment, reappointment, promotion, term of office, rates of remuneration, suspension and removal from office.[93] Yet, it is inevitable that, as a state institution, tribunals will be accountable to one of the state apparatus. Tribunals do not enjoy absolute independence. [94] As O'Connor noted, "the starting point for tribunal independence is to ask what tribunals require to carry out their functions."[95]

O'Connor, citing Bryden,[96] proposed three parameters as model for measuring tribunal's independence: institutional independence, adjudicative independence, and administrative independence.[97] Institutional independence refers to the tribunal's structural and institutional relationship to the executive; adjudicative independence pertains to the 'individual' aspect of judicial independence−the ability of tribunal members and panels to render decisions "impartially, free from external interference or improper influence from any source"; and administrative independence is concerned with claim by the tribunals to control their governance, finances and personnel.[98] As a measure of institutional independence, best practices require transparency and accountability[99] at the stages of the appointments processes− recruitment, assessment, selection and appointment. The appointment by the executive should not invite political patronage and submissiveness; it should be transparent and based on objective criteria stipulated in advance.

[92] Id.
[93], O'Connor, *supra* note 90, P.17.
[94], Id., P.6.
[95] Id., P.7.
[96] Phillip Bryden, How to Achieve Tribunal Independence: A Canadian Perspective' in Robin Creyke (ed) *Tribunals in the Common Law World* (Federation Press, 2008), as cited in O'Connor, *supra* note 90, p.15. Bryden identified four aspects of independence: adjudicative independence, institutional independence, administrative autonomy and policy independence.
[97] O'Connor, *supra* note 90, pp.15-18
[98] Id.
[99] Id., P. 42

The TAC has been established as a quasi-judicial body to review appeals from the tax authority,[100] and it is accountable to the Prime Minister. The TAP envisages appointment of the president of the TAC and other members of the Commission by the Prime Minister (now Minister of Justice). He would most likely make discrete enquires about potential candidates, and then selection remains at his sole discretion.

This appointment process offers the advantage of being practical and economical. Yet it is criticised for being prone to political patronage and bias in the final appointment. It sustains what O'Connor labelled as "'old boy network' that gave privileged access to certain social groups and perpetuated a narrow membership profile."[101] The closed nature of the recruitment process gives access to narrow class in the network who may not have the required qualification while others more qualified but out of the network may be overlooked.

This shortcoming could be mitigated by advertising for expression of interest and encouraging application from wider section of potential candidates.[102] This need to be accompanied by setting common merit based selection criteria[103] that would in effect circumvent political patronage and bias in the appointment. Art.87(2) of TAP simply invites lawyers with significant experience in tax or commerce, certified accountants, previous tax officers with significant experience, and other with special knowledge and experience relevant to the functions. For instance, Zambian Tax Appeals Tribunal Act of 2015 clearly provides that the Tribunal shall consist of the following members, to be appointed by the Minister of Finance:

[100] TAP, *supra* note 5, Art 86. The reorganization of the executive organs of the federal government in October 2018 shifted the accountability of the Commission from the Prime minister to Made to the Ministry of Justice (the then Attorney general). See Proclamation No.1097/2019, Art. 33(8).
[101] Id., p. 45
[102] Id., pp.44-45.
[103] Id.

(a) three legal practitioners of ten years or more standing recommended by the Judicial Service Commission and who have sufficient knowledge of, and experience in tax matters;
(b) two qualified accountants certified as such by the Zambia Institute of Chartered Accountants; and
(c) two persons from the business community.

Compared to its Zambian counterpart, the Ethiopian law is far vague on selection criteria mainly in using vague terms such as "significant", "relevant". Moreover, the number of members of the commission and the professional matrix also remains unclear.

The data collected from the Commission over the profile of its members shows that it has a total of seven members (4 males and 3females). The professional mix shows that six out of seven of them are trained in law while just one of them is an accountant who joined the Commission few months before. The experience of the members comprises those who begin their carrier within the commission with no previous experience to those who earned more than a decade of experience. Such degree of variation in experience is evidence of the limitations of the selection criteria.

Table 2: Profile of Members of the Commission

Members code	Male	Female	Age	Profession	credential	Years of service in TAC	Years of service elsewhere	Fulltime	Part-time
A	X		53	Law	LLM	4	18	X	
B	X		47	Law	LLM	3	-	X	
C	X		51	Law	LLB	3	-	X	
D	X		38	Acctg	BA	5 mon	8	X	
E		X	32	Law	LLM	3	6	X	
F		X	27	Law	LLB	2	0	X	
G		X	25	Law	LLB	2	0	X	
Total	4	3							

II. The Tenure Security and Remuneration

Similar to appointment processes, the tenure security and remuneration security of members determines institutional independence of tribunals. Tenure security is considered the hallmark of judicial independence internationally. The questions of whether members of tribunal should be appointed until retirement age, and if not for affixed term or a renewable one remain contested.

It has been held that tenured appointments would impair the ability of tribunals to meet changing needs of users and the function of the office.[104] Unlike judges of regular courts, tenured appointment of members of tribunals generally failed to win acceptance across different jurisdictions. Then, if members of tribunals should not be appointed until retirement age, should it be if for a single affixed term or a renewable is still controversial. Non-renewable term would deprive tribunals the opportunity of retaining skilled and experienced members, and of course discourages potential candidates from the start. On the other hand, members with renewable appointments are likely to be submissive to the political will of the executive. This could happen even without the influence of the executive for members expecting reappointment would be cautious of how their set aside rates would be perceived.[105] Due to this consideration, for instance, the New Zealand Law Commission rejected both tenured and renewable appointments and concluded that "fixed term appointments can be consistent with independence, provided that the term is long enough and that members have sufficient security from removal without cause during the term".[106]

Security of remuneration is also an aspect to institutional independence. It aims to shield the members of the tribunal from the executive for fear of manipulation of their means or from being tempted to supplement their

[104] Id., p.63
[105] Id., P. 62
[106] Id., P.63

livelihood from other sources. There has to be a guarantee that remuneration cannot be reduced during the term.[107]

The Ethiopian law, under Art 87(4) of TAP, lays down the rules on tenure security and remuneration. In the relevant part, it provides that a member of the Commission:

a) may be appointed as either a full-time or part-time member;
b) shall be appointed for a term of 3 years and shall be eligible for re-appointment;
c) shall hold office on such terms and conditions, including in relation to remuneration and attendance fees, as the Prime Minister (Minister of Justice) determines.

We noted in the foregoing discussion that renewable appointments and remunerations that depend on discretion of the executive could be detrimental to institutional independence. Thus, the short term (3 years) renewable appoints and remunerations that totally depends on the discretion of the Prime Minister is detrimental to institutional independence of the Commission, as O'Connor remarked that "independence which depends on the discretion of those who appoint the tribunal is 'illusory'".[108]

Interview evidences from members of the Commission revealed the absence of rules regarding the future destiny of the members after their term of service ends. Rather they capitalized their experience in the Commission is of special value that they will be in demand both in the government and the private sector. It is doubtful how that would work for all of them, and generally uncertainty about their future career would inevitably compromise their independence.

[107] Id., P. 74
[108] Id., p. 22.

4.3.4. Personal Independence of Commission Members

Personal independence, also known as adjudicative independence, concerns itself with whether tribunal members will render decisions impartially and whether there are safeguards against external interference or improper influence over the practitioner. Statutes often require judicial review of tribunal's decisions, tribunal codes of conduct, oath of office, and immunity from suit, disclosure of conflict of interests, and disqualifications. Most of the mechanisms are meant to ensure individual accountability which place duties and restrictions on adjudicators to preserve their own impartiality.

The TAP fares well regarding adjudicative independence. Its decisions are appealable to the Federal High Court though limited to issues of law.[109] The courts may decide to affirm the decision of the Commission, to set aside the decision of the Commission, or to dismiss the appeal.[110] To ensure impartiality, Art. 87 of the TAP provides integrity tests for persons to be appointed as Members of the Commission.[111]

A notable limitation of the TAP regarding adjudicative independence is largely associated with tribunal's codes of conduct. Members of the tribunal are duty bound to protect their own impartiality and there must be ways to sanction in case of default. Similar to code of conduct for the judges, there should have been codes of conduct for members of TAC and consequences of breach thereof, and due procedure in dealing with them needs to be put in place.

Be that as it may, experiences proved that formal structural safeguards are essential for independence of tribunals but they are not sufficient to ensure *de facto* independence. It is observed that unless complemented by cultural

[109] TAP, *supra* note 5, Art 57, 58.
[110] Id., Art 57(5).
[111] Id., Art 87.

institutions and societal values, they can be easily ignored or manipulated by the executive.[112]

4.3.5. Public Perception about Independence/Impartiality of TAC

Public trust in the neutrality of courts and tribunal is indispensable. Not just the reality but the perception about independence of institutions matters to a great extent. It is a common expectation from the public that "an adjudicator must not only be impartial, but must be seen to be impartial."[113]

The data gather from interviews shows that the perception of customers regarding independence/impartiality of TAC is generally positive. Yet, a significant number of interviewees alleged the institution to be a government adjunct and as such it tends to work in a way it does not offend the executive.[114] An interviewee pointed out that the commission does not dare to strictly apply the law where it thinks the decision's outcome will have wider implication and likely to affect the government revenue substantially.[115]

However, as noted earlier, the perception to be neutral is equally important to show the reality of impartiality. The mechanisms to enhance the perception of impartiality include permitting stakeholder or community organisations to take part in the nomination of Commission member, and to include some of their candidates as members of Commission.[116] In Zambia, for instance, two of the seven tribunal members are required to be from the business community. In the Ethiopian case, although the previous legislation[117] had

[112] O'Connor, *supra* note 90, p.23
[113] Id., P.12
[114] Interview with anonymous Taxpayer, Addis Ababa, Ethiopia, May 3, 2022. "በእኔ እምነት ነፃና ገለልተኛ ነው የሚል እምነት የለኝም፡፡ እንዴት ነው አለቃህ ላይ ክስ ቀርቦ ገለልተኛ ሆነህ የምትወስነው? ደሞዝ ከፍሎ እያሰራህ ራሱ ተቋሙ? በፍፁም ሊሆን አይችልም፡፡" (In my opinion, I don't think it (the commission) is independent and impartial. How can you impartially decide in a case in which your boss who pays your salary is sued? never!)
[115] Interview with Attorney Melese Woldie, *supra* note 59.
[116] O'Connor, *supra* note 90, P.14.
[117] See generally Income Tax (Amendment) Proclamation No. 608/2008.

recognized stakeholders' representation, there is no explicit provision in TAP. Yet, Art.87 (2)(d) of TAP generically provides that individuals having special knowledge, experience, or relevant skills may be appointed as members to the Commission. This provision may be broadly interpreted to accommodate stakeholders such as the business community. Thus, it could be helpful to draw professionals from all sectors including the academia.

4.3.6. The Proceedings at the TAC

4.3.6.1. Filing a Notice of Appeal to the Tax Appeal Commission

A dispute resolution system needs to be designed in ways that respects the procedural rights of taxpayers.[118] Also it is important to have a mechanism to determine whether any barriers to procedural justice exist and to identify how these barriers might be reduced or eliminated.[119] Under the Ethiopian law, appeal to the TAC must be filed within 30 days of service of notice of the objection decision. The research examined whether this requirement to file a case to the TAC causes impediments to access to justice. In exceptional cases, this period may be extended for a further 15 days but in such a case the taxpayer must show good cause.

The researchers found the timeline set in Ethiopian law is consistent with the international practice.[120] Further, the overall views of customers/lawyers on the issue was gathered through an in depth interview. The interviewees reported that the time limit is reasonable and practically that is not a problem. They also noted the possibility of extension in exceptional circumstance as a safe exit. They reasoned out that the taxpayer had been with the case

[118] Evgeny Guglyuvatyy, Procedural Justice: Examining Tax Resolution processes in Russia and Singapore, *Journal of Tax Administration*, Vol 7:1 2022, P.23.
[119] Id.
[120] A 2015 OECD survey found that periods of 30-60 days were most common. See OECD, Tax Administration 2015: Comparative Information on OECD And Other Advanced And Emerging Economies, OECD 2015, P. 313.

throughout the auditing process, the exit conference, the review at the tax authority, and thus has got more than 30 days. This is enough for a reasonable diligent person who really needs to exercise his right.[121] The interviewees underlined that taxpayers request more time to mobilize the fund for advance deposit, not really for preparing and submitting their pleadings.

4.3.6.2. The Advance Deposit Requirement

The question of whether the tax, once it is assessed, has to be paid immediately or it should be suspended during the protest/appeal process has drawn divided opinion. The competing interest of the state for timely collection of finance and the possibility of denial of access to justice need a balanced consideration. Thuronyi and Espejo observed differing experiences in common and civil law systems. In the formers case, the taxpayer typically does not have to pay the tax until there is a court decision, while in the Civil law systems the taxpayer is require to pay the tax assessed in principle but most countries provide for the suspension of tax collection under certain circumstances. The scholars described rules that deny the right to proceed for the protest/appeal if the taxpayer does not pay the tax as "a harsh approach and may raise constitutional questions of due process or procedural equality before the law." [122]

The Ethiopia law stipulates that:"a notice of appeal to the Tax Appeal Commission in relation to an objection to a tax assessment shall be treated as validly filed by a taxpayer only if the taxpayer has paid to the Authority 50% of the tax in dispute."[123] This requirement is one of the most contested issues in the Ethiopian tax administration system. Aschalew, commenting on the Ethiopian case, holds that "although the 50% amount of deposit may be tolerable in the interest of the general public, demanding taxpayers to meet

[121] Interview with Tesfaye Yizengaw, Attorney, Addis Ababa, Ethiopia. April 13, 2022; Also Interview with Attorney Mebit Ayehu, *supra* note 68.
[122] Thuronyi & Espejo, *supra* note 20, P.13.
[123] TAP, *supra* note 5, Art.56(2).

this obligation through payment of cash under all circumstances seems to be unjust."[124] The lawyers interviewed opined that the pre-payment rule is a serious impediment to access to justice. At times, according to these interviewees, the audit goes back to several years and the government's claim exceeds the whole assets of the business. A lawyer particularly mentioned, for instance, that his customer is assessed for eight million birr but the business as a whole cannot be sold for that amount.[125] Failing reversal of the decision at the TAC, he remarked, his customer's business would be closed. Another interviewee added that most businesses face liquidity problem to pay the deposit amount. They may not even resort to banks for loan due to the fact that they have to provide tax clearance but the tax authority will not issue the clearance before the payment of that amount.[126] Other interviewees proposed that the taxpayers' duty to pay should be postponed at least until the decision of the TAC as the neutral adjudicator.[127] They underlined that the unchecked decision of the tax authority should not block access to justice.

At this juncture, it is important to enquire into the nature of the advance deposit requirement. Is it not an issue of execution of the tax authority's decision? The tax authority is given ample power to take precautionary measures and enforcement power including seizure, freezing accounts, etc. The deposit requirement is being used as an easy way of execution of the tax authority's decision. In so doing, the system as it stands now takes hostage of the taxpayer's constitutional right to access to independent and impartial adjudicator. Those unable to pay would be denied access to justice. Tran-Nam et al remarked that "if tax dispute resolution is indeed not neutral between the

[124] Aschalew, *supra* note 74, p.219.
[125] Interview with Tesfaye Yizengaw, *supra* note 121.
[126] Interview with Rekebki Tsega, Attorney, Addis Ababa, Ethiopia. April 13, 2022.
[127] Interview with Tesfaye Yizengaw, *supra* note 121; Interview with Taddele Tesfaye, *supra* note 87.

'haves' and the 'have-nots', then this may be regarded as a violation of distributive justice."[128]

Thuronyi and Espejo contends that "a more moderate alternative is to provide that the failure to pay the tax does not affect the taxpayer's right to have the appeal heard, but the taxpayer will be subject to the compulsory collection procedure in the event that no deferral of payment is authorized."[129] The experience of some states such as Brazil shows that the taxpayer can proceed to litigate in court without advance deposit but the tax authority may proceed for execution just after its decision. In exceptional circumstances, the taxpayer may obtain suspension of execution upon provision of guarantees.[130] In South Africa, in principle, tax collection may not be suspended by an objection or appeal or pending the decision of a court of law but a taxpayer may request a senior South African Revenue Service (SARS) official (the Commissioner or his delegates) to suspend the payment of tax or a portion thereof.[131]

Section 164 of the South African Tax Administration Act No.28/2011 provides a number of instances where the suspension of payment or denial of same could be effected depending on circumstances. A senior SARS official may suspend payment of the disputed tax having regard to:

a) the compliance history of the taxpayer;
b) the amount of tax involved;
c) the risk of dissipation of assets by the taxpayer concerned during the period of suspension;
d) whether the taxpayer is able to provide adequate security for the payment of the amount involved;

[128] Tran-Nam and Walpole, *supra* note 8, *p. 326*
[129] Thuronyi and Espejo, *supra* note 20, p.12
[130] Daniella Zagari and Maria Eugênia Doin Vieira, 'Brazil', Whitehead (ed.), *supra* note 83, p.33. In Brazil, the court precedent allows the taxpayer to proceed without depositing the amount.
[131] See South African Tax Administration Act, 2001.

e) whether payment of the amount involved would result in irreparable financial hardship to the taxpayer;
f) whether sequestration or liquidation proceedings are imminent;
g) whether fraud is involved in the origin of the dispute; or
h) whether the taxpayer has failed to furnish information requested for purposes of a decision thereof.

On the other hand, a senior SARS official may deny a request for suspension of payment or may revoke a decision that suspended payment if satisfied that:

a) after the lodging of the objection or appeal, the objection or appeal is frivolous or vexatious;
b) the taxpayer is employing dilatory tactics in conducting the objection or appeal;
c) on further consideration of the factors considered for suspension, the suspension should not have been given; or
d) there is a material change in any of the factors considered for suspension.

Although the discretion to suspend resides with the tax authority, the South African approach offers possibilities to avoid drastic measures against tax payers. The researchers propose that the Ethiopian law should be revisited. Instead of setting pre-payment as precondition, the appellant should be allowed to proceed to appeal, and the tax authority may proceed for enforcement in due course. Depending on circumstances, the tax authority's action for enforcement may be suspended by the TAC upon the application of the appellant showing convincing causes and subject to appropriate guarantee.

4.3.6.3. The Hearing Procedure

The opportunity to be heard is an important element of procedural rule of law. In so far as tribunals share the function of the judiciary, they need to act judicially.Acccordingly, the tax administration legislations, in design, should

address the rules of a formal hearing, including the conditions for calling a hearing, the effect of non-appearance, the obligations and rights of the parties involved, and the institutional requirements for holding a hearing. To this effect, the TAP tacitly recognizes the taxpayers' right to be heard[132] in public.[133]

As a way to substantiate the evidence over such issues, the research team had also attended two sessions of hearing. Though the hearing begins with the appellant's brief statement, the chance to present one's perspective swings frequently between the parties; there is no formal examination of witness by the parties. Instead, the panellists are so active; they inquire the parties turn by turn repeatedly, require the party's witnesses (usually auditors) at any point to explain matters raised on the spot. We observed that the system is more inquisitorial than the Ethiopian judicial practice. The diligence and curiosity for facts and the search for truth by the panellist is so exciting, though our short lived observation is not adequate for an overall generalization.

We gathered the views of customers (lawyers) about the proceeding. By and large, they are content with the overall function of the Commission. According to the interviewees, the Panellists of the commission read the pleadings before the hearing, identify issues and the points in need of clarity. They all concur on the diligence of panellists which they claimed a character judges in regular courts are lacking.

Nonetheless, most of the interviewees remarked that the panellists give limited time to present one's own case, and as such there is a serious restriction on the right to be heard. Interviewees attributed this to the panellists' conviction that they have read it all and they only need clarification. While acknowledging panellists' diligence, interviewees stressed

[132] TAP, *supra* note 5, Art. 90(1).

[133] Id., Article 90(2); See Directive on the Working Procedure of the Tax Appeal Commission, Directive No 02/2011 E.C (issued by the Prime Minister), (hereinafter TAP Directive 02/2011), Art 11.

that it is not uncommon to get issues overlooked during the hearing. One interviewee remarked that panellists, when they, later in writing decision, realise issues that should have been debated but overlooked, often shift the burden to the party and state that the party did say nothing on this issue. The interviewees also underscored that the TAC is the final arbiter on matters of fact; there is no recorder during the trial to recount what real issues were presented. These two factors are resulting in significant repercussion on the right to be heard and judged according to facts.

Interviewees commented also on matters of evidence. The commission flexibly accepts evidence. They remarked that not in a few cases appellants submit to the commission documents that should have been submitted to the tax auditor or, at the latest, to the Review Department. There should be a limit on that, they remarked. The other input from the interviewees is that there are no fixed dates for decision. "The first fixed decision date is usually not workable and next appointments do not have fixed dates; simply they will tell you to follow up via the registrar". Sometimes the parties fail to follow up after a single or two visits. Interviewees alleged that there are uses and abuses of this gap in that the appellant who lost the case seat idle deliberately and later, where the authority moves for enforcement, the appellant initiates further appeal to the High Court alleging that he just knew it is decided while in fact several months have already passed after the decision. On the other hand, a lawyer stated that he had an incident where he honestly did not know it was decided but later, where he checks and tries to appeal, lapse of appeal time was raised as a preliminary objection. Then he had to go to the cassation bench to get it reversed in his favour.[134] So, there should be certainty in this practice as well.

[134] Interview with Girma Merhatsidik, Attorney, Addis Ababa, Ethiopia, April 15, 2022.

4.3.7. Efficiency and Competence of the TAC

The TAC as it stands now came into the picture following the enactment of tap in 2016. Data sources indicated there had been case backlogs that the newly structured TAC had to overtake. Here we provided evaluation of efficiency and competence of the TAC with the period of its short lived experience. Only the last three years' case submissions and disposals had been documented. The lack of proper documentation enables only limited trend analysis.

Table 2: : Summary of Case Disposal Rate between 2016 and 2022

Years	No. of objections filed	Cases disposed/decided
Sept. 2016-August 2019	2492	1852
Sept. 2019-August 2020	385	793
Sept. 2020-August 2021	832	765
Sept. 2021-Feb. 2022	576	529
Total	4276	3939 (337 left undisposed)

The data in the table shows what has been accomplished by the commission after it tookover the task in 2016. The figures, therefore, shows the exceeding performance of the commission. Had it not been for the backlogs, the Commission's annual performance, number of cases disposed, exceeded the appeals lodged.

Lawyers, who were all customers, were asked to share their views regarding the speed at which their cases are disposed. They responded that TAC disposes cases in quite reasonable speed at which they aspired to get similar service in regular courts. Regarding competence of commission members, opinions of the customers are positive but few users mentioned that there is a need to work on qualification and professionalism.[135] The profile of members

[135] Anonymous Interviewees, Attorneys , Addis Ababa, Ethiopia, April 15, 2022.

of the commission (see Table 3 above) also suggests that some members need to earn more experience.

The success rate of appellants supposedly measures the screening power and efficiency of the review department. It also indicates how far complaints are well founded. The data collected from the commission's registrar is presented below.

Table 3: Success Rates of Appellants=Ratio of ((cases reversed+varied+remitted)/total cases disposed)

Years	Reversed	varied	Remitted	confirmed	Withdrawn	Dismissed	Total disposed	Success rate
Sept. 2019-August 2020	199	112	8	338	67	69	793	319/793=40%
Sept. 2020-August 2021	147	58	15	361	5	179	765	220/765=28.8%
Sept. 2021-Feb. 2022	83	45	3	316	15	67	529	131/529=24.8%

The data presented above shows that the success rate of the appellants is between 40% to 24%. The implication is that significant number of objection decisions are reversed, varied, or remitted to the tax authority while they should have been screened and settled there. The rate would get higher along the review systems if one surveys cases taken to High Court, Supreme Court and Cassation division. Though three years data may not be conclusive enough to show the real picture of incidents, we take it to be informative to some extent. As such, this is a significant rate compared to some other

jurisdictions such as France[136] where only 12.4% of the decisions of the tax authority are revised/reversed by the administrative courts; Germany[137] where about 20% of decisions of the tax authority are revised/reversed by the specialized tax champers of ordinary courts. The good thing in this trend, again with caution due limited time data, is that the success rate is declining (from 40% to 28%, then to 24%) along the time range. It promises the possibility of learning curve at the tax authority; there shall be more cases settled there, and only few would land at the TAC.

Conclusion and Recommendations

In the course of an extensive appraisal on the institutional operation and specific practices of the Review Department and TAC, this study has found out arrays of evidences that would inform the institutions themselves, the legislature, and policy makers at large. To this end, it is found out that the current structural set up of the Review Department, and the TAC suffers from serious accessibility problem. In particular, the TAC is solely based in the capital. It is geographically inaccessible, which in effect deprives taxpayers the chance to get legitimate claims reviewed. The feasibility of more branches should be seriously considered. In areas where running costs are not economic, ICT solutions and Circuit tribunals could be employed. In the long run, we would propose harmonization of institutions with the regional governments so as to make delegation a feasible option.

The second problem is related to the mandate of the Review Department. The review department is accountable to the general manager of respective branches, and has no mandate to pronounce final judgment. The general manager has the exclusive mandate to approve or reject recommendations. As confirmed by the data sources, sometimes, the managers reverse legitimate recommendations without acceptable reasons. This renders the whole purpose

[136] Philipe Derouin, 'France', in Whitehead (ed)., *supra* note 3, P.93.
[137] Axel Cordewener and Michael Hendricks, Germany', in Whitehead (ed.), *supra* note 3, p.101.

of constituting the resource intensive review departments less useful. The researchers would recommend that either the branch manager's vote should be reduced to single vote (one among the rest instead of absolute veto), or reversals and amendments by the General Manager should be well reasoned out and must be, once again, reviewable by the next superior authority, whose sole mandate would be to confirm the general manager's or the review department's holding. Without such considerations, the system would be prone to corruption and other forms of misuse.

Third, the tax law does not adequately regulate procedural issues, both at the Review Department and at the TAC, including the qualification of the person who can appear before the Review Department/ TAC; the effect of non-appearance, submission of statement of defence by the tax authority; the hearing procedure; deadline for submission of evidence, etc. As such, it resulted in uncertain and protracted procedures in the determination of issues. There should be clear laws comprehensively regulating procedural aspects of the dispute resolution. In particular, evidence not presented at the exit conference (to the auditor) should be barred except in situation where convincing reasons are presented.

Fourth, the law extended the scope of appellate jurisdiction of TAC unduly, perhaps inadvertently, to every decision the tax authority makes. It is advisable to limit its jurisdiction to review of objection decisions for a focused and effective adjudication of same. Also, the institutional independence of TAC is questionable due to the closed nature of nomination process, short and renewable tenure of the members, etc. To mitigate that limitation, the appointment process should be open enough with a fair space of competition. There needs to be a call for all potential candidates Also, there has to be objective selection criteria such as quantified years of experience and specific skills and competence requirements. It is also advisable to disentangle the person who recruits and the one who finally appoints among the list of eligible.

The tenure and remuneration insecurity of members of the Commission is a serious drawback that subjects the members to the wills and whims of the appointing executives. We recommend fixed but longer term tenures instead of renewable ones. Remunerations should not also be at the sole discretion of the appointing authority.

There should be clear standards of codes of conduct for members of the Commission, and clear accountability mechanism in case of breach. The judicial codes of conduct and disciplining mechanisms could be adapted.

Although the current perception about the TAC regarding independence/impartiality is in good standing, it needs to build on that. One mechanism could be engagement of the business community, professional association, and academics in the recruitment for membership of panellists in the commission.

The requirement of advance payment hampers the right to access to justice. The possibility of closure of businesses due to liquidity problem should not be overlooked. We recommend postponing that requirement until TAC as a neutral adjudicator decides. Or, at least, let the appellant proceed to appeal without payment, and also let the tax authority proceed to enforce at a time of its convenience. Where there are compelling reasons to suspend execution, let the TAC decide on case by case basis. Debarring the right to access to justice should not be used as a means of enforcement.

Finally, regarding the proceeding at the TAC, the diligence of members of TAC to read pleadings in advance, their commitment and inquisitiveness to arrive at the truth are well appreciated by users. But significant numbers of them resented regarding the adequacy of the opportunity to present and to be heard. Given the TAC is the final decision maker on matters of fact, there is a need to reconsider the hearing practice of TAC. In terms of facility, there has to be a record system to cross-check facts presented at the hearing stage.