Adjudication of Tax Disputes within the Tax Authority in Ethiopia: Critical Reflections on the Law and the Practice

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Abstract

The experiences of various countries clearly demonstrate that the tax authority is vested with adjudication of tax disputes arising between taxpayers and itself when a taxpayer does not accept the decision of the authority. In Ethiopia, the 2016 Federal Tax Administration Proclamation (hereinafter FTAP) has unequivocally provided that if a taxpayer is aggrieved by a tax decision of the tax authority and if he wants to challenge that decision, he is compelled to take his grievance to the Review Department of the Tax Authority- an authority accountable to the Ministry of Revenues, which itself is the successor of the former Ethiopian Revenues and Customs Authority (ERCA). Before the coming into force of the FTAP, taking a tax case to the Review Committee of ERCA was not mandatory while the FTAP has clearly provided that taking a tax case to the Review Department is mandatory. This shows that the role of the Review Department has become more influential on the taxpayer as compared to its predecessor- the Review Committee. Therefore, it is imperative now to investigate the review power of the Department and the overall process of tax dispute resolution within the tax authority. This piece is, therefore, aimed at critically examining the process of tax dispute resolution at the Review Department of the Tax Authority at federal level. This study has found out that there are certain meaningful improvements made by the FTAP that enhance access to justice to the taxpayer and the fairness of the process. Nevertheless, the study has revealed several shortcomings in the FTAP including lack of clearly defined scope of review power of the Review Department; absence of clear provisions dealing with appointment, composition and removal of members of the Review Department; absence of unequivocally articulated right to be heard before the Review Department; that FTAP does not seem to have

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given sufficient time to taxpayers to lodge an application and that it has not provided exceptional circumstances where the tax authority should bear burden of proof. Therefore, the author recommends that the problems identified needs to be addressed by amending the FTAP.

Key words: *Tax Dispute, Internal Review, Hearing, Burden of Proof, Notice of Appeal, Objection Decision*

Introduction

It is obvious that tax is a compulsory levy which is levied and collected by the government of a given country irrespective of the will of an economic unit (a person) so designated as a taxpayer by a piece of tax legislation or tax code as the case may be.[1] This means that a government of a given country has an inherent power of taxation[2] whether that government is dictatorial, democratic or monarchical as the world history of taxation clearly demonstrates.[3] Nonetheless, the fact that a government enjoys such power does not mean that it is not accountable to its citizens concerning the kind of taxation system it puts in place. Therefore, tax systems have to meet certain standards by embracing critical features of a good tax system pertaining to substantive and administrative matters of taxation.[4] One of the most important components of a fair tax administration is the existence of a fair tax dispute resolution system.[5] That is why many jurisdictions have established both internal (administrative) disputes resolving organ (department) within the tax authority and external dispute resolution bodies such as quasi-judicial tax tribunals (commissions), a special tax court or ordinary courts as the case may be.[6]

[1] See Victor Thuronyi, *Comparative Tax Law,* Kluwer Law International, (2003), p.45.

[2] Odd-Helge Fjeldstad, Taxation, Coercion and Donors: Local Government Tax Enforcement in Tanzania, *Journal of Modern African Studies*, Vol. 39, No. 2, (2001), p.293.

[3] See Hanneke Du Freez, A Construction of Fundamental Principles of Taxation, PhD thesis, University of Pretoria, (2015), pp.46-61.

[4] Clinton Alley and Duncan Bentley, A Remodeling of Adam Smith's Tax Design Principles, *Australian Tax Forum*, Vol. 20, No. 4, (2005),p.586; see also Beverly I. Moran, Adam Smith and the Search for an Ideal Tax System, available at taxprof.typepad.com/taxprof_blog/files/Moran.pdf, accessed on July 15, 2020. See also Richard M. Bird, Improving Tax Administration in Developing Countries, J*ournal of Tax Administration*, Vol.1, No.1, pp.23-38; see also Richard M. Bird, Administrative Dimensions of Tax Reform, *Asia-Pacific Tax Bulletin*, (2004), pp.134-150.

[5] Binh Tran-Nam and Michael Walpole, Independent Tax Dispute Resolution and Social Justice in Australia, *University of New South Wales Law Journal*, Vol. 35, No.2, (2012), PP.470-474.

[6] See generally Simon Whitehead (ed.),*Tax Disputes and Litigation Review*, 8th ed., Law and Business Research LTD,(2019)

In Ethiopia, the Ministry of Revenues-a federal government organ-[7]is empowered to administer federal taxes[8] and resolves tax disputes using its internal review organ called the Review Department. The same arrangement exists in regional states since the tax administration proclamations of regional states are verbatim copies of the FTAP. Consequently, the structures and contents of the regional tax disputes resolution systems are virtually the same as the structure and content of the tax dispute resolution system of the Federal Government.[9] On account of this, the discussions and legal analyses made under this piece, based on the federal tax dispute resolution system, are equally relevant to have a clear picture of the tax dispute resolution system of the regional states. Therefore, the provisions of the regional tax administration proclamations have not been cited under each and every discussion and analysis made under this work as doing so cannot serve any purpose except duplication of same legal provisions, taking unnecessary space and wasting time and energy.

This contribution is principally aimed at critically examining the law dealing with the process of tax dispute resolution within the tax authority in Ethiopia. Consequently, the main research method employed in this piece is doctrinal research method as this method is concerned with a thorough investigation of legal concepts, values, principles and existing legal texts such as statutes and case laws.[10] Therefore, by using this research method, the author has analyzed legal provisions that are germane to this study, special emphasis being had on the provisions of the FTAP. Nonetheless, because doctrinal research method is not capable of addressing how the law is implemented, the author has supplemented this method by a qualitative research method as the latter is

[7] Federal Administrative Procedures Proclamation, Proclamation No. 1183/2020, *Federal Negarit Gazetta,*(2020). Article 2(1) of this proclamation defines an administrative agency as an executive organ of the Federal Democratic Republic of Ethiopia duly established by law and includes the executive organs of city administrations accountable to the Federal Government.

[8] Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia, Proclamation No.1097/2019, *Federal Negarit Gazetta*,(2019), Article 31.

[9] See for instance, The Amhara Regional State Tax Administration Proclamation, Proclamation No.241/2016, *Zikre-Hig*,(2016), Articles 52-55; Tigray National Regional State Tax Administration Proclamation, Proclamation No.282/2016, Tigray Negarit Gazetta,(2016). It is good to note that the Tigray Region Tax Administration Proclamation simply adopted the FTAP except that there are very few modifications in order to make it compatible to the situations in the region. However, no change at all has been made on the provisions of the FTAP dealing with resolution of tax disputes by the review department. Thirdly, see the Harari Region Tax Administration Proclamation, Proclamation No.136/2016, Articles 52-55; Afar Regional State Tax Administration Proclamation, Pro. No…. /2016, *Afar Dinkara Gezzet* (2016), Articles.52-55. The same is true with the tax administration proclamations of other regions.

[10] See generally Terry Hutchinson and Nigel Duncan, Defining and Describing What We Do: Doctrinal Legal Research, *Deakin Law Review*, Vol.17, No.1, (2012), pp.1-37.

instrumental to capture and categorize social phenomena and their meanings.[11] Therefore, the author has conducted in-depth interviews with fourteen (14) purposely selected individuals (consisting of members of the review department, tax practitioners, lawyers and taxpayers), has analyzed relevant documents and has made use of his personal observations as he is a consultant and attorney at law.

This piece is organized as follows. Section one discusses justifications for resolution of tax disputes by an internal review organ, scope of review power of an internal review organ and reviewable issues, time limit for filing a notice of objection to the internal review organ and time limit for making an objection decision. The second section highlights establishment, accountability, membership and the scope of review power of the Review Department of the tax authority in Ethiopia. Section three is deployed to the analysis of issues in relation to the actual tax cases proceedings before the Review Department by focusing on the time limit to file a notice of objection, the contents of a notice of objection, the hearing and burden of proof while section four analyzes issues pertaining to contents of a recommendation and objection decision. Finally, the work comes to an end with brief concluding remarks.

1. Overview of Resolution of Tax Disputes within the Tax Authority

1.1. Justifications

Needless to say, a tax authority is an administrative agency whose main function is collecting taxes in accordance with tax legislation. However, as any other administrative agency, it engages in internal tax dispute adjudication where a taxpayer is aggrieved by its decision. In many countries, giving the taxpayer an opportunity to get his grievance resolved by an internal review organ has become a common practice since there has been a firm belief that such approach strengthens the integrity of the tax administration, expedites the process of redressing the grievance of taxpayers and lightens the caseloads encountered by tax tribunals and ultimately by the regular courts.[12] An effective internal tax dispute resolution mechanism is not only less expensive than formal tax

[11] Lisa Webley, Qualitative Approaches to Empirical Legal Research, in Peter Cane and Herbert Kritzer(eds.), *The Oxford Handbook of Empirical Legal Research*, (2010), p.2.

[12]World Bank Group, The Administrative Review Process for Tax Disputes: Tax Objections and Appeals in Latin America and the Caribbean: A Toolkit, documents.worldbank.org › curated › pdf › The-Admi...(accessed April 12, 2020),p.18.(hereinafter *The Administrative Review Process for Tax Disputes*)

litigation before quasi-judicial organs and the regular courts, but also it gives the taxpayer a real chance to be heard as speedily as possible.[13]

In addition to affording taxpayers the chance to get wrong tax decisions revised and corrected, a well-organized internal review system is also beneficial to the government as such system helps tax authorities to speedily identify and correct mistakes at minimal administrative cost.[14] Moreover, this mechanism gives both the tax authority and the taxpayer the opportunity to rectify misunderstandings and resolve their disputes before the latter resorts to appellate organs.[15]

According to the World Bank Handbook on Tax Simplification, putting in place an internal review mechanism within the tax authority is aimed at providing credible, independent and timely resolutions of tax disputes thereby boosting public confidence in the tax system and minimizing corruption and abuse of power by tax officers.[16] The Organization for Economic Development and Cooperation (OECD) considers internal tax dispute resolution system as an instrument of protecting the rights of taxpayers and ensuring the integrity of the tax authority. For the OECD Guidelines for tax administration, internal review system is created to realize efficiency, self-control and justice.[17] Regarding efficiency, internal review process should realize resolution of tax disputes in a timely and less costly manner as opposed to courts of law while the self-control becomes a reality since such process offers the tax authority the chance to evaluate its own "systematic accuracy and administrative capacity." The internal review process is also believed to promote justice because "a swift and inexpensive review process by an independent agency within the tax authority can greatly enhance the perceived fairness and credibility of the dispute resolution process."[18]

Although the internal review mechanism is said to be advantageous both to the tax authority and the taxpayers, there are also counter-arguments raised against such mechanism. To begin with, an internal review mechanism is criticized because the system lacks openness, or publicity; it negates the principle of fair

[13]Id.
[14]Id.
[15]See European Commission's Directorate-General of Taxation and Customs Union, Guidelines for a Model for A European Taxpayers' Code, European Union, Brussels, (2016), https://ec.europa.eu/taxation_customs/business/tax-cooperation-control/guidelines-model european-taxpayers-code_en, (accessed March,15, 2020), p.16.
[16]World Bank, Handbook on Tax Simplification, Open Knowledge.worldbank.org › handle, (accessed March 22, 2020), p.131.(Hereinafter Handbook *on Tax Simplification*)
[17]See OECD, Tax Administration, (2013), www.oecd.org › ctp › tax-administration-2013, (accessed April 12, 2020), p.320.(hereinafter Tax *Administration*)
[18] Id.

play; the mechanism may be a victim of political patronage as opposed to merit or competence since the ones who entertain the dispute can be appointed because of their political affiliation and loyalty instead of their professional background and experience.[19] The other criticism is that members of the internal review organ may lack the requisite training and knowledge in which case these members may give a decision on the basis of their notion of justice in disregard of established norms, parameters and forms. Furthermore, it is argued that although resort to internal review is praiseworthy owing to flexibility, flexibility could be a source of uncertainty and unpredictability where aggrieved taxpayers may not be in a position to determine with any reasonable degree of precession what the outcome of the case may be.[20]

Because the above problems can undeniably occur, an internal review system should adhere to critical prerequisites and principles. The major ones are independence, transparency, legally defined rules and harmonized internal review procedures. Independence pertains to "the administrative distance" existing between the tax office that made the original tax decision and the office that is entrusted to review tax decision though complete separation of the two organs is hardly possible.[21] Transparency is instrumental since it helps the taxpayer to get key information regarding the review process. Hence, the organ that reviews the tax dispute is duty-bound to provide clear and easily accessible information regarding the steps involved in the review process from the beginning to the end of the process.[22] Moreover, in order to create a trustworthy internal review system, the law regulating the internal tax dispute review process is expected to be clearly understood to persons who are not specialists. With a view to avoiding taxpayers' confusions and ensuring consistent application of the law, the tax administration law and the tax authority are required to clearly and consistently define key terms germane to the internal tax dispute review process.[23]Equally important is harmonizing the internal review procedures since putting in place multiple objection procedures is "unnecessary and potentially wasteful."[24]

When we come to the reality on the ground, the practice of many countries around the world demonstrates that the internal review process is a widely used

[19]Duru Onyekachi, Administrative Adjudication: An Overview, https://www.academia.edu/6792919/Administrative_Adjudication_An_Overview, (accessed October 21, 2019), pp.3-4.
[20]Id.
[21]The Administrative Review Process for Tax Disputes, supra note 12, p.27.
[22] Id.
[23] Tax Administration, supra note 17, p.223.
[24]The administrative Review Process for Tax Disputes, supra note 12, p.31.

review mechanism. In several countries, taking a case to an internal review organ of the tax authority is mandatory while in several other countries resorting to this kind of dispute resolution mechanism is left to the free choice of the taxpayer. For instance, in Australia, a taxpayer aggrieved by the decision of the Australian Tax Office (ATO) is compelled to lodge an objection to the ATO as provided under the taxation administration Act of the country.[25] The Greek experience is also another example where interval review is mandatory.[26] By the same taken, bringing a complaint against a tax assessment to a tax director is mandatory in Belgium, [27] Denmark,[28] Dominican Republic,[29] and the Netherlands.[30]

On the contrary, there are legal systems where taking a tax grievance to the internal review organ is optional. In this regard, the Nigerian and the UK approaches are mentionable among many other jurisdictions. In Nigeria, the Federal Inland Revenue Act has provided that a taxpayer aggrieved by an assessment, action, decision or demand notice made upon him by the Federal Inland Revenue Service has the liberty to appeal directly to the tax appeal tribunal.[31] By the same token, in UK a taxpayer may file a written protest to Her Majesty Revenue and Custom (HMRC) against decisions involving direct taxes where the protest may be reviewed by an officer who was not involved in the original decision against which the petition is field. However, such taxpayer may opt out this application and may directly lodge an appeal to the tax appeal tribunal.[32] Moreover, in Brazil,[33] Ireland[34] and Norway[35] taking a tax case to an internal review organ is optional.[36]

[25]See Evgeny Guglyuvatyy and Chris Evans, Administrative Approaches to Tax Dispute Resolution: Alternative Perspectives from Australia and Russia, *Journal of Comparative Law*, Vol. 10, No.2, (2018), p.2.

[26]Ioannis Stavropoulos, Greece, in Simon Whitehead(ed.), *Tax Disputes and Litigation Review*, 7th ed., (2019) , p.118.

[27]Caroline P. Docclo, Belgium, in Simon Whitehead(ed.), *Tax Disputes and Litigation Review*, 7th ed., (2019), p.20.

[28]Jacob Skaadstrup Andersen, Denmark, in Simon Whitehead (ed.), *Tax Disputes and Litigation Review*, 7th ed. (2019), p.64.

[29]Christoph Sieger and Fabio J Guzman Ariza, Dominican Republic, in Simon Whitehead(ed.), *Tax Disputes and Litigation Review*, 7th ed., (2019), p.72.

[30]Pual Kraan, The Netherlands, in Simon Whitehead(ed.), Tax Disputes and Litigation Review, 7th ed., (2019), p.208.

[31]See Gospel R. Adams, An Evaluation of the Rules of Practice and Procedure of Tax Appeal Tribunal in Nigeria, LL.M thesis, Ahmadu Bello University, (2012), kubanni.abu.edu.ng › jspui › bitstream › AN EVALUATION OF THE RU...(accessed November 29,2019),p.41.

[32]Melinda Jone, Tax Dispute Systems Design: International Comparisons and the Development of Guidance from a New Zealand Perspective, PhD. thesis, University of Canterbury,2016, p.19, p.139.

[33]Daniella Zagari and Maria Egenia Doin Vieira, Brazil, in Simon Whitehead(ed.), *Tax Disputes and Litigation Review*, 7th ed., (2019), p.32.

1.2. Scope of Review Power and Reviewable Issues

The scope of review power and reviewable issues by an internal review organ of a tax authority are important concerns of tax administration laws. The experience of various countries demonstrates that these issues have been treated differently in different jurisdictions. As a matter of principle, tax disputes more often than not arise during tax audit or following issuance of a tax assessment or reassessment notice.[37] However, internal reviews are not circumscribed to tax audit or assessment issues only. Rather, there are jurisdictions that allow the taxpayers to raise objections in connection with any aspect of the way their tax responsibility is treated and handled. There are, however, countries which have confined the scope of internal review to an assessment as is the case, for example, in Uganda and Australia.[38] On the contrary, there are other jurisdictions that allow non-tax assessment reasons as valid grounds for objection before the internal review organ. In this regard, the South African approach is a typical example as the country's tax administration act allows a taxpayer to file objection against various non-assessment issues such as decision by the tax authority not to remit penalty, failure to authorize refund, declaration not to extend the period for lodging an objection and so on.[39]

When we come to the scope of reviewable issues, we understand that there are no uniform practices across jurisdictions. In fact, the approaches are divided. While there are approaches which preclude the internal review of system from accepting objections involving interpretation of laws (because it is believed that interpretation of tax law should be left to administrative tribunals or courts), there are also other approaches which allow the internal review organ to make interpretation of laws.[40]

[34]John Gulliver, Maura Dineen and Niamb Keogh, Ireland, in Simon Whitehead(ed.), *Tax Disputes and Litigation Review*, 7th ed., (2019), p.143.
[35]Thor Leegaard, Norway, in Simon Whitehead(ed.), *Tax Disputes and Litigation Review*, 7th ed., (2019), pp.252-253.
[36]This means that an aggrieved taxpayer has the right to elect either to take a tax case to an internal review organ or to an administrative tribunal (which is separate and independent of the tax authority) or to a regular or an administrative court.
[37]Bewket Abateneh, The Tax Appeal System under the New Tax Administration Proclamation: Improvements and Potential Shortfalls, LL. M, Bahir Dar University, (2017), p.33.
[38]Id.
[39]Johan Kotze, South Africa, in Simon Whitehead(ed.), *Tax Disputes and Litigation Review*, Law Business Research (2014), p.241.
[40]Bewuket, supra note 37, p.33.

1.3. Time Limit for Filing and Decision Making

In relation to resolution of tax disputes at the internal review stage, filing and decision making time limits are important concerns both to the taxpayers and the tax authority. That is why such issues have received attention in various jurisdictions although the duration of time varies from jurisdiction to jurisdiction. For example in Canada, a taxpayer aggrieved by the decision of the Canadian Revenues Authority (CRA) is required by law to file an objection within 90 days reckoned from the date of issuance of the tax assessment notice.[41] In Kenya, an aggrieved taxpayer has only 30 days to file an objection to the internal review organ as from the date of issuance of the tax assessment notice. [42]In Belgium, a tax complaint against a tax assessment should be made within six months and three working days after the tax bill being sent to the Tax Director.[43] In Portugal, an administrative appeal is to be filed within 120 days as from the date of receipt of an assessment notice by the taxpayer.[44] In Brazil,[45] any taxpayer aggrieved by the decision of the tax authority is entitled to lodge his complaint to the competent organ within 30 days of the receipt of the tax assessment. The same is true in Nigeria,[46] Zambia[47] and India.[48] In Uganda, the Income Tax Act has stipulated that a taxpayer who is dissatisfied with a tax assessment can lodge an objection to the assessment with the commissioner within 45 days after service of the notice of assessment.[49]It is 90 days in the USA[50]and the Republic of Korea[51] while it is 60 days in Pakistan[52] and China.[53]

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[41] Karen Dawn Stilwell, Mediation of Canadian Tax Disputes, LL.M thesis, University of Toronto, (2014), p.19.

[42]See The Republic of Kenya Tax Procedures Act, No. 29 of 2015, Revised Edition 2016(2015), Section 51(2), (7).

[43] Docclo, supra note 27, p.20.

[44]Diago Ortigao Ramos and Pedro Vidal Matos, Portugal, in Simon Whitehead (ed.), *Tax Disputes and Litigation Review*, 7th ed., (2019), P.277.

[45]Marcelo Habib Garvalho, Tax Appeal Processes in the Treasury Secretariat of the State of Rio De Jeneiro and the Internal Revenue Service, School of Business and Public Management IBI-The Institute of Brazilian Issues, Minerva Program, (Fall 2013), Washington D.C, www.gwu.edu/~ibi/minerva/Fall2013/Marcelo_Carvalho.pdf,(accessed April 29, 2020),p.7.

[46]Olumide K. Obayemi, An Assessment of the Nigerian Tax Appeal Tribunal and the Need for a Speedier and More Efficient System, *Research Journal of Finance and Accounting,*Vol.6, No.6, (2015),p.26.

[47]Kelvin Mpembamoto, An Evaluation of the Revenue Appeals Tribunal of Zambia, LL.B Thesis, University of Zambia, (2009),p.17.

[48]See Appeal to Commissioner of Income-Tax (Appeals), Income Tax Department, Department of Revenue,' Ministry of Finance, the Government of India, www.incometaxindia.gov.in/Tutorials/34-%20Appeal%20to%20CIT.pdf, accessed *March 16, 2020,* P 3.

[49]See the Ugandan Income Tax Act, 2014, Art. 99(1), omp.go.ug/assets/media/resources//206/INCOME%20TAX%20ACT.pdf, accessed March 10, 2020.

[50] Garvalho, supra note 45, p.24.

[51]See Korean Taxation, Ministry of Strategy and Finance 2012, p. 220, available at https://www.nts.go.kr/eng/data/KOREAN TAXATION2012.pdf, last visited on 30 May 2020.

[52]See the following piece in this regard; Income Tax Appeals, available at download1.fbr.gov.pk/docs/20144171244341203Appeals.pdf, (accessed May 232020)

Generally, a study conducted by the OECD demonstrated that time of appeal in the world mostly varies from 21 days to 90 days.[54]

When it comes to the time-limit within which a decision has to be given, stipulating a time frame has become a common practice in many jurisdictions of the world. Nonetheless, we notice that there are variations of the time limit among different jurisdictions.[55] For instance, in Austria, the tax authority is required by law to give a decision within six months after the filing of the administrative appeal to the same authority. If the tax authority fails to meet this deadline, the aggrieved taxpayer has the liberty to lodge a complaint with the federal tax court invoking the inactivity of the tax authority within the defined time.[56] By the same token, the internal tax dispute decision making body is duty-bound to render its decision within six months in Belgium[57] and Canada.[58] There are, however, other jurisdictions that have provided even shorter periods. For instance, in Greece[59] and the Dominican Republic,[60] internal review decisions should be made within four months and three months respectively. In the Netherlands,[61] the Tax Inspector is required by law to give its decision within six weeks while four months is the time limit in Portugal.[62]

2. Establishment, Accountability, Membership and Scope of Review Power of the Review Department in Ethiopia

2.1. Establishment and Accountability

The FTAP has stated that the Tax Authority is duty-bound to issue a directive that would specify "the procedures for reviewing an objection (including hearings) and the basis for making recommendation to the Authority and the

[53]Fuli Cao, *Corporate Income Tax Law and Practice in the People's Republic of China*, Oxford University Press, (2011), P.396.
[54]David Crawford, Detailed Guidelines for Improved Tax Administration in Latin America and the Caribbean, Chapter 11, UASAID's Leadership in Management, (2013)www.usaid.gov/where-we.../latinamerican...caribbean/tax-administration, (accessed 30 March 2020), p. 20.
[55]In general, whitehead (ed.), supra note 6.
[56]See Gerald Schachner, Kornelia Wittmann and Nicolas D.Wolski, Austria, in Simon Whitehead (ed.), *Tax Disputes and Litigation Review*, , Law Business Research,(2019),p.7.
[57] Docclo, supra note 27 ,p.20.
[58]Dominic C Belly(2019),Canada, in Simon Whitehead(ed.), Tax Disputes and Litigation Review, 7th ed., (2019), p.66.
[59] Stavropoulos, supra at note 26, p.118.
[60] Sieger and Ariza, supra note 29, p.72.
[61] Kraan, supra note 50, p.210.
[62] Ramos and Pedro Vidal Matos, supra note 44, p. 277.

decision making procedures."[63] Because of this, the ERCA issued a directive in 2017 which established the Review Department.[64] However, this directive was expressly repealed in February 2020 and replaced by another directive issued by the Ministry of Revenues which has been functional since then.[65] The new directive has contained relevant provisions concerning, *inter alia,* the organization of the Department,[66] accountability,[67] assignment of personnel of the department,[68] powers and responsibilities of the Department in general,[69]powers of the Department located at the Head Office,[70] powers of the branch Review Departments,[71] powers and responsibilities of the secretariat of the Department,[72] procedures of making recommendations and decision making,[73] contents of the recommendation,[74] procedures dealing with filing complaints,[75]and duration of decision making.[76]

Regarding accountability, the Directive has provided that the Review Department established at the head office of the Ministry is accountable to the Minister or to an official delegated by the Minister[77] whereas Review Departments established at branch offices of the Ministry are accountable to the General Manager of the branch concerned.[78] In addition, the Directive has made it clear that Review Departments established at branch offices are required to

[63]Federal Tax Administration Proclamation, Proclamation No.983/2016, Federal Negarit Gazetta,(2016), Article, 55(2)(hereinafter *the FTAP*),

[64]Directive Issued by the Ethiopian Revenues and Customs Authority to Establish the Review Department and Determine Its Working Procedures, Directive No. 127/2017 (Amharic) (July 2017) unpublished, http://www.mor.gov.et/index.php/directives/amharic-format#faqnoanchor, (accessed April 5,2020)

[65]Directive Issued to Define the Working Procedures of the Tax Complaints by Review Department, Directive No.169/2012 E.C (in Amharic), available with the author in soft copy.(hereinafter *Working Procedures of the Tax Complaints by Review Department*)

[66]Id., Article 4.

[67]Id., Article 8.

[68]Id.

[69]Id., Article.9.

[70]Id., Article10. As per this article of the directive, if the applicant taxpayer is a federal large taxpayer, his complaint can be accepted and entertained by the Review Department located at the head office of the Ministry if the disputed amount of tax, including penalty and interest, is above 300,000,000.00(three hundred million Birr); if the complainant taxpayer is a medium federal taxpayer, his grievance can be accepted and entertained if the disputed amount including penalty and interest is above 200,000,000.00(two hundred million Birr) and in the case of small federal taxpayer complainant , his case falls within the power of the Review Department located at the head office if the disputed amount including penalty and interest is above 100,000,000.00(one hundred million Birr).

[71]Id., Article 11.

[72]Id., Article 12

[73]Id., Article 13.

[74]Id., Article 14

[75]Id., Articles 15-18.

[76]Id., Article19.

[77]Id., Article 7(1).

[78] Id., Article 7(2).

make periodic reports to the Review Department established at head office of the Ministry[79] which is located in Addis Ababa.

2.2. Membership to the Review Department

In the 21st century, tax disputes have become more and more complex owing to various reasons[80] even in developing countries such as Ethiopia let alone in advanced economies. Therefore, the resolution of tax disputes nowadays requires understanding wide ranging and complicated factual and legal issues requiring expertise and professionalism making the selection and appointment of members of an internal review organ an important concern. The issue of membership has become one of the most important issues in tax dispute resolution at this stage because creating an internal review department capable of effective and efficient disposition of tax disputes is unthinkable in the absence of appropriate members.

As far as the Ethiopian context is concerned, the FTAP[81] is mute regarding membership issues apart from empowering the tax authority to establish an internal review department. Rather, the FTAP empowered the tax authority to establish the Review Department by issuing a directive.[82] On the basis of this empowerment, the Federal tax Authority issued the afore-mentioned directive,[83] which, *inter alia*, deals with membership to the Review Department. Art. 8(1) of the Directive states that members of the Review Department at head office are to be appointed by the Minister of Revenues while those working in the review departments established at branch offices are appointed by the manager of the branch office concerned. Sub article 2 of the same article has stipulated that the Minister or the manager of a branch office may assign an individual as a member of the Review Department by appointment or by promoting the existing professionals. As per Art.8(4) of the Directive, professionals assigned to work under the Review Department are expected to be those who served in auditing, tax assessment and legal services. However, Directive is mute regarding composition, number and removal of members of the Review Department. Therefore, the silence of the directive with regard to these issues means that

[79] Id., Article 7(3).
[80] Margaret McKerchar, Laura R. Ingraham and Stewart Karlinsky, Tax Complexity and Small Business: A Comparison of the Perceptions of Tax Agents in the United States and Australia, *Journal of Australian Taxation*, Vol.8, (2005) pp.289-327; Samuel A. Donaldson, The Easy Case against Tax Simplification, *Virginia Tax Review*, Vol.22, (2003), pp.646-746.
[81] FTAP, supra note 63.
[82] Id., Article 55.
[83] Working Procedures of the Tax Complaints by Review Department, supra note 65.

composition, numbers and the removal of members are determined by the Minister at head office and by the Manager at branch levels demonstrating that the tax authority enjoys unrestrained discretionary power in these respects.

When we come to the practice, each review department is composed of five members drawn from tax auditors, tax assessors and legal professionals. Members of the Review Department interviewed by the author made it clear that because tax cases have become complicated and more sensitive, the tax authority assigns individuals who have the requisite knowledge and experience in law and accounting particularly at large taxpayers' offices.[84] On the contrary, other interviewees informed this author that the selection and appointment of members is at the pleasure of the appointing official. Instead of relying on merit, political outlook and ethnic composition have been important factors for the selection and appointment of members of the review department.[85] Regarding removal of members, because members are employees of the Tax Authority, it is claimed that they cannot be arbitrarily removed; rather, they are removed in accordance with the relevant provisions of the Ethiopian civil service law and internal rules and regulations issued by the Ministry.[86]

2.3. Scope of the Review Power (of the Review Department) and Reviewable Issues

The several provisions of the FTAP have dealt with the power of the Review Department. Art. 54(1) has made it clear that if a taxpayer is dissatisfied with a *tax decision* and wishes to challenge the decision, he is required to file a notice of objection to the Review Department. Therefore, it is worthwhile to discuss what a tax decision is to get a clear picture of scope of review of the Review Department.

Art. 2(34) of the FTAP has enumerated what tax decisions are. According to this sub-article, a tax decision is a tax assessment (other than a self-assessment), a decision on application under Art.29 (amended tax assessment), a determination made under Art. 40(2) (a tax assessment made against a receiver), a determination of a secondary liability or the amount of tax recovery costs

[84]Interview with Ato Zewude Damtew, Chairperson of the Review Department of Large Taxpayers of Western Addis Ababa Region, Ministry of Revenues, September 29, 2020;interview with Ato Tolu Fite, General Manger of North West Branch. Ministry of Revenues, October 28, 2020.

[85]Interview with Ato Teferra Lemma, General Manager of Steely RMI PLC, September 22,2020; interview with AtoYohannes Woldegabriel, Director of the Arbitration Institute, Addis Ababa Chamber of Commerce and Sectorial Association, September 23, 2020.

[86]Interview with Zewude Damtew, cited above at note 84.

payable, a determination of late payment interest payable, a decision to refuse an application for a refund under Art. 49 or Art. 50, a determination of the amount of an excess credit under Art. 49,[87] the amount of a refund under Art.50[88] or the amount of refund required to be repaid under Art.50[89] and a determination of the amount of unpaid withholding tax under Art. 92(3) of the Federal Income Tax Proclamation (FITP).

It has to be noted that the scope of review power of the Review Department is confined to accepting a complaint from an aggrieved taxpayer involving any one of the above grounds of tax decision. When we closely see the constituent elements of tax decision defined by the FTAP, we can realize that the Ethiopian dispute resolution system by the internal review department of the tax authority is confined only to assessment based determinations made by the tax authority. This means that taxpayers cannot take non-assessment disputes to the Review Department which demonstrates that the FTAP has not made any departure from the previous tax laws of Ethiopia as far as the scope of review power of the internal review organ of the tax authority is concerned. The practice also shows that the scope of review power of the Review Department does not go beyond accepting and entertaining assessment based tax disputes. If taxpayers have non-assessment grievances, they resort to other administrative complaint mechanisms.[90]

Though the scope of review power of the Review Department is confined to disputes arising from tax assessment, the Department has the power to review both legal and factual issues. This can be understood by closely examining the relevant provisions of the FTAP that empowered the Review Department to review tax decisions of the authority which involve both factual and legal issues.[91] The practice on the ground also shows that the Department reviews tax disputes involving both factual and legal issues so long as the case is confined to tax assessment.[92]

[87]Id.
[88]Id.
[89]Id.
[90]Interview with Zewude Damtew, supra note 84; interview with Ato Semaw Nigatu, Consultant and Attorney-at-Law, September 24, 2020; interview with Ato Mesfin Taffese, Principal Attorney at Mesfin Taffese Law Office, September 24, 2020.
[91]FTAP, supra note 64, Article 2(34) cum Article 55.
[92]Interview with Ato Amare Lakew, private tax accountant and consultant, September 18, 2020; interview with Ato Tasew Abitew, General Manager of Tamire and Family PLC, October 22, 2020; interview with Ato Girma Tafesse, Tax Consultant at East Africa Holding Company, September 30, 2020.

3. Proceedings at the Review Department

3.1. Time Limit for Lodging Notice of Objection

As provided under the FTAP, a taxpayer dissatisfied with a tax decision (and who desires to challenge such decision) is required to file what is called a notice of objection with the Review Department within 21 (twenty one days) after he has received the notice of the tax decision.[93] However, the Customs Proclamation[94] has provided that the complaint has to be filed by the taxpayer within 15 working[95]days from the date of the written decision causing the grievance. Apparently, it seems that the FTAP[96] and the Customs Proclamation have set different time limits for lodging a complaint to the Review Department of the Tax Authority and to the Complaints Review Section of the Customs Commission respectively. However, the time limit set under both proclamations is nearly the same since the 21 days provided under the FTAP includes non-working days while the time limit set under Customs Proclamation is confined only to working days.

In the previous tax laws of Ethiopia, a taxpayer aggrieved by the decision of the tax authority would file an application for review to the then Review Committee within 10 (ten) days after receiving the tax assessment notice.[97] This ten days duration was one of the most important sources of discontent to taxpayers since they claimed that it was a very short period of time given that filing a complaint to the then review committee was not an easy task.[98] When the FTAP was at its drafting stage, taxpayers, stakeholders and various professionals vehemently argued that the ten days' time limit should be extended to 30 days. However, the

[93] FTAP, supra note 64, Article 54(1).

[94]Customs Proclamation, Proclamation No.859/2014,(as amended), *Federal Negarit Gazetta*, (2014), Article 153(1).

[95]Note that it is the Amharic version of the provision that states that complaints should be brought to the internal review organ within 15 working days. The English version has simply stipulated 15 days.

[96] Bear in mind that the FTAP is applicable to all federal domestic taxes; see Art.2(36) of the FTAP, supra at note 63.

[97]See Income Tax Proclamation, Proclamation No.286/2002, *Federal Negarit Gazetta*,2002, Article105(2)(now repealed) (Hereinafter *Income Tax Proclamation*).See also Value Added Tax Proclamation, Proclamation No. 285/2002, *Federal Negarit Gazetta*, (2002), Article. 41(3); (Hereinafter *Value Added Tax Proclamation*).Turnover Tax Proclamation, Proclamation No. 308/2002, *Federal Negarit Gazetta*, (2002), Article.19(2); (Hereinafter *Turnover Tax Proclamation*). Excise Tax Proclamation, Proc. No. 307/2002, *Federal Negarit Gazetta*, (2002), Art.16(2).(now repealed). (Hereinafter *Excise Tax Proclamation*).

[98]Aschalew Ashagre, የታክስ ከፋዮች ቅሬታ አፈታት ሥርዓት በኢትዮጵያ, Mizan Law Review, Vol.8, No.1, (2014), p. 212-214.(hereinafter *የታክስ ከፋዮች ቅሬታ አፈታት ሥርዓት በኢትዮጵያ*) See also Aschalew Ashagre, Review of the Ethiopian Income Tax Appeal System: Issues of Concern and Recommendations, unpublished, research conducted by the sponsorship of the International Financial Corporation (IFC) so that it would serve as an input during the preparation of the current FTAP, available with the author in soft copy.(Hereinafter *Review of the Ethiopian Income Tax Appeal System*)

Ministry of Finance[99] did not accept this stance and insisted on 21 days. This time limit was finally approved by the HoPR though no justification was given by the HoPR[100] to choose the 21 days' time limit as opposed to the 30 days' time limit suggested by taxpayers, stakeholders and various professionals.

When we see the time limit stipulated under the FTAP in light of international best practices,[101]it is obvious that the FTAP has opted for taking the minimum time limit for lodging of an objection to the Review Department. However, the FTAP has stipulated that if the taxpayer cannot file the notice of objection within the afore-mentioned 21 days, the authority may allow an extension of time for a maximum of 10 days,[102] as stipulated under Art.54(6) of the Proclamation, when the taxpayer is able to show to the satisfaction of the tax authority that the extension of time is sought owing to absence from Ethiopia, sickness or other reasonable cause that prevented the taxpayer from filing the notice of objection within the time prescribed by the law.[103]

But, what if the taxpayer is not able to request extension of time before the expiry of the 21 days limit owing to *force majeure*? The Proclamation does not give a remedy to such taxpayer which means the law lacks procedural fairness to taxpayers in this regard. Equally important is the fact that the law has not contained a provision which allows the taxpayer to lodge an out of time notice of objection (which is an important procedural remedy recognized under the ordinary civil proceedings in Ethiopia[104]), when he was not able to file the notice within this time or was not able to make request for extension of time. The silence of the law in this regard may result in procedural unfairness that jeopardizes the taxpayer's right to access to justice. In other words, the silence of the law in this regard has made taxpayer to be under the mercy of the review department.

[99] Although a foreign expert was hired to draft the FTAP, specific issues such as this were first determined by this Ministry since the Proclamation was drafted and made to take its final shape and content by the Ministry.

[100] The role of the House was so nominal because it did not get enough time to discuss on each and every provision of the Proclamation.

[101] See the discussions made under 1.3 of this piece.

[102] FTAP, supra note 63, Article 54 (7).

[103] Id. See also Working Procedures of the Tax Complaints by Review Department; supra note 65, Article 16.

[104] See Civil Procedure Code of the Empire of Ethiopia, Decree No.52/1965, *Negarit Gazetta*,(1965), Article. 328. Here, it has to be clear to readers that this author is not arguing that provisions of the Civil Procedure Code should be applicable to administrative proceedings. However, allowing a taxpayer to file an out of time appeal is a minimum procedural requirement that has to be applied in any proceeding.

As far as the duration of the filing date is concerned, opinions of tax officers, taxpayers, legal practitioners and other professionals are divided. Officers of the tax authority argue that because taxpayers understand the source of the dispute during the auditing stage, the 21 days' time limit is sufficient.[105] On the other hand, there are individuals who believe that this 21 days' time limit has to be extended to 30 days as preparing a notice of objection to the review department requires adequate time. These individuals justify their argument saying that since audit reports in Ethiopia mostly cover several tax years and there are no exit conferences available to the taxpayer as matter of right, sufficient time is important to examine all these documents and prepare a notice of objection which enhances the right of the taxpayer to get meaningful justice from the Review Department.[106]Despite division of opinions, a member of the Review Department informed this author that there are cases where taxpayers lost their right of filing their notice of objection owing to shortage of time. The same informer underscored that to make the tax dispute system at this stage fair to taxpayers; the 21 days' time limit should be extended to 30 days since such extension does not have any meaningful impact on timely collection of taxes.[107]It is also the belief this author that the time limit for filing a notice of objection needs to extended to 30 days since this time limit has been embraced in several tax systems.

3.2. The Notice of Objection

Because notice of objection is an important document, the FTAP has stipulated certain requirements that have to be satisfied by a notice of objection. According to Art. 54(3) of the FTAP, a valid notice of objection should state precisely the grounds of the taxpayer's objection to the tax decision; the amendments that the taxpayer believes are required to be made to correct the tax decision and the reasons for making the amendments.[108]In addition to the above requirements, Art.17(2) of the directive (Directive No 169/2020) has provided that a notice of objection should contain the name and address of the taxpayer, copy of the tax decision against which objection is filed, the date of the tax decision, name of the branch office which gave the tax decision and other information and

[105] Interview with Tolu Fite, supra note 84.
[106] Interview with Ato Girma Debele, General Manager of Peach Authorized Accounting Firm, September 28, 2020.
[107] Interview with Zewude Damtew, supre note 84.
[108] FTAP, supra note 63, Article 54(3(b&c). Here, it is to be borne mind that the aggrieved taxpayer may pray that a certain tax decision be totally reversed. Therefore, the notice of objection should state the grounds that may justify the total reversal of a tax decision although the Proclamation does not talk about the need for praying for reversal of the decision of the Tax Authority.

evidence which are helpful for making decision on the notice of objection. Besides, as provided under Art.17(3) of the same Directive, a notice of objection should contain the business license, TIN and tax certificate. In addition, if the notice of objection is to be filed by the agent of the taxpayer the document showing the power of attorney should be appended to the application. By the same token, if the taxpayer is registered for VAT, VAT registration certificate has to be produced at the time of filing the application. Moreover, Art.17(4) of the same Directive has made it clear that relevant and authenticated copies of documentary evidence should be appended to the notice of objection. Therefore, if the taxpayer fails to observe these strict requirements at the time of preparation of the notice of objection, the Review Department cannot accept the notice of objection. 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.[109]

In normal civil proceedings, where a statement of claim is filed by a plaintiff, the defendant has the right to submit a statement of defense as a matter of procedural due process of law. Though the rigid provisions of civil procedural rules are not applicable in administrative proceedings, tax administration rules should provide that the tax authority is entitled to file a statement of defense in response to the notice of objection filed by the taxpayer. Nonetheless, the FTAP has not contained a provision that allows the tax authority to file a statement of defense in response to the notice of objection filed by the taxpayer. Even the Directive (Directive No 169/2020) issued by the tax authority to supplement the provisions of the FTAP dealing with the Review Department has not contained any provision that entitles the tax authority to submit a statement of defense to the Review Department. In practice, the tax authority does not produce statement of defense owing to the silence of the law in this regard.[110]Therefore, it is argued that the tax authority should be entitled to produce its statement of defense to ensure procedural equality of the parties. It is also argued that the tax authority should be required to produce a statement of defense so that it would be easy for the Review Department to identify issues.

[109] Id., Art.54(4).

[110] Personal observation of the author as the author appears before the review department representing his clients.

3.3. The Hearing Stage

The right to be heard is one of the most important elements of procedural due process of law recognized in various jurisdictions in civil proceedings in general and in tax proceedings in particular. The opportunity to be heard is a cherished value in dispute settlements since it gives a neutral ground for a resolution of a dispute by an impartial decision-maker and it serves as an instrument of enhancing accurate results by enabling each side to present his case to the decision-maker.[111]According to Schwartz, the right to be heard is a fundamental principle and a foundation of administration of justice which should be available to an aggrieved party even outside the ordinary courts.[112] In a case where an administrative adjudication is involved, observing the basic standards of hearing is a critical matter since the opportunity to be heard in administrative adjudication is one of the most important fundamental elements of a fair play and it is taken to be an irreplaceable instrument to show the legal validity of the adjudication and the maintenance of public confidence in the value and soundness of this administrative adjudicative process.[113] According to Bayles, the opportunity to be heard is one of the most essential requirements of natural justice both in the common law and civil law countries whether or not the case involves an ordinary civil case or an administrative proceeding.[114]

An issue that arises in relation to the right to be heard is whether hearing should be an open or a closed hearing. In normal civil and criminal cases, hearing must be an open hearing since such kind of hearing is considered to be a fundamental element of justice. In addition, open hearing is supported because it creates public awareness which is a useful tool to control arbitrariness and injustice.[115] In this regard, Michael D. Bayles wrote that:

> The point of open application of rules is to let people see that justice is done. Like avoidance of the appearance of impropriety, open hearings help prevent demoralization. If people cannot see that justice is done, they might conclude that it is not. A common (though not always just) charge against secrecy is that people have something to hide. If just

[111] Leonard S. Rubenstein, Procedural Due Process and the Limits of the Adversary System, *Harvard Civil Rights-Civil Liberties Law Review*, Vol.11, (1976), P.48.
[112] Bernard Schwartz, Procedural Due Process in Federal Administrative Law, New York University Law Review, Vol.25, (1950), P.552.
[113] Id., P. 554.
[114] Michael D. Bayles, *Procedural Justice: Allocating to Individuals*, Kluwer Academic Publishers, (1990), P.40.
[115] Davis Kenneth Culp Discretionary Justice: A Preliminary Inquiry, Urbana University of Illinois Press, (1969), PP.111-12.

> rules are unjustly applied, public pressure can often correct the injustice.

When we come to Ethiopia, the right to be heard in the civil cases in general and administrative tax proceedings in particular is not expressly guaranteed under the FDRE Constitution though we can argue that such right does have an implied constitutional basis. This is because as the FDRE Constitution has recognized rule of law under its preamble[116]and because an opportunity to be heard is an important element of procedural rule of law[117] which has to be observed by any government organ, we can safely conclude that the FDRE Constitution has impliedly guaranteed the opportunity to be heard even in administrative tax proceedings. In addition, the FTAP has recognized that an aggrieved taxpayer has the right to be heard by the Review Department as Art. 54(2) of the FTAP states 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.*"*[118]*(emphasis supplied)* On the basis of this provision, the Tax Authority issued a directive that has determined the working procedures of the Review Department.[119]

Nonetheless, the Directive has not expressly stated that taxpayers have the right to be heard which means that they cannot enjoy the right to be heard as of right if we stick to the wording of the Directive.[120]Therefore, we can say that the Directive seems to have weakened the position of the Proclamation as the right to be heard of an aggrieved taxpayer seems to have been left to the discretionary power of the Review Department. Therefore, to avoid such a state of confusion, the HoPR should have expressly provided in the Proclamation that taxpayers have the right to be heard at any stage of a proceeding involving tax disputes.[121] However, when we come to the practice on the ground, it is observed that the Review Department hears the parties though the hearing is not an open

[116] The Constitution of the Federal Democratic Republic of Ethiopia, Proc.1/1995, *Federal Negarit Gazetta*,(1995), preamble(hereinafter the FDRE Constitution)

[117] Karina T.Hwang, The Procedural Aspect of the Rule of Law: India as a Case Study for Distinguishing Concept from Conception, CMC Senior Thesis,(2015),http://scholarship.claremont.edu/cmc_theses/1171, (accessed on February 20,2020).

[118] Despite this, it may be contended that because the opportunity to be heard is a very much weighty matter to an aggrieved taxpayer, the law-maker should have expressly provided in the Proclamation that taxpayers have the right to be heard in administrative proceedings.

[119] Directive, cited above at note 93.

[120] In practice, however, the author has observed on several occasions that the Review Department hears the parties although there is no an open hearing.

[121] Undeniably, tax cases are usually complicated owing to various reasons. When the opportunity to be heard is put into practice, the taxpayer can get the chance to clearly explain its objection since written submissions cannot replace the role of oral hearing.

hearing.[122]Therefore, it is argued that the law should expressly provide that the hearing must be an open hearing as it is such hearing that enhances transparency and accountability.[123]

3.4. Burden of Proof

The practice of various countries across the globe generally demonstrates that burden of proof is imposed on the taxpayer. According to Victor Thuronyi, "the burden of proving that an assessment is incorrect tends to be placed fairly squarely on the taxpayer in common law countries."[124] For instance, in Australia, onus of proof is unequivocally imposed on the taxpayer that has made the applicant taxpayer experience a serious hurdle in discharging the duty of proof in cases where the application for internal review or appeal is made against a tax assessment.[125] As provided under the Tax Administration Act of the country, the applicant or the appellant is required to prove that the assessment is excessive on the balance of probabilities. Courts in Australia made it clear that the taxpayer is said to have met the onus of proof where he is able to show that the assessment is wrong and what correction should be made to make the wrong assessment correct.[126] That is why Karen Wheelwright wrote that:

> There was no better example of the powers of the ATO and the inferior standing of taxpayers than the statutory requirement that taxpayers should satisfy the burden of proving their cases. The burden cast upon the taxpayer…. has been characterized as a 'reversal of the onus of proof. This is because the commissioner, by issuing an assessment, proves conclusively thereby that the assessment is correct. He is not required to lead evidence in support of his assertion, but instead it is the defendant taxpayer who must satisfy the tribunal of the fact that the assessment is excessive.[127]

In the USA, the rule remained that burden of proof in tax litigation lies on the taxpayer under all circumstances starting from the early 1920s to the close of the

[122] Interview with Ato Husamudin Seifu, General Manager of My Wish Enterprise PLC, September 28, 2020.
[123] Interview with Ato Wondiye Girma, Consultant and attorney-at-law, September 18, 2020; interview with AtoYohannes Woldegebriel, supra note 85; interview with Mesfin Tafesse, supra note 91.
[124] Thuronyi, supra note 1, P.218.
[125] Karen Wheelwright, Taxpayers' Rights in Australia, *Revenue Law Journal*, Vol.7, Issue No. 1, Article 10, (1997), pp.234-235.
[126] Id.
[127] Id.

20th century.[128] However, in the early 1990s, the onus of proof entrenched under the American tax system was seriously challenged by taxpayers and politicians on account of the abuse of power committed by the IRS and unreasonable tactics used by the same office in enforcing the Tax Code.[129] Hence, in 1998, the Internal Revenue Service Restructuring and Reform Act was issued which shifted the burden of proof from the taxpayer to the IRS where the former satisfies some preconditions of shift of burden of proof. According to this bill, burden of proof shifts to the IRS where the taxpayer produces some measure of credible evidence that is germane to the tax liability in question.[130] In addition, burden of proof is shifted from the taxpayer to the IRS when the latter uses statistical information from unrelated taxpayers to redefine the liability of the taxpayer and when it imposes a penalty on a taxpayer.[131] In Canada, burden of proof lies on the taxpayer since it is presumed that the tax assessment made by Revenue Canada is correct.[132]

In continental Europe, too, burden of proof lies on the taxpayer as a matter of principle although there have been circumstances where national courts and the European Human Rights Court decided that burden of proof should shift to the tax authority where burden imposed on the taxpayer is excessively cumbersome and unbearable.[133] In this regard, Victor Thuronyi wrote that:

> in civil law countries the allocation of the burden tends to be more complex, and to be based on both general principles of civil procedure and specific provisions in the tax laws. In France, the tax

[128] See M. Moran, The Presumption of Correctness: Should the Commissioner be Required to Carry the Initial Burden of Production, *Fordham Law Review*, Vol.55, Issue No.6, (1987), Article 9, pp.1087-1108.

[129] John R. Gardner and Benjamin R. Norman Effects of the Shift in the Burden of Proof in the Disposition of Tax Cases, *Wake Forest Law Review*, Vol.38, (2003), pp.1357-1358.

[130] Id, p.1363. See also John A. Jr. Lynch, Burden of Proof in Tax Litigation under I.R.C. Sec. 7491 – Chicken Little Was Wrong, *Pittsburgh Tax Review*, Vol. 5, No. 1,(2007),pp 1-60.

[131] Janene R. Finley and Allan Karnes, An Empirical Study of the Change in the Burden of Proof in the United States Tax Court, *Pittsburgh Tax Review*, Vol. 6, No. 1, (2008),pp. 61-82. These writers made it clear that the shift of burden of proof from the taxpayer to the IRS, however, entails other obligations that should be discharged by the taxpayer. First, the taxpayer needs to substantiate any item pursuant to the Requirements of the Revenue Code. Secondly, it is the duty of the taxpayer to maintain all records in accordance with the Code. Thirdly, the taxpayer has to be positive to the reasonable requests of the IRS regarding documents, witnesses, meetings interviews or other information.

[132] See William Innes and Hemamalini Moorthy, Onus of Proof and Ministerial Assumptions: The Role and Evolution of Burden of Proof in Income Tax Appeals, *Canadian Tax Journal*, Vol. 46, No. 6, (1998), pp.187-1211.

[133] Aschalew, *የታክስ ከፋዮች ቅሬታ አፈታት ሥርዓት በኢትዮጵያ*, supra note 98, p.223.

> administration has the burden of proof in certain cases when invoking the doctrine of abuse of law.[134]

In Ethiopia, the issue of burden of proof in relation to taxation figured out for the first time under the Rural Land Use Fee and Agricultural Activities Income Tax Proclamation which was issued in 1976 by the Provisional Military Administration Council (the Dergue).[135] Art. 31 of this Proclamation stipulated that:

> In cases where the tax is assessed by estimation, the appellant should give reasons for his objection to the assessment made by the tax office and the burden of proof shall shift to the tax office which would be expected to explain that no books of account or other documents were not submitted to it or books or accounts were submitted but were rejected on grounds that they were inadequate or incomplete or unreliable in light of the guideline issued by it or the tax so assessed by estimation was made conscientiously and reasonable after the appellant's agricultural activities or conditions and living standard were carefully examined and all appropriate investigations carried out.[136]

The issue of burden of proof in taxation again came into the picture when various tax proclamations were issued at the dawn of this century which expressly provided that burden of proof would lie on the taxpayers without providing any exceptional situation where burden of proof may be shifted to the tax authority.[137]

The FTAP has also retained the stance of the previous tax proclamations as burden of proof lies on the shoulder of the taxpayer under all circumstances.[138] The explanatory note prepared by the drafter of the FTAP justified the imposition of burden of proof on the taxpayer on the ground that the taxpayer has information regarding a tax liability and he has to prove that the decision of the tax authority is not correct.[139] Nonetheless, entrenching a presumption of correctness in Ethiopia with no exception whatsoever is highly questionable as it

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[134] Thuronyi, supra note 1, pp.218-2019.

[135] Rural Land Use Fee and Agricultural Activities Income Tax Proclamation, Proclamation No. 77/1976, *Negarit Gazetta*, (1976).

[136] This provision would be an important safeguard to the taxpayer in preventing arbitrary decisions by the tax office. Probably this important clause was included in that law because the Dergue Regime was pro-farmers and agriculturalists as a regime advocating socialist ideology.

[137] See Income Tax Proclamation, supra note 97, Article.116; Value Added Tax Proclamation, supra note 97, Article 44; Turnover Tax Proclamation, supra note 97, Article 22; Excise Tax Proclamation, supra note 97, Article.19.

[138] FTAP, supra note 63, Article 59.

[139] See Technical Notes on the Federal Tax Administration Proclamation, available with the author in soft copy, P.83.

gives unlimited discretionary power to tax auditors to determine a tax liability which may not have any factual foundation. It also opens the door for the auditors to misuse and abuse their powers since any decision they made by them can be accepted as correct and conclusive unless it is disproved by the taxpayer. However, there are circumstances where the taxpayer cannot prove that the decision of the tax authority is wrong in which case the taxpayer may be a victim of a wrong decision which may be motivated by ignorance, malice or outrageous mistake. In addition, imposing an absolute burden of proof on the taxpayer may be a fertile ground for corruption since tax auditors may impose any arbitrary amount of tax on a taxpayer and negotiate with the taxpayer for the reduction of an arbitrarily imposed tax burden.[140]

Let us cite some provisions from the FTAP and see how burden of proof imposed on the taxpayer under all circumstances can be difficult and at times insurmountable to a taxpayer. Art. 26 of the FTAP has provided that where a taxpayer fails to file a tax declaration, the tax authority automatically resorts to assessment of the tax liability of the taxpayer by estimation (by rendering documents and records kept by the taxpayer useless). In such a case, it is difficult to the taxpayer to prove that the estimated assessment made by the tax authority is not correct. Consequently, the taxpayer may be condemned to pay whatever is decided by the tax authority since the latter is under no obligation to prove that its decision is based on certain facts and findings.

Secondly, Art. 23(4) of the FTAP has provided that where the tax authority has reason to believe that the taxpayer will not file a tax declaration during a certain tax period, it may require the taxpayer to make a tax declaration before the due date. If the taxpayer does not comply with this notice, the tax authority may resort to a jeopardy assessment, which is made by estimation once again, by virtue of Art. 27(1) of the same Proclamation. If the taxpayer does not accept the tax assessment made by the tax authority, the former has to prove that the assessment made by the tax authority is wrong which in effect means that the law requires the taxpayer to prove in the negative.

Thirdly, Art. 48(1) of the same Proclamation has stated that a certified auditor, certified public accountant or public auditor who aided, abetted, counseled or procured a taxpayer to commit fraud resulting in a tax shortfall or to evade tax is assimilated to the taxpayer and is jointly and severally liable with the taxpayer for the amount of the tax shortfall or evaded. Because the FTAP has imposed the

[140] See Aschalew, የታክስ ከፋዮች ቅሬታ አፈታት ሥርዓት በኢትዮጵያ, supra note 98, p.224.

burden of proof on the taxpayer or a third party assimilated with the taxpayer, such a person is required to prove that he did not commit any one of the acts mentioned above that allegedly resulted in tax shortfall or tax evasion.

In Ethiopia, in addition to the heavy burden of proof imposed on taxpayers under all situations, taxpayers are confused as to what evidence is relevant and admissible that can be adduced to rebut the presumption of correctness enjoyed by the tax authority. This is partly attributable to the fact that the country does not have a compressive evidence law which may be used as a guideline in civil tax cases. The absence of comprehensive evidence rules in general and evidence rules pertinent to tax disputes in particular in Ethiopia has put Ethiopian taxpayers in a state of uncertainty (although legal certainty is an irreplaceable element of rule of law[141]) and are exposed to an uncontrolled powers of tax auditors who can do whatever they want to do with impunity. Moreover, no one can be certain as to the standard of proof to be employed by the decision-maker to say that the taxpayer has or has not met his obligation of burden of proof.

As far as the practice is concerned, the informants made it clear to this author that there are circumstances where taxpayers decline to challenge tax decisions before the Review Department as they cannot produce evidence which would rebut the presumption of correctness.[142] According to the informants, the imposition of burden of proof on the taxpayer with no exception gives an opportunity to corrupt tax auditors to impose unfounded taxes on taxpayers and later on negotiate with the taxpayers for reduction of the burden by taking bribes from the taxpayers.[143] Therefore, informants argue, the FTAP has to provide exceptional circumstances where the tax auditor may be required to prove the correctness of the assessment in order to strike a balance between the interest of the tax authority and the taxpayers.[144]

4. Making Recommendations and Objection Decisions

4.1. The Recommendation

As discussed earlier, the Review Department is empowered only to make a recommendation which may be affirmed, varied, remanded or totally rejected by

[141] See James R. Maxeiner Springer, Some Realism about Legal Certainty in the Globalization of the Rule of Law, in Mortimer Sellers and Tadeusz Tomaszewski(eds.), The Rule of Law in Comparative Perspective, Springer Nature, (2010), pp.41-57.
[142] Interview with Tolu Fite, supra 84.
[143] Interview with Mr. Teka Mehari, Consultant and Attorney at Law, September 22, 2020.
[144] Interview with Dawit Teshome, supra note 111; interview with Tasew Abitew, supra note 92; interview with Semaw Nigatu, supra note 90; interview with Yohannes Woldgebriel, supra note 86.

the concerned official of the tax authority.[145] To make the recommendation, the Review Department is required to follow and observe certain conditions and procedural requirements in the course of entertaining a tax case which results in the recommendation. The first requirement is quorum. The Directive issued to prescribe the working procedures of the Review Department has stated that there shall be quorum where two-thirds of the members of a panel are present and the recommendation supported by the majority becomes the final recommendation which is submitted to the tax official concerned for final action.[146] However, when there is a tie, the recommendation supported by the head of the tax office becomes the final decision[147] while a member of a panel who has a dissenting opinion cause his dissenting opinion minuted.[148] Secondly, the Directive has provided that the recommendation made by the Review Department is required to contain summary of the objections raised by the taxpayer, the arguments of both sides, issues that need decision, the legal provisions and reasons that led the Review Department to make the recommendation and evidence produced by the taxpayer.[149]

4.2. Time Limit for Decision-Making

Any decision, be it administrative or judicial, should be made within a reasonable period of time since "justice delayed is justice denied" as the saying goes.[150] Timely disposition of cases is useful for the parties to the dispute since it saves their time and reduces their cost. Therefore, determining a time limit by law within which a decision is given is an important instrument to achieve these objectives. In Ethiopia, requiring the tax authority to render its objection decision within a certain defined period of time was totally unknown before the coming into force of the FTAP. As a result, the taxpaying community was complaining that there was unreasonable delay within the Review Committee since the Committee was not required by law to make its decisions within a defined period of time.[151] In response to the discontents of the taxpaying community, the FTAP has clearly stipulated that the Tax Authority is required to give its objection decision within 180 days reckoned from the date of filing the

[145] FTAP, cited above at note 63, Article 55(1).
[146] Working Procedures of the Tax Complaints by Review Department, supra note 65, Article 13(1&2).
[147] Id., Article 13(2).
[148] Id., Article 13(3).
[149] Id., Article 14(1).
[150] See Tania Sourdinand Naomi Burstyner, Justice Delayed is Justice Denied, Electronic copy,http://ssrn.com/abstract=2721531, (accessed May 20,2020), pp.46-60.
[151] See Aschalew Ashagre, Review of the Ethiopian Income Tax Appeal System, supra at note 98, p.21.

notice of objection to the Review Department by an aggrieved taxpayer.[152] The stance taken by the FTAP is an important step forward in ensuring speedy disposition of tax disputes within the internal tax dispute resolution system provided that the time limit stipulated by the Proclamation is observed by the Review Department.

In practice, the Review Department generally renders its decision within 180 days.[153] According to the interviewees, when tax cases are not complicated, decisions are rendered even within two or three months.[154] Generally speaking, the Review Department has adhered to the time limit provided by the FTAP because there is a strict supervision by the managers of branches of the Ministry of Revenues and by the concerned high ranking officials of the head office.[155] More importantly, the fact that members of the Review Department are experienced individuals and full time employees of the Review Department has helped the disposition of cases within the time defined by the FTAP. In general, at the federal level, the Review Department cannot decline to render its decision within the 180 days without any acceptable justification. Nonetheless, there are exceptional situations where cases may take even more than one year where legal issues involved are complicated and when legal opinions are sought from the legal Department of the Ministry of Revenues and Ministry of Finance. In addition, cases are sometimes delayed because of the deliberate non-appearance of a taxpayer with a view to delaying the tax decision thereby delaying payment of tax.[156]

The FTAP has made it clear that if the tax authority fails to render its objection decision within the afore-mentioned time limit for whatever reason, the taxpayer may appeal to the Federal Tax Appeal Commission (FTAC) within 30 days after the end of the 180 days period[157]as though an objection decision were made by the Review Department. The question, however, is whether the Review Department should stop entertaining the case once the taxpayer has lodged an appeal to the FTAC owing to the fact that the former failed to meet the time limit provided by law. Though the FTAP is mute as far as this issue is

[152] FTAP, cited above at note 64, Article 55(7). Hence, the Review Department is expected to make its recommendations in less than 180 days so that the tax official can make the tax decision within the 180 days stipulated by the Proclamation.
[153] Interview with Zewude Damtew, supre note 84. The author also witnesses that the Review Department renders its decisions within 180 days though there are exceptional circumstances where the 180 days time limit is not observed owing principally to complexities of cases.
[154] Interview with Tolu Fite, supra note 84.
[155] Id
[156] Id.
[157] FTAP, supra note 63, Art.55(7).

concerned, we can argue that once a taxpayer has lodged an appeal to the Commission, after the expiry of the afore-mentioned 180 days, the proceeding at the Review Department is deemed automatically discontinued as there should not be parallel proceedings at the Review Department and the FTAC for doing so is a meaningless waste of time and resources of both the taxpayer and the tax authority. In practice, however, taxpayers do not take their case to the FTAC even if the Review Department fails to render its decision within the time defined by the FTAP since they are desirous of seeing their cases finally determined by the former without incurring any additional cost and without making any tax payment.[158]

4.3. The Final Objection Decision

Having received a recommendation from the Review Department, the concerned tax official has the power to fully or partly endorse the recommendation, to totally reject it or to remand the case for reconsideration where he believes that there are other factual or legal matters that should be reconsidered by the Review Department.[159] The decision of this tax official, to the exception of remand, is known as *an objection decision* under the FTAP and is a binding decision which is expected to contain a statement of findings on the material facts and the reasons for the decision.[160]

As is the case in other jurisdictions, the FTAP has made it clear that giving reasons in an objection decision is mandatory. Although the duty to give reasons under the American and European tradition of administrative law has been considered somewhat under-theorized, such duty has become a rule in several jurisdictions of the world.[161] For instance, in Belgium a separate statutory law has clearly stipulated that giving reasons is mandatory in all administrative decisions. More importantly, the Belgian Constitutional Court suggested that the law requiring the giving of reasons has obtained a constitutional status.[162] In the Netherlands, the General Administrative Law has stipulated that giving reasons is mandatory.[163] The same is true in France.[164] In addition to individual member

[158] Interview with Tolu Fite, supra note 84; and interview with Zewude Damtew, supra note 84.
[159] FTAP, supra note 63, Article 55(3).
[160] Id., Article 55(6).
[161] Jerry L. Mashaw, Reasoned Administration: the European Union, the United States, and the Project of Democratic Governance, *The George Washington Law Review*, Vol.76, No. 99, (2007), p. 101.
[162] Id.
[163] Ingrid Opdebeek and Stéphanie De Somer, Duty to Give Reasons in the European Legal Area: Mechanism for Transparent and Accountable Administrative Decision-Making? A Comparison of Belgian, Dutch, French and EU Administrative

states, the duty to give reasons is clearly entrenched under the EU legal order. In this regard, Art. 296 of the Treaty on the Functioning of the European Union (TFEU) states that legal acts are required to state the reasons on which they were based and shall refer to any proposals, initiatives, recommendations, requests, or opinions required by the treaties.[165] In addition, the charter on Fundamental Right of the European Union, which has enshrined the right to good administration, has stipulated that the administration is duty bound to give reasons.[166] Giving reasons in administrative decisions is also a requirement in USA,[167] Canada[168] and the UK.[169]

There are several justifications for the duty to give reasons. To begin with, the duty to give reasons contributes to the development of a relationship of confidence between an administrative body and a person affected by the decision of that body since reasoned decisions are instrumental in enhancing transparency which in turn has become one of the most important pillars of modern democratic administration.[170] Secondly, giving reasons enables legal subjects to have better information which in turn facilitates oversight by administrative authorities and the judiciary. Thirdly, the duty to give reasons ensures thorough decision making because the decision making administrative organ is compelled to think seriously before it makes a certain decision.[171] Moreover, it is argued that giving reasons fosters the rationality of decision-making, compels state bodies to give account for their decisions, facilitates judicial protection and adds consistency to decision making by an administrative organ. Furthermore, it is believed that giving reasons compels the decision-maker to give proper attention to the decisions which in turn increases the acceptability of such decision.[172] According to Buijze, the core justification for giving reasons is that it gives transparency on the level of the motives or justifications underlying the decision since transparency is an important principle of modern administration in general and tax administration in

Law,(2016)file:///C:/Users/user/AppData/Local/Temp/7-RAP-2-1.pdf, (accessed February 5,2020),P.101.

[164] Id.

[165] See The Consolidated Version of The Treaty on the Functioning of the European Union, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012E%2FTXT, (accessed March 2, 2020).

[166] Fundamental Right of the European Union, Official Journal of the European Union, at file:///C:/Users/user/AppData/Local/Temp/text_en.pdf,(accessed March 4, 2020).

[167] See Kendrick Lo, When Efficiency Calls: Rethinking the Obligation to Provide Reasons for Administrative Decisions, *Queen's Law Journal*, Vol.43, No.2, (2018), p. 325

[168] See H.L. Kushner,The Right to Reasons in Administrative Law, *Alberta Law Review*, Vol. 24, No. 2, (1986), pp.305-33.

[169] P.P. Craig, *Administrative Law*, Sweet and Maxwell, (2003), pp.436-443.

[170] Ingrid Opdebeek and Stéphanie De Somer, supra note 163, p.103.

[171] Id

[172] Id, p.131.

particular.[173] Although transparency could not to be taken as an end by itself, it is a means to insure accountability of public administration.[174]

When we see the practice at the federal level, we realize that the Review Department tries to give reasons in its decisions.[175] However, it is hardly possible to conclude that the decisions are adequately reasoned with critical legal analysis.[176] This is partly attributable to the fact that members of the review department are required to entertain many cases to be decided within 180 days. Hence, in order to ensure timely disposition of cases, members cannot make thorough analysis and give detailed reasons for their decisions.[177]

Concluding Remarks

Tax authorities around the world have the power to review their own decisions by establishing a department for this purpose which is usually different from the department making the tax decision. However, the practice of various jurisdictions shows that taking a tax complaint to the internal review organ of the tax authority is mandatory while there are several jurisdictions which have made it optional. In Ethiopia, taking a tax complaint to the Review Department is mandatory if a taxpayer wishes to challenge a tax decision made by the tax authority. To this end, the Tax authority has established an internal review organ called the Review Department which is a permanent organ of the tax authority. When a notice of objection is filed against a tax decision by a taxpayer, the Review Department, having entertained the arguments of both an aggrieved taxpayer and the tax authority, makes a recommendation which may be approved, varied, rejected or remanded by the concerned official of the tax authority.

The current FTAP has introduced some useful procedural rules which enhance the adequacy, effectiveness and fairness of the tax dispute resolution system at this stage. To mention the conspicuous ones, the FTAP has tried to define tax disputes that can be entertained by the review Department; it has also extended the hitherto 10 days' time limit to 21 days for filing a notice of objection to the Review Department though the sufficiency of this time limit is still questioned. In Addition, the Proclamation has stated that a taxpayer has the right to request

[173] A. Buijze, *The Principle of Transparency in EU Law*, Uitgeverij Box Press, (2013), p. 36–51.
[174] M. Bovens, Analyzing and Assessing Accountability: Conceptual Framework,*European Law Journal*, No. 13, issue 4, (2007) p. 447.
[175] We can understand this by having a look at decisions of the Review Department.
[176] Interview with Dawit Teshome, consultant and attorney at law, September 17,2020.
[177] Interview with Zewude Damtew, supra note 84.

the extension of the 21 days' time limit where he is not able to make the notice of objection within the 21 days on account of sufficient cause that prevented him from filing the notice of objection within the 21 days' time limit. Moreover, the FTAP has provided that decision must be made within 180 days which was alien to the Ethiopian tax dispute resolution system starting from the early 1940s until the entry into force this proclamation in July 2016. Furthermore, the FTAP has provided, though tangentially, that the taxpayer has the right to be heard. Finally, the FTAP has stated that the Tax Authority is duty-bound to give reasons for its decisions which is supported by the jurisprudence of administrative justice in other jurisdictions of the world as giving reasons is nowadays taken to be a useful element of procedural fairness and procedural due process of law.

Despite the above positive developments made by the FTAP, there are also some critical shortfalls that should have been addressed by the Proclamation. To begin with, even if the FTAP has tried to define the scope of review power of the review department, it has not made it clear whether the listing made under Art.2(34) of the Proclamation is an indicative listing or an exhaustive listing which can be a source of controversy where taxpayers lodge complaints to the Review Department other than the ones enumerated under this sub-article. Secondly, the selection, appointment, composition and removal of members of the Review Department are left to the discretion of the tax officials while the law-maker, which enjoys the highest political authority in the country,[178] should have included at least general legal provisions dealing with these issues in the FTAP. Third, the Proclamation has taken the minimum time limit, as compared to the international practice, for filing an objection decision to the Review Department while the taxpayers earnestly recommended 30 days at the time when the draft proclamation was tabled for discussion.

Fourth, the Proclamation has not expressly and emphatically provided that taxpayers are entitled to hearing when they litigate their cases before the Review Department though hearing is an indispensable element of procedural due process of law. Fifth, the FTAP has imposed burden of proof on taxpayers under all circumstances which makes the tax dispute resolution system at this stage unfair to the taxpayer while the tax authority is allowed to unduly benefit from presumption of correctness no matter how erroneous and unfounded its tax decision might be. Sixth, although the Proclamation has stated that an objection decision has to be made within 180 days reckoned from the time of filing the

[178] The FDRE Constitution, supra note 116, Art.50(3).

notice of objection, the law has not contained any meaningful sanction if the tax authority fails to make the objection decision within this period of time without any justification.