The Effect of Changes in Tax Rates Amidst Tax Years in the Determination of Corporate Income Taxes in Ethiopia: A Comment on Federal Supreme Court Cassation Decision on *ERCA v MIDROC Gold*

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Abstract

A dispute occurred between ERCA v MIDROC Gold (Federal Supreme Court Cassation Division, File No. File No. 130705, 07 Sep. 2017), because the mining tax rate was re-amended from 35% to 25% in 26 July 2013, bifurcating the tax year of 2013, creating an issue what should be the effect of the change in the tax rates amidst the tax year, particularly, whether these two tax rates can be applied in determining the latter's profit taxes. The Federal Tax Appeal Commission, the Federal High Court, the Federal Supreme Court and the Cassation Division of the Federal Supreme Court decided that mining income taxes are paid on the aggregate annual taxable income not by dividing the year into months, and applied the new 25% tax rate for the aggregate annual taxable income. The author, in this work, disagrees with these decisions and argues that the times from 01 January to 25 July and from 26 July to 31 December should have been separately treated as transitional tax years; the 35% and 25% tax rates should have been applied to these transitional tax years respectively, and the annual tax should have been the summation. In this way, it was possible to avoid the undue retroactive application of the 25% tax rate, to strike a balance between the tax authority's interest to collect due taxes and the taxpayer's interest to pay taxes only due according to law, and moreover, to develop a precedent to avoid possible similar future controversies.

1. Introduction

Followed mining income tax rate reduction from 35% to 25%in July 2013[1], a dispute arose between ERCA *v* MIDROC Gold,[2] whether two rates can be

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[1] Mining Income Tax (Amendment) Proclamation No. 802/2013, Fed. Neg. Gaz., Year 19, No. 58, (Proc. No. 802/2013), Article 2 and Mining Income Tax (Amendment) Proclamation No. 23/1996, Fed. Neg. Gaz., Year 2, No. 11, (Proc. No. 23/1996), Article 2

applied in the determination of the latter's income tax for the tax year of 2013. The Ethiopian Revenues and Customs Authority (ERCA) argued that the tax should be computed by applying the 35% and 25% tax rates using proportion method and summing the two proportions. MDIROC Gold argued that the 25% tax rate prevailed in the tax year. The 25% rate was effective form 26 July 2013.[3] This shows that the 35% rate was effective through 25 July 2013. The application of these two rates in the tax year created a dispute. The Federal Tax Appeal Commission (FTAC), the Federal High Court (FHC), the Federal Supreme Court (FSC) and the Cassation Division of the FSC (Cassation Bench) decided for MIDROC Gold. The author questions the appropriateness of these decisions. It is argued that if tax rates are changed amidst tax years, the effect should be that both tax rates should apply to their sphere of transitional tax years within the same tax year. In so doing, the case comment has four sections. Next to this introduction, section two presents the facts of the case. Section three presents the author's comments, and section four goes for conclusion.

2. Summary of Facts of the case

Before 1993, mining income was taxed under the main income tax law, but with a higher rate of 51%.[4] When special mining tax law was introduced in 1993, the rate was made 35% for small-scale mining and 45% for large-scale mining.[5] The tax rate for large-scale mining was reduced to 35% in 1996[6]

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[2] Ethiopian Revenues and Customs Authority *v* MIDROC Gold Mines PLC, Federal Supreme Court Cassation Division, File No. 130705, decision of 07 Sep. 2017(30 Meskerem 2010 E.C) (Unpublished)(ERCA *v* MIDROC Gold). Recently, the Ethiopian Revenues and Customs Authority has been changed to the Ministry of Revenues. The author has used the name ERCA for convenience in this work.

[3] Proc. No. 802/2013, supra note 1, Article 3.

[4] Tadesse Lencho, *Towards Legislative History of Modern Taxes in Ethiopia, 1941-2008*, Journal of Ethiopian Law, Vol. 25, No.2 (Towards Legislative History of Modern Taxes), (2012), p. 124.

[5] Mining Income Tax Proclamation No. 53/1993, Neg. Gaz., Year 52, No. 43, (Proc. No. 53/1993), Article 3.The lowering of the mining tax rate in this respect can be considered part of the liberalization reforms that followed the collapse of the Dergue regime and the capture of state power in Ethiopia by the Ethiopian People's Revolutionary Democratic Front in 1991. See generally Alemayehu Geda and Abebe Shimeles, *Taxes and Tax Reform in Ethiopia, 1990-2003*, United Nations University Research Paper No. 2005/65 (December 2005) and Alemayehu Geda, Readings on the Ethiopian Economy, (Addis Ababa University Press), (2011), pp. 188-206.The mining tax law had also included special provisions. These include, *inter alia*, straight-line depreciation allowance for capital expenditures and pre-production costs in four years; reinvestment deduction up to 5% of the gross income for each accounting year; and loss-carry-forward for ten consecutive years. Moreover, the tax year was specially provided to be the Gregorian calendar year ending in 31 December. With respect to the determination of taxable income, it was provided that taxable income should be determined after all allowable expenditures, depreciation allowances, reinvestment deductions and transferable losses are subtracted

and to 25% in 2013.[7] The re-amendment to the mining tax law, which reduced the tax rate from35% to 25%, was effectivefrom26 July 2013, i.e., almost amidst the tax year of 2013.[8] Following this, MIDROC Gold reported that its taxable income for the tax year of 2013 was ETB 1, 976, 578, 000.40 (One Billion Nine Hundred Seventy Six Million Five Hundred Seventy Eight Thousand Birr and Forty Cents). Then, having computed its tax liability at 25% rate, it reported that the tax due for it to pay was ETB 494, 144, 500.10 (Four Hundred Ninety Four Million One Hundred Forty Four Thousand Five Hundred Birr and Ten Cents). Then after, stating that it had paid ETB 500, 000, 000.00 (Five Hundred Million Birr) withholding tax, it claimed a refund of ETB 5, 855, 499.90 (Five Million Eight Hundred Fifty Five Thousand Four Hundred Ninety Nine Birr and Ninety Nine Cents).

ERCA's Large Taxpayers Branch Office Tax Assessment and Collection department revised MIDROC Gold's tax declaration. It divided the taxable income that MIDROC Gold reported into two proportions and computed the tax for the income from 01 January to 25 July (206 days) at 35% rate and the income from 26 July to 31 December (159 days) at 25% rate using proportion method. Taking the sum of these two proportions, it decided that the tax due was ETB 605, 699, 313.12 (Six Hundred Five Million Six

from the gross income. See Towards Legislative History of Modern Taxes, *Id*., p. 125 and Proc. No. 53/1993, *Id*., Article 2(2), 4, 8, 9 and 10.What has to be noted is that the mining tax law did not make a difference with respect to the fact that corporate profit taxes are payable annually. Compare Article 4 of Proc. No. 53/1993, *Id*., with Article 18 of Income Tax Proclamation No. 286/2002, Fed. Neg. Gaz., No. 8, Year 34 (Proc. No. 286/2002) (now repealed) and Article 20 of the Federal Income Tax Proclamation No. 979/2016, Fed. Neg. Gaz., Year 22, No. 104 (Proc. No. 979/2016).

[6] Proc. No. 23/1996), supra note 1, Article 2.

[7] Proc. No. 802/2013, supra note 1, Article 2. New income tax law has been enacted in 2016. The mining taxation has been incorporated back to the income tax law, with lower tax rate of 25%. See Proc. No. 979/2016, *supra note 5*, Article 37(3) and 100(1)(b). Whether the continuous reduction of mining tax rates for large-scale mining from 45% to 35% and further to 25% was backed by dictating economic realities seems questionable. Usually, the reasons for enacting or amending a law are highlighted in preambles or separate object clauses. Neither of the amendments to the mining tax law, however, had stated reasons. Only roughly expressed in the preambles of both amendments was the fact that amending the law was necessary. See Proc. No. 23/1996, supra note 1 and Proc. No. 802/2013, supra note 1, Preambles. Moreover, while mining taxation has been incorporated to the income tax law, it does not seem there is sufficient reason to justify taxing mining income at 25% whereas other corporate profits are taxed at 30% rate. See Proc. No. 979/2016, *Id*., Compare Article 19(1) and Article 37(3). Lowering mining tax rate is not, however, unique to Ethiopia. Studies show that African countries, generally, impose lower corporate tax rates for mining than the general tax regime, and particularly, African countries under tax Multinational Corporations involved in the mining sector. See M. Moore et. Al (2018), *Taxing Africa: Coercion, Reform and Development*, (London: ZED Books) (Taxing Africa) pp. 89-111 and Bertrand Laporte, Céline De Quatrebarbes and Yannick Bouterige*, Mining taxation in Africa: The gold mining industry in 14 countries from 1980 to 2015*, (2017) <halshs-01545361> p. 12.

[8] Proc. No. 802/2013, supra note 1, Article 3.

Hundred Ninety Nine Thousand Three Hundred Thirteen Birr and Twelve Cents).

Then, deducting the withholding tax which MIDROC Gold claimed that it had paid, the department computed an extra tax of ETB 105, 699, 313.12 (One Hundred Five Million Six Hundred Ninety Nine Thousand Three Hundred Thirteen Birr and Twelve Cents) and, added late payment interest and penalty it noticed MIDROC Gold to pay ETB 112, 773, 768.14 (One Hundred Twelve Million Seven Hundred Seventy Three Thousand Seven Hundred Sixty Eight Birr and Fourteen Cents). MIDROC Gold appealed to the Tax Review Committee within ERCA's Head Office, which confirmed the tax decision. MIDROC Gold, then, appealed to the FTAC, which decided for it.[9] The FTAC's decision was confirmed by the FHC,[10] FSC[11] and the Cassation Bench.[12]

Throughout the litigation, ERCA argued that since Proc. No. 802/2013, which provided for 25% mining income tax rate, was effective only from the time of its publication in the Federal Negarit Gazeta on 26 July 2013, Proc. No. 23/1996, which provided for 35% mining income tax rate was effective in the time from 01 January to 25 July; and these two rates were effective and binding in their time sphere within the tax year. It added that applying the new law, i.e., Proc. No. 802/2013 retroactively beginning from 01 January 2013 was against the provision of the Proclamation itself, therefore, the tax should be determined in two proportions, then, these two proportions should be summed for the annual tax. On the contrary MIDROC Gold argued, that since the tax rate was amended before the tax for the tax year of

[9] MIDROC Gold *v* ERCA, FTAC, File No. 950, decision of 13Nehasie 2007 E.C., (Unpublished)

[10] ERCA *v* MIDROC Gold, FHC, File No.170680, decision of 03/05/2008 E.C., (Unpublished)

[11] ERCA *v* MIDROC Gold, FSC, File No. 123093 decision of 22/09/2008 E.C., (Unpublished). The readers should note here that had it been according to the Civil Procedure Code, second appeal from the FHC's decision would be impossible since the FHC did not vary the FTAC's decision. See Civil Procedure Code of the Empire of Ethiopia, Decree No. 52 of 1965, Neg. Gazeta, Extraordinary Issue No. 3 of 1965, Article 231(2). In case of tax appeals procedure as is in the case of our discussion, however, second appeal from the FHC's decision is possible to the FSC and is not limited to cases the FHC varies the FTAC's decisions. See Proc. No. 286/2002, supra note 5, Article 112(3). The new federal income tax law has also a clear and express provision that appeal is possible from the FHC's decisions to the FSC. See Federal Tax Administration Proclamation No. 983/2016, Fed. Neg. Gazeta, Year 22, No. 103, Article 58(1). The important lesson here is that while the relevant tax law provisions provide for the right to second appeal without limiting it to cases where there is variation of decisions, these prevail over the Civil Procedure Code regarding tax appeals.

[12] Fasika Tadesse, "Midroc Comes out Victorious in Tax Dispute", Addis Fortune, [Vol 18, No. 914] Oct 30, 2017, available at https://addisfortune.net/articles/midroc-comes-out-victorious-in-tax-dispute/, accessed on 25/10/2018, (hereinafter Fasika Tadesse).

2013 was due, i.e., before the tax year of 2013 was finalized, the prevailing tax rate for the tax year was 25%; and that so long as the tax has to be determined based on the aggregate amount of the annual taxable income, there was no any provision in the law which allowed dividing the tax year into two and computing the tax based on two tax rates.

The FTAC, FHC, FSC and the Cassation Bench reasoned that the mining income tax law, issued in consideration of the special nature of mining taxation, provided for the accounting year for mining income taxation to be the Gregorian calendar year ending in 31 December. They also added that the mining income tax law had provided for mining income tax to be determined on annual basis calculating the annual aggregate amount of taxable income after all allowable deductions are subtracted from the annual gross income not by dividing the tax year into months. Accordingly, they applied the 25% rate for the total annual tax.

The case attracted divided opinions. When it was pending in the FTAC, many of ERCA's Public Prosecutors opined that the law was plain and the tax should be calculated using the two tax rates, whereas others argued that the purpose of the new law was to favor the taxpayer by lowering the tax rate, hence the tax should be calculated at 25% rate.[13] After the case was decided by the Cassation Bench, Yohannes Woldegebriel, former Legal Service Directorate Director of the then Ethiopian Customs Authority, has been reported to have agreed with the cassation decision on the point that the Company's turnover has to be assessed annually not on monthly basis, but doubted the appropriateness of the cassation decision applying the new tax rate retroactively, because, he believed that proclamations in Ethiopia are effective up on publication in Federal Negarit Gazeta.[14] The author also observed that legal officers in the Ministry of Revenue, as currently is, agreed with the decision doubting that two tax rates can be applied in a tax year.[15]According to this author, the decisions of the FTAC, FHC, FSC and the Cassation Bench are indefensible. The following section presents the author's comments.

[13] The author was one of the ERCA's Public Prosecutors assigned to the litigation in this case, and, had been discussing on the matter with many of the Public Prosecutors who were in the ERCA's Head Office.

[14] Fasika Tadesse, supra note 12.

[15] The author, in the due course of writing this comment, has discussed on the matter with former colleagues in the Legal Service Department of the Ministry of Revenues.

3. Analysis and Comment

According to the author's views, the decisions of the FTAC, the FHC, the FSC, and the Cassation Bench are not sound, at least, for the following reasons. First, applying the 25% rate retroactively from 01 January 2013 goes against the express provision of Proc. No. 802/2013 for it to be applicable from 26 July 2013. If retroactive application of the 25% rate were the parliamentary intent, expressly providing so would have been possible. Although there is no prohibition of retroactivity of tax statutes in Ethiopia, according to the author's view, tax laws should not be applied retroactively, at least, in cases the legislature did not provide so. The debate in other countries, similarly, is on the validity of retroactive tax bills enacted by the legislature.[16] There is no issue of retroactive application of tax statutes the retroactive application of which is not provided by the legislature. In our case, the parliament did not provide for the 25% rate to be applied retroactively from 01 January. A tax bill can also be made to begin application from the first day of the tax year either retrospectively or prospectively. For example Proc. No. 286/2002 was provided to prospectively apply for incomes generated from 01 Hamle 1994 E.C., whereas it was in force from 27 Sene 1994 E.C.[17]. This was not the case in the case of our discussion. In this case, Proc. No. 802/2013 had been unduly applied retroactively from the beginning of the tax year of 2013, based on a wrong understanding that the tax year is indivisible and two tax rates cannot be applied in one tax year.[18]

Second, the FTAC, the FHC, the FSC, and the Cassation Bench failed to balance the interest of ERCA (tax authority) and MIDROC Gold (taxpayer). Balancing is settling conflicts between fundamental principles, both accepted in the legal system, by determining the proper boundary between them.[19] Its essence is that it is settling conflicts not in an "all or nothing" approach, i.e.,

[16] For an earlier analysis on the issue in the case of U.S.A. for example, see Ralph R. Neuhoff, Retrospective Tax Laws, 21 St. Louis L. Rev. 001 (1935).

[17] Proc. No. 286/2002, supra note 5, Article 120

[18] Interestingly, the Cassation Bench has established a precedent that the confiscation of properties found to have entered the Ethiopian territory without custom's clearance or the payment of the due customs duties emanates from tax law not from criminal law and that the principle of non-retroactivity of criminal law does not apply, as if confiscation of property was not a penalty. See *Custom's Public Prosecutor v Ato Tsegahun Mengistu*, File No. 23855, in Federal Supreme Court Cassation Decisions, Vol. 7, pp. 265-269.

[19] Aharon Barak, The Judge in a Democracy, Princeton University Press: Princeton and Oxford, (2006) (*The Judge in A Democracy*), pp. 164-167.

eliminating or giving a zero value to either of the conflicting values.[20] Historically, the governments' power to tax and taxpayers' right to pay always conflict.[21] The case of our discussion is a manifestation of the conflict between the government's power to tax and the taxpayers' rights regarding the enactment, application and interpretation of taxing bills. However, while striking a balance between the interests of ERCA, i.e., collecting taxes according to the law and MIDROC Gold, i.e., paying taxes due only according to law was required, neither of the FTAC, the FHC, the FSC, and the Cassation Bench tried to. In this case ERCA lost totally and MIDROC Gold took all. What has to be understood, however, is that this precedent, unless changed, may disadvantage taxpayers. For example, if tax rate increases in the future in similar way, taxpayers will be taxed according to the highest rate for the whole tax year. What has to be clear here is that the FTAC, FHC, FSC or the Cassation Bench did not raise the general issue of how tax statutes have to be interpreted and, particularly, they did not clearly argue that the relevant provisions should be interpreted and the dispute be settled in favour of the taxpayer. They, rather, seem to have simply rushed to conclude that the tax year was indivisible, in effect deciding for the taxpayer. The case would be very tricky for them if the tax arte was increased. Indeed, one doubts if they would easily dare to establish the rule that the tax year is indivisible and apply to the new rate retroactively.

Now, the question comes: how should have the case been settled? Perhaps, the issue would not have occurred had the legislature provided for Proc. No. 802/2013 to be applicable either retroactively from the beginning of the tax year of 2013 or proactively from the beginning of the tax year of 2014. Now, the issue is how to fill this gap. Similar to interpretation in law, interpretation of tax statutes is subject to debates.[22] On the one hand, based on the view

[20] Ibid

[21] For an historical account on this, see Chantal Stebbings, The Victorian Taxpayer and the Law: A Study in Constitutional Conflict, Cambridge University Press, (2009).

[22] The debates on interpretation in law vary between Textualism (New Textualism), Intentional-ism (Originalism) and to Purposive-ism regarding the substantive approaches of interpretation and between Strict Constructionist Rule, Literal (Plain Meaning) Rule, Golden Rule, Mischief Rule and Rules of Analogy regarding the technical canons of interpretation. For example, see Aharon Barak, Purposive Interpretation in Law, (Princeton University Press: Princeton and Oxford, (2005), pp. 12-12; *The Judge in a Democracy*, supra note 19; Chinua Asuzu, "Remember Lot's Wife! Interpretation of Tax Statutes", available at http://ssrn.com/abstract=1920702, accessed on 17/10/2018, (Remember Lot's Wife); and John H. Farrar, "Reasoning by Analogy in the Law", Bond Law Review: Vol. 9: Iss. 2, Article 3, (John H. Farrar)

that the taxpayer is weaker than the government as in penal laws, there is an argument that doubts in tax statutes should benefit taxpayers.[23] The argument for the interpretation of tax bills in favour of taxpayers is based on the literal rule of statutory interpretation. According to this, tax statutes are to be construed literally, words in tax bills are given their ordinary meaning and ambiguities are resolved in favour of taxpayers.[24] The literal rule sees taxes as penalties imposed by the state limiting citizens' right to prosper from their business.[25] Not all ambiguities in tax bills are, however, resolved in favour of the taxpayer. While ambiguities in taxing provisions are resolved in favour of taxpayers, ambiguities in exemption provisions of tax bills are resolved in favour of the tax authorities, and strict interpretation does not mean that even the taxing (charging) provisions will never be construed reasonably, it means that benefit of doubt will be given to the taxpayer as a last resort. [26]

On the other hand, especially in connection to combating tax shelters, there is an argument for the purposive approach to interpretation of tax statutes.[27] Chinua Asuzu, one who opposes the argument in favour of taxpayers asked: "Is it necessarily correct to say that the taxpayer is always weaker than the Government? Is the Microsoft Corporation weaker than the Government of South Sudan?"[28] His allegation is true. Let alone a young state like South Sudan, lack of equipped human resource is one of the challenges for African countries to tax Multinational Corporations, especially those involved in the extraction sector.[29] On another view, the argument for tax statutes to be interpreted in favour of taxpayers remains indefensible if one considers taxes not as penalties by the state, rather as prices voluntarily paid for living in a

[23] Florence N. Dollo, 'Tax Legislation and the Lawyer's Training Needs- An African Perspective', cited in Remember Lot's Wife, *Id*., p. 25.

[24] John Tretola, "The Interpretation of Taxation Legislation by the Courts - A Reflection on the Views of Justice Graham Hill" in Revenue Law Journal, Volume 16, Issue 1, Article 5, (2006) pp. 74-76.

[25] Id., pp. 78-79.

[26] Stephen W. Bowman, "Interpretation of Tax Legislation: The Evolution of Purposive Analysis" in Canadian Tax Journal, Vol. 43, No. 5 (1995) p. 1170; Sanjeev Kumar Tiwari, "Rules for Interpretation of Taxing Statutes: A Critical Appraisal of New Trends and Approaches" in International Journal of Law and Legal Jurisprudence Studies, Volume 2 Issue 5, ____pp. 112-116.

[27] Shannon Weeks McCormack, "Tax Shelters and Statutory Interpretation: A Much Needed Purposive Approach", University of Illinois Law Review, Vol.__ No. 3. (2009) pp. 697-772

[28] Remember Lot's Wife, supra note 22, p. 26.

[29] Taxing Africa, supra note 7, p. 106.

modern society.[30] Indeed, although taxes are mandatory contributions, they are by no means to be put in parallel to criminal fines and confiscations. Therefore, "there are no special principles of construction applicable only to fiscal legislation[s],"[31] tax disputes can be settled using the approaches and canons of interpretation used in other statutes. When we relate it to the case of our discussion, the issue was not whether the taxpayer is liable to pay tax or not, it rather was whether a tax year can be divided into two shorter tax years to give effect to two different tax rates, both validly provided by a parliamentary law. Hence, it becomes true that if the precedent established by this case that tax year is indivisible sustains, taxpayers will be taxed at a higher rate for the whole year in case tax rate increases amidst tax years.

Accordingly, for the settlement of this case, the tax year of 2013 should have been divided into two *transitional tax years*. In Proc. No. 286/2002, which was in force while the case was in litigation, it was provided that if taxpayer's accounting year is changed from Ethiopian Budget year to Gregorian calendar year or vice versa, the time between the last tax year and the beginning of the new tax year is treated separately as *transitional tax year*.[32] Similar provision has been included also in the new income tax law.[33] This shows that although corporate income taxes, conventionally, are paid annually, the tax year is not totally indivisible. The author believes that the provision for transitional tax years in cases of change in taxpayer's accounting year should be applied to cases of change in tax rates effective amidst a tax year, as is in the case of our discussion, by analogy.[34] Analogy means treating case alike if their similarity outweighs their difference.[35] According to the author's view, the purpose of the provision in the income tax law for transitional tax year is to avoid confusion and controversy as to how the change in the accounting year shall be treated for the purpose of profit tax calculation. Similarly, the determination of annual tax is the tripartite interplay between "tax year", "taxable income" and "tax rate". This

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[30] See Emmanuel Kasimbazi, "Taxpayers' Rights and Obligations: Analysis of Implementation and Enforcement Mechanisms in Uganda," Danish Institute for International studies, DIIS Working Paper No 2004/12 (Copenhagen, 2004)

[31] Vinelott J (1982), Interpretation of Fiscal Statutes, cited in Remember Lot's Wife, supra note 22, p. 24.

[32] Proc. No. 286/2002, supra note 5, Article 64(5), emphasis added.

[33] See Proc. No. 979/2016, supra note 5, Article 28(5).

[34] What is only prohibited is establishing crimes by analogy. See, for example, FDRE Criminal Code, Article 2(3).

[35] John H. Farrar, supra note 22, p. 149.

means that the tax payable in a tax year is equal to the profit (taxable income) earned in the tax year multiplied by the tax rate provided for in the law. Therefore, if the change in the taxpayer's accounting year crates a transitional tax year in the time between the ending tax year the beginning of the coming new tax year, this should, similarly, apply to change of tax rate to the effect that if tax rates change amidst the tax year, the tax year should be divided into two transitional tax periods based on time where the old rate ends and the new rate begins application.

Similarly, the provision in the income tax law for transitional tax year, which, as argued above is applicable to cases of change in tax rates, should have been applied to the change in the mining income tax rate in the case of our discussion. This argument is supported by the *acontrario* reading of the provision in the mining tax law, which provided that other tax laws cannot be applicable to matters covered under the mining income tax.[36] The mining tax law, although it provided for the tax year to be the Gregorian calendar year, as we have seen earlier, did not expressly preclude change of tax rates and the resultant application of transitional tax periods. Therefore, the tax year of 2013 should have been divided into two transitional tax years; the tax for the income from o1 January to 25 July should have been computed at 35% rate and the income from 26 January to 31 December at 25% tax rates respectively; and the total tax due for the tax year should have been the sum of the amounts determined for these transitional tax years. What has to be underlined is that, determining the tax using transitional tax years could not cause any undue harm to MIDROC Gold (taxpayer) except that it would pay the tax according to the law of the parliament. In this way, it was possible to avoid the undue retroactive application of the new law on the one hand and strike a balance between the interests of the parties to the case on the other. More importantly, this would have been a precedent enabling to avoid possible similar future controversies, which may arise due to revision in tax regime resulting in increase or decrease of tax rates effective amidst a tax year.

The author's argument for the application of transitional tax years in case of change in tax rates as in the case of our discussion is not uncommon in the experience of other countries having developed tax system. For example, the

[36] Proc. No. 53/1993, supra note 5, Article 14

Internal Revenue Code of the U.S.A. provides that "[I]f any rate of tax … changes, and if the taxable year includes the effective date of the change …tentative taxes shall be computed by applying the rate for the period before the effective date of the change, and the rate for the period on and after such date …."[37], and, "the tax for such taxable year shall be the sum of that proportion of each tentative tax which the number of days in each period bears to the number of days in the entire taxable year."[38] This provision clearly shows that the tax year is not indivisible. Indeed, if the tax rate changes before the tax year ends, the tax year is divided into two short tax years to enforce the two tax rates, and the tax due for the entire tax year is calculated by taking the summation. The author hopes similar express provision will be included in the Ethiopian corporate income tax law in the future. It is regrettable, however, that the FTAC, the FHC, the FSC, and the Cassation Bench did not try to apply the provision for transitional tax year in the case of our discussion through interpretation. They even did not raise the question whether or not the change in tax rates amidst the tax year can have the effect of bifurcating the tax year into two transitional tax years. They, rather, mistakenly rushed to their conclusion taking for granted that the tax year is indivisible.

Lastly, a point that has to be raised is the understanding on ERCA's part. According to the author's understanding, if the times from 01 January to 25 July and from 26 July to 31 December were treated separately as transitional tax years, the tax should have been computed by determining two separate taxable incomes for each transitional tax year vouching all transactions conducted within these transitional tax years, not by using proportion method. As already said earlier, however, ERCA, improperly, took the annual taxable income which MIDROC Gold reported as an aggregate amount and divided it proportionally into two based on the number of days of the tax year. In addition to this, even throughout the litigation, although ERCA argued for the tax year to be divided into two and the two tax rates to be applied respectively, it did not expressly argue that the times from 01 January to 25 July and from 26 July to 31 December should be treated as "transitional tax years." Moreover, it did not argue that its argument was

[37] 26 U.S. Code § 15 (a)(1), available at https://www.law.cornell.edu/uscode/text/26/15, accessed on 17/12/2018.

[38] *Id*., § 15 (a)(2).

supported by the analogical interpretation of the provision for transitional tax year in the income tax law in case of change in taxpayer's accounting year. Because of this, ERCA's argument to divide the tax year into two was seen as "strange" to the law. Had ERCA applied the treatment of transitional tax years properly in determining the tax and expressly argued for in the litigation, the author thinks, this might have helped the FTAC, the FHC and the FSC or at least the Cassation Bench to understand the nature of the case.

4. Conclusion

Although it is conventional knowledge that corporate profit taxes are paid annually, when the taxpayer's accounting year changes from Ethiopia Budget year to Gregorian calendar year and vice versa, according to the income tax law, the time between the last tax year and the beginning of the new tax year is separately treated as transitional tax year. This shows that the tax year is not totally indivisible. However, there is no provision in the law whether change in tax rates amidst a tax year can have the effect of dividing the tax year into two transitional tax years. In 26 July 2013, the mining income tax rate was re-amended from 35% to 25%. This created a dispute regarding the application of these two tax rates to the tax year of 2013 in ERCA *v* MIDROC Gold. In this case, the FTAC, the FHC, the FSC and the Cassation Bench decided that mining income taxes are payable annually not by dividing the tax year into monthly basis, and applied the 25% tax rate retroactively from the beginning of the tax year. The author disagrees with these decisions, and argues that the change in tax rate amidst the tax year should have the effect of bifurcating the tax year into two. Accordingly, the times from 01 January to 25 July and from 26 July to 31 December should have been treated separately as transitional tax periods; the 35% and 25% should have been applied to the income generated in these transitional tax years respectively; and the tax due for the entire tax year of 2013 should have been the sum of the taxes determined for these transitional tax years.