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ADDIS ABABA UNIVERSITY SCHOOL OF LAW

LL.M PROGRAM (BUSINESS LAW)

The Powers and Proceedings of the Review Departments in Tax Disputes: The Law and Practice of the Review Department in the Head Office and Large Taxpayers Branch Office

BY

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A Thesis Submitted to Addis Ababa University, School of Law in Partial Fulfillment of the Requirements of the Degree of Masters in Business Law(LL.M)

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Declaration

I, the undersigned, declare that this thesis is my original work and all sources used have been duly acknowledged.

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Acknowledgement

I owe special indebtedness to the good hearts that have been on my side throughout this work. From the very inception of the concept and development of the proposal through the whole course of the research, it is the intellectual views and constructive comments including technical assistance of my advisor Dr. Taddese Lencho that gave this research sense, meaning and shape. My friends Mr. Arba Beyene and Mr. Mesfin Beyene you deserve a special acknowledgement for your assistance and moral encouragement.

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Acronyms

Art.: Article

MOR: Ministry of Revenue

FTAP: Federal Tax Administration Proclamation

TRD: Tax Review Department

FAG: Federal Attorney General

FDRE: Federal Democratic Republic of Ethiopia

FDREC: Federal Democratic Republic of Ethiopia Constitution

OECD: The Organization for Economic Development and Cooperation

ADR: Alternative Dispute Resolution

FTAC: Federal Tax Appeal Commission

FITP: Federal Income Tax Proclamation

FETP: Federal Excise Tax Proclamation

FAPP: Federal Administrative Procedure Proclamation

CPC: Civil Procedure Code

Abstract

Internal tax review system is a tax dispute settlement mechanism. As per the Ethiopian Tax administration system, it is a mandatory mechanism for a tax payer who objects a decision of a tax authority before a tax payer takes his/her case before the Tax Appeal Commission. The purpose of this thesis is to examine whether there are adequate rules for internal tax review mechanism and whether such rules are adhered by the internal review department and the practical challenges that the department faces. To this end the researcher employed qualitative research method and hence, analyzed the Tax Administration Proc. No,983/2016 and the Directive on internal tax review, Directive Number 171/2021 along with empirical data obtained from officers, lawyers, tax experts, by employing interview techniques and reviewing tax cases from the department. The thesis, therefore, argues that there are gaps in the Proclamation with regard to rules of evidence and cost of litigation before the department; gaps in the Directive with respect to composition of committee members, case handling, hearing and powers of the ministry. Also, the ministry did not establish well-functioning department. Both officers and taxpayers lack knowledge of internal tax review mechanism. Hence, the researcher recommends that legal reform measures on the gaps identified, conducting training and awareness creation for the Authority's staffs and installing a suitable organizational structure and allocating adequate expert staffs are necessary for the proper functioning of the system.

CHAPTER ONE

Introduction

1.1. Background

It is inevitable and frequent that disagreements arise in the day-to-day operation of the tax authority. Tax dispute involves range of issues. It may be caused by tax shelters usually created by lawyers and accountants¹, inaccuracy of books of accounts, misunderstandings of the law by both the audit officer and tax payer which may stem from excessive complexity of tax system; amount of deduction allowed and taxability of the certain incomes or confusion as to the scope of a given tax law. “Whatever the cause of such disagreements, they must be handled properly before they come to have repercussions for the economy, since taxation is crucial component of any national economy”.² Providing the tax dispute resolution mechanism therefore, is integral to tax administration.

There are different alternatives to resolve tax disputes. It ranges from negotiation between the tax authority and tax payer to taking tax dispute cases directly to the regular courts. Now a days, it is countries’ experience that tax authority is entertaining tax disputes between the tax payer and itself when the tax payer disagrees with the decision of the authority.³ This power of adjudicating tax disputes can be justified by multiple of reasons. It is generally accepted that administrative agencies are appropriate forum for resolving disputes of special nature. One of the reasons is pragmatic consideration⁴ that it is believed that the administrative agencies have special knowledge and personnel in the area. Another reason for conferring combination of powers on administrative agencies is timely disposition of issues. Informality, specifically in administrative adjudication is also another consideration of entrusting power to resolve disputes with administrative agencies.

¹ Henry J. Aaron and Joel Slemrod (Editors), *The Crisis in Tax Administration*, The Brookings Institution Press, 2004, Washington DC, p. 3

²Loide Humutumwa, *Improving the Procedures for Resolving Tax Disputes in Namibia: A Case Study on Taxpayers’ Right to a Fair Hearing within a Reasonable Time*, Master’s Thesis, p. 35

³Aschalew Ashagire Byness, “Adjudication of Tax Dispute within the Tax Authority in Ethiopia: Critical Reflection on the Law and the Practice”, *Bahir Dar University Journal of Law*, Vol.11, No. 1, Dec, 2020, p.1

⁴ William F. Funk and Richard H. Seamon (5thed), *Administrative Law*, (Wolters Kluwer, New York, 2016), P.24

recommendations to the authority as to the decision to be taken on the objection.¹⁰It also empowers the ministry to issue the Directive specifying the procedures for reviewing an objection including hearings, and basis for making recommendations to the authority and the decision making procedure.¹¹

Objection of tax decision is a mandatory stage before taking it to administrative quasi-judicial body- Federal Tax Appeal Commission (hereinafter the Commission).¹²From the tone of the Proclamation, one can understand that the review department established must enjoy independence and the proceeding is envisaged to be conducted in accordance with fair hearing principles.¹³ As such, the department is expected to entertain objections by taxpayers independently and in a manner serving the objectives it is established to, such as, correcting the error of the ministry, justice, compliance, and timely disposition of the cases.

This paper is aimed at examining the power of the review department to accept the objection, producing evidence, and remanding to audit officer and the proceeding of hearing, document production and making recommendation to the minister or the person authorized by the minister in light of trends followed by other nations and accepted practices and guidelines put by the organizations such as world bank and OECD. The legal framework guiding the review department and practical challenges faced by the department is critically examined by investigating legal concepts, principles and tax laws related to tax dispute review process and accompanying this with qualitative research method using data collected through interview, personal observation and case analysis.

1.2. Statement of the Problem

Objection on tax decision is mandatory step stipulated under the federal tax administration proclamation. Thus, the taxpayer is required to have an objection decision on matters considered to be tax decisions. The writer of this thesis is of opinion that the step required by the Proclamation is not for the sake of fulfilling the procedure to be followed and put procedural barrier before

¹⁰ *Ibid*

¹¹ *Ibid* Art. 55(2)

¹² *Id* Art. 2(2)

¹³ *See Id*, Art.55/1, for example

taking the case to the appellate body. Rather, it is meant to serve some purposes envisaged by legislature.

Tax dispute review process must follow accepted standards such as fair hearing, correct fact finding method by exercising evidence production (production of both witnesses and documents), and impartial approach when entertaining the given case. Professionals capable of understanding the excessive complexity of the tax laws and accounting concepts must be appointed in order to properly handle the tax dispute presented to the review department.

To this end, there must be clear and mandatory rules that guide review departments and maintain the independence of the same. Some of the decisions the researcher noted, however, reveal that the department simply approves the decision passed by the audit section of the authority. Thus, it appears that the objection process is there to put procedural barrier before taking the case to the appellate body (the Commission in our case)¹⁴. Some decisions of the department are also not final that the department leaves fact finding process to the audit section and it creates grievance on tax payer. There is also claim on the part of tax payers that the department usually allows short time to produce some evidences which are sometimes bulky and out of country. Because of shorter time allowed to produce, the department does not settle the dispute and this is one of the reasons which forces tax payers to appeal against the decision of the department. Thus practices such as this are against objectives of settling the tax disputes such as correcting errors by tax authority, cost consideration of both the tax payers, early collection of revenue, timely settlement of disputes with minimum cost and serving justice. Therefore, this research tried to answer the following major research questions in which the writer identified the legal gaps in guiding the review department and practical mismatches that created hurdles on both the tax authority and tax payer.

1.3. Research Questions

1. Are rules of Ethiopian internal review system of tax dispute adequate enough to make it effective?
2. Are the existing legal requirements for internal review system of tax dispute properly followed by the relevant body?

¹⁴ FTAP, Art. 56

3. What practical challenges does the Tax Review Department/s face in performing its/their task?

1.4. Objectives

The paper generally aims at analyzing the law and practice on the powers and procedures of the tax review department. It, in particular, it will address the following objectives:

- To analyze the adequacy and effectiveness of the legal framework governing the powers and procedures of the tax review department.
- To describe the practice of the review department in complying or otherwise of the pertinent legal rules
- To investigate the practical challenges facing the department in performing its tasks.

1.5. Significance of the Study

The researcher believes that the final output of his investigation will add policy, legal and practical importance to policy makers, legislatures, practitioners and the academia. It specifically will have the following significance.

1. Help the law makers amend the loopholes in the law with regard to tax review procedures
2. Helping the tax authority to have effective tax dispute handling mechanism by depicting gaps and way outs
3. Fill the gaps in research and further help future researchers interested in the area as a blueprint for their research.

1.6. Scope of the Research

This research is limited to examine the tax dispute adjudication within the tax authority at federal level. Tax dispute adjudication at the Tax Appeal Commission and regular courts is out of the scope of the paper. The ministry of revenues has about 13 branches each having its own review department. Analyzing the case from each branch could be unmanageable and it is limited to tax review department at Head office and Large Taxpayers Branch with regard to practical aspects of the tax review process. It is only limited to administrative tax dispute excluding criminal related tax disputes.

1.7. The Methodology of the Study

The study followed a qualitative approach and both empirical assessment and doctrinal analysis were employed. Empirical approach was employed for the assessment of practical application and doctrinal approach for the analysis of adequacy of rules for internal tax dispute review system in Ethiopia at Federal level.

1.7.1. Research Design and Approach

The research was conducted based on a qualitative design. The researcher believed that qualitative design is proper to make an in depth analysis of the law related to the powers and procedures of the tax review system. It was also important to explain the practices of the review departments as applied to the answers responded by key informants to semi structured interviews and open ended questions.

1.7.2. Data Source and Collection Instruments

The data used for the purpose of this paper are generally relied on primary and secondary data. Specifically, it used laws, reflection of previous work experience and experience sharing of members of the review department. In the case of Secondary data, relevant official reports, legal documents and research papers were used in the study. Case analysis and reflection was also the major way of conducting this research. Information gathered from various published journals, reports, books, project reports, public speeches and related materials were consulted throughout the research.

In order to have insight on interpretation of the laws by concerned body, unstructured interview was administered. Interview of persons in tax review department, tax consultants was conducted in due course of the research. Therefore, analysis of laws, documents and other secondary sources was made.

1.8. Data Analysis and Interpretation

Qualitative data gathered was analyzed qualitatively by arranging issues of facts and law then putting separately in to the context it fits the most. The researcher employed rules of interpretation of legal instruments for legal analysis and logical reasoning for factual analysis. For the responses

made by key informants and tax payers' responses a thematic/segmental analysis technique was employed; by categorizing similar ideas in to themes/segments.

1.9. Limitation of the Study

The major challenge that has been faced by the writer were unavailability and inaccessibility of materials, unwillingness of officers in the review department of the ministry of revenues, tax payers selected for the interview and tax consultants.

1.10. Structure of the Thesis

To accomplish the objective this paper is organized into four chapters. The first chapter of the paper deals with the background of the research. Accordingly it starts with the introductory issues related to the internal tax dispute resolution alternative and states the problem it seeks to address, the main research questions to be answered, states the objective, justify the significance of the study, delimit the scope of the research conducted, decide the research methodology employed and explaining the ways data analysis and interpretation.

The second chapter tries to highlights on concepts approaches and rationale for providing for tax dispute review within the tax authority. In doing so, the chapter presents the concepts related to tax review, the approaches to tax review, justification for entrusting tax dispute review within the tax authority. In the chapter the literatures related to tax dispute review within the tax authority are reviewed to serve as basis to examine legal gaps and practical challenges in the following chapter of the paper.

The third chapter examines the extent of the power of the review department and procedures established by the Directive and working manual of the department vis-à-vis the objectives why tax dispute related to tax decision is mandatorily reviewed by the tax authority. In due course the writer examines the power of the review department to evaluate the fulfillment of the pre-requirements of the objection, calling and questioning the audit officer to explain the decision, and evidence production. As the chapter is main body of the research, actual hearing procedure, requesting for legal opinions from legal service directorate, remanding of the decision to audit officer when circumstances warrants to so, procedure of making recommendation and finality of

the decision the department passes are analyzed from data collected through interview, personal observation and selected case analysis. The fourth and final part of the paper provides conclusion and recommendations with respect to the subject matter of the paper.

CHAPTER TWO

Concepts, Approaches and Rationale for Providing Settlement of Tax

Disputes within Tax Authority

2. Introduction

A tax dispute is a disagreement between the taxpayer and tax authority because of different reasons, including taxpayers' failure to abide by the requirements of tax law, taxpayer pursuing unreasonable standing or tax authority made a mistake or difference in interpretation of tax laws etc. these issues may in turn arise from, complexity of tax laws, complexity of the transaction, error committed by the tax authority and so on. Since tax disputes inevitable a clear legal procedure and dispute settlement mechanisms should be put in place.

Though there are different tax dispute settlement mechanisms around the world the internal review system is the most common dispute settlement mechanism. Internal review system can be either mandatory or optional depending on the requirement of preconditions for the taxpayer to get its case reviewed before taking the case to either administrative tribunals or regular courts. Though flexibility, cost effectiveness, opportunity to correct mistakes, expediency in the timely collection of tax and due process rights are attributed to the internal review system, it is also criticized for lack of transparency, lack of principle of fair play, susceptibility to political patronage, lack of tax expertise, uncertainty and unpredictability. This chapter tries to shed light on the concept, nature, feature and rationale of tax dispute resolution in general, internal tax review system in particular.

2.1 . The Concepts of Tax Dispute Resolution

Disputes are reality of human life. "Dispute is claim of right or controversy especially one that has given rise to particular law suit."¹⁵ The word controversy here refers to disagreement with someone's stand in a given situation. Tax dispute accordingly is a disagreement between the tax payer and tax authority because of different reasons. It may arise because of; taxpayers' failure to

¹⁵ Bryan A. Garner, *Black's Law Dictionary*, Thomson West Publishers, 8th Ed., 2004 P. 1423

abide by the requirements of tax law, taxpayer pursuing unreasonable standing or tax authority made a mistake or difference in interpretation of tax laws and so on.¹⁶

Tax payer's failure to live up to the words of the tax laws and unreasonable standing are frequent even if the tax assessment is justified.¹⁷ This might stem from different factors such as rules about requirement to pay tax pending tax dispute adjudication and interest and penalty required to be paid.¹⁸ Of course, taxpayers might chose to litigate to use the money to be paid in a situation where the tax payer has no opportunity to borrow as a result of lack of property to be mortgaged by financial institutions or where the inflation is high so that the money is used to purchase property which will be sold to pay the tax claimed by the tax authority. There has to be a mechanism to minimize this kind of frivolous litigation.

Complexity of tax laws is another reason of tax dispute as it involves multiple of fields which require knowledge of different fields related to tax laws. Related to the complexity of tax laws confusion as to the scope of application of a given tax law, ambiguity or vagueness of certain provisions of the law or due to taxpayer or tax authority not being able to correctly interpret the given provision¹⁹ are the main sources of tax disputes. In circumstances like this, it is inevitable that disagreements arise and should be appropriately settled using tax dispute settlement mechanisms²⁰ devised by the tax administration law.

Tax law, itself, is very complex subject and so is the tax dispute. The reason, however, of tax disputes is not limited to the complexity of the tax law only. Problems might arise directly from complexity of the transaction involving companies operating under different legal environment and accounting practices.²¹ Divergence in definition of the income subject to taxation in different

¹⁶ Victor Thuronyi, *How Can Excessive Volume of Tax Disputes Be Dealt With?*, December 2013, p.9 Available at: <https://iatj.net/content/congresses/paris2011/Adjudication%20of%20Tax%20Disputes%20-%20Nigeria.pdf> (Accessed on 25 Feb, 2022)

¹⁷ *Id*, P. 10

¹⁸ *Ibid*

¹⁹ John cited in Homutwa *Supra note 2*, p. 35

²⁰ The tax dispute settlement mechanisms range from internal tax dispute adjudication in countries like ours to using alternative dispute resolution mechanisms in countries like Australia. Of course countries now days are promoting and reformulating their tax administration laws to embrace alternative dispute resolution mechanisms such as mediation and arbitration. In between, there are countries who allow tax payers to choose between taking their tax disputes directly to regular courts or having their cases adjudicated within the tax authority.

²¹ Henry J. Aaron and Joel Slemrod, *The Crises in Tax Administration*, *the Brookings institution*, 2004

nations and lack of information on the tax levied in other country are also related problems with respect to trans-boundary transactions.²²For example, in Ethiopia, undistributed profit of the body (a company, partnership, public enterprise or public financial agency, or other body of persons whether formed in Ethiopia or elsewhere)²³ is subject to tax at rate of 10% as per article 61 of the Federal Income Tax Proclamation.²⁴ This income in effect is income from undistributed dividend. Thus, the tax paid from this income is dividend tax. But double taxation avoidance treaties that the country concluded with different nations do not clearly provide for taxation of this kind of income.

Mistake by the tax authority might also be another reason which gives rise to tax dispute. The mistake may be related to error of calculation by the tax assessor. But some mistakes may stem from aggressive assessments aimed at collecting as high revenue as possible on the part of the tax authority.

2.2 . Nature/ Features and Types of Tax Disputes

2.2.1. Types of Tax Disputes

Based on the types of parties involved and matters of disputes, tax disputes may be classified:²⁵ 1. Tax dispute that arise between tax authorities (for example, country-to country, central-to-local government disputes due to the overlap in power of taxation);

2. Tax dispute between taxpayers (for example, in the wake of a corporate acquisition, there might be questions on whether the buyer or the seller should bear taxes due for previously accrued tax liabilities); and

3. between tax authority and taxpayer (for example, during determination of tax liability).²⁶ Tax dispute between tax authority and tax payer by itself involves many issues. For instance, in Australia, they are classified into four broad categories: (a) complaints; (b) objections to reviewable rulings; (c) disputes as to facts or the application of tax law by a taxpayer as matters are being assessed); and (d) objections to assessments (including self-assessment and

²² *Ibid*

²³ FTAP, Art. 2(5)

²⁴ Federal Income Tax Proclamation, Proclamation No.979/2016, Federal NegaritGazetta,(2016), (hereinafter *the ITP*),

²⁵ Misganaw, Gashaw, the Room for Alternative Dispute Resolution Process in Tax Disputes: A message for Ethiopian Tax Administration, *Ethiopian Business Law serious*, V5, 2012 at , page 25

²⁶ Ethiopian Federal Tax Administration Proclamation Number (983), 22th Year, no.103, 20th Aug. 2016, AddisAbaba at art.54,(here in after FTAP)

Commissioner-made adjustments).²⁷ Categories (b) and (d) generally refer to statutory rights, while (a) and (c) relate to administrative due process. In Ethiopia as per Art. 2(34) and 54 of the Federal Tax Administration Proclamation (here in after FTAP or the Proclamation) tax decisions give rise tax dispute between ministry and tax payer. 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 payable, a determination of late payment interest payable, a decision to refuse an application for a refund and a determination of the amount of an excess credit under Art. 49, amount of a refund and the amount of refund required to be repaid under Art.50 and a determination of the amount of unpaid withholding tax under Art. 92(3) of the Federal Income Tax Proclamation (FITP). These issues can be categorized in to two; issues of facts or issues of law. The former relates to relevancy, accuracy and sufficiency of information used to make tax decisions that relates to interpretation of law or characterizing of facts at hand to apply law as basis for tax decision. 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. The work of this researcher is related to tax disputes between the tax authority and the taxpayer during tax declaration, assessment and collection in Ethiopia at federal level. Hence, rules and practice of internal review of tax dispute between Ministry of Revenue and tax payer is the point of investigation.

2.2.2. Features of Tax Disputes

Tax dispute has peculiar features. These features emanate from the unique nature of tax obligation and taxation power. The type of tax dispute displays public law features namely either international law or constitutional law dispute. The second type reflects that of private civil or commercial disputes. Whereas, the third one, have got unique features of all. Some of the unique features of tax disputes between tax authority and tax payer as identified by authors are as follows.

These are:

1. It involves complex and voluminous tax laws

²⁷ *Ibid*

2. There is reversal of roles and shifting of burden of proof: even though it is tax authority that obliges and decides and determines payment of tax, it is the tax payer who lodges complaint and assumes roles of plaintiff. This is contrary to laws of obligation where the creditors fetch the debt. As result, burden of proving incorrectness of tax decisions rests up on Tax payer though it is tax authority which triggered the case
3. Asymmetry of information between tax authority and tax payer with respect to process of tax decision making
4. Outcome of dispute has general effect; not limited to only specific tax payer.
5. Uneven position of parties to influence laws; tax authority can cause change of law.
6. Tax dispute can be basis for tax ruling and as such source of law.²⁸

This type of tax dispute deserves thorough investigation as it involves important issues in tax law. So, examining aptness of the rules for internal review and the practice thereof is central point deserving due scrutiny in this work.

From these features, we can deduce that tax dispute settlement by internal review, for that matter tax dispute settlement in general has two grand purposes or importance's; resolving the dispute at hand and clarifying the unclear issues for taxpayer in a similar position and tax authority. This in turn helps achieving the objectives of tax law or tax administration.²⁹As a result the dispute settlement adopted by a given legal system directly affects the effectiveness of tax assessment and collection.

2.3 . Approaches to Resolve Tax Disputes

The unique nature and complexity of tax disputes entailed special approaches for tax dispute settlement mechanisms. From early day to present we can identify four different approaches meant to resolve tax disputes.³⁰ These are:

- 1, Rebellions/riots against tax impositions;
- 2, Administrative handling procedure;
3. Specialized or regular courts;

²⁸Binh, Tran-Nam & Michael, Walpole, "Independent Tax Dispute Resolution and Social Justice in Australia," *University of New South Wales Law Journal* 35, no. 2 (July 2012) , p 474

²⁹Kedsaraporn, Panngam, *An Analysis Of Fairness In Tax Dispute Resolution Processes In Thailand And Proposals For Policy And Legislative Reform*, PhD thesis, School of Taxation and Business Law UNSW Business School August 2018, p 27

³⁰Misganaw, *Supra* 25 at pp 26

4, Alternative dispute resolution mechanisms (ADR): Nevertheless, while the first one, the old method which was applied both in Ethiopia and elsewhere³¹, but no longer used and it is not legally recognized approach, the fourth approach is not accepted as suitable method for tax disputes uniformly, throughout world. In some jurisdictions, tax disputes can be settled via ADR mechanisms while in others it is not amenable to ADR.³² Of course, this approach is highly promoted in different jurisdictions as it is claimed to be the forum which gives the tax payer swift resolution of the case and enables tax authority timely collection of the tax decided. The remaining two approaches are the prevailing ones and rules, doctrines and jurisprudence is developed with respect to these two approaches. Most importantly, these approaches are not mutually exclusive rather one supplements the other. In short, tax disputes settled at internal administrative handling mechanism/ internal review in our case/ are appealable to or subject to judicial review by regular or specialized courts or tribunals specifically entrusted with the power to review tax decisions of internal review.³³ However, the internal review or administrative handling mechanism is subject to controversies and criticisms as it involves the most critical legal issues. On one hand, the organ that is party to dispute acts both as party to dispute and the judge on the matter. Executive organ exercises judicial power in the dispute that highly affecting human rights of tax payer.

On the other hand, administrative exigencies requires cost effective and efficient tax collection, enabling the authority to rectify its mistakes and reducing lengthy court cases are objectives to be attained by internal review mechanisms. So, how to reconcile these seemingly conflicting interests is the subject of rules for internal review system of tax disputes. As rules emanate from sources but targeted on making the system effective while protecting the rights and interests of both tax authority and tax payer.³⁴

It has to be noted that there are two approaches that are employed to handle the tax disputes at internal review level based on whether there are preconditions for taking tax disputes to another steps of settlement mechanisms, usually stipulated in law concerned with tax administration specifically dispute settlement sections. These are optional and mandatory internal review for tax

³¹*Id at pp 27*

³²*Ibid*

³³ *Ibid*

³⁴ *Ibid*

dispute settlement by countries. When we say the optional settlement of the tax dispute under the internal review system, it is up to the tax payer to have its case reviewed by the same tax authority.³⁵ This approach gives the tax payer to make cost and benefit analysis whether taking the case to the tax authority help swiftly solve the problem. Tax payer may assess the extent of independence of personnel engaged in reviewing the tax matters, length of time in which the case will be disposed, probability of the outcome of the decision, flexibility of the system and opportunity to produce relevant evidences (demonstrative, documentary and testimonial) to the review department. If the tax payer finds positive answers for these issues, it may choose to have his tax decision reviewed by the tax authority. If not it can directly appeal to administrative tribunals or regular courts as stipulated by the law.³⁶

The mandatory internal review system as opposed to the optional one is a system where it is a precondition for the tax payer to have its case reviewed before taking the case to either administrative tribunals or regular courts. Other bodies, either administrative tribunals or regular courts entertain the case at appellate level. The tax payer has no freedom to take its case to other bodies in charge of resolving tax cases. If the tax payer fails to apply for review of decisions of the tax authority and directly takes the case to the bodies entertaining the tax cases at appellate level, the tax authority is entitled to raise preliminary objection that the appellate body lacks jurisdiction to entertain the case at first instance level. Failure of the tax payer to follow the procedure in tax administration statutes may result in losing the case completely.

2.4. The Ethiopian Approach for Tax Dispute Settlement

Like that of many other jurisdictions, Ethiopia also follows different approach for tax disputes than other civil or commercial disputes. As result, under Ethiopian legal system; first, internal review at tax grievance review department level; second, to Tax Appeal Commission under Ministry of Justice third, appeal for Federal High court then, to federal Supreme Court and to its Cassation Division on the existence of fundamental error of law. Finally, it can be brought before Council of constitutional inquiry and House of Federation if it is believed that the administrative actions or laws contradict with the constitution and entail constitutional dispute or constitutional

³⁵ *Ibid*

³⁶ *Id at pp 30*

interpretations. So, in Ethiopia, internal review of tax disputes is mandatory and the initial method available for tax payer to settle their disputes against the Ministry as defined under article 2(34) of Federal Tax Administration Proclamation No 983/2016 and pursuant to article 54 of the same. Tax dispute is non- arbitrable matter under Ethiopian legal system though there are arguments for ADR in tax disputes.³⁷

Based on whether the taking of the case to review department of the tax authority as a precondition to take it to other bodies in charge of entertaining tax cases, the Ethiopian system is not purely mandatory not optional either. It is mandatory for the taxpayer to apply to tax decisions and decisions in the process of tax decision (decisions like rejecting vouchers showing expenses for the lack of fulfilling technical requirements of vouchers and other documents) to be reviewed by the review department of Ministry of Revenues. Tax payer cannot appeal on tax decisions and decisions in the process of tax decision as it is clearly stated under article 2 sub article 2(b) of Tax Administration Proclamation.³⁸Failing bring objection to review department within 21 days after the taxpayer received it³⁹ makes the tax decision final and conclusive and cannot be disputed at tax appeal commission, a court or any other proceedings on any ground whatsoever.⁴⁰

Decisions other than tax decisions and decisions in the process are not required to be reviewed by the review department. Taxpayer is free to take decisions out mentioned here to appellate body or to apply for the review department for the decision to be reviewed. The practice however, shows that the taxpayers bring notice of objection virtually on all decisions. While the reason why the taxpayers bring objection on all decisions remains out of the scope of this work, decisions other tax decision and decision in the process of determining tax decision are of minor nature in their nature and better resolved by ministry.

2.5 Arguments for and against Internal Review System of Tax Dispute

Internal review mechanism is used as one method of resolving tax disputes but there are arguments for and against it even if jurisdictions invariably adopted it as system of tax dispute.

³⁷ Art 7(3) of arbitration and conciliation working procedure proc. 1237/2020 and see Misganaw, supra 25 at pp 29

³⁸ FTAP, supra 26 art.54

³⁹ Ibid)

⁴⁰ Id, Art. 53 sub article 1(a)

2.5.1 Arguments for Internal Review System

The advantages of internal review mechanism are indicated by literatures are as follows;

A. As a Means of Rectifying the Mistakes of the Tax Authority

Tax is a complex concept and determination of tax is prone to misunderstandings and miscalculation from the section entrusted with this duty. It also involves variety of interests from tax payers, government and general public. Undertaking auditing of very complex entities especially multinational companies triggers a problem of missing application of different laws, accounting concepts and established standards in each case⁴¹.

The mistake may emanate from the workload of auditors⁴². The auditing in Ethiopia, as observed by the writer, usually involves examining five year's document of the entities identified for auditing. Documents presented by the taxpayers are very bulky and the auditors are pressurized to complete the auditing in a very short time. Their efficiency is also evaluated based on number of the entities audited and revenue the decision yields.⁴³ This in turn may force the auditor to rush and result in mistakes.

The auditor may also commit misdeed. Lack of organized system of control and subjective judgmental nature of the very activity of auditing may give freedom to the auditor to decide in whatever manner bringing benefit to him/her.⁴⁴ Some issues are left to the discretion of auditors. The auditor could abuse this power and it may result in unreasonable and burdensome tax liability on the taxpayer. Thus the internal review system enables the tax authority to check the correctness of its decision and correct mistakes committed by officers in tax assessment and auditing departments.⁴⁵

B. Timely Collection of Tax

⁴¹Forum on Tax Administration Committee on Fiscal Affairs Compliance Sub-group (FTACFACSG) (2004). Compliance Risk Management: Managing and Improving Tax Compliance: Guidance Note. *Centre for Tax Policy and Administration*.

⁴² Ibid)

⁴³ Misganaw, *Supra* 25 at pp 30

⁴⁴ Ibid

⁴⁵ Irenius D.Bimo and etal (2019), the Effect of Internal Control on Tax Avoidance: the Case of Indonesia, *Journal of Economics and Development*, Emerald Publishing limited, pp (131-142) pp 134

Tax administration has review department as many as its branches; sometimes exceeding its branches. The officer assesses the tax liability of a taxpayer and evidences of the taxpayer with respect to tax decision subject to objection are within the control of the tax authority.⁴⁶ This enables review department to dispose the case within the short time compared to other bodies in charge of handling tax disputes.⁴⁷ Other bodies, however, are disadvantaged in accessing evidences and encumbered with cases arisen from different tax centers that tax payers are paying in. Years may lapse until tax disputes are disposed by bodies other than tax authority.⁴⁸ This hinders the country from having clear budget for the future plan of the government. Thus timely disposition of tax disputes means timely collection of appropriate tax.⁴⁹

C. Cost Effectiveness

Internal review system is promoted for disposing the case within short period of time. If the appropriate decision is rendered by the internal review department the tax payer may be willing to pay the tax on the basis of clarified decision.⁵⁰ This in turn reduces the interest and penalty related to the tax determined compared to high sometimes doubled interest and penalty expected from tax payer if it takes long time to dispose the case.

Payments for lawyers and other tax experts is another area which worries the tax payer in relation to tax dispute settlement. Fees for lawyers and other experts such as accountants is high and swift and sufficiently clear decisions protect tax payer from lengthy appeals and further proceedings which expose the latter to higher fees.⁵¹ When making internal review mandatory, the concern of the tax payer regarding cost of proceedings for the review, for the tax system to be efficient, has to reduce the compliance cost. Therefore, it requires the tax administration to put in place the internal review department with sufficient and trained personnel and safeguard the independence of the department to enable the department arrive at fair and proper decisions.

D. Ensuring the Right to Be Heard and Integrity of the System

⁴⁶ Henry J. Aaron and Joel Slemrod ,*supra*21 page 50

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ Victor Throyni, *Supra* 16 pp 11

⁵⁰ Irenius D.Bimo and etal, *supra* 44 pp 136

⁵¹ *Ibid*

Though the internal review system is flexible in that it does not strictly apply court like proceedings, it allows the tax payers themselves to produce facts available with them and explain what they know before the review department⁵². Informal communications with tax payers is possible in that it gives highlight of the condition of the taxpayer. The taxpayer is given chance often without requirement of paying the tax determined by the authority.⁵³ Requiring payment of the tax, either partially or fully may prevent taxpayer from objecting the decision due to lack liquid money. The internal revenue may cooperate with the tax payer who brought the objection to produce evidences in the hands of third parties using the general power entrusted on the tax authority.⁵⁴ Flexibility of the proceeding is not limited to allowing taxpayer presenting its case to the review department. It also allows the taxpayer be represented by professional experts in the areas of taxation including lawyers and appearing expert witnesses in the proceeding.

The internal review system especially where it entertains the taxpayers objection with reasonable independence and rectifying the mistakes committed by the authority (whatever the reason is) ensures the integrity of the tax system. This in effect builds the confidence the tax payer has on the system and contributes for the overall efficiency of the taxation by encouraging tax compliance.

To generalize, giving chances to rectify its mistakes, expediting tax collection, ensuring the right to be heard and ensuring integrity of the system⁵⁵ are considered to be advantages of the internal review system. World Bank and other international organizations support this system for it provides 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.⁵⁶

2.5.2 Arguments against It

Criticisms forwarded against it are the followings. It lacks opens, it does not fulfil principle of fair 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

⁵² Aschalew Ashagre, Aschlew, Ashagire , Adjudication of tax disputes with in the Tax Authority in Ethiopia, Critical Reflection on law and the practice, *Journal of Law, BahirDar University*, vol.11no.1, pp (36-66) pp 41

⁵³ *Ibid*

⁵⁴ Irenius D.Bimo and etal *supra* 44 pp 136

⁵⁵ Aschlew Ashagire , *Supra* 51 pp 42

⁵⁶ *Ibid*

loyalty instead of their professional background and experience.⁵⁷ 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 praise worthy 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 precision what the outcome of the case may be.⁵⁸

⁵⁷*Ibid*

⁵⁸ Victor Throyni, *Supra 16* pp 11

CHAPTER THREE

Power and Functions of Tax Review Department in Ethiopia

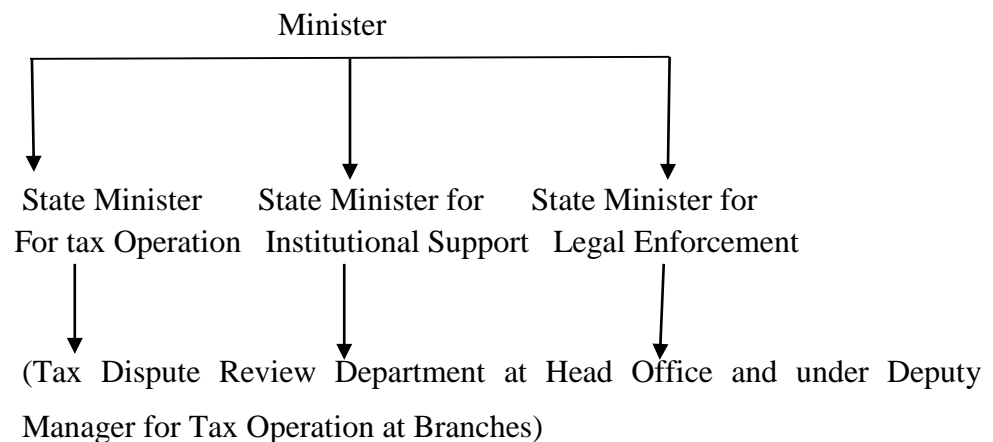
3.1. Introduction

Tax dispute between tax authority and tax payer has unique characteristics and hence, separate dispute mechanisms are adopted that are meant to solve those tax disputes. One of such mechanisms is internal tax review system. Ethiopia also adopted mandatory tax review system for tax to object the tax decision of tax authority. So, to evaluate the compliance and adequacy of rules tax review system of federal government so as to attain objectives the research laying down background of the review system is important.

3.2. Organizational Structure, Power and Composition of Tax Review Department

3.2.1. Structure of the Tax Review System

Ministry of revenue is one of the ministries established by the new proclamation, definition of powers and functions of executive organs Proclamation Number 1263/2021⁵⁹, which is in charge revenue affairs of the federal government and tax is one and the main revenue source. As a result, as part of federal government executive organs, Ministry of Revenue executes tax administration laws and internal tax review mechanism. The organizational structure of the Ministry is depicted under the figure below.



⁵⁹ Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia, Proclamation No.(1263), 28th No.4. Federal Negarit Gazette, 25 Jan.2022Art. 16(8), 27 1

Understandably, we can infer from the structure in the figure above the tax review system is located both at head office level and branch office level. At head office level the internal review department is under the State Minister for Tax Operations and at branch level it is accountable to the branch manager.⁶⁰ At both level it is led by the head of office of the review department. So, internal tax review department is part of administrative wings of the MOR and as such the rules and principles applicable to the MOR as a whole are applicable to the department. In other words, the department is neither independent nor neutral of tax decisions made by other sister departments.

So, from vantage point of organizational structure, internal tax review department (here in after TRD) in Ethiopia is permanent but not independent segment of the MOR. Practically, also, officers both at head office and branch level, “internal review departments are placed from any department because the internal review department is considered as just small segment of the branch or the head office for which it is accountable.”⁶¹ Thus, this structural organization has its own negative impact on effectiveness of the system. One, it affects the department on deployment of employees and resources so as to handle the cases expediently. Two, it paves the way for officers and officials who made tax decisions to influence the officers in charge of handling objections/complaints. It is so because the department is not a standalone independent organ guided by its own rules and personnel. This will put the department at the mercy of the interests of other sister departments such as the Audit department, the tax assessment departments and legal departments.⁶² This in turn will contribute to potential conflict of interest. This is also against the long standing principle of decision making power of judicial or quasi-judicial organs that no one shall be a judge/presides on its own case. If an auditor who assessed the tax in the first place and a lawyer a tax ruling in the same tax issue of an individual payer can review what he/she has already settled, the problem is that this individual is presiding over his own case. Third, it has also implication on budget allocation to the department. Even though it can be argued that for efficiency and accessibility it is good that the department is put under lower level administrative segments of the MOR at the same time it is important to note that had the department been put under top level organs it wouldn't

⁶⁰ Tax Review Department Establishment Directive number 171, Ministry of Revenue, Ethiopia, 2021, Art.6 (here in After the Directive)

⁶¹ Interview with Mr. Abere Asfaw, Head of the Legal Department, Ministry of Revenue, Ethiopia, May 10,2022

⁶² The Directive art. 7/4

have compromised the efficiency so long as the department is well staffed and well equipped and placed as branch or independent department in places where it is necessary. Both the customers and officers at the department indicate that “the place of the department in the organizational structure has to be re-examined.”⁶³ Hence, it has to be further researched and revisited in light of ensuring the objectives of tax administration.

3.2.2. Power of the Tax Review Department

Identifying and analyzing nature and load of cases helps understanding the problems the department is facing. Staffing and placement of the department can be influenced by the nature and number of cases. Furthermore, it is the basis for allocating resources to the department and it has implication on efficiency of the system. And efficiency is one of the central goals of the whole system. With respect to powers and functions of the department it is vital that whether the power is clearly indicated and defined. When it is clear and detail it enables the department to effectively discharge its duties. And solves problem of whether a matter presented before it falls under its preview of power. So, in this regard, as far as the Ethiopian tax administration concerned reviewing objections of tax decisions made by the tax officers and making recommendation to the branch manager or higher official is the power of the department.

Generally, there are two approaches to determine nature of cases to be entertained by internal review mechanisms. Some legal systems allow interpretations of laws and others, however, do not allow interpretations of law but cases short of legal interpretation.⁶⁴ When we see the Ethiopian case, we can see the powers that the TRD is entrusted with is that it entertains a case brought before it by a tax payer who is dissatisfied by the decision of the auditor (Art. 54(1) of TAP. According to this article, 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. As per Art 2(34) and 54 of the FTAP tax decisions are considered as tax dispute between ministry and tax payer. The Department has a broad range of powers in relation to tax decisions. Tax decision is defined under article 2/34 and 54 of the Proclamation. Accordingly, 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

⁶³ Interview with Abere Abebe, Advisor to the Minister, Ministry of Revenue, Ethiopia, May 1, 2022

⁶⁴ Aschalew Ashagire, *Supra 51* at pp.42

determination of a secondary liability or the amount of tax recovery costs 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, the amount of a refund under Art.50 or the amount of refund required to be repaid under Art.50 and a determination of the amount of unpaid withholding tax under Art 92(3) of the Federal Income Tax Proclamation.

These issues that the Department entertains can be categorized in to two; issues of facts or issues of law. While the former relates to relevancy, accuracy and sufficiency information used to make tax decisions the other relates to interpretation of law or characterizing of facts at hand to apply law as basis for tax decision. The problem, however, is that the Review Committee of the Department enjoys a power of advisory role; the ultimate power to render effective decision resides on the Ministry in its confirmation, amendment or remand the recommendation of the Department.⁶⁵ This creates a further problem on the good administration of the tax system for different reasons. First, the Minister is a political appointee expected to execute administrative tasks and other acts of management of the Ministry. In its execution it is expected to represent the office with utmost good faith and diligence. Assuming a quasi-judicial power such as entertaining tax decisions will affect the fairness of the decision because of conflict of interest. Second, the confirmation, amendment or otherwise of the recommendation of the Department on tax decisions makes tax dispute settlement a political decision. This is because the Minister, being a politician irrespective of his or her professional background is not expected to pass a reasoned decision. He/she may also lack the necessary qualifications on top of political biases that may arise between the tax payer and the Minister as an individual. Apart from the question whether the definition given to tax decision is exhaustive as indicated by Aschalw, in this regard the law is clear. But, in practice there is no labor division and the department is not functioning as stipulated under the Directive.⁶⁶ The researcher observed that officers are working the jobs of a secretary and there are no enough workers in the department. .

⁶⁵ FTAP, supra 26 Art.55/4 and the Directive, *Supra 48*, article 11/4

⁶⁶ Interview with, Mr. Zewdie Damtew, Head, Large Tax payer Tax Review Department, Ministry of Revenue, Ethiopia, April 21, 2022

Number	Case name	Time length it took	Issue involved /legal or factual	Type of Final decision/ confirm , vary or remand	The department that handled it (t head office or branch office
	Great Abyssinia PLC	52 days	Both legal and Factual including issues related to double taxation avoidance treaty between Ethiopia and Israel	Except on few issues the department confirmed the decision of Auditor	Large Tax Payers Branch
	Astico Food Processing S.C	73 days	Both legal and factual including refusal of expenses of the company claiming that the transactions were conducted using forged vouchers and purely legal issue of who is primarily responsible to pay tax on capital gain at time of transfer of shares	The department confirmed many of issues brought before it.	Head Office

Number	Case name	Time length it took	Issue involved /legal or factual	Type of Final decision/ confirm , vary or remand	The department that handled it (t head office or branch office
	Ethio-Japan Textile S.C	46 days	Purely Legal (the dispute was whether the company is obliged to withhold Excise Tax on Textile which arose from contradiction between Amharic and English Version of Proclamation on Excise Tax	The department confirmed decision of auditor because it based its decision on circular of Ministry of finance.	At Large Tax Payers branch
	BMT Energy PLC	49 days	The case involved both legal and factual controversy. It involved laws such as trade license, tax administration, income tax, Value Added Tax, contract specifically construction contract. Factual controversies	The department confirmed decision of the auditor in all issues.	Head office

Number	Case name	Time length it took	Issue involved /legal or factual	Type of Final decision/ confirm , vary or remand	The department that handled it (t head office or branch office
			related to amount of depreciation allowed for buildings, imported materials and illegal vouchers.		

3.2.3. Composition of the Tax Review Department

Composition of internal review officers determines both quality and efficiency the system. Particularly, the expertise, experience, impartiality and tenure security of members of internal review department affects the effectiveness of the system.

Authors confirmed that modern tax disputes require expertise on tax issues to handle cases ⁶⁷and even technical knowledge may be relevant when disputes certain issues that require special knowledge arise. For instance, with respect to technological goods, equipment, intellectual property issues, financial services, and mining activities and like, it requires special knowledge of the area apart from tax accounting and tax law knowledge.

The Proclamation does not provide rules on composition of officers when it provides for tax review mechanism. What it provide is empowering tax authority to establish the department. The MOR,

⁶⁷ Aschalew Ashagre, *Supra 51* at pp 42

by ‘Directive’’, under article 7 indicated that the department shall ensure that officers have required knowledge and skill. They shall be selected from tax auditing, assessment and legal officers but there shall be one accountant and legal expert.⁶⁸ Here the ‘Directive’ should have indicated specific qualities of experts and necessity of specialized knowledge indicated. The department at any level is composed of head, officers, secretary, record officer and other assistant and necessary workers.⁶⁹ Furthermore, it is indicated that department at ‘large tax payers’ branch level will have coordinators and deputy heads. And there will be more than one team of reviewing officers when there is caseload at any branches. When this happen team leader or chairman will be the coordinator of branch and if it is at large taxpayers level the deputy head will chair the teams.

The Directive is not also clear when it says that at branch level for large tax payers, there have to be two TRDs and a deputy Manager (Art.4/2). This is because under article 5/2 the Directive stated that the TRDs for large tax payers should be chaired by the Branch office’s Deputy Manager. This is ambiguous to the extent that it is not clear which Deputy Manager should chair the TRDs; whether the deputies under article 4/2 and 5/2 are one the same or two independent managers. It seems plausible to adhere to the idea that the branch office’s TRD deputy manager which is part of the composition of the TRD is the one who chairs the TRDs for large tax payers. This means that article 5/2 is a redundant or should be included under article 4 as an extension of 4/2.

The source of selection, expertise and quality of these heads, coordinators and team chairmen is not indicated. Regarding code of conduct of the officers of the department, the rules of code of conduct for workers of the MOR and obligations imposed on tax officers govern them as stipulated under article 6 of FTAP. Generally, the code of conduct imposes obligations of fairness, avoiding conflict of interest and impartiality on tax officers. It is not, however, clear who/which department shall entertain the case of those officers in default be it the Ethics Department or an ad hoc disciplinary committee. The practice nevertheless shows that it is “the Ethics Department which

⁶⁸ The Directive, *Supra* 48 at pp 7/4).

⁶⁹ *Id.*, Article 4(1)

initiates the case against the officers to an ad hoc committee organized by the Director of the Ethics Department.”⁷⁰

The number of members of the team of TRD is not also clear, nor their tenure and selection criterion. As to the identity of members, the officers are required to be those who have worked as audit, tax assessment and legal officers and at least one of the members of committee must be legal officer and another one is required to be audit officer.⁷¹ In this respect, it can be argued that the number of members of Tax Review Committee is at least five from the wording of the article 4 and 7(4) of Directive. The researcher is of the opinion that, those personnel prescribed under sub article 1 (a-c) of article 4 are intended to be members of the committee. Because it is provided, under article 5 of the ‘Directive’ that the head of the office is the chairperson of the committee. If the branch office has more than one committee, the vice head or the person delegated by the head becomes chairperson of the other committee.⁷² Therefore, the committee has the chairperson, officers (at least one legal officer and one audit officer) and secretary. Accordingly, it has minimum of four members.

But, what if one officer has both legal and auditing background? What if the head or vice head was working as audit or legal officer? The head of review department may have a legal background, but he might not have worked as a legal officer or any position requiring legal expertise. In such a situation, the committee chaired by such a head may lack the involvement of a qualified legal officer as a member because the head may act as a legal officer/expert and chairperson of the committee. The head plays multiple roles in this situation. One is that s/he is appointed by the minister at head office and by the branch manager at branch and briefs the recommendation of the committee to the Minister or the person representing the minister, at head office and the branch manager, at branches. He chairs the committee and umpires the vote when the voice of members divided equal.⁷³ He acts as an expert member of the committee too. In this scenario, there may be a probability that the required necessary members may lack a proper legal expert which may affect the quality of the decision in legal application and interpretation. It is not advisable that a single

⁷⁰ Interview with Mr. Abere Abebe Mengesha, head , Disiplinary commite, Ethiopia, June 10, 2022

⁷¹ The Directive, *Supra* 49 Art. 7(4)

⁷² *Ibid*

⁷³ *Ibid* Art 11/2/

person playing multiple roles. The intention of the drafters of the Directive, as explained by Ato Abere Abebe,⁷⁴ “was to provide for specific professionals as officers of the committee.”

Finally, however, the Directive approved without specifically providing exclusion for the chairperson acting as any of the expertise provided by the Directive.⁷⁵ The Directive fails to provide the minimum and maximum number of the members of the committee. It is also not clear as to composition of the officers whether the chair person or one officer having both legal and auditing profession could act in both capacities. Because of this, the head, having political influence is acting as both the chairmanship and legal officers in the committee at Large Taxpayers Branch. Therefore, it is appropriate to specifically provide for the maximum and minimum number of the members of the committee.

In practice, the selection and appointment of officers does not follow formal procedure. The head and vice head of the department is appointed by the Minister of MOR and “the head requests the branch to fill the vacant posts of officers.”⁷⁶ Then, the branch manager requests directorates of the MOR to send auditors and legal experts. The clarity problem in the law with respect to selection criteria created practical challenges including expertise to branch offices. An interview conducted with an informant shows that there are instances of miscommunication between branch heads and the Ministry. For example, a branch in Medium Tax Payer requested for the transfer of senior legal officer to handle cases involving complicated issues including transfer pricing tax from the head office. The branch, however, learned that “the employee in fact transferred is not a senior legal officer nor fulfill the necessary qualifications.”⁷⁷ Such practical inconveniences create hassles on the effectiveness and efficiency of tax administration. In one case the Commission exposed the lack of expertise of the RD.

At this juncture, it is appropriate to see a case mentioned under Chapter three where the audit department missed the scope of the application of treaty between Israel and Ethiopia.⁷⁸ It was the

⁷⁴ Interview with Mr. Abere Abebe, *supra* 56

⁷⁵ *Ibid*

⁷⁶ Interview with, Inspector Ketema Adane, Senior Legal Expert at Ministry of Revenue, Ethiopia, March 5, 2022, see also the Directive art.7/2

⁷⁷ Interview with Melese Maekele, Chair of Medium Tax Payer Review Department, Ministry of Revenue, Ethiopia, June 15, 2022

⁷⁸ Great Abyssinia V Ministry of Revenues, Federal Tax Appeal Commission, File No. B-660/2012-----

case between Great Abyssinia PLC Vs Ministry of Revenues.⁷⁹ In that case the Great Abyssinia PLC Company had an agreement with Israeli company to use the name “Frigat”. The audit department decided the company to pay royalty tax of about three years. The company claimed that the royalty fee to Israeli company is free tax as per the double taxation avoidance treaty concluded by the two countries. The audit and the review department disallowed the objection of the company on the ground that it failed to prove that the company with which it made contract to use its name is tax resident of State of Israel. No one tried to entertain by applying the treaty between two countries.

The treaty between Israel and Ethiopia imposes limit on the rate of royalty tax on condition where substantial shareholders of the recipient company of income subject to tax are resident of that state; not freeing the royalty fee from taxation by either country. It is not only the audit department but the review department also failed to apply the provisions of the treaty. The researcher, formerly being Senior Legal Officer, asked the auditor why the Audit Department as well as the Review Department didn't try to apply the provision of the treaty in this regard.

The Auditor replied that it was difficult to understand terms like substantial shareholders in the treaty. A group of staffs having appropriate training can solve such a problem as working in group may help to share knowledge compared with the Audit Department where tax decisions are handled by single auditor except where it is decided by the section that the company is very complex and must be audited by two auditors. From this one can conclude both the rules and practice with respect to selection and composition of officers is neither clear nor organized one that enables the department to discharge its responsibility effectively.⁸⁰

3.3. Functions of the Tax Review Department

The functions of the Department involve issues such as preliminary functions (examining applications whether they have cause of action and judgment sought, whether necessary documents are fulfilled), setting the case in motion, weighing of evidences and time and cost dimensions of cases.

⁷⁹ *Ibid*

⁸⁰ *Ibid*

3.3.1. Pre-proceeding Functions

As stated under article 54 of FTAP, the initiation of the proceeding starts when the tax payer files notice of objection of tax decision to the Ministry. Then, what are the contents of this notice and how it can be prepared, when and where it can be prepared are the questions that need to be answered. Both tax payer and the department have roles in this regard. The Proclamation states that tax payer shall file in writing, his objections, within 21 days after service of notice of the tax decision by the Ministry.⁸¹ When the tax decision objected is related to an amended assessment, a taxpayer's right to object to the amended assessment shall be limited to the alterations, reductions, and additions made in it to the original assessment.⁸² The notice of objection shall fulfill the following conditions a) the notice of objection should state precisely the grounds of objection to the tax decision, the amendments that the taxpayer believes are required to be made to correct the decision, and the reasons for making those amendments; b) when the objection relates to a tax assessment, the taxpayer has paid any tax due under the tax assessment that is not disputed by the taxpayer in the objection; and c) if a tax payer prefers to pay the tax assessed on protest, after the tax in dispute is fully paid.⁸³ Additionally, the protesting tax payer annex evidences for his/her allegations and submit signed application to the department.⁸⁴ The record officer shall receive and stamp the same. However, the department did not yet develop form for the application/objection notice like that of tax appeal commission⁸⁵. Existence of format swifts the work and makes the work easy.

In practice, "tax payers comply with the requirements of the law but the department lacks experienced officers and expertise."⁸⁶ For instance, at "a time while the record officers and secretary checking formality enter in to merit checking of the objection", this will not be in line with law.⁸⁷

⁸¹ FTAP, *supra* 26, Art.54/1

⁸² *Id* Art.55/4

⁸³ *Ibid*

⁸⁴ The Directive, *Supra* 48 Art 16

⁸⁵ Format prepared by Tax Appeal Commission

⁸⁶ Interview with Mr. Abere Abebe, *Supra* 61

⁸⁷ Interview with Mr. Abere Asfawu, *Supra* 66

Pre-proceeding tasks about case management and involve planning, organizing and deciding the case is determined.⁸⁸ Factors such as the number of cases, experts allocated to handle it and the length of time cases take affect case management. In this regard, the Department, both at head office and large tax payers' level, is congested with objection cases which the Department failed to devise any mechanism to solve it. ⁸⁹ There is no rule under the law. Though the Proclamation is not expected to state it the Directive should have contained the rules. Perhaps, the head of the Department, as mandated to submit reports related to organizing objections, analyzing the same and the source of the problem along with recommendations seems advisable to submit problems associated with case management to the manager.⁹⁰ Even this is not a solution by itself though it may serve basis to solve the case management problem. Absence of the rules to manage cases affects expeditious disposition of case and in effect collection of taxes as indicated objective of the review system in particular and tax administration in general.

3.3.2. Hearing (Setting the CASE in Motion)

Procedural justice is at the heart of the decision making process of administrative dispute settling. Without procedure, it is difficult to provide the common understanding of law and facts to disputing parties.⁹¹ It is also by the help of procedural justice that the content of the law is specified and disambiguated which would have led to inevitable differences in interpretation among disputing parties.⁹² This is because the substantive laws regulating primary relations are constructed in a very general and abstract language to make it comprehensive.⁹³ Parties to disputes usually tend to have impartial views to pursue their own interests. It is through the mechanism of procedural justice that conflicting partial perspective is reconciled.⁹⁴ In short procedure related to a dispute settlement is considered as a primary aid to address the issues concerning compliance with the substantive laws regulating conducts of the citizens.

⁸⁸ Case management manual by Justice sector professions training institute, Ministry of Justice, Ethiopia, 2014

⁸⁹ The researcher was working as a senior legal officer at the Ministry and has come across such facts by his personal observations

⁹⁰ The Directive, *supra* 48, Art. 9/8

⁹¹ Lawrence B. Solum (2004), "Procedural Justice", *Southern California Law Review*, Vol.78, No.1, P. 186

⁹² *Ibid*

⁹³ *Ibid*

⁹⁴ Kedsaraporn Panngam, *Supra note 28*, P. 25

Generally, tax dispute settlement has two main objectives. One is settling the case at hand. Obviously this function is inherently the objective of dispute settlement.⁹⁵ Here, it can be argued that taxpayers and tax authority have different view on resolving the tax disputes. The tax payer focus on the personal costs related to the tax dispute settlement while the tax authority focuses on the correct application of the tax laws.⁹⁶

The other is to clarify and disambiguate the tax law so as to provide guidance to tax payers and decision makers.⁹⁷ The clarifying and disambiguating function of dispute resolution is important not only to the complexity of tax laws but also many concepts in tax law remain undefined.⁹⁸ .

Oral hearing is one of the primary means to ensure that procedural justice is served in which disputants (the taxpayer and tax authority in this case) are given an opportunity to put their case to tribunal or other bodies entrusted with entertaining the case.⁹⁹ It is more likely that the taxpayers can understand the reasons of the decision passed by concerned department. It is more so in our case because the audit or other departments issued tax notice are not required to present the written defense (response).

Sometimes the review department requires the audit officer to present written response to the objection brought by the taxpayer. The objective of the oral hearing when the audit department presents its defense orally seems to serve two purposes. One is that it serves as a means of proving a response from the audit department is secured. It is at this stage that the audit or other departments concerned with tax decision present their version of elaboration, which resembles defense in judicial proceeding. It is at this time that “the review department orders the auditor who decided the tax to produce written response if the case happens to be complicated.”¹⁰⁰

⁹⁵ Suzette Chapple (1999),” Income Tax Dispute Resolution: Can We Learn From Other Jurisdictions?”, *Journal of Australian Taxation*, Vol. 2 Issue 5, P. 312

⁹⁶ Kedsaraporn Panngam *supra* note 28, P. 29

⁹⁷ *Ibid*, P. 313

⁹⁸ *Ibid*

⁹⁹ Peter Leyland and Gordon Anthony(7th Edition), *Textbook on Administrative Law*, (Oxford University Press, 2013)P. 166

¹⁰⁰ Interview with Mr Melese Maekele, *Supra* 65

1. Conditions for Setting the CASE in Motion (Hearing)

One of the prerequisite that the Directive puts before commencing hearing is fulfillment of the quorum of the committee. The Directive states that the hearing is conducted when three of the officers or two thirds of the members of the committee is present.¹⁰¹ However it is not clear to the number of members of the committee. It is also not clear whether the hearing is to be convened if number of members of committee is three and two of the members are present.

As described above, under the sub section of composition of TRD, at least three of the officers of the committee or two third of the members of the committee is required to conduct the hearing. Still the wording of article 11(1) of the Directive is ambiguous as to whether it is referring to officers selected as experts from the area of law and auditors other than the head of the office and secretary or three of the members of the committee. One can, however, argue that the officers provided under article 11(1) of the Directive are those officers selected to play the role of expertise in the area of tax law such as auditors and lawyers. This can be referred from article 2(6) of the Directive which defines a group which is substitute for the tax review committee. It distinguishes among officers, office head and secretary of the office. It is noteworthy to reproduce definition hereunder.

Article 2(6)

Group means collection of officers, office head or the vice office head as the case may be and the secretary of the office. (Translation is mine)

It is because of the wording of this provision that the researcher argues that the minimum number of members of the committee (though the verbatim translation is group) is five. In practice, however, as mentioned above, when three members of the committee are present, it is considered as quorum fulfilled to conduct the hearing. According to Ato Abere Abebe, “it was not intended to consider the officials such as head, vice head and secretary as officers.”¹⁰² Accordingly, to conduct the hearing, at least three officers other than that of officials must be present or two third in which case two officers may be enough in addition to officials afore mentioned. But it must be

¹⁰¹ The Directive, *Supra* 49 Art.11/1

¹⁰² Interview with Mr Abere Abebe, *supra* 66

noted that this researcher is of the opinion that the number should be manageable as much as possible. Therefore, the Directive can be reformed in a way including two experts from the areas of law and auditing and officials to chair the hearing. Be that it may, the fulfillment of the quorum is an essential requirement to conduct hearing by the tax dispute review department.

The other prerequisite for hearing is appearance of both the taxpayer and representative of the department from whose decision the objection is brought to the tax decision review office. This requirement is not clearly provided under the Directive. But it is a matter of logic. Parties must appear before the committee to conduct the hearing. As it has been discussed above it is this stage which help the committee identify points of departure between the department passed the tax assessment notice and the taxpayer.

However, what if either the taxpayer or the officer from whose decision the objection is brought fails to appear before the committee? Should the committee reject the objection if taxpayer failed to appear? Should it also decide to proceed for ex parte hearing of the objection if officer fails to appear? The Directive in this regard has no single provision. Then, should the review department make use of procedures set in civil procedure? Following the procedure laid in civil procedure is against the nature of the internal review of tax disputes. As it is discussed previously, one of the natures of the internal tax dispute review is its flexibility.

In practice, “it is rare that the taxpayer fails to appear on the date set for hearing,” according to Ato Zewudie Damitewu.¹⁰³ In situations like this, the department sets other date to conduct the hearing and notifies the taxpayer via phone or sending formal letter to the taxpayer.¹⁰⁴ As to what would the department do if the taxpayer fails to appear repeatedly, Ato Zewudie Damitewu replied that “it is the departments concern too, though, till now no taxpayer failed to appear repeatedly?”¹⁰⁵ The flexibility should not be taken to mean without any limitation.

How is it treated when the officer from whose decision the objection is brought fails to appear? Except for some investigative audits, the auditing is conducted by the officer under the audit or

¹⁰³ Interview with Mr Zewudie Damitew, *Supra* 68

¹⁰⁴ *Ibid*

¹⁰⁵ *Ibid*

tax assessment department within the same branch.¹⁰⁶ The department is notified by internal Memo if the audit is conducted at branch and the auditor from investigation Case Team is notified by formal letter when the investigation audit is done by head office Investigation Audit Case Team. Sometimes, “the date set for hearing coincides with the date set for exit conference for another taxpayer by the audit department.”¹⁰⁷ In this situation, the audit department formally notifies the review department and the review department in turn notifies the taxpayer by changing appointment.¹⁰⁸

The FTAP envisages the authority (Ministry of Revenues) to issue directive specifying the procedures for reviewing objection including *hearings* (emphasis added) and the basis for making recommendations to the authority and the decision making procedure.¹⁰⁹ The Directive, however, failed to provide for the details of procedure to be followed at hearing stage. Thus the review department has no guidance as to what measure should be taken when parties fail to appear.

The taxpayer must be notified in clear terms what would happen if he/she/it fails to appear. The way outs available for the taxpayer who failed because of good cause should have been specified. Measures for the failure of officer called to elaborate the decision must also be specified. Unless specific procedures are there to guide the department, the fate of taxpayer is at the mercy of the committee when the tax payer fails to appear at first day set for hearing. Failure to specify effect of failure to appear on the part of the ministry may also expose the taxpayer to extra costs to the detriment of cost efficiency function. The procedure, however, should strike the balance between the timely disposition of dispute and other interests such as flexibility of the procedure and timely collection of the taxes due to the government.

Issues dealt above are related to steps prior to the commencement of the actual hearing. Usually, the hearing is conducted in the office the review department. In certain exceptional cases, “the

¹⁰⁶ The writer has the personal experience that each branch has its own audit or tax assessment department and the dispute review is taken place in the same branch. Most of the time investigation audit is conducted by the Investigation Audit Case Team under the department to control tax evasion. Disputes arising from investigation audit could be handled at the head office or at concerned branches as the case may be. Disputes considered as complex involving huge amount of tax liability (100,000,000) are handled at head office and those disputes involving tax liability less than this are handled at branches where the taxpayers pay their taxes.

¹⁰⁷ Interview with Mr Zewudie Damitew, *Supra* 68

¹⁰⁸ *Ibid*

¹⁰⁹ FTAP, Art. 55(2)

hearing could be conducted in the meeting hall when the number of persons is many and it is decided to record the hearing.”¹¹⁰

2. Setting the Scene (Commencing of Hearing)

Who opens the hearing? It is an accepted principle that the one who bears the burden to prove opens the hearing.¹¹¹ Usually plaintiff has right to begin in the hearing as he/she bears the burden to prove the claim he/she brought. But sometimes, defendant has the right to begin in the hearing when he/she admitted the existence of the obligation for instance, however, brings claim that the plaintiff is not entitled as he/she claimed. This aligns with the principle that the one who bears the burden to prove begins the hearing.¹¹²

In the internal review of tax disputes, it is the taxpayer who brings the objection to the review department. Thus normally, the tax payer has the burden to prove the objection brought before the department. Legally too, the tax payer has the burden of proof in any proceeding in relation to tax decision that the tax payer claims to be in correct ¹¹³, “either by failing to consider all relevant facts or by incorrectly applying the law.”¹¹⁴ The burden to prove incorrectness of the tax decision by taxpayer is justified on various grounds.

Primary reason among justifications is asymmetry of the information. This means that the taxpayer has information in his/her hand with respect to each and every transaction conducted. The taxpayer can prove facts denied by the tax authority by producing evidences against the position taken by the tax payer. Another reason is that “tax decision is passed by professional auditors and it is suggested that it should not be subjected to a much challenge.”¹¹⁵ These are stands taken by the drafters of the FTAP, as explained by Ato Wasihun Abate. Ato Abere Abebe also supports this stand as long as the decision is passed by the professional Tax Auditors. Even he argues further “that the possibility of winning the case at any stage is less likely and they bring the objection by

¹¹⁰ Interview with Mr. Zewdie Damitew, *supra* 68

¹¹¹ Robert Allen Sedler(1968), *Ethiopian Civil Procedure*, (Haileselassie I University, Faculty of Law)

¹¹² *Ibid*

¹¹³ FTAP, Art. 59

¹¹⁴ The World Bank Group *supra* note 5, P. 63

¹¹⁵ Interview with Mr Wasihun Abate Former Senior Expert and advisor of Ministry of Finance,interview conducted on 6 april,2022

spending the money which could have been collected by the ministry otherwise.”¹¹⁶ He also justified his stand by stating such a stand will deter frivolous proceedings brought about irresponsible tax payers’ objections.

“Ato Abere Abebe, however, failed to consider the limitation that the tax auditors have as they lack at least the knowledge to interpret the legal instruments”.¹¹⁷ The researcher personally agrees with this stand. The case between Ethio-Japan Textile Share Company and Ministry of revenue¹¹⁸ could have been resolved, even not decided, had the auditor known interpretations of laws when there is contradiction between the Amharic and English version of the legal instrument on which he/she relied to pass decision. It was the excise tax dispute in which the auditor decided on the company to pay excise tax on textile. The Amharic Version of the Excise Tax Amendment Proclamation¹¹⁹ levies 10% tax on the textile products or clothes produced or prepared in a factory. Whereas the English version levies 10 % excise tax on textile and textile products produced in a factory.¹²⁰ The English version levies tax on both the textiles and textile products, whereas the Amharic version subjects only clothes to the excise tax. It is clearly provided that the Amharic Version prevails and applicable when contradiction occurs between the English and Amharic Version of the Proclamation.¹²¹

Because the tax auditor has no exposure to mechanisms of legal interpretation, the case went up to the Tax Appeal Commission which decided on the issue to the tax payer by interpreting the law. “Furthermore, the burden of proof placed on the taxpayer is usually mistakenly interpreted” said one key informant.¹²² The tax authority generally and the auditor particularly, in objections brought before the department, has to establish *prima-facie* evidence that the taxpayer has failed to comply with the tax laws. Sometimes, the auditors pass arbitrary decision and the tax payer is required to disprove the decision under guise of the burden of proof by the tax payer.¹²³ Thus, absolute

¹¹⁶ Ato Abere Asfaw, Director of Legal Service Directorate, Ministry of Revenue, Interview Conducted on 10 May, 2022.

¹¹⁷ Arba Beyene, Senior Legal Expert at Ministry Of Revenues, Interview Conducted on 6 February, 2022

¹¹⁸ Ethio-Japan Textile Share Company vs Ministry of Revenue, Tax Appeal File No.B-140/13 Federal Tax Appeal Commission, 2021

¹¹⁹ Excise Tax (Amendment) Proclamation No. 570/2008, Federal Negarit Gazeta, 14th Year, No. 22, Art. 2(8).

¹²⁰ *Ibid*

¹²¹ Federal Negarit Gazetta Establishment Proclamation No. 3/1995 Federal Negarit Gazeta, 1st Year, No. 3 Art.2(4)

¹²² Interview with Mr Arba Beyene, *supra* 117 .

¹²³ *Ibid*

reliance on auditors is wrong because tax law, as provided in previous chapter, complex and needs great attention to correct mistakes made by the latter.

Be that as it may, the Directive issued to establish working procedure for the review department lacks detailed rules as to who begins the hearing and how the hearing is commenced. However as to who begins the hearing one can infer from the burden prof imposed by the Proclamation. Therefore, it can be said that the tax payer begins the hearing before the committee. Taxpayer, however, lacks technical knowledge on the decision passed and under exceptional circumstances, especially when the tax payer is not represented by professional in the area of tax, auditor of tax authority must be required to explain the decision.

The practice of the review department lacks consistency. Sometimes the committee gives the review of objection of taxpayer and requests the auditor to respond or explain the decision. "It sometimes gives opportunity to taxpayers to explain their objection."¹²⁴ Other times, it just reads and begins questioning the parties as to their version of arguments. "Sometimes the committee reads the objection of taxpayer and the written explanation by the auditor and requires the tax payer to respond to the explanation provided by the auditor."¹²⁵

This inconsistency is emanated from lack of the detailed rules for the hearing. As it has been provided in preceding sections tax dispute settlement within the tax authority is informal in process. It is also the forum where the real hearing is conducted. Being real forum to be heard, it must give the appropriate opportunity for the parties to control the process. Control of the process is control over opportunity to present evidences and arguments.¹²⁶ Thus each party has to present ones version of evidences and explanation thereto. The party also must be given to present the argument justifying his/her claim. There should also be an order of presenting evidences and arguments. However, the order should also comply with the nature of tax dispute settlement process within the tax authority, such as flexibility and informality.

¹²⁴ Ato Muluken abera Formerly Senior Tax Auditor at MoR, Interview conducted on 24 May, 2022

¹²⁵ *Ibid*

¹²⁶ John Thibaut and Laurens Walker, *Procedural Justice: A Psychological Analysis*, (Lawrence Erlbaum Associates, 1975), P.174

The law maker under the Tax Administration Proclamation envisaged, issuance of the Directive encompassing details in order to achieve the objectives of tax administration in general and objectives of tax dispute review within the tax authority in particular. But the Directive in this specific issue lacks details of the hearing process. The problem is not limited to who opens the hearing. But it failed to define the roles of committee at the time of hearing. Therefore, the Directive needs to be amended to encompass the detailed rules on the procedure of hearing which needs to include rules on who opens the hearing, what is required from the defense side- usually the auditor and the roles that the review committee is required to play. The rules on hearing must give opportunity to parties to have high level of control over the process which helps the outcome acceptable by the parties.¹²⁷ Therefore it is at this time that the parties face the department entrusted to entertain tax disputes which can capture the views of the department which passed the decision and taxpayers view on compliance to the tax law.

Is representation before the review department allowed? No law prohibits the taxpayer from being represented by legal professionals as long as they are given power of agency. It is, however, rare that the taxpayers are represented by professional lawyers. Tax consultants, considered as professionals in the area of tax, are the main actors from the part of the taxpayer. “They, sometimes, appear before the review department to explain the objection as representatives.”¹²⁸ But tax consultants, in practice in Ethiopia, are those professionals specialized in the areas of accounting and related fields of study. In rare cases, lawyers appear before the department and hearing in those cases appears to court proceeding. As it is informal proceeding, it is difficult for the lawyers to present their cases in a manner of conventional court proceeding. Therefore, it needs lawyers to experience informal nature of hearing before the department. “The members of committee, however, are uncomfortable where lawyers appear at the hearing before it because they believe that lawyers would divert the issue and it may result in wrong decision.”¹²⁹ The taxpayers are also “not fully willing to be represented by lawyers except for some cases, as they want to maintain the smooth relationship with the tax authority.”¹³⁰

¹²⁷ *Ibid*

¹²⁸ Interview with Mr Zewudie Damitew, *supra* 54

¹²⁹ Interview with Mr. Bruk Bekele Attorney at Federal Courts, Addis Ababa, July 12, 2022-----

¹³⁰ *Ibid*

Generally, though the hearing procedure for an internal review system should remain informal and should not be confined to the procedures in court like proceedings, such as the rules of civil procedure, problems associated to cost, effectiveness, predictability of the review system should be alleviated. This is because, unless specific procedures are there to guide the department, the fate of taxpayer is at the mercy of the committee when the tax payer fails to appear at first day set for hearing which will have bearings on cost and predictability implications. This is also true where the effect of failure to appear on the part of the ministry is not specified which will expose the taxpayer to extra costs to the detriment of cost efficiency function. The procedure, therefore, should be designed to strike the balance between the timely disposition of dispute and other interests such as flexibility of the procedure and timely collection of the taxes due to the government.

3.3.3. Evidence Examination and Expert Opinion

Evidence is at the center of any tax dispute. Though there are tax disputes which relate to purely legal issues, more often than not, “tax disputes before internal tax review department involve factual issues.”¹³¹ In other words, proving the existence of certain fact or disproving certain allegation is the main task while handling tax disputes. Tax authority makes tax decisions based on facts it obtained from tax declarations, audit reports, records, financial statements and the like. In the same token, a tax payer challenges tax decision made based on these facts. The documents and records state facts about tax liability of the tax payer. So, legally speaking these elements relate to evidence. Evidence is something meant prove fact in issue or conclusion or disprove fact in issue or conclusion.¹³² Thus, no doubt that rules of evidence are at the kernel of internal review proceedings. Then, the question is, therefore, are there adequate rules to that effect that enable the department to render effective recommendation while respecting the right of the tax payer? If so, are those rules adhered by the department?

With respect to the first question, it has to be reckoned that we do not have evidence law for judiciary system as a whole let alone to have evidence rules for administrative proceedings like internal tax review system. Under advanced legal system of both common and civil law legal

¹³¹ Interview with Mr. Zewdie Damtew, *supra* 54

¹³² Kahsay Debessu, *Module of law of evidence*, Training Material for Federal Justice Sector professionals, (Federal Justice and Legal Research Institute)

systems evidence law encompasses rules admissibility of means of proof, facts need not be proved, guiding rules for relevancy, burden of proof and standard of proof.¹³³ But, in Ethiopia there is no comprehensive evidence law that deals with these matters apart from rules under certain substantive, administrative or procedural laws that are stated sparsely.

Hence, when we look at tax administration law and administrative procedure law of Ethiopia, rules of evidence that are stated in black in white are only two. The first is the rule of burden of proof. It is sated under article 59 of the Proclamation which says *in any proceeding in relation to a tax decision, the burden shall be on the taxpayer to prove that the tax decision is incorrect*. The second one is under article 30 of the Proclamation Number 1183/2020, deals with reasoned decision that *adequate reasons should be given for administrative decision on made*.¹³⁴ The first one relates to the burden of proof and the second one relates to the necessity of giving reasons for decision which can emanate from the substance, legal ground or *evidence of the case*.

Furthermore, the Directive under article 12 provides for rules evidence. It stipulates that the recommendation on the objection shall contain the points of objection, arguments of both parties, the issues involved, analysis, legal grounds and evidences used to reach a conclusion. From these we can understand that evidences shall be stated in the decision part. Additionally, the tax review committee can ask any person or body or request any document from any person for information that help rendering the decision.¹³⁵

However, the practice shows that there are problems regarding admissibility, relevancy, standard of proof and exceptional rule for burden proof. . For instance, in one giant tax objection case a letter written by breweries association regarding deductible expenses was produced by Brewery Company to the Department which admitted it and rendered a decision based on this evidence.¹³⁶ However, as per the principles of rules of evidence, the evidence should not have been admitted

¹³³ *Ibid*

¹³⁴ Federal Administrative Procedures Proclamation, Proclamation No. 1183/2020, Federal Negarit Gazeta, Year 26th no.32 Apr.7, 2020

¹³⁵ The Directive, *Supra 48*, Art. 12

¹³⁶ Interview with Arba Beyene, *supra 117*

as it was produced by the institution whose interest is directly involved which in turn makes it non credible. With respect to burden of proof, there are cases where the justification for imposing burden of proof on the tax payer does not usually work because of asymmetry of information. These are instances where the tax payer lacks information to disprove the decision made by the authority where a prima facie rule to shift the burden of proof may be applied. .

With respect to expert opinion, though it is discretionary power of the committee to seek expert opinion, Ethiopia does not have rules of examining expert opinion. Also the tax payer may abuse this system by producing its own partial expert. Thus, even though expert opinion is important it is susceptible for abuse. Therefore, the criteria on who the expert should be, and its autonomy and impartiality together with rules of procedure for making an opinion, should be stipulated.

Like the hearing procedure above, though the flexibility of internal review system is needed to collect tax debts efficiently, the lack of evidentiary rules and lack of sound and workable evidence collection and reasoning rules negatively affects the right of tax payer and the government, hence the effectiveness of the tax administration system.

3.3.4. Recording of Hearing

Recording hearing has multifaceted purposes in judicial or other tribunals' proceedings. It helps the court or other tribunals to capture arguments and claims raised by the parties to proceeding. It also serves the purpose of re-examining the arguments and stands taken by the forum first heard the parties in further proceedings. Therefore, it has at least two major purposes. These are evidentiary at further proceedings such as appeal and memorizing the judge at the hearing. Recording hearing before review department would serve similar purposes.

As mentioned above, the hearing is recorded in some selected cases which are considered as complex and involving huge amount of tax liability. The record serves only the purpose of memorizing members of the committee. It is not presented in further proceedings such as appeal to Tax Appeal Commission as the researcher's knowledge goes.¹³⁷ This does not mean that Tax

¹³⁷ Tax payers in tax appeal presents memorandum of appeal along with tax notice and decision on objection. There is no way for the tax payer to present the record of hearing even if it was recorded by the review department. The Tax Appeal Commission too is not interested in producing the hearing conducted before the department as it considers itself as a tribunal to inquire both facts and laws to decide up on the case brought before it.

Appeal Commission cannot have power to access the hearing before the review department. It can order the department to produce the recorded hearing if the issue is whether certain claim is presented before the department. In cases where the department failed to record the hearing, parties to the case before the commission have no way to prove their claim if the other side denies. Though the Tax Appeal Commission has a power to entertain cases on both questions of law and fact and is not required to confine itself to the deliberations made under the Review Department, recording helps for both parties (to support or despise evidence) and even for the Commission to have a full access of the story of the case for it to duly settle the case.

In practice, problems related to recording are hampering proper serving of justice particularly for tax payers. In a case between Ethio-Leather PLC. Vs MOR¹³⁸, where the appellant raised the issue of loss of the tax year of 2016 and 2018 to be carried forward to the year, 2019/2020 where the RD failed to record. The appellant later applied to the Commission for loss of the tax year, 2018/2019 to be carried forward for the year, 2020 where the Commission dismissed the appeal stating that the issue of loss carry forward was not raised at the RD. The fact, however, was that if not for the failure to record, the appellant argued, the issue was raised before the RD. a loan repayment and expenses for purchase of construction inputs as a deductible expense before the Commission which the respondent denied that the fact was raised at the Review Department. The commission ordered the production of evidence to bring the record of the proceeding of the Department to which it was not possible produce since the latter failed to record. The Commission dismissed the case by preliminary objection. Such problems violate substantive rights of tax payers and need to be addressed. The case gets shoddier where the Commission, despite its power of decision on questions of fact, requires that issues not raised at the Department won't be considered at the appellate level. Were there clear laws and mandatory requirements for recording such problems would be alleviated. Therefore, it is essential that recording hearing for all cases presented for review should be made.

¹³⁸ Ethio-Leather PLC Vs MOR, Tax Appeal Commission file.no.B-1112/2013, 2013 see also Military Inputs Manufacturing Enterprise Vs MOR, B781/2013 for similar comparisons

3.3.5. Deliberation and Making Recommendation by the Department

The final result of proceeding before the department is recommendation in tax disputes. The review department does not have power of rendering the binding decision on taxpayers. Its power is limited to making recommendation as per article 55(1) of the FTAP. It is the authority which is entrusted with the power of allowing the objection in whole or in part or disallowing the latter and the decision rendered by the Authority is referred to as an “objection decision”.¹³⁹

The problem with this provision is that it fails to define who is specifically responsible for rendering the objection decision. As a result, there is discrepancy among objection decisions. In some cases, the head of the office under which the objection was deliberated approves the recommendation by the committee. In some other instances, the branch manager approves or amends the recommendation by the committee. The Authority, according to article 2 sub article 4(a), of FTAP is Ethiopian Revenues and Customs Authority (currently Ministry of Revenues). The then Authority is represented by the Director of the Authority and now it is the Minister who represents the ministry. The Proclamation does not envisage delegation of allowing, amending, remanding or disallowing power of the authority or the minister.¹⁴⁰

The Directive, however, entrusts the power of rendering objection decision to the branch manager. Furthermore, it allows the delegation of the power to persons in lower positions such as the Head of the office of the objection.¹⁴¹ This is why the head of the office of objection approves the recommendations of the committee. It could be the same person who chairs the proceeding of the objection. Unless a mechanism is devised including legal amendment, such a provision will create overlaps of powers and interests.

It must also be noted that the Directive gives power to the branch manager or the person delegated by him to remand to tax review department which rendered recommendation by framing issues to be settled. But the review department is prohibited from remanding decisions to other departments

¹³⁹ FTAP, *supra* 26 Article 55(4)

¹⁴⁰ It should not be taken that the writer opposes the delegation of power of rendering decision on objection. Rather reading of the provision of the proclamation that there is no word that allows or envisages delegation of the power entrusted to the minister.

¹⁴¹ The Directive, *Supra* 49, Art.11/4

to render decision on the objection before it.¹⁴² For one thing, as discussed in previous section of this material, the review department has the power to produce the evidences and any explanation sought to decide on the issue before it as per article 12(2) of the Directive. On the other hand, this prohibition is aimed at tackling problems related to finality of the decision. It is a rampant problem that the RD usually remands the cases to the department which rendered the decision for the tax payer to present evidences and the Department decides accordingly. But, tax payer is left with decision that is not final i.e. not matured to be appealed from.¹⁴³ Moreover, the often raised problems in relation to recommendations of the RD are that the latter passes unclear and conflicting recommendations that are neither appealable nor capable of execution. For example, in a case between Elegant Interior Design and Eng.PLC Vs MOR¹⁴⁴, whether a an income on which a capital gains tax was paid is susceptible for income tax, the appellant objected that it shouldn't be subject to pay income tax since it has already paid a capital gains tax on its property of taxable assets. The RD recommended and passed an ambiguous decision stating that “on the condition of proving the facts that the appellant did pay capital gains tax or not it shouldn't be obliged to pay income tax. Otherwise, he should.”¹⁴⁵ The Audit Department, however, latter notified the appellant to pay an income tax from which an appeal was made to the Commission. The Commission dismissed the case on the ground that the case is not appealable since it is a matter of execution of decisions. The RD, in another case, also passed a decision stating that “the appellant should pay 10% mining income tax if it is a sub-contractor or 15% if it is a mining contractor”¹⁴⁶ depending on the identity of the appellant and conditional to identifying the same. Such absurd and unclear statements by the RD shouldn't amount to decisions proper. These problems arise as a result of lack of experts and adequate staff so much so from lack of clear provisions on procedures and contents and nature of judgment/recommendation writing.

¹⁴² *Ibid*, Sub Article 5

¹⁴³ It is personal experience of the writer and other legal officers working at Legal Directorate of the Ministry

¹⁴⁴ Elegant Interior Design and Eng.PLC Vs MOR, Tax Appeal Commission file.no. B-868/2013, 2013

¹⁴⁵ *Ibid*

¹⁴⁶ Yara Dallol VV Eth.branch Vs MOR, Tax Appeal Commission file.no.B-1443/2013, 2013

3.3.6. Contents of the Decision

According to article 12(1) Of the Directive, the recommendation of the committee is required to contain:

- a) The root cause of the objection;
- b) The objection of the tax payer and arguments and explanation by the parties;
- c) Issues that require decision
- d) Reasoning,
- e) Laws, analysis and evidences served to base the decision of the committee.

It can be noticed from different decisions that most of the recommendations by the review department do not fulfill these requirements. Recommendations lack arguments of the parties, reasoning, analysis and relevant laws to the specific case before the committee and issues to be decided by the department. “These problems emanate from the lack of the required professionals in the composition of the committee.”¹⁴⁷ Tax being an interdisciplinary concept, requires professionals from areas of law, economics and accounting to decide on disputes related to latter. Except from the office head of the review department, there is no officer with legal background in the review department at High Tax Payers Branch Office.¹⁴⁸ Cases at the branches involve very complex legal relations and concepts. The concepts like related party transaction, foreign tax credit, transfer pricing, double tax avoidance and other concepts arise at the branch offices because huge companies from different countries pay tax at that branch and resultant objections related to tax decisions which the branch renders.¹⁴⁹

Though the Directive envisages judgment like that of regular courts, informality of the procedure and lack of legal officers or less representation and participation, most decisions are not in the form what the Directive provides. Other practical problem related to content of the decision, is “that officers in the team divide cases among themselves even though the team has legal officer. It is difficult for one officer to comprehend all issues involving different subject matters.”¹⁵⁰ The presence of legal officer cannot guarantee making correct analysis of the case because of the nature of taxation. The legal officer may address the legal aspect of the case but may fail to comprehend

¹⁴⁷ Interview with Mr. Abere Abebe, *Supra* 56

¹⁴⁸ *Ibid*

¹⁴⁹ *Ibid*

¹⁵⁰ Interview with Mr. Zewdie Damtew, *Supra* 54

concepts related to accounting. The facts of the case may mandate to consider the policy reason (social, economic or monetary policy) of taxing/not taxing of certain transaction. Therefore, though the Directive prescribes the contents of the recommendation of the review department, because of the practice of dividing cases among officers having different professions to prepare recommendations and limitations related to nature of tax law made it difficult to follow the content as provided under the director.

3.3.7. Time and Cost Dimension

Time and cost are very important factors both for tax payer and tax authority and affect the review system in particular and tax administration in general. Hence, the rules about effective use of time and cost minimization are necessary. In this regard, both the Proclamation and Directive provide for time limit for both tax payers to lodge the objection and the Department to render recommendation on the objection. It is twenty one days as of receipt of tax decision, for the tax payer to object and 180 days for the Department to make recommendation.¹⁵¹ The twenty one day may be extended with 10 additional days up on request. The 180 days for the department to make recommendation is too long, it is half a year. In practice, “the time limit for the tax payer is strictly observed but the Department does not obey the rules.”¹⁵² The time for objection is also criticized by experts and tax payers that it is too short and is below the average time allowed by other jurisdictions and insufficient to prepare the objection.¹⁵³

Cost wise, the tax payers incur expense for applying their objection and related costs. Though it is an expected cost and the government is not expected to relieve them from such cost, cost minimization as an objective of tax administration is necessary to be observed. That is to say both tax payer and the government should not incur unnecessary costs.¹⁵⁴ In this regard, the rules are not clear; neither the Proclamation nor the Directive deal with cost dimension of proceedings before the Department. Perhaps, it is considered regular administration work. The power of the Department vis a vis cost allocations of the parties is nowhere indicated. Though it can impose

¹⁵¹ FTAP *supra* 26 Art.55/7

¹⁵² Interview with Mr. Zewdie Damitew, *supra* 54

¹⁵³ Aschalew Ashagre, *supra* 43 at pp 42

¹⁵⁴ *Ibid*

additional amount for the tax payer to pay beyond what is the amount objected about,¹⁵⁵ the Department doesn't have any power on the allocation of costs.

However, review of tax objection incurs cost by the tax payer and hence there should have been rules related to costs to be incurred by the government when it found that tax authority officers committed fault when making tax decision. This might make the system effective. This is also in line with modern administrative procedures and Ethiopian law also provides for it.¹⁵⁶ However, unlike the formal judicial proceedings tax review proceedings are left to be flexible and less formal. Imposition of costs on either the tax payer or the Authority need, on the other hand, to be justified. In most jurisdictions, the tax authority should pay the costs incurred by the tax payer where the tax payer wins in the appellate proceedings.¹⁵⁷ This empowers potential tax payers to challenge unfair administrative decisions. On the other hand, it can create a problem for court congestion since any tax payer with frivolous claims would take his/her appeal to the court. On another note, imposing cost on the losing tax payer may discourage frivolous claims from being brought to appeal though it will have a negative impact on the quality of tax assessment since it discourages the tax administration from overly aggressive assessments.

While these rules may play a role in respect to judicial appeals, they are clearly not advisable for protests within the tax administration, as “the possibility of internal review should not be restrained and no cost should be incurred by the taxpayer.”¹⁵⁸ Therefore, the cost issue in an internal review system should not be an issue of utmost priority; however, the law should take discouraging frivolous claims from being brought and encouraging prudent tax assessments in to consideration. These issues may be realized by other mechanisms; such as strict rules for regulating the behavior of tax officers on one hand and enabling the Commission and the court to impose costs on case by case basis on the other.

¹⁵⁵ The Directive, *supra* 48, article 8/5

¹⁵⁶ Federal Administration Procedure Proc. No. 1183/2020, Federal Negarit Gazette, Year 26, No. 32, Art.59

¹⁵⁷ Victor Throyini, *Supra note 16* at pp 9

¹⁵⁸ *Ibid*

3.3.8. Review Power of the Minister

The Directive under article 12 sub article 7 provides that the minister is authorized to review the decision of the department at any time if falsified document involved, clear mistake that causes grave damage, or review decision is made with acts related to crime. For this purpose the minister may organize a group on temporary basis to bring recommendation.¹⁵⁹ This provision according to Abere Abebe,¹⁶⁰ is included in the Directive because of practical problems that the tax authority has faced. “There are decisions where the ministry lost huge amount of tax because of falsified documents and corruption” says Abere Abebe.

The authority as per article 55(4) of TAP is only entrusted to allow, disallow or vary the recommendation of the review department. This provision of the Directive gives unlimited power to the minister beyond the power of decision. Arba Beyene said that ‘this power of the minister is inappropriately given in that it fails to address circumstances such as when the dispute went to a body other than the ministry and the power of the Tax Appeal Commission to remand the decision’¹⁶¹ it believes that tax assessment must increase as per article 91 of the TAP.

The other contradiction with this provision is that it hinders timely disposition of tax disputes.¹⁶² As discussed earlier in chapter 2, one of the reasons for entrusting power of reviewing tax disputes on tax authority is timely disposition of tax disputes which also has cost efficiency of tax dispute resolution. It contributes for overall tax administration efficiency.

Empowering the minister to review without any restriction could vitiate the tax administration in that it may initiate the minister to review tax review decisions after many stages have been employed such as appeal. Review power without any time limit may be a great challenge to the tax payer in case where the tax authority reviews the decision after documents and records are lost. This may make it difficult for the tax payer to prove that decision was correct. Reviewing the decision is not the only solution for cases decided because of falsified documents and corruption.

¹⁵⁹ FTAP *supra* 26, Article 12(7)

¹⁶⁰ Interview with Mr Abere Abebe, *supra* 56

¹⁶¹ Interview with Mr Arba Beyene *supra* 117

¹⁶² *Ibid*

Making officers accountable for the decision may better serve the purpose of tax administration efficiency.

All in all, the proclamation has not given the power to the Minister to review its decision under article 55 of FTAP. Even if it could be argued that the Ministry is empowered to review its decision, the time of reviewing must be limited consistent with time limitation to keep records and there must also be restriction in cases where the decision is appealed from.

CHAPTER FOUR

Conclusion and Recommendations

4.1. Conclusion

From the forgoing discussion we can infer the following concluding remarks. Tax dispute involves range of issues. It may be caused by tax shelters usually created by lawyers and accountants, inaccuracy of books of accounts, misunderstandings of the law by both the audit officer and tax payer which may stem from excessive complexity of tax system; amount of deduction allowed and taxability of the certain incomes or confusion as to the scope of a given tax law. “Whatever the cause of such disagreements, they must be handled properly before they come to have repercussions for the economy, since taxation is crucial component of any national economy. Providing for the tax dispute resolution mechanism therefore, is integral to tax administration.

There are different alternatives to resolve tax disputes. It ranges from negotiation between the tax authority and tax payer to taking tax dispute cases directly to the regular courts. Now a days, it is countries’ experience that tax authority is entertaining tax disputes between the tax payer and itself when the tax payer disagrees with the decision of the authority. Complexity of tax laws is another reason of tax dispute as it involves multiple of the fields which requires knowledge of different fields related to tax laws. Related to the complexity of tax laws confusion as to the scope of application of given tax law, ambiguity or vagueness of certain provisions of the law or due to taxpayer or tax authority not being able to correctly interpret the given provision are the main sources of tax disputes.

In circumstances like this, it is inevitable that disagreement is appropriately settled using tax dispute settlement mechanisms devised by the tax administration law. Tax dispute has peculiar features. These features emanate from the unique nature of tax obligation and taxation power has general effects; not limited to only specific tax payer.

In Ethiopia, as per art 2(34) and 54 of the Federal Tax Administration Proclamation tax decisions give rise to tax dispute between ministry and tax payer. The issues to these disputes can be categorized in to issues of facts or issues of law. While the former relates to relevancy, accuracy

and sufficiency of information used to make tax decisions the latter relates to interpretation of law or characterizing of facts at hand to apply law as basis for tax decision. The Review Department in the MOR comprises members that accept complaints from aggrieved taxpayers involving any one of the grounds of tax decisions defined in the FTAP.

Hence, in this thesis rules and practice of internal review of tax dispute between Ministry of Revenue and tax payer was the point of investigation. It, therefore, discussed the powers and functions of the RD of MOR. If properly implemented, internal tax review system gives chances to rectify its mistakes, expedites tax collection, ensures the right to be heard and ensures integrity of the system. Furthermore, it is considered as 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.

As a setback, it may also suffer from lack of openness, lack of principle of fair play, political influence, and lack of expertise. With respect to legal framework or sources of rules for internal tax review system in Ethiopia, the constitution, general principles of tax law and tax administration laws serve as source like protection and respect of human rights, transparency, accountability, principles of equity, efficiency, certainty and neutrality, accessibility, fairness and impartiality, less administrative cost and measurability or predictability emanate from them. These values of a good tax review system are infuriated, as founded about in this thesis, because of legal and practical problems. The legal problems give rise to problems of power, structure, composition and functions of the RD. On top of practical problems such as lack of expertise, recording, recommendations and deliberations, the legal gaps and ambiguities contribute to in efficient, ineffective, costly, partial, unaccountable and unjust tax review system.

4.2. Recommendation

The following recommendations are forwarded for the legal gaps, misapplication or non-application of rules by the department and practical challenges that hinder the Department from effective and efficient review of tax objections. Accordingly, the problems related the power, structure, composition, function of the RD including lack of expertise, political patronage and conflict of interest and violations of tax payers' rights arising either from legal gaps or practical

challenges will be alleviated if the following recommendations are observed. As such legal reforms,

- ❖ Rendering trainings and awareness creation regarding rules of tax in general internal tax review system in particular both for officers and tax payers are suggested as recommendation.
- ❖ The place of the department in the organizational structure has to be re-examined.
- ❖ Composition or staffing of officers, evidence collection and hearing procedure, case management and manner of making final decision by the head affects the whole effectiveness of the system. Source of the problem is both from the inadequacy of legal framework and misapplication of even the existing rule therefore, amendment to that effect should be made.
- ❖ As per article 9(1) of the Directive the head of the department is entrusted to examine and identify problems by analyzing the lodged complaints and forward along with solutions to the office the department. Hence, an enabling environment including legal and technical solutions for the head of the department to identify the challenges that the department faces in light of objectives the department meant to achieve has to be created.
- ❖ The Ministry shall install the structures as indicated in the Directive and fill the vacancies in the departments.
- ❖ The rules and practices with respect to selection and composition of officers which are neither clear nor organized should be amended to enable the department to discharge its responsibility effectively.
- ❖ In practice there is no labour division and the department is not functioning as stipulated under the Directive. So, the Ministry shall follow up and ensure proper functioning of the department.

- ❖ Absence of the rules to manage cases affects expeditious disposition of case and in effect collection of taxes as indicated objective of the review system and tax administration in general. So, the Directive should be amended to include rules of evidence.
- ❖ Appearance requirement is not clearly provided under the Directive and the consequences for failing to appear are not stated, therefore, amendment to that effect should be made.
- ❖ Article 12 sub article 7 of the Directive that empowers minister to review the decision of the department at any time if falsified document involved, clear mistake that causes grave damage, or review decision is made with acts related to crime should be amended as it creates problems when the Minister or an executive appointee assumes multiple roles that conflict of interest may arise or unbridled power may be granted to the same person such as reviewing his own decision or review of the decision after many stages for review have been employed. This in turn affects efficiency, quality and finality of decision that would finally affect the system of good tax administration.

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