

# ADDIS ABABA UNIVERSITY SCHOOL OF LAW AND GOVERNANCE

The Right of Tax Payers to Due Process in Tax  
Administration in Ethiopia: A Case Oriented  
Study

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## Contents

## Contents

Acknowledgment .....	1
Chapter one .....	4
1. Introduction .....	4
1.1 Background of the Study .....	4
1.2. Statement of the Problem .....	6
1.3 Objectives of the Study .....	7
1.3.1 General Objectives .....	7
1.3.2 Specific Objectives .....	7
1.4 Significance of the Study .....	7
1.5. Research Methodology.....	8
Chapter Two.....	9
Procedural Due Process of Law in Relation to Tax Administration.....	9
<b>2.1. General Remarks</b> .....	9
2.2. Introduction to Tax Administration .....	10
2.3. Due Process of Law in General.....	13
2.3.1. Historical Background of Due Process of Law.....	13
2.3.2. Definition of Due process of Law .....	14
2.3.3. Dichotomy of Due Process: Substantive v. Procedural.....	16
2.4. Elements of Procedural Due Process of Law .....	19
2.4.1. Opportunity to be heard .....	20
2.4.2. Presence of an Impartial and Independent Tribunal .....	22
2.4.3. Rendering Reasoned Decisions .....	24
2.5. Rights of Taxpayers to Procedural Due process of Law: An overview .....	26
2.5.1. Notice after Tax Assessment.....	28
2.5.2. The Right to be Heard During Tax Audit .....	31
2.5.3. The Right to be heard during Tax Foreclosure.....	35
Chapter Three: Rights of Taxpayers to Procedural Due Process in Ethiopia at the Level of the Tax Authority .....	43
3.1. General Remarks .....	43

3.2. Introduction to the Ethiopian Tax System.....	43
3.3. The Right to be Notified After Tax Assessment.....	49
3.4. Procedural Due Process during Tax Audit.....	55
3.5. Procedural due Process during Tax Foreclosure.....	65
Chapter Four: Procedural Due Process Rights of Taxpayers During Tax Dispute Settlement .....	74
4.1. General Remarks .....	74
4.2. An Overview of Tax Dispute Settlement in Ethiopia .....	74
4.3. Procedural Due Process of Law at the Review Committee .....	78
4.3.1. Establishment, Composition and Accountability.....	78
4.3.2. Impartiality and Independence.....	81
4.3.3. Opportunity to be Heard of the Taxpayers.....	83
4.3.4. The Right to Get Reasoned Decision.....	86
4.4. Procedural Due Process of Law at the Tax appeal Commission.....	91
4.4.1. Establishment, Composition and Accountability.....	91
4.4.2. Impartiality and Independence.....	95
4.4.3. Opportunity to be Heard of the Taxpayers.....	97
4.4.4. The Right to Get Reasoned Decision.....	107
4.5. Procedural Due process Rights in Regular Courts .....	111
4.5.1. The Right to be Heard .....	111
4.5.2. Independence of the Court.....	117
4.5.3. The Right to Get Reasoned Decision.....	124
Chapter 5.....	127
5. Conclusion and Recommendation	
5.1 Conclusion.....	128
5.2 Recommendation.....	133
Bibliography .....	136

# Chapter one

## 1. Introduction

### 1.1 Background of the Study

Tax is defined as a compulsory contribution payable by an economic unit to a government without expectation of direct and equivalent return from the government for the contribution made. There are many purposes for collecting revenue through taxes. It includes giving government power to allocate resources; to enable government to provide/support social development; to stabilize the economy; and to encourage optimal economic growth.<sup>1</sup>

Thus, considering the administration of this relevant source of government's income will be crucial. Tax administration refers to the identification of tax liability based on the existing tax law, the assessment of this liability, and the collection, prosecution and penalties imposed on recalcitrant taxpayers. Tax administration, therefore, covers a wide area of study, encompassing aspects such as registration of taxpayers, assessments, returns processing, collection, and audits. Tax administration therefore, should aim at improving laws regarding the registration, assessment and collection of revenue.<sup>2</sup>

The legal rules required for effective tax administration include rules for the establishment of an individual's tax liability and a system of appeals from the initial assessment of tax; rules for the collection of taxes; and rules relating to tax offences and their punishment. The tax

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<sup>1</sup> Lisa Kayaga; Tax policy challenges facing developing countries: a case study of Uganda (2007) (www.collectionscanada.gc.ca ) last visited on 13/01/2015

<sup>2</sup> Asamenew Gebereselessie; Tax Assessment and Collection Problems of Category "A" tax payers: A Case of Yeka Sub City,(AAU), (2012 ) p. 1([http://hdl.handle .net/123456789/3310](http://hdl.handle.net/123456789/3310)) last visited on 13/01/15

administration should provide impartial and professional courteous service and must keep private and confidential information regarding the individual taxpayers.<sup>3</sup>

In the day-to-day operations of Tax Authorities disagreements with the taxpayer cannot be avoided. As a result, the tax system of a given country should be able to come up with a grievance handling system which needs the consideration of taxpayers' right carefully.<sup>4</sup> The taxpayer has a guarantee against unfairness or error in the administration of taxes and the right to appeal to competent, impartial authorities when he disagrees with the determination of the assessing officer<sup>5</sup>. This implies the due process rights of taxpayers. Due process right protects a person from being deprived of his/ her right to life, liberty or property by government's action without notice and opportunity to be heard. This right should be well protected and respected since taxpayers are milestone of the economy. Countries may have different institutional make up to handle disputes between Tax Authorities and the taxpayers but generally this cases could be entertained before administrative tribunals, regular courts or by alternative dispute resolution (ADR) methods.<sup>6</sup>

The Ethiopian Revenues and Customs Authority (ERCA) is the body responsible for collecting revenue from customs duties and domestic taxes. Ethiopia has gained 58,981,000,000 birr in the year 2003 E.C, 85,740,000,000 birr in 2004 E.C and 107,010,000,000 in 2005 E.C from tax.<sup>7</sup> This data indicates that the country gets a great amount of money from tax and it is increasing each year. Thus, to ensure the income from this source the government shall make sure that the taxpayer has a trust on the tax authority to pay what is due on him willingly. To build this trust, acknowledgment and respect of

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<sup>3</sup> Id, p.13

<sup>4</sup> Aschalew Ashagre, የግብር ከፋዮች ቅሬታዎች አፈታት ሥርዓት በኢትዮጵያ፣ አዲስ አበባ ዩኒቨርሲቲ፣ የህግና አስተዳደር ትምህርቶች ኮሌጅ; unpublished, p 1

<sup>5</sup> *Encyclopaedia Britannica Ultimate Reference Suite*. Chicago: Encyclopædia Britannica.

<sup>6</sup> Aschalew , cited above at note 4, p 1

<sup>7</sup> General Government Revenue Quarterly Performance( Cumulative)2006/07-2012/13, this information is collected from the Ministry of Finance and Economic Development on Nov.4/2014

fundamental rights of taxpayers, which are recognized under the constitution<sup>8</sup> and other tax laws is imperative. Therefore, while the authority engages in its duties it is expected to protect the due process right of the taxpayers.

## 1.2. Statement of the Problem

This paper aims to address some problems observed in the institutions designed to hear the grievance of an aggrieved taxpayers in Ethiopia in relation to due process right. And problems encountered in relation to tax audit, assessment and foreclosure. It is indicated earlier that the country earns a great deal of money from tax collection; this being the case it will be necessary to make sure the taxpayers are treated well and their rights are respected. There are three levels for an aggrieved taxpayer to appeal his case. These are the Review Committee, the Tax Appeal Commission (TAC) and Courts. To ensure the respect of due process right of a taxpayer an impartial decision maker is imperative. Thus, the paper will try to evaluate the fairness and neutrality of decisions passed by the Review Committee and the TAC. This issue will be seen in relation to the lack of clear criteria to select the members of both institutions and its impact on the impartial decision making.

The adequacy of the specified time for the taxpayer to appeal to TAC after he/ she receive tax assessment notification will be addressed. The right of the taxpayer to get a well reasoned decision in a reasonable time will be scrutinized in relation to tax laws and the practice. The fairness of the requirements which needs to be fulfilled to appeal a case from the review committee will be touched up on. In relation to the courts, it is known that there is lack of a directive that indicates how to classify a given case as question of fact or law. The impact this loophole may have on taxpayer's right to take their case to courts will be addressed. Furthermore, the impact of the independence of the judiciary to insure the respect of taxpayers' right by the Tax Authority will be discussed.

The paper will mainly focus on procedural due process in the adjudicatory power of the tax authority mainly dealing with the mentioned problems and questioning its adequacy. It will

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<sup>8</sup> Some of the Taxpayers' Rights recognized under the FDRE constitution are the right to privacy, the right to equality of treatment, the right to be protected from inhuman treatment and the right to access to justice.

also address issues of procedural due process during tax audit, the right to be notified after tax assessment and Procedural due Process during Tax Foreclosure. Issues related to Substantive due process are beyond the scope of this paper.

The research Questions will be:-

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- How will the lack of a law governing the appointment of the TAC affect the right of taxpayers to an impartial tribunal?
- Is the time limit provided to take a case to the Review Committee and the Tax Appeal Commission adequate to insure the due process rights of taxpayers?
- Are the decisions rendered by the tax administration well reasoned?
- Is the existing system of Appeal for taxpayers during tax audit and foreclosure fair and impartial?
- What is the effect of not having a rule to determine question of law and fact by the courts?

## 1.3 Objectives of the Study

### 1.3.1 General Objectives

The general objective of this paper is to identify the procedural rights of the taxpayer and to scrutinize the fairness of the grievance handling system in Ethiopia.

### 1.3.2 Specific Objectives

- to identify procedural due process rights of tax payers;
- to assess the adequacy of the grievance handling system;
- to pinpoint the problems evident in the grievance handling system with case oriented study.

## 1.4 Significance of the Study

As it is well evident that the revenue gained from tax is a great contributor to a country's economy, respecting the due process right of taxpayers is imperative. Having a well established tax administrative system that protects the due process right of tax payers will create a suitable environment for taxpayers and potential business men. Given its great importance the issue of procedural due process has to be addressed with due care. Though the

area of due process right has been researched well, this short essay will try to see the procedural due process rights of taxpayers in Ethiopia. By doing so, this paper will try to identify the reasons behind the above enumerated problems and the possible solutions.

This could help interested parties to get some idea about the problems observed in the area and how to tackle them. In addition to this, it can also be an inspiration for further research in the area.

## 1.5. Research Methodology

Legal and case analysis will be used while referring to relevant primary and secondary sources to address the problem. The target population will be, available Tax Payers, ERCA employees, people working in the Tax Appeal Commission and Review Committee and judges. Survey interview will be conducted to collect information about practical challenges of the grievance handling procedures.



## Chapter Two

# Procedural Due Process of Law in Relation to Tax Administration

### 2.1. General Remarks

It is important to establish administrative agencies with legislative and judicial powers to ease the burden that the government is facing as the result of the proliferation and complexity of its obligation.<sup>9</sup> Tax is a vital source of revenue for a certain government to exist and fulfil the different demands of the public. To deal with this crucial obligation the tax authority will be established in a different form as one branch of the government. As any one of the government agencies, it is expected to use its powers only as much as delegated to it; if it tries to pass that point it, will be an unconstitutional act.

One of the powers of the agency is quasi adjudicatory which involves passing a decision on disputes and enforcement orders. This judicial authority will allow the agency to adjudicate cases initiated. While exercising this power the tax authority needs to comply with due process requirements since their decision will affect rights of the taxpayer.<sup>10</sup> Realizing the need for protection of individual rights and freedoms from administrative actions,

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<sup>9</sup> Semahagn Gashu , Due Process Of Law and Administrative Decisions in Ethiopia, (April 1996). p.10-11

<sup>10</sup> Basics of Administrative Law: U.C. Santa Barbara Bern School , (Sep,2011), ([www.bern.ucsb.edu/partnership/documents/Gorsenadminlaw9.29.11.pdf](http://www.bern.ucsb.edu/partnership/documents/Gorsenadminlaw9.29.11.pdf)) last visited on 12/01/2015

governments are forced to create procedural safeguards. Procedural due process and Fair pre-deprivation procedures, which reduce the likelihood of erroneous deprivations of liberty and property, constitute one form of protection. Even after a deprivation has occurred, the due process may play two further related roles.

Due process may require judicial review of official action and, when review is granted, may create entitlements to judicial remedies.<sup>11</sup> Having this in mind, this part of the paper will try to explain the idea of procedural due process in relation to taxpayers' right. Accordingly, taxpayers' right to notice after tax assessment, the right to be heard during tax audit and tax foreclosure will also be addressed.

## 2.2. Introduction to Tax Administration

Tax is a charge ,monetary ,imposed by the government on persons, entities, transactions or property to yield public revenue<sup>12</sup>. The government of a country gains a lot from taxation to finance different activities. The right to impose taxes and to determine the circumstances under which they will be due is a privilege of the legislative power and the administration of the tax law is the responsibility of the executive branch. The administration is generally separated into departments because taxes differ so greatly in their bases and methods of collection. In most countries the Ministry of Finance has three branches authorized to levy taxes. One collects income taxes; another levies taxes on the transfer of goods and on such legal transactions as stamp fees, inheritance taxes, registration dues, and turnover taxes; a third is responsible for customs and excise duties.<sup>13</sup>

The process of levying of taxes include the assessment, or the definition of the exact amount subject to taxation under the statute and enforcement.<sup>14</sup> After the identification of taxpayers by registration the next step is assessment of the tax due. The assessment could be made either by relying on the declaration of the taxpayer or through estimation by the Tax Authority. What comes next is the collection of the tax due and this process need to be easier for the taxpayer to pay the tax due more willingly. The tax authority will use the mechanism

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<sup>11</sup> Richard H. Fallon, Jr., "Some Confusions about Due Process, Judicial Review, and Constitutional Remedies", Columbia Law Review , VOL. 93 (1993), p.329 ([www.jstor.org](http://www.jstor.org)) last visited on 13/01/2015

<sup>12</sup> The Black's Law Dictionary; (9<sup>th</sup> ed., 2009), p.1594

<sup>13</sup> Baron Jean M.J. Van Houtte ; "Tax Law." Encyclopaedia Britannica Ultimate Reference Suite. Chicago: Encyclopædia Britannica, (2010)

<sup>14</sup> Ibid

of auditing when it is suspicious of the tax return reported by the taxpayer.<sup>15</sup> When the audit is completed and the taxpayer is found to owe more money, he will be expected to pay it.

However, if he fails to do so the tax authority will be forced to use other means like foreclosure to ensure the payment.

The taxpayer has the right to appeal to competent, impartial authorities when he disagrees with the determination of the assessing officer. In some countries, disputes between taxpayers and the tax administration are settled by special commissions consisting of high-ranking civil servants. In others, the decision is the privilege of the judiciary. In the vast majority of countries, however, a combination of both systems prevails. Out-of-court jurisdictions commissions composed of tax officials and laymen frequently act as preliminary settlement committees that decide factual questions, leaving the interpretation of the tax law to the courts. In general, when a taxpayer disagrees with the amounts of the tax as calculated by the administration, he files a petition with a tribunal, which may be either a specialized court or the ordinary court. Even if he must exhaust the administrative processes before he may take a dispute with the tax authorities to court, he can still invoke the jurisdiction of a judicial court to re-examine the case, in respect both of the facts and of the legal arguments. Appeals solely based on the misinterpretation of the law may go to the supreme court of the country, in most jurisdictions.<sup>16</sup>

As the Tax Authority is one of the government's agencies which ensures the proper collection of taxes it needs to respect the due process rights of the tax payers. Procedural justice will lead to legitimacy. Legitimacy in tax compliance behaviour is defined as a belief/ trust by taxpayer on the tax authority. This belief that they are fairly treated will make them to have the willingness to obey the laws.<sup>17</sup>

As we will see in this chapter procedural due process contains certain basic requirements like notice, hearing, the right to counsel, impartiality on decisions making and reasonable

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<sup>15</sup> Yosef Alemu, Seizure And Foreclosure of Tax Payer Property as Enforcement Mechanism under Ethiopian Tax Law, (April,2005),p.10-12

<sup>16</sup> Baron Jean M.J. Van Houtte; "Tax Law." Encyclopaedia Britannica Ultimate Reference Suite. Chicago: Encyclopædia Britannica, (2010).

<sup>17</sup> Gerbing, M. D. An Empirical Study of Taxpayer Perceptions of Fairness. (1988, unpublished Doctoral Thesis, University of Texas, Austin). (Bizresearchpapers.com) last visited on 13/01/2015

decisions based on record. These elements are also applicable in tax administration to make the tax collection system fair and reasonable. Notice will help to notify the parties and provides an opportunity for rebuttal.<sup>18</sup> Taxpayers should have the right to be notified of an assessment, a decision on adjudication, or of any collection action against the taxpayer's assets.<sup>19</sup> A person should get a fair chance of answering to a case against him before being deprived of his right to property or liberty.<sup>20</sup> The hearing must be at a meaningful time and in a meaningful manner.<sup>21</sup> The adjudicators in a proceeding shall be neutral and impartial. They are expected to give their judgments only based on the fact presented before them<sup>22</sup>. The appointment or selection process of the judges is also an important aspect that determines the impartiality of the institution.<sup>23</sup>

Taxpayers should have the right to have audits held at a reasonable time and they should have the right to an explanation of why their tax is being assessed the way it is and to an explanation of the reasons for a decision by an adjudicator. In addition to this taxpayers should have the right to access to the government's evidence in the case of adjudication<sup>24</sup> and the right to counsel.

Due process in tax system requires an administrative and possibly judicial determination of whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary.<sup>25</sup>

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<sup>18</sup> Will Bateman, "Procedural Due Process under the Australian constitution", *Sydney Law Review*, , Vol.31, (2009) p. 415-16

<sup>19</sup> Predrag Goranovic: Taxpayers' Rights and Tax Administration in Montenegro PhD, School of Economics, University of Montenegro, ([unpan1.un.org/intradoc/groups/public/documents/nispacee/unpan00453.pdf](http://unpan1.un.org/intradoc/groups/public/documents/nispacee/unpan00453.pdf)) last visited on 13/01/15

<sup>20</sup> Justice Brijesh Kumar ; Principles of natural justice: Allahabad High Court (1995), p. 3-4 ([www.ijtr.nic.in/articles/art36](http://www.ijtr.nic.in/articles/art36)) last visited on 12/01/2015)

<sup>21</sup> Erwin Chemerinsky, Constitutional law, (2<sup>nd</sup> ed., 2005) p. 1020

<sup>22</sup> Id, p37-38

<sup>23</sup> Temesgen Beyene, The Question of Independent and Impartial Constitutional Adjudicator in Ethiopia: a comparative study with Germany and south Africa; central European University (2012), p.41 ([file:///c:/User/rosa/Downloads/beyene\\_temesgen.pdf](file:///c:/User/rosa/Downloads/beyene_temesgen.pdf)) last visited on 13/01/15

<sup>24</sup> Richard K. Gordon, Tax Law Design and Drafting Vol. 1 (1996), p. 14-17

<sup>25</sup> Leslie Book, "The Collection Due Process Rights: A Misstep or Step in the Right Direction?"

It is evident that ordinary courts are congested with cases so it will be costly and time taking to take all disputes between administrative agencies and citizens to them.<sup>26</sup>

## 2.3. Due Process of Law in General

### 2.3.1. Historical Background of Due Process of Law

The idea of due process is vividly contained for the first time in history in chapter 39 of the Magna Charta. Article 39 of the Magna Charta (Charter of Liberties) states that “*No freeman shall be taken and imprisoned, nor will we go upon him, except by the lawful judgment of his peers and by the law of the land.*”<sup>27</sup>. However, some claim that the idea of due process was there before the Magna Charta. The first canon of the Edict of Corad II, Emperor of the Holy Roman (1024-1039) stated that “no man shall be deprived of his life, whether held of the emperor or a lord, but by the law of the empire and the judgment of his peers”<sup>28</sup>

The Statute of Edward III ( “*The Statute of Westminster of the Liberties of London*”) of the 1354 used the phrase ‘Due Process of law’ for the first time and extended the protection of due process of law to every human being in UK in the following manner:

*“ No man of what state or condition that he be , shall be put out of land or tenement, nor imprisoned nor disinherited , nor put to death without being brought in answer by due process of law”*<sup>29</sup>

The USA constitution used due process of law for the first time in the fifth amendment; which states that “...nor be deprived of life, liberty, or property, without due process of law;...”<sup>30</sup> This amendment was limited to the federal government for application.

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Villanova Public Law and Legal Theory Working Paper Series :Villanova University School of Law  
(Dec, 2004), p.1187 ( [www. paper.ssrn.com/sol3/paper.cfm?abstract\\_id=647503](http://www.paper.ssrn.com/sol3/paper.cfm?abstract_id=647503)) last visited on 12/01/2015

<sup>26</sup> Bizuneh Beyene Protection of Individual Rights in Administrative Proceedings ; A Survey Based on Some Agencies; (April, 1998),p.19

<sup>27</sup> Thamar E. Dufwa, The Viking Laws and the Magna Charta, (1963)

<sup>28</sup> Rodney L. Mott, Due process of Law (1973), p.1

<sup>29</sup> Ibid, p.32-38

<sup>30</sup> The Constitution of the United States; Amendment 5 - Trial and Punishment, Compensation for Takings. Ratified 12/15/1791.

To correct this Americans come up with the fourteenth amendment. It provides that "...nor shall any State deprive any person of life, liberty, or property without due process of law ..."<sup>31</sup>. It was needed to extend the due process protection to the States.

### 2.3.2. Definition of Due process of Law

Almost all constitutions one way or another contain the due process right but they do not seem to define the term.<sup>32</sup> According to Merriam Webster's Dictionary, due process is defined as:

*"1 : a course of formal proceedings (as legal proceedings) carried out regularly and in accordance with established rules and principles called also procedural due process*

*2 : a judicial requirement that enacted laws may not contain provisions that result in the unfair, arbitrary, or unreasonable treatment of an individual called also substantive due process"*

The definition of this dictionary clearly shows the two aspects of due process i.e. procedural and substantive due process. When we see the first part of the definition, we understand that it is all about procedural due process. It describes procedural due process in terms of a procedure which is needed to be followed in a given legal proceeding guided by existing rules. The second part of the definition deals with substantive due process. It shows that substantive due process is there to insure that laws did not contain provisions which will cause an unfair and arbitrary treatment of individuals.

The Black's Law Dictionary defines it as

*"The conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case."*<sup>33</sup>

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<sup>31</sup> The Constitution of the United States; Amendment 14 - Citizenship Rights. Ratified 7/9/1868.10

<sup>32</sup> American Jurisprudence, "Constitutional Law" Vol.16 (2<sup>nd</sup> ed., 1964), see also *Corpus Juris Secundum*, "Constitutional Law", Vol. 16A (1965), P. 938

<sup>33</sup> *The Black's Law Dictionary*; cited above at note 12, p.575

This definition of due process of law contains only of the procedural aspect. It describes that due process is about the conduct of a given legal proceeding in line with the rules and making sure that individuals are not deprived of their right to get notice before hearing and fair trial.

On the basis of the above two definitions we can say that the definition rendered by Merriam Webster's Dictionary is broader and inclusive. This is because it contains the definition of both procedural and substantive due process. As a result, it defines due process as a protection from both arbitrary laws and procedures of the government.

Due process of law is not an absolute right; but is a relative to and restrained by the similar right of others and the interests of the public.<sup>34</sup> The guarantee is not meant to protect a person from the conduct of other private persons; rather it is to protect a person from the arbitrary actions of the state.<sup>35</sup> It is a fundamental constitutional guarantee that all legal proceedings will be fair and that one will be given notice of the proceedings and an opportunity to be heard before the government acts to take away one's right. It is also a constitutional guarantee that law shall not be unreasonable and arbitrary. Due process holds the government subservient to the law of the land, protecting individual persons from the state.<sup>36</sup>

In USA, *Goldberg v. Kelley* case<sup>37</sup>, it is clearly established that due process is in no way limited to judicial proceedings, but extends to every case in which an individual may be deprived of life, liberty or property, whether or not the proceeding by judicial or administrative in its nature. Due process clause has as its fundamental goal the protection of citizens from arbitrary governmental interference with their guaranteed constitutional rights. Due process is violated when governmental action is arbitrary and unreasonable, with no substantial relationship to public health, safety and welfare.<sup>38</sup>

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<sup>34</sup> *Corpus Juris Secundum*, cited above at note 32, p.565

<sup>35</sup> American Jurisprudence, cited above at note 32 see also *Corpus Juris Secundum*, cited above at note 32

<sup>36</sup> Chhavi Agarwal; [Due Process of Law and Natural Justice](#)

(manupatra.com/roundup/323/Articles/du%20process%20of%20law.pdf) last visited on 17/01/2015

<sup>37</sup> *Goldberg, Commissioner of Social Service of the City of New York v. Kelley*.et.al (397 US.254) Supreme Court of the United States (March 1970) (en.wikipedia.org/wiki/Goldberg\_v\_Kelly) last visited on 17/01/2015

<sup>38</sup> *Roth v. Board of Regents of State Colleges, et al* 408 US. 564 Supreme Court of the United States (June,1972) (en.wikipedia.org/wiki/ Board\_of\_Regents\_of\_State\_Colleges\_Roth) last visited on 17/01/2015

Due process of law is related with other legal concepts like rule of law, justice and equality before the law.<sup>39</sup> Rule of law is defined by the Black's Law Dictionary<sup>40</sup> as a doctrine that every person is subject to ordinary law within the jurisdiction. This means both the governor and the governed are under the law. We have said due process is about protection of individuals from being arbitrarily deprived of their right to life, liberty or property. This protection can only be guaranteed when we have a government which is under the law. Due process presupposes the existence of rule of law in the system. So both due process and rule of law are against arbitrariness and anarchy. The objective of due process is to prevent arbitrariness and achieve fairness and justice. Thus, we need to insure the prevalence of due process to achieve justice. Equality before the law<sup>41</sup> is the condition of being treated fairly and equally according to regularly established norms of justice. Both equality before the law and due process require that laws and procedures of the government should not be arbitrary and they should not discriminate against others unreasonably<sup>42</sup>. Equal protection values restrain officials because the concepts of equal protection and due process, both stemming from ideal of fairness, are not mutually exclusive<sup>43</sup>.

### **2.3.3. Dichotomy of Due Process: Substantive v. Procedural**

The principle of due process of law has been divided in to two major broad categories. These are substantive and procedural due process. The dichotomy of due process is a result of two types of laws; substantive and procedural. Substantive law creates, defines and regulates rights whereas procedural law enforces those rights or seeks remedy for their violation. These rights are those general rights that reserve to the individual the power to possess or to do certain things, despite the government's desire to the contrary. These are rights like freedom of speech and religion. Procedural rights are special rights that dictate how the government can lawfully go about

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<sup>39</sup> Anmut Lakew, The Principle of Due Process of Law as Enshrined in the New Constitution of the FDRE(1994), (May 1995), p.15-18

<sup>40</sup> The Black's Law Dictionary; cited above at note 12, p.1448

<sup>41</sup> Id , p.616

<sup>42</sup> Anmut, cited above at note 39, p.15-18

<sup>43</sup> Leonard G. Ratner; The Function of the Due Process Clause : University of Pennsylvania Law Review Vol. 116; No.6 (Apr.1968), p.1096-97



taking away a person's freedom or property or life, when the law otherwise gives the power to do so.<sup>44</sup>

### ***2.3.3.1. Substantive Due Process***

As early as the reign of Edward III in England a statute was held invalid if it was repugnant to common right and reason, natural law and the common law, connoting substantive due process.<sup>45</sup> Substantive due process is a limitation upon the legislative power that it should not enact laws which will result in an arbitrary deprivation of certain fundamental rights.<sup>46</sup> A Statute not providing for a notice and hearing, for payment of compensation or which arbitrarily discriminate against a person can be held null and void by court of law.<sup>47</sup> Substantive due process as the phrase connotes asks whether the government has an adequate reason for taking away a person's life, liberty or property.

Substantive due process restricts the government from depriving individual's right to life, liberty or property by an act that has no reasonable relationship to any proper governmental purpose. Thus, substantive due process asks for the law to be reasonable, objective and clear and that not only the legislative but other governmental activities should be reasonable. It could also include the determination of the compatibility of the substantive law or government action with the constitution.<sup>48</sup>

In addition to this, it holds the government from taking action beyond what is necessary for a given case. Substantive due process right comes to the picture when the rules of the government contradict the aims and principles the government strives to achieve.<sup>49</sup>

### ***2.3.3.2. Procedural Due Process***

Procedural due process identifies procedures that need to be followed before an individual's right to life, liberty or property is deprived such as : a public as opposed to a secret trial, a notice; a competent and an impartial tribunal; and opportunity to be heard.<sup>50</sup> Classic

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<sup>44</sup> Chhauhi Agarwal; cited above at note 36

<sup>45</sup> Rodney L. Mott, cited above at note 28, p.48

<sup>46</sup> John E. Nowak and others, *Constitutional law*, (2<sup>nd</sup> ed., 1983), p.425

<sup>47</sup> *Juris Secundum*, cited above at note 32 , p. 544-545

<sup>48</sup> Semahagn Gashu; cited above at note 9, p 9-10

<sup>49</sup> Id p 21-22

<sup>50</sup> Id, p.72-74

procedural due process issues concern what kind of notice and what form of hearing the government must provide when it takes a particular action<sup>51</sup>. This general requirement for notice and hearing prior to the deprivation of a property, liberty, or privacy interest will help to insure that the government actions comply with the law<sup>52</sup>.

In *Carey v. Piphus* the US Supreme Court said that

*“A purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly as well as to minimize the risk of mistaken deprivations of protected interests”*<sup>53</sup>

When a person is about to be deprived of his right, he needs to get the chance for instance, to fair trial; where he can defend his case using available evidences. This opportunity to be fairly treated may help a person develop a trust on the government’s decision; whether it is in his favour or not.

It should be noted that the procedural aspect of due process of law has a more far-reaching recognition than substantive due process.<sup>54</sup> The procedural meaning of due process law appears as used in Magna Charta.<sup>55</sup>

The government may interfere with human activity only for a socially useful purpose. It should restrict human activity no more than necessary to implement that purpose. The intrusion should be minimal. Thus, greater restriction is not socially useful when a lesser one will do the job.<sup>56</sup> The concept of the balance of convenience between private rights and public welfare runs throughout the entire scope of due process. Benefit to the community must be overwhelming before important private rights can be restricted. Due process is built on the foundation of fairness and reasonableness.<sup>57</sup>

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<sup>51</sup> Erwin Chemerinsky, cited above at note 21, p. 1006

<sup>52</sup> Leslie Book, cited above at note 25, p.1163-65

<sup>53</sup> *Carey v. Piphus* (435 U.S. 247,262) US Supreme Court(1978) (<https://supreme.justia.com/cases/federal/us435/247/case.html>) last visited on 17/01/15

<sup>54</sup> Anmut, cited above at note 39, p. 23

<sup>55</sup> *Juris Secundum*, cited above at note 32, p.538

<sup>56</sup> Leonard G. Ratner; cited above at note 43, p.1071

<sup>57</sup> Rodney Mott; Due Process of Law: A Historical and Analytical Treatise of the Principle and Methods Followed by Courts in Application of the “ Law of the Land”, (1973) p.597-602

The demands of procedural due process are flexible and contextual rather than rigid. It calls for such procedural protections as the particular situations demands.<sup>58</sup> Procedural safeguards need to adapt to changing facts and circumstances. Without this, individual's right to due process will be at risk by the act of a government<sup>59</sup>.

Procedural due process principle gives effect to standards of natural justice. A bedrock principle of natural justice is that a party to proceedings must be given a reasonable opportunity of appearing and presenting his case<sup>60</sup>. And this principle is also a fundamental requirement of procedural due process.

## 2.4. Elements of Procedural Due Process of Law

In *Goldberg v. Kelly*<sup>61</sup> the supreme court of USA identified the following to be essential elements of procedural due process:

- Timely and Adequate notice of hearing:-
- Hearing
- Opportunity to introduce evidence and opportunity for cross examination
- Decision based on record supported by reasons for the adverse action
- The right to neutral/impartial decision maker
- Representation by counsel

some include judicial review as an element of procedural due process.<sup>62</sup>

Opportunity to be heard, presence of an impartial and independent tribunal and rendering reasoned decisions will be discussed below.

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<sup>58</sup> *Goldberg v. Kelley*. Cited above at note 37 *Matthew v. Eldridge, Morrissen V. Brewer* (408 U.S.471,481/) Supreme Court of United States (1972)

<sup>59</sup> Jason Parkin; Adaptable Due Process,(2012), p.1313

<sup>60</sup> Will Bateman ;cited above at note 18, p. 415-16

<sup>61</sup> *Goldberg v. Kelley*. Cited above at note 37

<sup>62</sup> K.Davis, Administrative Treaties, , vol.1 (1958), p.64

### 2.4.1. Opportunity to be heard

After being notified of a case the parties need to get adequate and fair opportunity to present their arguments and evidences<sup>63</sup>. Fair hearing provides with the opportunity to present your evidences and at the same time challenge evidences presented by the adverse party. It gives a chance for the recipient to participate in the decision making process. No one may be lawfully deprived of essential rights before being heard, without contesting the charge brought against him and defending himself on the laws and facts in dispute<sup>64</sup>. Notice and hearing supplement each other and thus the mere giving of the former without a reasonable hearing is of no avail. The hearing must be in each case fair, complete, appropriate, full reasonable, such as to enable the person to be affected to defend, enforce and protect his rights.<sup>65</sup>

The right to fair hearing has become a central element of due process since the 1970s when the supreme court of USA decided in *Goldberg v. Kelley* that welfare recipients must be given notice and opportunity to be heard at a fair hearing prior to termination of their benefits. The court held that due process requires pre-termination hearing which shall contain minimum requirements like notice, the opportunity at the hearing to confront and cross examine witness, to be represented by counsel and adjudication by an impartial decision maker. Notice is a fundamental element of procedural due process which is needed to let a person know that a given proceeding is underway and give him an opportunity to present his side of argument.<sup>66</sup> It is a summons to a party to appear and defend i.e. declare something which he wants to say concerning the facts in issue and which will positively affect the judgement to be rendered in favour of him.<sup>67</sup>

Opportunity to introduce evidence and cross examination of the witness of the adversary are also essential elements of fair trial. After a person is given the opportunity to be heard he needs to get the chance to present his side of argument while doing so he can present

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<sup>63</sup> Semahagn cited above at note 9, p 27

<sup>64</sup> American Jurisprudence, cited above at note 32, p.972-74

<sup>65</sup> E. Nowak, cited above at note 46, p.555-56 and L. Mashow, A.Meerril and M. shane; Administrative Law, American Public Law System,(1992),p.270

<sup>66</sup> Bizuneh cited above at note 18, p.30

<sup>67</sup> *American Jurisprudence*, cited above at note 24 p.971

evidence, cross examine the opposing parties witness and inspect the validity of the evidence presented by the other party.<sup>68</sup> The right to argument may depend on the situation. Sometimes the adjudicator may give the chance full argument and in another time he may only allow short presentation. Be that as it may both the right to present evidence and argument are imperative to realize the right to fair trial. Presenting one's witness to support one's argument and to cross examine the counter party's witness is helpful to strengthen one's side of argument<sup>69</sup>.

The Supreme Court of USA in the Goldberg case also held that the circumstances of those who are to be heard shall be considered to provide them with a meaningful opportunity to present their case. Government agencies were not unfamiliar at all with fair hearing prior to Goldberg. Some public benefit programs made hearings available to individuals. In the 1970s fair hearings were like mini trials with a written decision that parties are allowed to appeal to some higher level of authority. The idea from Goldberg's case extended to apply beyond welfare benefit cases. A wide area of programs administered by government agencies started to be subject of Goldberg's fair hearing requirements.<sup>70</sup>

When a person gets the chance to be heard, he will be able to enjoy rights like the right to appear in person or represented by counsel; to be present during the taking of evidence or testimony; know the claims of his opponents, hear evidence introduced against him ; confront, cross- examine and set up defence against his litigant; introduce evidence in support of himself; and prepare and present appropriate arguments as to law and fact.<sup>71</sup>

Fair hearing requirements have the potential to enhance government accountability. Individuals could challenge the decisions rendered by an agency which will promote accuracy in decision making process of an agency. There are some arguments that the mere existence of fair hearing does not indicate that erroneous deprivations of rights will be reversed. Joel Handler identified some conditions that must be fulfilled before an individual challenges a given erroneous decision at a fair trial. He stated that the individual have to know that wrong has been committed and there is a remedy, have a resource to pursue the remedy and calculate that the benefits of winning will override the costs of trying. Thus, he

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<sup>68</sup> Bizuneh cited above at note 26, p34-37

<sup>69</sup> Semahagn cited above at note 9, p.29

<sup>70</sup> Jason Parkin cited above at note 59 , p.1315-25

<sup>71</sup> Anmut Lakew, cited above at note 39, p. 26

concludes that if any one of these conditions is not fulfilled the mere availability of fair hearing is useless.<sup>72</sup> The function of adjudication is to resolve a disputed and minimizing social disturbance. Having an opportunity for fair trial insures the maintenance of integrity and efficiency of the system. This will enhance the truth seeking and finally reconstruction of a given dispute.<sup>73</sup>

A person should get a fair chance of answering to a case against him before being deprived of his right to property or liberty. The opportunity to conduct hearing before making any decision was consideration to be a basic requirement in the court proceeding. Later on this principle was applied to other quasi- judicial and other tribunals and ultimately it is now clearly laid down that even in the administrative actions, where the decision of the authority may result in civil consequences, a hearing before taking a decision is necessary. This implies that if the aim of protecting procedural due process right is to reduce miscarriage of justice then it is reasonable that it is applied in administrative proceedings.<sup>74</sup>

The hearing must be at a meaningful time and in a meaningful manner. Meaning, the recipient has timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.<sup>75</sup> Administrative hearing should be public though there are exceptions when it will be in camera if there is justifying reason. The fact that it is done publically will help to develop confidence on the parties. The judges will also be more transparent if the proceeding is done in public.<sup>76</sup>

#### 2.4.2. Presence of an Impartial and Independent Tribunal

As discussed above impartiality is an important element of fair hearing. Impartiality and neutrality is essential to the effective operation of courts as an external check on government

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<sup>72</sup> Jason Parkin cited above at note 59 , p.1328-29

<sup>73</sup> Leonard cited above at note 43, p.1163-68

<sup>74</sup> Justice Brijesh Kumar cited above at note 20, p. 3-4

<sup>75</sup> Erwin Chemerinsky, cited above at note 21, p. 1020

<sup>76</sup> Bizuneh cited above at note 26, p34-37

decision. Tribunals should be free from interference or direct influence by the government bodies from which they hear appeals<sup>77</sup>.

In <sup>78</sup> Clark v. city of Hermosa Beach case, the US Supreme Court held that:

*“An individual has the right to a tribunal which meets... standards of impartiality... Biased decision makers are impermissible and even the probability of unfairness is to be avoided. The factor must often considered destructive of administrative board impartiality is bias arising from pecuniary interests of board members... personal embroilment in the dispute will also void the administrative decision.... ”*

From this decision it can be understood that a person aggrieved by the action of the government is entitled to impartial decision maker. The decision maker needs to be free from both personal and pecuniary interest in the case at hand. If the judge has an interest on the subject matter of the case, it will be difficult to trust his/her impartiality.

When we see this in relation to natural justice, the first principle of natural justice is ‘No man shall be a judge in his own cause’ meaning the deciding authority must be impartial and without bias. No man can act as a judge for a cause in which he himself has some interest, pecuniary or otherwise. Pecuniary interest affords the strongest proof against impartiality. In one case<sup>79</sup> in India Justice Gajendragadkar said “it is obvious that pecuniary interest howsoever small it may be, in a subject matter of the proceedings, would wholly disqualify a member from acting as a judge.”<sup>80</sup>

To say there is a fair hearing we need to make sure that the tribunal is impartial. The decision maker is expected to base its rational analysis and decisions only on the facts of the case.

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<sup>77</sup> Peter Cane; “Administrative Law”: Clarendon Law Series (4<sup>th</sup> ed., 2004),p.389-90

<sup>78</sup> Douglas A. Clark et al v. city of Hermosa Beach (48 Cal. App. at 1170, Supreme Court of Los Angeles County) (1996) ([WWW.lawjustia.com/cases/california/court\\_of\\_appeal/4th/48/1152.html](http://WWW.lawjustia.com/cases/california/court_of_appeal/4th/48/1152.html)) last visited on 12/01/2015

<sup>79</sup> M/S Builders supply corporation V. the Union of India and other (AIR .1965 SC 1061) Supreme Court of India (Nov.1964) ([indiankanoon.org/doc/473527/](http://indiankanoon.org/doc/473527/)) last visited on 16/01/15

<sup>80</sup> Justice Brijesh Kumar; cited above at note 20, p. 1-2

The judges should be free from bias and prejudice to make sure the right to fair trial is made.<sup>81</sup> The mode of appointment of the judges and the structure of the tribunal system can help to foster impartiality and independence.<sup>82</sup>

The presence of independent and impartial adjudication will help the system to guarantee the protection of fundamental rights and liberties of the people against the executive and legislative branches of government. The overall aim of independence is proving that judges are the authors of their decisions, and that they should be free from any inappropriate influence from outside. To make full sense of the right to fair trial, the role of an independent tribunal is essential.<sup>83</sup>

Administrative agencies have other functions other than dealing with disputes. Thus, there might be a chance of bias. Considering this it will be better to see the neutrality of a decision mainly from the perspective of reasonableness and the judge's personal or financial interest in the case. The appointment or selection process of member of the persons who are appointed as judges is also an important aspect that determines the impartiality of the institution.<sup>84</sup>

### 2.4.3. Rendering Reasoned Decisions

As it has been tried to be indicated previously there are several things that a administrative tribunal should include to be considered as a fair proceeding. Some of them are an unbiased tribunal; notice of the proposed action and the grounds asserted for it; an opportunity to present reasons why proposed action should not be taken; the right to call witnesses; the right to know the evidence against oneself; the right to have a decision based exclusively on the evidence presented; the right to counsel; the making of a record; the availability of a statement of reasons for the decision; public attendance; and judicial review of the final

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<sup>81</sup> Semahagn cited above at note 9, p.28

<sup>82</sup> Peter Cane cited above at note 77, p.389-390

<sup>83</sup> Temesgen cited above at note 23, p. 19-21,28-29

<sup>84</sup>Id ,p.37-38, 41



decision. Thus we can see from this list that the availability of reasoning in an administrative decision is one of the standard features of hearing right.<sup>85</sup>

Being reasonable can be defined as being fair, proper, or moderate under the circumstances.<sup>86</sup> It can be understood from this definition that being reasonable is mainly about being fair. In administrative decision making there will be a person whose right is at stake; thus when a given administrative body renders its decision it shall be reasoned and based on sound information. In an adjudication process one should identify the facts of the case, the interests of opposing parties, and rules applicable in the particular situation. To address the interests of the parties and deliver justice one should be able to reason out why he/she is deciding in a certain way. This will one way or another insure fairness of the decision as it is an indication of the effort of the administration to look in to relevant laws and evidences.<sup>87</sup>

One justification for the giving of reasons is respect for human dignity and equality, so that those who claim to exercise power must be accountable. The fact that the decision is well reasoned is a base for those who want to appeal from that decision. The giving of reason also enhances public confidence in the decision making process, strengthens the rationality of the process itself and helps to challenge decisions. If the reason provided in a given decision is clear enough to be understood by the parties, it need not be detailed.<sup>88</sup> Administrative authorities or tribunals are not supposed to pass detailed orders as passed by the courts of law. They may not be very detailed and lengthy orders but they must at least show that the mind was applied and for the reasons.<sup>89</sup>

It is very important that the judge make sure that the record of the case is complete and the decision shall be made only based on the information on the record. The administrative

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<sup>85</sup> Jerry L. Mashaw, Reasoned Administration: "The European Union, the United States, and the Project of Democratic Governance"; The George Washington Law Review Vol. 76:99, (2007), p.106 (www.Digitalcommons.law.yale.edu/cgi/viewcontent.cgi) last visited on 12/01/2015 )

<sup>86</sup> *The Black's Law Dictionary*; cited above at note 12, p.1379

<sup>87</sup> David H.Rosenbloom and Robert. S.Kravchek , Public Administration Understanding Management, Politics And Law in the Public Sector,(2005), p.331

<sup>88</sup> John Alder, Constitution and Administrative Law, (2007), p. 414-415

<sup>89</sup> Justice Brijesh Kumar cited above at note 20, p. 6

agency should not base its decision on information received by it otherwise than at the hearing. The decision must contain evidence justifying the court or agency's order.<sup>90</sup>

The reliance of the decision maker on the legal rules and evidences adduced and the hearing is confirmed by stating the evidences he used to come up and the reason for the final determination, in the decision. Thus, the reasons shall be related with the relevant provisions of the law and evidence adduced. This will make sure that the hearing is not pretence. Making sure that a decision is well reasoned will rectify that a person's right to hearing, present evidence, make legal arguments and the like are not looked over. As reasoning is one procedural requirement it helps for a fair determination of a person's substantive right; when there is a conflict.<sup>91</sup>

Reasons in administrative decision will also be necessary when that decision is subjected to a judicial review. Judicial review will determine the reasons for the action based on the reasons explained in the administrative decision. Thus, the existence of an understandable and comprehensive reasoning will facilitate the judicial review proceeding. Reason giving is so much dependent on the requirement of a hearing, and the entitlement to a hearing is itself a function of a right to defend some particular substantive legal entitlement.<sup>92</sup>

## 2.5. Rights of Taxpayers to Procedural Due process of Law: An overview

Any government has the power to levy tax on taxpayers. Though tax is a compulsory levy by the government, when the Tax Authority collects tax, the rights of taxpayers must be respected. The authority should exercise its power under the limit of rule of law and respect the rights of taxpayers.<sup>93</sup>

A formal acknowledgement of taxpayers' rights is vital to restore and maintain taxpayers' confidence on administration of the tax laws by the Tax Authority.<sup>94</sup> Regarding the rights of

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<sup>90</sup> Semahagn cited above at note 9, p.9

<sup>91</sup> Jerry L. Mashaw, cited above at note 85, p.106-108

<sup>92</sup> Id, p.109,111

<sup>93</sup> Aschalew, cited above at note 4, p 4

<sup>94</sup> Id, p 9

taxpayers there is no uniformity in having a single document dealing with the rights of taxpayers. Some countries have a charter of taxpayers' rights and others haven't.<sup>95</sup> For a tax payer to have a confidence on the tax authority it is important that he is aware of his rights. This will be better achieved by having an organized charter for taxpayer's right. The taxpayers charter is a legal document that outlines the basic rights and obligations of taxpayers' in their interaction with the tax authority.<sup>96</sup> Taxpayer Bill of Rights (TBOR) will help a taxpayer to understand his rights easily without the need to refer to different codes as it provides the general rights that taxpayers have in an organized way. The Canada Revenue Agency (CRA) has adopted and published a TBOR. Including, right to expect CRA to be accountable and the right to be treated professionally. The Australian Taxation Office (ATO) has also created and adopted a taxpayer charter, which outline not only a tax payer's rights and obligations, but also what tax payer can expect from the ATO and what a tax payer can do if he or she is not satisfied.<sup>97</sup> The right to be informed, assisted and heard, appeal, pay no more than the correct amount of tax and certainty are basic rights present in all tax systems.<sup>98</sup>

Different legal systems might list different types of taxpayers' right in their codes but there are fundamental rights which could be considered as common for all taxpayers. These are: the right to be informed, the right to quality service, the right to pay no more than the correct amount of tax, the right to challenge the tax authorities position and be heard, the right to appeal on tax authorities decision in an independent forum, the right to finality, the right to privacy, the right to confidentiality, the right to retain representation, and the right to a fair and just tax system, including access to the taxpayer advocate service.<sup>99</sup>

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<sup>95</sup> Simon James, *et al*, The Taxpayers' Charter: A Case Study in Tax Administration, (2005), p 3

<sup>96</sup> Ibid

<sup>97</sup> Towards a more perfect tax system: a tax payer bill of rights as a frame work for effective tax administration: recommendations to raise tax payer and employee awareness of tax payer rights( Nov. 4 .2013), p.5-9 ([www.taxpayeradvocate.irs.gov](http://www.taxpayeradvocate.irs.gov)) last visited on 16/01/15

<sup>98</sup> OECD, committee of fiscal affairs, Tax payers' rights and obligations- a survey of the legal situation in OECD countries (April.27,1990) ([www.oecd.org/tax/adminstration/taxpayers%27\\_Rights\\_and\\_obligation-practice\\_Note.pdf](http://www.oecd.org/tax/adminstration/taxpayers%27_Rights_and_obligation-practice_Note.pdf)) last visited n 16/01/15

<sup>99</sup> Toward A More Perfect Tax System: cited above at note 97, p. 2-3

### 2.5.1. Notice after Tax Assessment

Assessment is the determination of the rate or amount of something, such as a tax or damages.<sup>100</sup> Thus, it is a process of determining the value of something for a given purpose. One of the areas that need assessment is taxation. Assessment is a way of determining the liability of a given tax payer.<sup>101</sup> We need assessment to avoid arbitrary imposition of tax on citizens and create a uniform and fair method of tax collection which can be applicable equally on all citizens<sup>102</sup>. The amount due on a certain taxpayer can be assessed after the analysis of the taxpayer's situation and the legal provision that apply to him.<sup>103</sup> Taxpayers are required to make declaration of their income within prescribed period. The declaration made by the taxpayer serves as the point of departure in the process of assessment.<sup>104</sup> The return, with the attached reports and statements, is meant to provide such complete information that the assessing tax official can rely on it to compute the correct tax.<sup>105</sup>

There are mainly two types of tax assessments; official government assessment and self assessment. In official government assessment the tax payer is only required to bring in different information and documents which makes his participation very minimal. Thus, the tax authority will be the one who determines the tax liability. But in the case of self assessment the taxpayer plays a key role in determining the tax due. He is expected to analyze his accounts and calculate the tax liability. The officials come in to the picture for investigation; when they suspect a fraudulent act. Self assessment seems to be fair and acceptable as the tax payer is the one who knows his business and how it functions .<sup>106</sup>

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<sup>100</sup>*The Black's Law Dictionary* cited above at note 12, p.133

<sup>101</sup> Tamrat Bizuneh , Assessment Notification and Their effects under the Ethiopian Income Tax Law: Case Oriented Analysis, (May, 1988), p.2

<sup>102</sup> Belay Eshetu, Assessment of Income Tax under Ethiopian Income Tax Law, (April,1998),p.16

<sup>103</sup> "tax law." Encyclopædia Britannica. Encyclopaedia Britannica Ultimate Reference Suite. Chicago: Encyclopædia Britannica, (2010)

<sup>104</sup> Tamrat , cited above at note 101, p.2

<sup>105</sup> "tax law." Encyclopædia Britannica. Encyclopaedia Britannica Ultimate Reference Suite. Chicago: Encyclopædia Britannica, (2010)

<sup>106</sup> Belay cited above at note 102, p.15-16, 25

In examining tax returns, the basic principle is that a return is assumed to be correct until the assessing official determines otherwise. In countries such as the United States, where the self-assessment method prevails, a minority of returns is selected for audit; most, however, are only checked as to timely arrival, inclusion of all required forms and attachments, and arithmetical accuracy.<sup>107</sup>

Both types of assessments may be made in one of these two ways; assessment based on books of account and assessment by estimation. In case of assessment based on books of accounts, the records and accounts of the tax payer will be examined by the concerned body for assessment. If this body gets the records and books of accounts satisfactory and valid, it will proceed on making the assessment. But if the authority finds the accounts presented suspicious then it will make an audit.<sup>108</sup> Assessment by estimation, on the other hand, is made without the books and records by the taxpayer. It is made by estimation when the accounts are rejected because of, for example, under valuation, overstated inclusion of disallowable items etc, failure to maintain books of accounts and records and failure to make a declaration within the prescribed period of time.<sup>109</sup> This kind of assessment can be made in different forms. For instance, inspectors may go to the tax payer's business to investigate, the size, the types of goods, his trade activity and will make an estimation of the daily income of the tax payer using his personal judgment. Information from third parties who have a business relation with the taxpayer may be used also as one method to make the estimation. It seems the estimation is based on more subjective elements which may make it disadvantageous to the taxpayer. The tax assessment made by the authority must be communicated to the taxpayer through tax assessment notification; the assessment notification must contain full information for that purpose.<sup>110</sup>

The taxpayer is expected to declare his income for proper implementation of the tax law. The declaration of income and expenses and documents attached to declaration will assist the authority to make the assessment and find out the amount of tax the taxpayer owes the government.<sup>111</sup> This process of declaration will protect the taxpayer from arbitrary imposition

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<sup>107</sup> "tax law." Encyclopædia Britannica. [Encyclopaedia Britannica Ultimate Reference Suite](#). Chicago: Encyclopædia Britannica, 2010.

<sup>108</sup> Belay cited above at note 102, p. 25-26

<sup>109</sup> Tamrat cited above at note 101, p.5

<sup>110</sup> Belay cited above at note 102, p.27-28

<sup>111</sup> Id, p.25

of tax by the authority and will also help to facilitate the tax assessment. If there is no suspicion of fraud the tax authority will proceed to assess the taxable income after it received the declaration.<sup>112</sup>

After making a timely tax assessment basing on the relevant laws it has to send notice of tax assessment to the taxpayer to notify the assessment. When the taxpayer receives the notification he is expected to either pay the amount stated on the notification or appeal to the relevant body if he disagrees with the amount.<sup>113</sup>

Unless Tax authority makes a reasonable effort to assess and collect the tax within a given period after the taxpayer submitted his declaration of income, its right might be barred by period of limitation However, if the tax payer has not declare his income or has submitted a suspicious declaration no time limit shall bar the assessment by the tax authority.<sup>114</sup>

We can mention different purposes of sending assessment notification. One purpose could be informing the taxpayer if he needs to make additional payment to what he has declared and paid. It will also help to notify the taxpayer that he has paid more than what he should have as a result he is entitled to be refunded. The right to be notified of an assessment will inform the tax payer his right to lodge an appeal when he is aggrieved with the assessment made by the tax authority. This right to an appeal has got a period of limitation. This time starts to run from the date of service of notification. For this period to run it is necessary to serve assessment notification on taxpayers. The execution of assessment notification is also dependent on the service of assessment notification that is if taxpayer fail to exercises their right of appeal, the tax administration is entitled to open in action for execution. The authority can exercise this power after serving the notice and wait for the period given for appeal lapses.<sup>115</sup>

Given the purposes listed above it is important to insure the proper service of assessment notification to the taxpayer. The service procedure shall make sure that the defendant receives the best kind of service possible under the circumstances.<sup>116</sup> It shall be communicated to the taxpayer if possible personally by handing it to him if not handing it to

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<sup>112</sup> Id,p.18

<sup>113</sup> Id p.24

<sup>114</sup> Income Tax Proclamation,(2002), Art. 71(2,3) proc. No.286, Neg. Gaz.8thYear, No.34

<sup>115</sup> Tamrat cited above at note 101, p. 24-25

<sup>116</sup> Yosef cited above at note 15 ,p.33

adult member of his family or an employee. If not the second option will be affixing the notification on the door of the premises where the taxpayer has his residence or carrying on a business.<sup>117</sup> The last and the least method is delivering the notice through substituted services such as publication in a newspaper.<sup>118</sup>

### 2.5.2. The Right to be Heard During Tax Audit

The definition of the amount subject to taxation under a particular statute requires an analysis of the taxpayer's situation and of the legal provisions that apply to him. The taxpayer submits a tax return including copies of the balance sheet, profit and loss statement. The return, with the attached reports and statements, is meant to provide such complete information that the assessing tax official can rely on it to compute the correct tax. In examining tax returns, the basic principle is that a return is assumed to be correct until the assessing official determines otherwise.<sup>119</sup>

Auditing is the examination of the records and reports of an enterprise by specialists other than those responsible for their preparation. Public auditing by independent and impartial accountants has acquired professional status and become increasingly common with the rise of large business units and the separation of ownership from managerial control. The public accountant performs tests to determine whether the management's statements were prepared in accord with generally accepted accounting principles and fairly present the firm's financial position and operating results; such independent evaluations of management reports are of interest to actual and prospective shareholders, bankers, suppliers, lessors, and government agencies.<sup>120</sup> Thus audit is a formal examination of an organization's or individual's accounts or financial situation. Tax audit is the review of a tax payer's return by the tax authority including an examination of the tax payer's books.<sup>121</sup> The taxpayer's role during the Audit is to cooperate with the with the tax authority and make the records available upon request.<sup>122</sup>

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<sup>117</sup> Tamrat cited above at note 101, p.37

<sup>118</sup> Yosef cited above at note 15, p.33

<sup>119</sup> "Tax Law." Encyclopaedia Britannica Ultimate Reference Suite. Chicago: Encyclopædia Britannica, (2010)

<sup>120</sup> "Auditing." Encyclopaedia Britannica Ultimate Reference Suite. Chicago: Encyclopædia Britannica, (2010)

<sup>121</sup> *The Black's Law Dictionary*; cited above at note 12, p. 150

<sup>122</sup> The Ohio Taxpayers' Bill of Rights :Ohio Department of Taxation,p.3

([www.tax.ohio.gov/portals/o/communications/publications/taxpayer\\_bill\\_of\\_rights.pdf](http://www.tax.ohio.gov/portals/o/communications/publications/taxpayer_bill_of_rights.pdf)) last visited on 16/01/15

Notification of audit is needed to show the date the audit will start. The scope of the audit will be set out, and will range from a single issue for a specific period or year to a comprehensive audit for a number of years. The notice will describe the types of records that need to be made available, and the auditor will explain the planned audit method and procedures.<sup>123</sup>

The procedure varies from one country to another and depends largely on the circumstances of the case. Tax audit can either be desk audit or field audit<sup>124</sup>. An audit may be performed either in the office of the tax agent, by correspondence, or in the taxpayer's office.<sup>125</sup> Tax audit could also be comprehensive general audit, where all the books and accounts will be audited; when the error is so small, it can be made through mail.<sup>126</sup>

The tax authority is entitled to examine the books and records kept by the taxpayer, within reasonable limits. They are, within the same limits, entitled to question not only the taxpayer but other persons acquainted with the case. There are legal guarantees protect confidential communications and prohibiting disclosures of financial information about the taxpayer.<sup>127</sup>

It is generally accepted that a tax audit is an examination to determine whether a taxpayer has correctly reported and assessed their tax obligations. However, the role of an audit program in a modern tax administration is beyond merely verifying a taxpayer's reported obligations. A well planned audit system can provide the administration with significant influence across the community rather than only affecting the taxpayer selected for audit and collecting the tax. Furthermore, when a tax system punishes those tax payers who do not comply properly with their obligation, it will help to enhance the trust that the community has on the authority and also encourages compliance.<sup>128</sup>

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<sup>123</sup> Virginia Taxpayer Bill Of Rights: Department of Taxation,(2012)  
([www.tax.verginia.gov/documents/BILLOFRIGHTS.pdf](http://www.tax.verginia.gov/documents/BILLOFRIGHTS.pdf)) last visited on 16/01/15

<sup>124</sup> Belay , cited above at note 102, p.26

<sup>125</sup> "Tax Law." *Encyclopaedia Britannica Ultimate Reference Suite*. Chicago: Encyclopædia Britannica, 2010.

<sup>126</sup> Belay cited above at note 102, p.26

<sup>127</sup> "Tax Law." *Encyclopaedia Britannica Ultimate Reference Suite*. Chicago: Encyclopædia Britannica, 2010

<sup>128</sup> Edmund Biber, *Revenue Administration: Taxpayer Audit—Development of Effective Plans*; IMF, (April,2010), p.1-2 (<https://books.google.com.et>) last visited on 16/01/15



The audit program also plays an important part in clarifying the law and educating taxpayers on appropriate compliance measures, such as legal filing requirements, deductibility of expenses, and improved record keeping.<sup>129</sup>

During the examination process, the auditor reviews the facts, circumstances, records, and other pertinent information that supports the taxpayer's return. The audit work may take a few days or longer, depending on the complexity of the audit situation (e.g., size of business, diversity of operations, etc.) and on the completeness and accuracy of the records. At last, the auditor will announce the result of the evaluation. It could be filed correctly, overpaid; in which case the tax payer is entitled to a credit, underpaid; where the tax payer is expected to pay the remaining amount. When the auditor is done with the auditing he will explain the result of the audit to the tax payer. If the taxpayer owes tax and agrees with all or part of the audit determination, the auditor will accept full payment of the undisputed portion of the determination. If the taxpayer disagrees with the audit findings, the taxpayer has the right to discuss the areas of disagreement with the auditor or his supervisor. The taxpayer has the right to appeal all or part of the audit determination.<sup>130</sup> If the tax payer wants to appeal the hearing date and place should be convenient for all parties. The taxpayer may bring an attorney or other representative to the hearing or authorize a representative to attend the hearing in place of the taxpayer.<sup>131</sup>

Potential sources of tax disputes should be eliminated during the course of the audit by the auditor. an auditor can reduce the number of fact-based disputes arising from an audit by discussing and clarifying facts with the taxpayer, gathering appropriate evidence and verifying third party information. A clear explanation by the auditor to the taxpayer of the law applicable to a transaction will help to prevent a dispute on matters of interpretation at the assessment stage. After the auditing is completed and still the tax payer is not satisfied with the finding and the process, he can appeal to the relevant body and the fact that he has such right should be informed to him by the auditor. Any taxpayer who is aggrieved or dissatisfied by an assessment or any decision of the tax administration should be able to raise an objection and be assured of a fair hearing. Structured systems of resolving taxpayers

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<sup>129</sup> Id, p.2

<sup>130</sup> State of Michigan Department of Treasury Taxpayer Rights Handbook, p.17-18 ([www.michigan.gov/documents/taxes/TABOR\\_199483\\_7pdf](http://www.michigan.gov/documents/taxes/TABOR_199483_7pdf)) last visited on 16/01/15

<sup>131</sup> Id p.5

question on assessment is an important aspect of equity and transparency. When the taxpayer object to an assessment or a decision, it will result in a dispute between the taxpayer and the tax administration. The dispute may arise due to disagreement on the interpretation of either the facts relevant to the case or the law applicable or both.<sup>132</sup>

The taxpayer has a guarantee right to appeal to a competent and impartial authorities when he disagrees with the determination of the assessing officer.<sup>133</sup> Having the mere right to a hearing is not enough to guarantee due process right of taxpayers. Thus, an independent and qualified administrative appeals process within the tax administration, a special tribunal when the taxpayer is dissatisfied with the outcome of the administrative appeals process; and judicial process to resolve matters of law are needed. Both parties to the dispute should present their part of the case to make the right to appeal meaningful. The auditor responsible for making the assessment which is the subject of the disagreement should also make a presentation before the administrative appeals body explaining the basis and justification of the assessment. Where the administration and the taxpayer fail to agree during the dispute resolution meeting, the matter may be escalated by the taxpayer to the tribunal and courts of law as provided for under the revenue statutes.<sup>134</sup>

The power to audit must be supported by a power to amend the original tax return. The report by the auditor will be used as the basis for any reassessment. Most revenue bodies enable taxpayers to provide comments on the audit report before the reassessment is completed, in order to raise unclear facts or different interpretations of law.

The taxpayer will commonly have the right to appeal against that reassessment if he disagrees with it.<sup>135</sup>

In New Zealand, a Notice of Response (NOR) must give brief reasons why the taxpayer rejects a proposed adjustment, and specify how the proposed adjustment could be altered in order for the taxpayer to agree with it. A NOR cannot merely state that the Inland Revenue

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<sup>132</sup> Mario de Zamaróczy, Tax payer Audit Improvement Guide : East AFRITAC Coordinator, p.44-45 ([www.eastafritac.org](http://www.eastafritac.org)) last visited on 16/01/15

<sup>133</sup> "Tax Law.". *Encyclopaedia Britannica Ultimate Reference Suite*. Chicago: Encyclopaedia Britannica, (2010)

<sup>134</sup> Mario de Zamaróczy, cited above at note 132 p.44-45

<sup>135</sup> Strengthening Tax Audit Capabilities: General Principles and Approaches; Prepared by Forum on Tax Administration's: Compliance Sub-group ;Centre For Tax Policy And Administration, (16 October 2006), p.16 ([www.oecd.org/tax/adminstration/37589900.pdf](http://www.oecd.org/tax/adminstration/37589900.pdf)) last visited on 16/01/2015

Department's (IRD) proposed adjustment is unacceptable. If the IRD accepts all the contentions in the NOR, the agreement will be recorded and IRD will not make the proposed adjustment. If it disagrees with some or all of the contentions, it will inform the taxpayer. The dispute will then usually move to the conference stage. Auditors are not usually authorised to amend assessments without the approval of other tax officers.<sup>136</sup>

### 2.5.3. The Right to be heard during Tax Foreclosure

Foreclosure is a legal proceeding by which a mortgagor's rights to a mortgaged property may be extinguished if the mortgagor (borrower) fails to live up to the obligations agreed to in the mortgage. The mortgagee (the lender) may then declare the entire debt due and owing and may seek to satisfy the debt by foreclosing on the property. Most foreclosures are brought in equity proceedings. Foreclosure is commonly by a court-decreed sale of the mortgaged property to the highest bidder, who is often the mortgagee. The proceeds of the judicial sale are first used to pay the debt; the surplus, if any, is paid to other creditors with subordinate claims on the same property and then to the mortgagor. If the proceeds are insufficient to pay the debt, the debtor is responsible for paying whatever amount of the mortgage is still unpaid. Where a mortgage provides for it, a mortgagee may exercise "power of sale" without prior recourse to the courts.<sup>137</sup> Foreclosure is the commonest mechanism by which the interest of creditors is safeguarded by avoiding the risk of having no guarantee to recover a debt.<sup>138</sup>

The process of foreclosure first develops in feudal England in relation to mortgage. At that time, mortgage was about the transfer of title to a land to the mortgagee if the mortgagor was unable to repay the full amount owed on the date set. When this happens the mortgagor will lose all claim to the property regardless of the value of that property compared to the debt owed. Through time this harsh system started to change when mortgagors got the right to redemption. This right permitted a defaulting mortgagor to redeem his property by paying in debt he owed within a reasonable time. This equitable right to redemption is still prevalent.

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<sup>136</sup> Ibid

<sup>137</sup> "Foreclosure.". Encyclopaedia Britannica Ultimate Reference Suite. Chicago: Encyclopædia Britannica, (2010)

<sup>138</sup> Kinfe Micheal, An Introduction to the Ethiopian Law of Tax Foreclosure: A Commentary LLB (AAU), p.2 ([www.abssinialaw.com/uploads/The\\_Ethiopian\\_Tax\\_Foreclosure\\_Regime\\_3\\_.pdf](http://www.abssinialaw.com/uploads/The_Ethiopian_Tax_Foreclosure_Regime_3_.pdf)) last visited on 16/01/15

At first all foreclosures were strict foreclosures.<sup>139</sup> There are three major forms of foreclosure; namely „Strict foreclosure „Judicial foreclosure and Power of sale foreclosure.<sup>140</sup>

➤ Strict Foreclosure

Strict foreclosure is a rare procedure that gives the mortgagee title to the mortgaged property without first conducting a sale after a defaulting mortgagor fails to pay the mortgage debt within a court special period. The use of strict foreclosure is limited to special situations except in those few states that permit this remedy generally<sup>141</sup>. As we can understand from this definition strict foreclosure is a procedure that grants the mortgagee title to the mortgaged property without a sale. Strict foreclosure is considered as the hardest method that may be used if the debtor is totally insolvent. The main advantage of strict foreclosure it that it avoids the relatively long process involved in the sale of the property of the mortgagor the mortgagee would perfect his title over the property after the due date had lapsed<sup>142</sup>. It is often criticized for being harsh and oppressive since it totally divests the property of the debtor. Later this type of foreclosure was abandoned; though there are still minor practices of this kind of foreclosure.<sup>143</sup>

➤ Judicial Foreclosure

Judicial foreclosure is a court supervised procedure in which as soon as the due date for payment had lapsed, the mortgagee would resort to enforce his right through the order of the court.<sup>144</sup> The court proceeding requires standard legal steps such as the filing of a complaint, service of process, notice and hearing; which will make the process costly and time consuming. Judicial foreclosure is available in all jurisdictions and is the exclusive or most common method of foreclosure because of the intervention of the court in the whole process.<sup>145</sup> The involvement of the court will help to reduce the chances for a defective

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<sup>139</sup> William Weber, “Tax Foreclosure: A Drag on Community Vitality or a Tool for Economic Growth?” University of Cincinnati Law Review, Vol. 81 (2013), p. 1618-19 (scholarship.law.uc.edu) last visited on 16/01/2015

<sup>140</sup> Kinfe Micheal; cited above at note 138, p.4

<sup>141</sup> *The Black's Law Dictionary* cited above at note 12, p.719

<sup>142</sup> Yosef cited above at note 15, p.49

<sup>143</sup> "Foreclosure", Encyclopaedia Britannica Ultimate Reference Suite. Chicago: Encyclopædia Britannica, 2010.

<sup>144</sup> Yosef cited above at note 15, p.49

<sup>145</sup> *The Black's Law Dictionary* cited above at note 12, p.719

foreclosure.<sup>146</sup> The sale of the property has to be confirmed by the court ordering the same and may also be set aside under certain exceptional condition; such as fraud in conducting or publicizing the sale, or when there is no saleable interest on the property. The remaining proceeds of the sale will be paid to other creditors with subordinate claim on the property.<sup>147</sup>

➤ Power of Sale Foreclosure

In power of sale or statutory foreclosure, a clause inserted in mortgages will give the mortgagee the power, in default of payment, to advertise and sell the mortgaged property at public auction without recourse to courts. Though this type of foreclosure reduces the prolonged court procedures, it should not give the impression that the judiciary is totally excluded from the whole proceeding. It will rather have a supervisory role by reviewing the sale by ensuring whether the sale was justified.<sup>148</sup>

It is necessary to give the opportunity to appeal when the taxpayer is aggrieved of the assessment made by the tax authority. Thus, before their right to property is deprived tax payers should be guaranteed the due process right to appeal.<sup>149</sup>

Tax foreclosure is defined as a public authority's seizure and sale of property for non-payment of taxes.<sup>150</sup> Tax foreclosure can be explained as a procedure of enforcing delinquent taxes through seizure and sale of the delinquent tax payer's property. It is a self executing enforcement mechanism by which the tax authority enforces delinquent taxes without direct judicial involvement. It involves a series of legally prescribed condition precedents that need to be followed in the foreclosure processes.<sup>151</sup>

The purpose of tax foreclosure could be securing public revenue and ensuring that taxpayers are not denied their rights to property and due process. Tax foreclosure proceedings are restricted in their operation to the person who falls in default and the tax authority should always act within the limits of its authority.<sup>152</sup> In USA, if a person liable for any federal tax

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<sup>146</sup> Yosef cited above at note 15, p.49

<sup>147</sup> Kinfe Micheal; cited above at note 138, p.6

<sup>148</sup> Id p.7

<sup>149</sup> Yosef cited above at note 15, p.55

<sup>150</sup> *The Black's Law Dictionary* cited above at note 12, p.719

<sup>151</sup> Kinfe Micheal cited above at note 138, p.1

<sup>152</sup> Id , p.8

neglects or refuses to pay the tax after demand, the amount of the tax, including any interest and penalties, together with any costs that may have accrued, shall be a lien in favour of the United States upon all property and rights to property, whether real or personal, belonging to such person. Except for exempt property listed under the Internal Revenue Code, all property on which the Service has a tax lien is subject to levy by the Service.<sup>153</sup>

To ensure a prompt collection of taxes, a tax foreclosure proceeding has certain procedures that need to be followed by the tax authority prior to the sale of the foreclosed asset. In different jurisdictions certain prerequisites for tax foreclosure proceedings are enacted. Some of them are:-

- Default Notice

Notification of taxpayers who fall in default is imperative to inform the taxpayer that his delinquency is known and that the tax authority will strive to ensure the collection of the tax through possible means. For tax purposes, notice may be served for taxpayers under various circumstances. It may, for instance, be served after the assessment of the tax due and to notify the taxpayer the intention of the tax authority to seize his property. Notice of seizure will be served during foreclosure proceeding. A notice of seizure being in a written form it shall contain the object for which it is sent and certain important elements provided under the law<sup>154</sup>. It is a kind of last warning to the tax payer, that he should effect the money he owes the government. Unless he do so, his property will be sized and be sold for the purpose of his tax obligation, interest, administrative penalty and costs of seizure and sale of the property. This rule is consistent with due process requirement that any individual must be given notice an opportunity to defend himself before taking away his property.<sup>155</sup>

By clearly defining the process for identifying and notifying persons facing liquidation of real property interests in the tax sale and foreclosure processes, courts and legislatures would promote effective notice to respondents<sup>156</sup>. In the USA, for example, a seizure notice shall

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<sup>153</sup> Marilyn E. Phelan, Ph.D, J.D. Taxpayers' Procedural Due Process Rights in a more Aggressive Federal Tax Enforcement System, p.8-9

([library.ttu.edu/about/facility/face/entries/social\\_sciences/PDF/phelanTaxpayers.pdf](http://library.ttu.edu/about/facility/face/entries/social_sciences/PDF/phelanTaxpayers.pdf)) last visited on 16/01/15

<sup>154</sup> Kinfe Micheal cited above at note 138, p.10

<sup>155</sup> Yosef cited above at note 15, p.32

<sup>156</sup> James J. Kelly Jr., Bringing Clarity to Title Clearing: Tax Foreclosure and Due Process in the Internet Age: Notre Dame Law School (2008), p.68

explain the administrative appeals and their procedure available to the taxpayer with respect to the seizure and sale and the alternatives available to prevent seizure on the property. Delivering such information is important to ensure fairness and equity in each process of the tax system. Relating to notification the service of the notice is a very crucial issue, as it is a way of insuring that the taxpayer has received the important information contained in the notice and act accordingly. Delinquent taxpayers may be served with notice of seizure either actually or constructively according to the circumstances of the case. It could also be served by posting it around the residential area or working place of the taxpayer.<sup>157</sup>

- Inquiry Into Taxpayers' Assets

In this step the tax authority collects information about the assets and any transactions of the taxpayer. This will help to simplify the seizure and sale of the property which will in turn makes the foreclosure proceeding fruitful.<sup>158</sup>

- Attachment

Attachment is also a vital condition precedent in tax foreclosure proceedings. Attachment is arresting or seizing a person's property to secure a judgment or to be sold in satisfaction of judgment<sup>159</sup>. Thus, when the tax payer defaults to pay his tax, attachment will be must after possible processes to respect the tax payer's right are fulfilled. Arresting the assets of a person liable is one prerequisite for collecting delinquent taxes through seizure and sale.<sup>160</sup>

- Seizure

Seizure is an act or an instance of taking possession of a person or property by legal right or process<sup>161</sup>. When a tax payer fails to comply with the notice then the process of seizure comes in to the picture. Seizure can thus be made either directly from the taxpayer or from third parties who are in custody of the taxpayer's property.<sup>162</sup> Seizure shall include only properties possessed and obligations existing at the time of the seizure. However, in exceptional situation the seizure may go beyond the obligation existing at the time the seizure.

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<sup>157</sup> Kinfe Micheal cited above at note 138, p.14

<sup>158</sup>Id ,p.17

<sup>159</sup> *The Black's Law Dictionary* cited above at note 12, p.145

<sup>160</sup> Kinfe Micheal cited above at note 138, p.18

<sup>161</sup> *The Black's Law Dictionary* cited above at note 12, p.1480

<sup>162</sup> Kinfe Micheal cited above at note 138, p.19

In the US, the seizure may extend beyond property or right to property possessed at time of the seizure only with regard to a levy on salary or wage.<sup>163</sup>

- Appraisal

Appraisal in our context is to refer to the determination of what constitutes as a fair price, valuation of the attached property. As a matter of principle, appraisal is made right after the seizure of the property. This estimation will be used as a minimum value at the sale of the property. The valuation shall be done carefully by the tax authority to avoid a much exaggerated price or undervaluation.<sup>164</sup> The authority shall check and control whether or not the property is correctly estimated. As the estimated value of the property will be the minimum value for sale, this area must be regulated properly to generate the maximum price, as fairness requires from the property to be sold.<sup>165</sup>

- Proclamation of Sale

After the tax authority decides to sell the tax payer's property in order to satisfy the tax the later owes, it needs to let the public know about it(notice for sale). Proclamation of the sale will help the public to participate in the auction and obtain a fair price for the property. After the proclamation is done the Auction will be conducted.

- Adjustment of the Tax Liability: - this is to identify whether the proceeds of the sale adequately covers the tax liability. The tax authority refunds the excess proceeds of the sale to the taxpayer<sup>166</sup>. The majority of jurisdictions rely on a combined sale and foreclosure process to make sure both that the taxes due are paid in full and that any surplus value in the property is made available to the stakeholders whose interests have been liquidated.<sup>167</sup>

The level of judicial involvement varies from full judicial foreclosure to a confirmation of the sale at the end of the redemption period. After the sale, a statutory redemption period where the owner may redeem the property will be given. But this post sale redemption period shall

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<sup>163</sup> Id , p.20

<sup>164</sup> Id, p.23

<sup>165</sup> Yosef cited above at note 15, p.59

<sup>166</sup> Kinfe Micheal cited above at note 138, p.28-29

<sup>167</sup> James J. Kelly cited above at note 156, p.72



not be too much prolonged because it might have its own effect on the right to property of the purchaser.<sup>168</sup>

Seizure should be undertaken only when delinquent taxes can't be recovered in any other possible means without affecting the fiscal interest of the government. Generally, in spite of the significance behind enforcing payment of taxes, it is obviously true that the enforcement procedure should not override the constitutional right of taxpayers. Furthermore, though there might be lengthy process in obtaining warrant, one should also note the positive effect that the involvement of the judiciary may have. It may considerably increase the confidence of taxpayers on the overall proceeding that in turn, have the effect of encouraging voluntary tax compliance.<sup>169</sup>

An adequate notice will inform the interested parties of the action and afford them an opportunity to present their objections<sup>170</sup>. The tax enforcement regime particularly tax foreclosure is also questioned as to its constitutionality in relation to one's right of access to justice. According to this constitutional provision, the right to bring ones matter to judicial body is the right of every one so long as the matter is justiceable.<sup>171</sup>

Pursuant to Taxpayers' Bill of Rights a collection due process hearing is available if the taxpayer receives a notice of the filing of a tax lien and/or notice of intent to levy.<sup>172</sup>

In some jurisdictions if a taxpayer agrees with a tax deficiency but does not have funds available to pay the deficiency, certain options are available to prevent the tax authority levying on the taxpayer's property. For instance, in USA, the taxpayer may obtain relief from the seizure of her property by obtaining an extension for payment of the tax or by working out an agreement with the IRS (Internal Revenue Service) to pay the tax over a period of time through an instalment agreement.<sup>173</sup> If a taxpayer does not agree with an alleged tax deficiency, he may request an administrative review on the alleged amount of tax deficiency using his constitutionally guaranteed opportunity to be heard and appeal. In USA for instance, the taxpayer may request a meeting with the supervisor of the person who issued the

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<sup>168</sup> William Weber, cited above at note 139, p. 1620

<sup>169</sup> Kinfe Micheal; cited above at note 138, p.29

<sup>170</sup> James J. Kelly cited above at note 156, p.68

<sup>171</sup> Kinfe Micheal cited above at note 138, p.29

<sup>172</sup> Marilyn E. Phelan, cited above at note 153, p.15-26

<sup>173</sup> Id, p.10

findings and he may also appeal an alleged tax deficiency to the Internal Revenue Service Appeals Office by requesting administrative review if he did not agree with the finding.<sup>174</sup>

If the taxpayer is not still satisfied with the finding of the administrative review he may still appeal his case to the court of law. In USA, if the taxpayer does not request an appeals conference or disagrees with some or all of the issues after the appeals conference, the taxpayer will receive a formal Notice of Deficiency that permits the taxpayer to file a petition for review with the U.S. Tax Court within ninety days from the date the notice is mailed to the taxpayer.<sup>175</sup> It has been discussed in this chapter right to be heard is a very essential element right of tax payer. Thus the same is true in time of foreclosure. Throughout each process of foreclosing tax payers right to notice and appeal shall be respected whenever they is a disagreement with the tax authority.

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<sup>174</sup>Id , p.15-26

<sup>175</sup> Ibid

## Chapter Three: Rights of Taxpayers to Procedural Due Process in Ethiopia at the Level of the Tax Authority

### 3.1. General Remarks

The tax authority is a government agency which ensure the proper collection of taxes. While performing its obligation, its decisions might affect taxpayers' right. As one government organ the tax authority is expected respect people's right as recognized in the constitution. Thus, it has a constitutional obligation to respect the due process rights of the tax payers including the right to be notified before a certain action is taken, the right to be heard, and the right to present a case before an impartial and independent body. One of the mechanisms that have been employed to prevent violations of rights by administrative agencies is providing procedures to be followed in the discharge of their duties. There have to be procedure when administrative agencies exercise their power. The foundation of administrative procedure is constitutional due process of law.<sup>176</sup> This part of the essay tries to see the obligation of the tax authority in respecting the tax payers' right in time of tax assessment, audit and foreclosure and problems observed in this regard.

### 3.2. Introduction to the Ethiopian Tax System

Tax in Ethiopia is as old as the country itself. All kings, leaders and land lords of ancient time have levied different types of taxes for various purposes.<sup>177</sup> Some authors believe that there was some form of taxation during the 12th and 14th centuries in the form of giving some amount of one's produce (like agricultural crops), cattle and direct labour contribution in serving the local chiefs. In Ethiopia, elements of modern taxation were introduced, during the reign of Emperor Haile Selassie. All taxation in kind was abolished and the monetary form was introduced.<sup>178</sup> Since its beginning, the modern Ethiopian tax system has developed and evolved mainly as a result of increase in the need for revenue, change in economy and governments and the shift in international situations. The Ethiopian tax system went through some major revisions and numerous piecemeal amendments.<sup>179</sup>

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<sup>176</sup> Semahagn cited above at note 9, p.13-14

<sup>177</sup> Mesfin Gebeyehu, *Tax Audit Practice And Its Significance In Increasing Revenue In Ethiopia: The Case Of Addis Ababa City Administration*, (Jan.2008), p.34

<sup>178</sup>Report of a National Training Workshop On Strengthening Financial Management And Accountability For Regional Development In Ethiopia (Debre Zeyit, Ethiopia); Organized by the Public Administration, Human Resources and Social Development Division of the Economic Commission for Africa in collaboration with the Office of the Prime Minister of the Federal Democratic Republic of Ethiopia (FDRE). (25-29 December 1995) , p.7 (<http://hdl.handle.net/10855/2639>) last visited on 17/01/2015

<sup>179</sup> *Taddese Lencho* The Ethiopian Tax System: Excesses and Gaps; *Michigan State International Law Review* Vol. 20:2,(2012), p.329

The first major change in Ethiopia's tax system was made in the years 1942-44. These changes include amendments to property taxes (land and cattle). Broad-based taxes on goods and services were also introduced in the mid 1950s. In the early 1960s, changes were also made in the rate and structure of taxes, especially on income. In the post-revolution period (1974-91), significant major changes on the rate and structure of all types of taxes were made. These involved widening the land tax base, introducing capital and surplus transfers from nationalized firms, as well as certain minor arrangements on other taxes.<sup>180</sup> After the year 1991/2 the subsequent taxing system in Ethiopia can be divided into three broad categories: (i) taxes on income and profits, (ii) taxes on goods and services and (iii) taxes on international trade. Most of these taxes have been reformed and amended in the last decade following the general 1992 liberalization (or reform) policy. Some institutional reforms aimed at enhancing the government's capacity to raise tax revenue have also been made.<sup>181</sup>

The 1994 Constitution of Ethiopia states that the country will be ruled by the federal system which comprises the federal government and member states having their own legislative, executive and judicial powers<sup>182</sup>. All financial requirements necessary to carry out duties and responsibilities that have been given to the federal government and the regional state are covered by the respective organs and the sharing of revenue between the federal government and regional states follow the arrangements of the powers of the government.<sup>183</sup> The Constitution assigns taxation powers as taxes exclusive to the Federal Government and the Regional States, taxes concurrent to both the Federal Government and the Regional States and taxes undesignated.<sup>184</sup> The federal arrangement follows the dual structure in which all the three branches of government co-exist in respect of the Federal and Regional powers<sup>185</sup>. This, in taxation, means in principle that both the Federal Government and the Regional States enjoy full legislative, executive, and judicial powers with respect to taxation powers reserved to them<sup>186</sup>. Taxes levied by federal and regional governments consist of direct and indirect taxes. Direct taxes are taxes including employment income taxes, business income tax, rental

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<sup>180</sup> Alemayehu Geda1 and Abebe Shimeles, Taxes and Tax Reform in Ethiopia, 1990-2003; Research Paper No. 2005/65, (December 2005), p.2

<sup>181</sup> Ibid

<sup>182</sup> The FDRE Constitution, (1995), Art. 50(1,2) Neg Gaz , Year 1 no. 1

<sup>183</sup> MESFIN cited above at note 177, p.37

<sup>184</sup> FDRE Constitution cited above at note 182 , Art. 96-99

<sup>185</sup> Id , Art. 50(1,2)

tax and taxes on royalties and chance winnings, while indirect taxes are mainly composed of value added tax (VAT), turnover tax (TOT), excise taxes, stamp duty and custom duties.<sup>187</sup>

After considering taxes and taxation power in Ethiopia it is imperative to discuss the administration. Tax administration refers to the identification of tax liability based on the existing tax law, the assessment of this liability, and the collection, prosecution and penalties imposed on recalcitrant taxpayers.<sup>188</sup> With the establishment of the Federal Government Revenue Board in 1995, Ethiopian Tax Administration was for the first time organized as a separate and autonomous government body. The Board was established to oversee and coordinate the operations of three federal revenue agencies at the time: the Inland Revenue Authority, the Ethiopian Customs Authority, and the National Lottery Administration. In 2001 the Ministry of Revenue was created as a reorganization of Ethiopian tax administration.<sup>189</sup> This ministry oversees the three revenue collection institutions: Federal Inland Revenue, Ethiopian Custom Authority and the National Lottery Administration.<sup>190</sup>

In the year 2008 reorganization and restructuring of tax administration was made to merge the three revenue agencies of the Federal Government into one authority the Ethiopian Revenues and Customs Authority (ERCA).<sup>191</sup> According to article 3 of the proclamation No .587/2008, the Authority is looked upon as "an autonomous federal agency having its own legal personality".

Ethiopian tax policy is based on tax payers' voluntary compliance i.e. self assessment. It aspires to promote investment, support industrial development; and broadening the tax base and decreasing the tax rate, at least maintaining the current reduced tax rates compared to most other countries, in view of financing the ever-growing needs of the government expenditure. ERCA has the mission for accomplishment of these policy objectives<sup>192</sup>.

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<sup>186</sup> *Taddese*, cited above at note 179, p..331

<sup>187</sup> Asamnew cited above at note 2, p.4

<sup>188</sup> *Id.* p.1-2

<sup>189</sup> *Taddese* cited above at note 179, p.347-50

<sup>190</sup> Alemayehu Geda1 and Abebe Shimeles, cited above at note 180, p.3

<sup>191</sup> A Proclamation to Provide for The Establishment of the Ethiopian Revenues And Customs Authority Proclamation 2008, preamble, proc. No. 587/2008, Neg. Gaz 14th Year, No 44

<sup>192</sup> Ethiopian Revenues And Customs Authority Domestic Tax Audit Manual (May 2014) p.1

Recent tax administration reforms have introduced a number of changes to Ethiopian tax administration, some of them are; for the first time, the tax authority (ERCA) has assumed the powers to investigate and prosecute tax and customs offenses directly and the regular police and prosecution offices will have a mere supporting role like the apprehension of suspects, production of witnesses, seizure and control of contraband; Special personnel administration regulations were issued in 2008 governing employees of ERCA, who until then had been governed by the Federal Civil Service Laws<sup>193</sup>; the establishment of additional branch offices, training and recruitment of qualified personnel, introduction of performance and accountability measures, setting up a taxpayer education programme and similar initiatives aimed at implementing the new income tax, VAT, turnover tax and excise tax proclamations.<sup>194</sup> The reform measures are intended to encourage trade, investment and development; broadening the tax base and increase Government revenues to support social programs and alleviate poverty; strengthen the enforcement capacity of the tax and customs authorities; and promoting equity in the tax system.<sup>195</sup>

Taxpayers have the right to receive prompt, courteous, and professional assistance in their dealings with the tax authorities, to be spoken to in a way they can easily understand, to receive clear and easily understandable communications from the tax authorities, and to have a way to file complaints about inadequate service.<sup>196</sup> If this is the case, the tax administration should provide impartial and professional courteous service and must keep private and confidential information regarding the individual taxpayers. It should also offer clear, understandable and current tax information and will make this information available to tax payer through various media and provide timely, accurate written information that one can rely on to requests for tax information.<sup>197</sup>

In addition to the major role of ERCA in the tax administration other government bodies are involved in tax administration in a limited capacity; for instance the Ministry of Finance. The Ministry of Finance may have ceased as a tax administration body since 1995, but it is still

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<sup>193</sup> *Taddese*, cited above at note 179, p.347-50

<sup>194</sup> Alemayehu Geda and Abebe Shimeles, cited above at note 180, p.4

<sup>195</sup> Mesfin Gebeyehu, cited above at note 177, p.39

<sup>196</sup> Danshera Cords; Administrative Law and Judicial Review of collection Decisions: Saint Louis University Law Journal, (2008), Vol.52, p. 452-53([www.slu.edu/dovuments/law/law%20journal/archives/cords.pdf](http://www.slu.edu/dovuments/law/law%20journal/archives/cords.pdf)) last visited on 12/01/2015

<sup>197</sup> Asamnew cited above at note 2,p.22

involved in some capacity in tax administration. The Ministry of Finance is a major player in the field of issuing tax exemptions and directives on the implementation of the principal tax laws.<sup>198</sup>

If we say this much as an introduction about the Ethiopian tax system, it will be right to say something about taxpayers' right. As in all other countries, one of the purposes of taxation in Ethiopia is the raising of as much revenue as possible to meet the ever-expanding government expenditure for the supply of public goods and services which otherwise would not be available to the general public by the market.<sup>199</sup> The tax system in Ethiopia is not only meant to raise revenue for current expenditures but also aims at directing economic agents to the development goals foreseen by the government through the incentive schemes embedded within the prevailing tax laws. Through the tax system, government can protect domestic industries from competing imported goods through levying high tariff on the latter. Taxation is also used for non-fiscal purposes such as reducing the inequalities in income distribution; encouraging certain industries and discouraging others depending on how useful and appropriate they are at that particular economic stance.<sup>200</sup> To achieve all this aims and more it is paramount to protect and respect the taxpayers' right since they are the source of the income.

Ethiopia has not yet codified tax payers' right under a single document they are found dispersed in different legal documents including the FDRE Constitution. Our constitution under Chapter 3 contains lists of human rights. Thus, tax payers will have to share the fruits of this rights. Such rights include: the right to privacy, the right to equality of treatment, the right to be protected from inhuman treatment, and security and property<sup>201</sup>. They also have right to access to justice. When we say access to justice, tax payers can challenge the authority's decision when they are not satisfied by it. They have the right to raise objections and provide additional documentation in response to the authority actions or proposed actions, to expect that the authority's will consider their objections and documentation promptly and impartially, and to receive a written response if the tax authority finds them

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<sup>198</sup> *Taddese* cited above at note 179, p. 351

<sup>199</sup> Jira Jebessa, Fantahun Melles, Dieter Gagel, Gerhard Quincke (ed), Taxation in Ethiopia: Direct and indirect taxes - Categories of tax payers Declaration of income and assessment of taxes Tax incentives (10/2004) , p.26 ([www.scribd.com/doc/162154105/Taxation-in-Ethiopia-1#](http://www.scribd.com/doc/162154105/Taxation-in-Ethiopia-1#) scribd) last visited on 17/01/2015

<sup>200</sup> *Id* , p.26-27

<sup>201</sup> *Aschalew* cited above at note 4, p 5

insufficient. Taxpayers are entitled to a prompt and impartial administrative appeal of Tax authority's actions and have the right to receive a written response explaining the Appeals Division's decision. They have the right to protest and appeal a determination of the tax authority if they disagree with an assessment of tax or penalty, reduction or a denial of a refund, a revocation of a license or permit, or other determination.<sup>202</sup>

One of the mechanisms that have been employed to prevent violations of rights by administrative agencies is proving procedures to be followed in the discharge of their duties. There has to be procedure when administrative agencies exercise their power. The foundation of administrative procedure is constitutional due process of law.<sup>203</sup> Starting from the constitution due process guarantee is indicated directly or indirectly in the country's different tax laws. Ethiopians can challenge arbitrary administrative decisions in different channels. When an agency carries out its judicial function it is engaged in adjudication, a process very much similar with a trial court. While adjudicating a case, it will conduct many activities like carefully assessing the claim and collect evidences in order to reach to the most apt decision. In the administrative agency (Ethiopian Customs and Revenue Authorities) there are three different adjudicatory bodies; the review committees, the Tax appeal commission and, regular courts. The FDRE Constitution under article 12 also contains the principle of transparency and accountability of the government. This responsibility will compel the government to provide the necessary information to the taxpayer and insure the respect of other taxpayers' right.

In addition to the FDRE Constitution, we find rights of taxpayers in different tax laws of the country. For instance, Income Tax Proclamation, VAT Proclamation, TOT Proclamation and others also contain some rights. To mention some, claiming deductible expenses, exemptions, the right to lodge an appeal if they are aggrieved by the action of the tax authority and etc....<sup>204</sup> The tax Authority has a responsibility to maintain the secrecy of all information of the taxpayers save some exceptions.<sup>205</sup> Taxpayers have the right to expect that any information they submit to the tax authority during the tax procedure, and other

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<sup>202</sup> Danshera Cords; cited above at note 196, p. 452-53

<sup>203</sup> Semahagn cited above at note 9, p.13-14

<sup>204</sup> IT Proclamation cited above at note 114, Arts.20 28,30,105 and 107 cum 112 proc, Value Added Tax (VAT) proclamation (2002) Art.8,43 Proc.285 8<sup>th</sup> Year No. 33, Turnover Tax Proclamation (TOT) (2002) Art.7,21 Proc.308, 9<sup>th</sup> Year No. 21

<sup>205</sup> IT Proclamation cited above at note 114 Art.39(1)



data which are acquired by the tax authorities in connection with their tax obligations will not be disclosed unless authorized by the taxpayer or by law, except in the cases, defined by the law. Officers of the authority are also obliged to treat every taxpayer based on objective fact without any favouritism.<sup>206</sup>

### 3.3. The Right to be Notified After Tax Assessment<sup>207</sup>

It has been indicated in the previous chapter that an assessment is a way of determining the liability of a given taxpayer.<sup>208</sup> We need assessment to avoid arbitrary imposition of tax on citizens and create a uniform and fair method of tax collection which can be applicable equally on all taxpayers.<sup>209</sup> A tax assessor is responsible for preparing and maintaining the assessment, and collecting the tax levies in accordance with the quality standards. Taxpayers are required to pay a tax in proportion to their level of income. Collection of tax should be convenient and the cost of collecting the taxes should not be high to discourage business.<sup>210</sup>

Every taxpayer has a unique TIN, which he or she is supposed to use in all his or her correspondence with the tax authority, and no taxpayer should have more than one TIN.<sup>211</sup> Tax payers except category C have record keeping responsibility which includes a record of the business assets and liabilities, including a register of fixed assets showing the date of acquisition the cost of acquisition, and the current book value of each asset; a record of all daily income and expenses related to the business activity and the matter to which they relate and a record of all purchases and sales of goods and services related to the business activity.<sup>212</sup> Taxpayers are required to file returns which contain all the particulars of the taxpayer within specified months of the end of their tax accounting year. All documents

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<sup>206</sup> International Tax Dialogue: Revenue Administration In Sub-Saharan Africa :An Example of a Codified Set of Taxpayers' Rights and Obligations – Slovenia :ITD Comparative Information Series No 1.2010 (2010) ([eadi.org/gc2011/carter-627.pdf](http://eadi.org/gc2011/carter-627.pdf)) last visited on 17/01/15

<sup>207</sup> This essay will repeatedly use the Income Tax proclamation No. 286/2002 as the other tax laws are more or less similar regarding the issue we are dealing with.

<sup>208</sup> Tamrat cited above at note 101, p.2

<sup>209</sup> Belay cited above at note 102, p.16

<sup>210</sup> Asamnew cited above at note 2, p.23-26

<sup>211</sup> IT Proclamation cited above at note 114, Art.43(a)

<sup>212</sup> Id ,Art.48

regarding taxation should be presented to the tax authority where the taxpayer has his/her file.<sup>213</sup> The declaration made by the taxpayer serves as a starting point in the process of assessment.<sup>214</sup>

The return, with the attached reports and statements, is meant to provide such complete information that the assessing tax official can rely on it to compute the correct tax.<sup>215</sup> Declaration of income will protect the taxpayer from arbitrary action of the authority and will also help to facilitate the tax assessment process. If there is no suspicion of fraud the tax authority will proceed to assess the taxable income after it received the declaration.<sup>216</sup>

According to the Income Tax Proclamation a person whose income is exclusively of schedule "A" is not required to declare his income. The amount of tax withheld on an employee's schedule A income, paid to the tax Authority and accompanied by the employer's statement shall be the amount assessed by the tax authority effective on the date the tax is paid and subject to later amendment.<sup>217</sup> Schedule B and C income tax payers are expected to submit their income declaration in a form that the tax authority prescribes. Category B and A tax payers are suppose to deliver the declaration within two and four months respectively from the end of the taxpayers tax year. If there is excess payment the authority shall refund it within 90 days of becoming satisfied on the tax declaration. Though the tax authority may make amendment on the declared tax because of error or omission by the tax payer, the tax due shall be the amount assessed by the tax authority.<sup>218</sup> Every taxpayer who has Schedule D income, not subject to withholding at source constituting a final tax, shall prepare a declaration of that income in a form prescribed by the Tax Authority; which shall be submitted to the Tax Authority within two (2) months from the end of the Ethiopian Fiscal Year.<sup>219</sup> Article 68 of the Income Tax (IT) proclamation dictates that standard assessment will be used to assess the tax due to category C taxpayers. In standard assessment the

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<sup>213</sup> Asamnew cited above at note 2, p.24

<sup>214</sup> Tamrat cited above at note 101, p.2

<sup>215</sup> "tax law." Encyclopædia Britannica. Encyclopaedia Britannica Ultimate Reference Suite. Chicago: Encyclopædia Britannica, 2010.

<sup>216</sup> Belay cited above at note 102, p.18

<sup>217</sup> IT Proclamation cited above at note 114, Art. 65(2,3)

<sup>218</sup> Id Art. 66(1,4,5)

<sup>219</sup> Id Art.67(1)



- If the authority cannot find information from third party it could use the amount sales that was used as a base to calculate the previous years or months tax due to the taxpayer. This amount of sales will be related to the current inflation rate to assess the tax due.
- If the other methods are not possible the tax authority will resort to estimate the tax using information collected from a field visit to the taxpayer's business place or referring to other taxpayers who are in the same line of business as the taxpayer in question.

As stated in the directive, one way to estimate taxpayer's debt is using information from 3<sup>rd</sup> parties. By third parties we mean for instance suppliers, wholesalers, like beer Factories selling their products to bars. So the authority will check the amount and price of the beer bought by the bar. It is obvious that there will be problems while the estimation is made in this way. The authority will not be able to estimate the correct amount; as a result, complains are raised by the taxpayer now and then. These complains are entertained in the review committees.<sup>226</sup> Administrative assessment based on estimation may create inconvenience on either the taxpayer or the government.<sup>227</sup> It is clear that the taxpayer will not be able to pay exactly what he owes; since the estimation process is more or less subjective. Hence, assessment made without books and records of the taxpayer could result in unfair amount of assessment which might affect the taxpayer.

The time of declaration is the one year period from 1<sup>st</sup> Hamle to 30<sup>th</sup> Sene. The tax declaration period for an individual or an association of individuals shall be the fiscal year i.e. 1<sup>st</sup> Hamle to 30<sup>th</sup> Sene and in the case of a body, the accounting year of the body which won't change unless it obtains prior approval from the tax authority.<sup>228</sup> After the taxpayer has submitted a declaration of income within the time and manner prescribed in the proclamation, the Tax Authority has five years to amend the assessment. The five years starts to run from the due date of the declaration, if the taxpayer reported the declaration on the prescribed time and the correct manner. However, if the taxpayer prepares the declaration in a manner required by the proclamation but submitted it after the due date, the tax authority will have 5 years which will start to run from the date the declaration was delivered to it. The tax

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<sup>226</sup> Interview, cited above at note 220

<sup>227</sup> MESFIN cited above at note 177, p.60-61

<sup>228</sup> IT Proclamation cited above at note 114, Art. 64(1,2,3)

authority can assess the tax due to a taxpayer any time, if the tax payer has not declared his income or has submitted a fraudulent declaration.<sup>229</sup>

After making a timely tax assessment based on the relevant laws, the tax authority has to send notice of tax assessment to the taxpayer; to notify the assessment.<sup>230</sup> Notice is a fundamental element of procedural due process, which is needed to let a person know that a given proceeding is underway and give him an opportunity to present his side of argument<sup>231</sup>. Notice helps to inform the taxpayer if he needs to make additional payment to what he has declared and paid, and to notify the taxpayer that he has paid more than what he should have, as a result, he is entitled to be refunded. In addition notification helps to inform the tax payer his right to lodge an appeal when he is aggrieved with the assessment made by the tax authority.<sup>232</sup>

There are about seven contents prescribed on this proclamation that should be part of an assessment notification. These are:-

- gross income and deductions applicable under this Proclamation;
- taxable income;
- rates applicable or percentage;
- taxes paid and due;
- any penalty or interest;
- the taxpayer's name, address, and TIN; and
- a brief explanation of the assessment and a statement of the taxpayer's rights<sup>233</sup>

At the back page of the notification, it contains brief explanation, on how tax due and penalties are assessed based on the law (in percentage) and forums available for the taxpayer to appeal if there is a disagreement.<sup>234</sup>

Notices that will be issued by the tax authority are expected to be prepared in writing. It is needed to be in a written form since assessment notification entails a lot of effects on both tax payers and the authority and it involves the movement of a great deal of money .

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<sup>229</sup> Id , Art.71(1,2,3)

<sup>230</sup> Belay cited above at note 102, p.24

<sup>231</sup> Bizuneh cited above at note 26, p.30

<sup>232</sup> Tamrat cited above at note 101, p. 24-25

<sup>233</sup> IT Proclamation cited above at note 114, Art. 72

<sup>234</sup> Interview, cited above at note 220

Furthermore, this notification may be needed as evidence later in litigation, if any. Thus, having it in a written form insures the reliability, and durability.<sup>235</sup>

To achieve the purposes of assessment notification it is imperative to make sure assessment notification reaches the taxpayer through the best kind of service possible under the circumstances.<sup>236</sup> The first best option is to communicate the tax payer if possible personally if not handing it to adult member of his family or an employee.<sup>237</sup> The income tax proclamation also suggests the same. The service of the notice will be in the case of a resident individual, by registered letter or by delivery to the taxpayer in person, or if he is absent, to any adult member of his family or any person employed by him at his residence, or place of business or, professional practice, provided that, if no person can be found to accept such service, then, the same may be effected by affixing the notice to the door or other available part of the said residence or place of business. When we consider the case a resident body, notice could be addressed to it, by a letter to the registered address of the body or by delivery to any employee of the body at any of its places of business. However, if the tax payer is of non-resident the notice will be delivered to their agent or agents in Ethiopia, or by affixing to the door or other available part of the residence or place of business of such agent if he could not be served in person. If all the above mentioned ways are exhausted and yet it is impossible to deliver the notice, the service may be discharged by the publication on a newspaper in which court notice may be advertised.<sup>238</sup> The practice is not that much different from this procedure. The notice will be served on the taxpayer soon after the assessment is over mostly within 3 up to four days. Mostly the authority will try to contact the taxpayer via telephone; to inform him to come and take the notification. If the taxpayer cannot be reached then the tax authority will send its personnel to deliver the notification personally. They will try to deliver it in this way two or three times. Practically it is observed that, sometimes it will be difficult to contact the taxpayer or his agent personally even after trying repeatedly, as a result, they will use other means explained above.<sup>239</sup>

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<sup>235</sup> Tamrat cited above at note 101, p.19 and Interview, cited above at note 220

<sup>236</sup> Yosef cited above at note, p.33

<sup>237</sup> Tamrat cited above at note 101, p.37

<sup>238</sup> IT Proclamation cited above at note 114 , Art.73(1)

<sup>239</sup> Interview, cited above at note 220

Any assessment of tax duly served on the taxpayer shall become final when<sup>240</sup>:

- ✓ The taxpayer fails to pay the tax due or to lodge his or its appeal with the Tax Appeal Commission within thirty (30) days from the date of receipt of an assessment notice or from)the date of decision of the review committee,
- ✓ the time for appealing the decision of the Tax Appeal Commission has expired; or
- ✓ the Court of Appeal renders its final decision.

A tax payer who did not pay the finally assessed tax is in default.<sup>241</sup> When the tax payer receives the notification, he is expected to either pay the amount stated on the notification or appeal to the relevant body if he disagrees with the amount.<sup>242</sup>

### 3.4. Procedural Due Process during Tax Audit

Though, tax collections is an important source of revenue for the country, total tax revenue performance has been relatively poor in Ethiopia. To insure the proper amount of tax is collected, the enforcement powers of the tax administration, including tax audit, should be applied judiciously which will in turn assists to maintain steady economic progress of the nation.<sup>243</sup>

As it has been discussed in the previous sections the taxpayer submits a tax return including copies of the balance sheet, profit and loss statement. The return, with the attached reports and statements, is meant to provide such complete information that the assessing tax official can rely on it to compute the correct tax. In examining tax returns, the basic principle is that a return is assumed to be correct until the assessing official determines otherwise.<sup>244</sup> Tax

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<sup>240</sup>IT Proclamation cited above at note 114 ,Art.73(2), VAT proclamation cited above at note 204 Art.43(2,3)and 29(2)

<sup>241</sup> Id Art.73(3), VAT proclamation cited above at note 204, Art.43(2)

<sup>242</sup>Belay cited above at note 102, p.24

<sup>243</sup> Getaneh Mihret , Tax Audit Practice in Ethiopia: The Case of the Federal government , (June 2011), p.4 (etd.aau.edu.et/dspace/handle/123456789/3165) last visited on 17/01/15

<sup>244</sup> "tax law." Encyclopædia Britannica. Encyclopaedia Britannica Ultimate Reference Suite. Chicago: Encyclopædia Britannica, 2010

audit is the review of a tax payer's return by the tax authority including an examination of the tax payer's books<sup>245</sup> and the tax payer is expected to assist the tax auditors in the process.<sup>246</sup>

Article 38 of the Income Tax Proclamation No. 282/2002 states that the Tax Authority has the mandate to investigate any statements, records and books of account submitted by any taxpayer at any time by:

(a) sending duly accredited inspectors to the place of business or practice of the tax payer to check same or any vouchers, stocks of other material items of the taxpayer

(b) requiring the taxpayer or any employee thereof who has access to or custody of any information, records or books of account to produce the same and to attend during normal office hours at any reasonably convenient tax office and answer any questions relating thereof;

(c) requiring any person including municipality, Body, Financial Institution Department or Agency of Federal or Regional Government to disclose particulars of any information or transactions, including any lending or borrowing which it may have relating to the taxpayer.

Tax audit is defined by a manual prepared in ERCA on domestic tax audit (here in after referred as the manual) as a systematic examination of business's relevant commercial system to determine whether a taxpayer's declaration states the tax liability correctly and complying with the provisions of the tax laws and related subsidiary legislations. Auditing involves examination of financial statements, books of accounts and vouchers of a taxpayer by tax auditors so as to ascertain whether the taxpayer has accurately considered revenues and expenses when determining the taxes shown in the declarations as per the requirements of the tax laws.<sup>247</sup> The main role of tax audits and examinations is to check the accuracy of the information that taxpayers provide to tax authorities.

However, in addition to this purpose it has further benefits like, enhancing the trust that the community has on the authority.<sup>248</sup> Tax audit may increase tax revenue directly through assessment of additional taxes, and indirectly by improving taxpayer compliance with the tax

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<sup>245</sup> The Black's Law Dictionary cited above at note 12, p. 150

<sup>246</sup> The Ohio Taxpayers' Bill of Rights cited above at note 122

<sup>247</sup> Domestic Tax Audit Manual cited above at note 192, p. 9-137

<sup>248</sup> Edmund cited above at note 128, p.1-2



laws and regulations. A successful audit helps to investigate, detect and prevent loss of tax revenue.<sup>249</sup>

Non-compliance and tax avoidance can take many forms like stay out of the system by not registering, failure to maintain books and records, not submit declaration on time and other similar ways. For this reason, the tax administration needs to develop a range of strategies to treat particular risks and have the flexibility to apply them.<sup>250</sup> The auditing together with a system of adequate penalties for detected cases of fraud is the universal method for tax control and the prevention of tax evasion. Tax evasion can be brought to light best by a means of an effective audit program.<sup>251</sup>

According to the manual the types of audits are defined by three major factors, namely:- a) The audit scope and intensity b) The period(s) under examination c) The location of the audit activity.<sup>252</sup> The major types of audit in ERCA are comprehensive audit, issue audit, desk audit, Special Audit Projects, Advisory Visit Audit, Refund Audits, Investigation Audit and De-Registration Audits.

The manual stipulates that ERCA is responsible to create a situation for a taxpayer to believe that he is being treated fairly in all aspects and the auditor is required to accomplish the audit with a minimal disturbance of taxpayer's staff.<sup>253</sup>

It has been highlighted in the previous chapters that the taxpayers have the right to expect that any information they provide to the tax authority will not be disclosed unless authorized by the taxpayer or by law. Thus, the taxpayers have the right to expect the tax authority to investigate and take appropriate action. There are legal guarantees to protect confidential communications and prohibiting disclosures of financial information about the taxpayer.<sup>254</sup> The tax laws provide that the tax authority and all persons who are or have been its agents or employees shall maintain the secrecy of all information, save the exceptions.<sup>255</sup> The manual in this regard dictates that taxpayer information will not be

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<sup>249</sup> Getaneh Mihret , cited above at note 243 , p.4, 6

<sup>250</sup> Domestic Tax Audit Manual cited above at note 192, p.15

<sup>251</sup> Getaneh, cited above at note 243, p.14

<sup>252</sup> Domestic Tax Audit Manual cited above at note 192, p.9-13

<sup>253</sup> Id p.4

<sup>254</sup> "tax law." Encyclopædia Britannica. Encyclopaedia Britannica Ultimate Reference Suite. Chicago: Encyclopædia Britannica, 2010

<sup>255</sup> IT Proclamation, cited above at note 114, Art.39(1), VAT Proclamation cited above at note 204, Art.53(2), TOT Proclamation cited above at note 204, Art.30(2)

disclosed to unauthorized person unless the taxpayer has provided ERCA with consent. The consent must be in writing and signed using ERCA's standard forms, or some other form of written consent that provides all the information addressed on ERCA standard forms; or specific provisions in the legislation administered by authorized bodies in Ethiopia provide for the disclosure of information. Audit staff must be aware of the importance of using and disclosing taxpayer's confidential information only when consistent with the confidentiality provisions of the legislation.<sup>256</sup> Auditors are highly required to be careful not to disclose financial information of a given taxpayer. This is one requirement even at the time of recruitment of the auditor. According to the authority Problems related to confidentiality are not much noticed in practice but if there are problems the taxpayer could report it to the intelligence department to look in to the problem.<sup>257</sup>

The auditors are expected to behave professionally according to the ethical requirements that apply to them which will help to build the trust that the taxpayers have on the audit. Some of the ethical requirements that they are required to adhere to are listed in the manual. These are, integrity, fairness, justice and credibility in their work, auditor's independence- meaning the auditor's decision should not be affected by personal or external interests. Auditors should not only try to be independent from the taxpayer and interest groups, but they should also be objective and impartial in the issues they audit. Conclusions and reports should be based on facts gathered according to tax audit standards. Auditors should make sure that their work is reliable, timely, useful, convincing and based on the relevant law.<sup>258</sup>

Impartiality is an imperative component for a fair audit thus, if it is found that the auditor has a financial or personal interest in a specific audit then he will be replaced.<sup>259</sup>

Selecting files for audit should always be based on sound risk assessment. Sound risk assessment includes evaluating the potential collectability of a debt that could arise as a result of an audit action. Difficulty to collect a potential debt is only one aspect to consider in

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<sup>256</sup> Domestic Tax Audit Manual cited above at note 192, p.5

<sup>257</sup> Interview, Ato Mesfen, Tax Audit Work Process, ERCA East District and Tax audit procedure and program development directorate, Eastern District, ERCA (Dec 5 ,2014)

<sup>258</sup> Domestic Tax Audit Manual cited above at note 192, p.6-7

<sup>259</sup> Interview, cited above at note 257

selecting a file for audit or closing a file early. The collection of an assessment is an important final step in the audit process.<sup>260</sup>

Essentially there are four different audit approaches these are substantive procedures approach, balance sheet approach, systems-based approach and risk-based approach. ERCA is emphasizing the risk based approach. So every audit will be directed towards this approach. In this kind of approach audit resources are directed towards those areas of the financial statements that may contain misstatements (either by error or omission) as a consequence of the risks faced by the business.<sup>261</sup>

The audit department will start the auditing process from the day the taxpayer declares his/her income to the authority.<sup>262</sup> In examining tax returns, the basic principle is that a return is assumed to be correct until the assessing official determines otherwise.<sup>263</sup> Thus, auditing is not done on every taxpayer. The authority only takes sample taxpayers selected using different criteria for auditing. The audit department may select risky areas mainly using two methods. One is using information gained from the Risk Department and the Intelligence Department. These departments identify risky areas based on various indicators like for example if the tax payer, most of the time declares loss, if the amount of income he declared is very low or if he is not using receipts in the business, when he required to do so ( e.g VAT). The other way is establishing a committee to identify risky areas using different criteria.<sup>264</sup>

An audit test is a procedure performed by a tax auditor in order to assess the accuracy of various financial statement assertions. The two common categorizations of such tests are system test and substantive tests. These tests typically are performed on a sample basis over an existing group of similar transactions. One common outcome of testing is the identification of individual entries that may indicate the possibility of error and which may therefore warrant further investigation of internal control procedures<sup>265</sup>. Audit testing is

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<sup>260</sup> Domestic Tax Audit Manual cited above at note 192, p.4-5

<sup>261</sup> Id ,p.17-23

<sup>262</sup> Interview, cited above at note 257

<sup>263</sup> "tax law." Encyclopædia Britannica. Encyclopaedia Britannica Ultimate Reference Suite. Chicago: Encyclopædia Britannica, (2010)

<sup>264</sup> Interview, cited above at note 257

<sup>265</sup> Domestic Tax Audit Manual cited above at note 192, p.20

mostly done by a committee formed for that purpose. This committee will use mainly, about fourteen criteria to look for risky areas.<sup>266</sup>

The fact that a taxpayer is to be audited should be known to him before hand. Notification of audit is needed to show the date the audit will start. All audit notification letters issued to a taxpayer and agent will clearly indicate the nature of the Revenue intervention. The scope of the audit will also be set out, and will range from a single issue for a specific period or year to a comprehensive audit for a number of years.<sup>267</sup> The manual has annexed the requirements that notice of intention to audit shall contain. The notice of intention to audit shall mainly contain the taxpayer's name, TIN number, address, what the audit intends to cover, what is expected from the taxpayer in terms of availability of his financial information.<sup>268</sup> The notification letter (audit entrance letter) will describe the types of documents that need to be made available by the taxpayer for instance receipts, records and financial statements. Being notified before the tax authority engages in auditing is the due process right of the taxpayer. This will enable the taxpayer to get the chance to prepare evidences to challenge the actions of the authority. Usually the taxpayer will get 5 days to prepare the necessary documents after the receipt of the notification letter. However, sometimes when the taxpayer complains that the five days are not enough to prepare the document, extensions will be allowed depending on the circumstance and the reasons claimed by the taxpayer.<sup>269</sup> It is observed in practice that a lot of complains are raised that the five days are not enough. Though the authority tries to see the complains case by case and add some period for the taxpayer to prepare documents, it seems, it will be best if the period of time given is increased by law. Additionally, the law could give certain discretion to the authority to increase more that such fixed period in exceptional cases. However, as it is currently practiced five days are very short.<sup>270</sup> It is best if the taxpayer is communicated personally to deliver the notice, if possible. If not the next option would be handing it to adult member of his family or an employee.<sup>271</sup> If no person can be found to accept such service, then, the

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<sup>266</sup> Interview, cited above at note 257

<sup>267</sup> Virginia Taxpayer Bill Of Rights cited above at note 123

<sup>268</sup> Domestic Tax Audit Manual cited above at note 192 , annex 2 , p. IV

<sup>269</sup> Interview, cited above at note 257

<sup>270</sup> Yosef , cited above at note 15 , p.33

<sup>271</sup> Tamrat cited above at note 101 , p.37

same may be affected by affixing the notice to the door or other available part of the residence or place of business.<sup>272</sup>

Both field audit and desk audit are used in auditing, practically. They will select which method to use depending on the circumstance of the case. If it is for example a big company, mostly they use field audit and for small companies they will just use desk audit refereeing to the documents prepared by the taxpayer. The next step is interview especially when it is a field audit. The interview is used to gather primary information like what kind of accounting system and record keeping is used. In addition to information gathering the auditor asks the taxpayer to prepare certain things to facilitate the auditing process for instance office, computer (if possible) and soft copies of needed documents. The taxpayer is mostly asked to prepare these materials in about three days. Sometimes complains will be presented to the auditing department seeking more time of preparation. The department will see in to the compelling reasons and might give them additional time.<sup>273</sup> Here also the time given for the tax payer to be prepared for the auditing does not seem to be enough, since, the tax payer need to prepare an office, materials like a computer and relevant documents. Thus, to decrease the complaints raised by taxpayer as to the shortness of the time, it would be best to give an adequate amount time from the beginning.

Audit evidence is all the information used by the auditor in arriving at the conclusions. It includes the information contained in the accounting records underlying the financial statements and other information. A considerable amount of the audit team's work consists of obtaining, examining and evaluating evidential matter. The measure of the validity of evidence for audit purposes lies in the nature of the evidence and the judgment of the audit team. Auditors are not expected to examine all information that may exist. The auditor should obtain audit evidence to draw reasonable conclusions by performing audit procedures.<sup>274</sup>

Evidence may be categorized as physical, documentary, and inquiry<sup>275</sup>

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<sup>272</sup> IT Proclamation cited above at note 114, Art.73(1)

<sup>273</sup> Interview, cited above at note 257

<sup>274</sup> Domestic Tax Audit Manual cited above at note 192,p.18-22 and Interview, cited above at note 257

<sup>275</sup> Id ,p.19

- Physical evidence is obtained by direct inspection or observation of activities of people, property or events. Such type of evidences could be documented for instance, photographs, charts, maps.
- Documentary evidence consists of information such as accounting records, invoices, letters, contracts and management information on performance. It includes internally generated documents.
- Inquiry consists of seeking information of knowledgeable persons, both financial and nonfinancial, inside or outside the entity. Inquiry is an audit procedure that is used extensively throughout the audit and often is complementary to performing other audit procedures.

In practice, mostly they use documentary evidences like receipts, business accounts, and financial statements.<sup>276</sup> The evidence should be presented following the rules of relevancy, competency and sufficiency. The information used to prove or disprove an issue is relevant if it has a logical, sensible relationship to that issue. Evidence is competent when it is reliable and the best attainable through reasonable methods. Evidence obtained from an independent source is more reliable than that secured from the audited organization. Sufficiency is the presence of enough factual and convincing evidence to support the audit team's findings, conclusions and recommendations.<sup>277</sup> The collection of a relevant and sufficient evidence is imperative stage in the auditing process. Because, as it is indicated in previous chapters, that decisions rendered by the authority needs to be only based on the law, facts and evidences. The personal interest of the auditor should not affect the process. This will ultimately helps to make sure the rendering of a reasonable decision by an impartial and neutral organ; which is a fundamental right of due process.

After the auditor reviews the facts, circumstances, records, and other pertinent information that supports the taxpayer's return, the auditor will announce the result of the evaluation.<sup>278</sup> He will be required to prepare an audit report to that effect. The time in which the auditor is expected to be done with the report depends on the situation. Meaning, normally the manual provides, for example, if the audit is to be conducted for 2 years tax return then the auditor is expected to present his report in 21 days. However, in practice this 21 days could be extended

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<sup>276</sup> Interview, cited above at note 257

<sup>277</sup> Domestic Tax Audit Manual cited above at note 192, p.21-22

<sup>278</sup> State of Michigan Department of Treasury Taxpayer Rights Handbook, p.17-18 ([www.michigan.gov/documents/taxes/TABOR\\_199483\\_7.pdf](http://www.michigan.gov/documents/taxes/TABOR_199483_7.pdf)) last visited on 16/01/15

sometimes even up to 2 months due to different reasons like lack of source documents and business accounts , the working or manufacturing process of the business in hand and other related reasons could delay the reporting responsibility of the auditor. Generally, the reasons could be internal (within the tax authority) or external (taxpayer).<sup>279</sup> It is very important that the law puts a limitation to the discretion that the authority is using to extend the time for an audit report. Because, it is possible that the auditors could abuse this right to request for an extension for any reason pertaining to their fault.

The report will contain detailed information of each of the findings, evidences used, reasoning and other essential details. It is also expected to contain a statement which will inform the taxpayer that he has a right to present his compliant regarding the audit and which forum he could use.<sup>280</sup> The fact that the auditor is required to prepare his report in a well reasoned manner is a manifestation of the right to a reasoned decision.

Review of audit work is a key aspect of quality control. All audit work should be reviewed, by an auditor with a higher level of competency and experience than the audit team member who performed the audit work. The Purposes of Review Procedures are mainly to ensure that audit procedures carried out were sufficient and appropriate to reduce the risk of material misstatement to an acceptable level and to ensure that the financial statements are in agreement with the known facts and comply with the relevant reporting framework and applicable tax laws. There are about 3 levels of reviews these are quality assurance review, final review and detailed review. For all audits at least two levels of review should be expected, before which the audit report and reassessment notice is released/ issued. These reviews are conducted as part of individual audit engagements. As part of the authority's quality control process, reviews may be conducted on a selection of files by the quality assurance team.<sup>281</sup>

**Detailed Review is** Carried out by the audit team coordinators on auditors' work. And concerned with quality control this level review makes sure whether the working papers were properly prepared , the right work been done in accordance with the audit plan, audit program

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<sup>279</sup> Interview cited above at note 257

<sup>280</sup> Ibid

<sup>281</sup> Domestic Tax Audit Manual cited above at note 192, p.83

and audit objective(s), whether there are unresolved issues and the like. Generally, it is a review of every piece of paper or electronic documents.<sup>282</sup>

**Final Review** is general review to ensure that working papers are properly prepared as per the standard it mainly checks whether the detailed review been conducted properly, are issues raised fully understood and what solutions were recommended by the process owner while addressing issues raised<sup>283</sup>.

**Quality assurance review** takes place after the audit is finished and the audit report is signed and it is not concerned with detecting misstatements in the financial statements because it is too late, but with ensuring that the authority`s procedures where applied properly. It is about taking decisions on the audit conclusion and about procedural matters.<sup>284</sup>

In practice, the two types of reviews are used; detailed review and quality assurance review. Detailed review is a usual check up by the team leader on the auditor`s work. The team leader will review the result and process of the audit, whether it is done in time and if the auditor asks for more days to present the report, the reasons behind will be checked. These and other checkups will be conducted on the auditor, which will help to reduce abuse of power. The other type of review is quality assurance review which is not yet in practice.<sup>285</sup> The role of review procedures is checking whether the auditor exhausted evidences raised properly and whether the evidence gathered has reduced the risk of material misstatement to satisfactory level. Thus, the ultimate aim is to make sure the auditor based his report on evidence gathered. This makes the process of auditing fair and trusted by the taxpayer. But, when we see the practice the review process is not yet used much. This may result in the carelessness of the auditor in auditing process of the taxpayer`s business. Furthermore the tax payer may lose confidence in the process since the reviewing process is weak. Thus, it will be best both for the taxpayer and the tax authority to practice the reviewing process in an effective way.

After the auditor prepares the report, exist conference will be conducted. This is a system in which the finding of the audit will be discussed with the taxpayer. The conference mainly includes the taxpayer, the auditor, the team leader and other professionals. The auditor will present his findings with the supporting evidences. The taxpayer will indicate which findings

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<sup>282</sup>Id ,p.84

<sup>283</sup>Id p.84-85

<sup>284</sup> Ibid

<sup>285</sup> Interview, cited above at note 257



he accepts and which he won't accept with the reason behind<sup>286</sup>. So this conference is a primary forum to negotiate with the tax payer and solve problems related to the auditing at grass root level. The tax payer is given up to ten days<sup>287</sup> since the receipt of the reassessment notification to present his disagreement if any, on the auditing to the review committee or to the Tax Appeal Commission within thirty (30) days of receiving the Assessment Notice as per Article 105 and 107 of the Income Tax Proclamation No. 286/2002.

Cases mostly audited in practice nowadays are TOT and VAT cases. Imbalance between the number of tax payers and skilled personnel the authority has is causing a delay in auditing process, practically. On the side of the tax payer, the problem observed often is lack of financial documents that will assist the auditing process; this is mostly as the result of hiding the documents or not preparing them on time.<sup>288</sup>

### 3.5. Procedural due Process during Tax Foreclosure

One of the changes the tax reform in Ethiopia brought is a unilateral out-of-court means of enforcing unpaid taxes called tax foreclosure.<sup>289</sup> As it has been discussed in the previous chapter the enforcement procedure for tax collection starts by giving grace period to the tax payer in order to enable him make the payment by raising funds from different sources. If he is not in a position to do this, he can make different agreement with the authority to make payments in the future in the form of instalment agreements or may settle on compromise or guarantee payment. When all the options and procedures did not end in positive results the authorities will resort to the sale of the property.<sup>290</sup> Tax foreclosure is defined as a public authority's seizure and sale of property for non-payment of taxes.<sup>291</sup>

The purpose of tax foreclosure is securing public revenue and ensuring that taxpayers are not denied their rights to property and due process. Though they are more or less similar, these

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<sup>286</sup> Ibid

<sup>287</sup> The exceptions to the ten days are found under Article 87(2) of proclamation 622/2009 which gives 15 days and proclamation No. 612/2008 an amendment to the stamp Duty proclamation which allows a tax payer to appeal to the review committee, or the Appeal Commission against the assessment within 30 days of the receipt of the assessment notifications.

<sup>288</sup> Interview, cited above at note 257

<sup>289</sup> IT proclamation cited above at note 114, Art. 77-83, VAT Proclamation cited above note 204 Art. 30-33

<sup>290</sup> Yosef cited above at note 15, p.56-57

<sup>291</sup> The Black's Law Dictionary cited above t note 12, p.719

foreclosure rules are found spread in the country's different tax proclamations and also a directive to enforce them.<sup>292</sup>

Tax foreclosure is a self executing enforcement mechanism by which the tax authority enforces delinquent taxes without direct judicial involvement. It involves a series of legally prescribed condition precedents that need to be followed in the foreclosure processes. It is initially triggered by the taxpayer's failure to pay taxes due to the government.<sup>293</sup> It has been discussed in the previous sub sections that any assessment of income tax duly served on the taxpayer shall become final when the taxpayer fails to pay the tax s/he owes; or he fails to lodge his appeal with the TAC within 30 days of receiving an assessment notice; or from the date of decision of the review committee, the time for appealing the decision of the TAC has expired; or the Court of Appeal renders its final decision . The taxpayer will be considered in default if he fails to pay the final assessment.<sup>294</sup> When it is certain that a taxpayer is in default then the tax authority will have the right to seize the property of the former to cover the tax due and expenses related to the enforcement of seizure endured by the authority. Seizure is meant to include seizure by any means as well as collection from a person who owes money or property to the taxpayer. It can also be made on the accrued salary or wages of any employee, including a government employee, by serving a notice of seizure on the officer who has the duty of paying the salary or wages. Furthermore, a seizure shall extend only to property possessed and obligations existing at the time of the seizure.<sup>295</sup>

The tax authority will have the right to demand the surrender of the property (obligation) in the hands of another person and thus any person in possession of the property subject to seizure shall, unless such property is, at the time of such demand, subject to an attachment or execution under any judicial process or is encumbered by law with the preferred right of other creditors, is expected to hand over such property (or discharge such obligation).<sup>296</sup>

Though the law did not provide as such, in practice two warnings will be given to the taxpayer, to pay the tax due to him after assessment is delivered. If he still did not pay after the second warning, notice of seizure will be served on him. This notice includes a warning

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<sup>292</sup> Kinfe Micheal; cited above at note 138 , p.8

<sup>293</sup> Kinfe Micheal Yilma, Notes and Reflections on Tax Foreclosure Rules and Taxpayers' Rights to Privacy and of Access to Justice in Ethiopia; Ethiopian Journal of Human Rights, Vol. I, (March 2013), p.198

<sup>294</sup> IT Proclamation cite above at note 114 , Art. 73(2,3)

<sup>295</sup> Id , Art.77(1,2)

<sup>296</sup> Id , Art.78(1)

that he should pay his debt within 30 days if not the authority will be forced to seize his property.<sup>297</sup>

This notice is expected to include the following elements:

- the assessment notification previously sent to the defaulting taxpayer;
- the tax due, interest until the notice is sent, any penalties, etc.
- the fact that the proceeds of the sale of any seized property may be used to pay the tax due and any costs that may be incurred while executing the enforcement procedure.<sup>298</sup>

Thus, if the taxpayer did not respond after all this, his property will be seized. Though, precedence will be given to secured creditors, after that the authority has a preferential claim over all other claims upon the assets of the person liable to pay the tax until the tax is paid. The residual after the bank sold the property will be given to the tax authority. Documents and evidences necessary to indicate that the tax is not paid yet, necessary warnings have been served and the specific taxes which are not paid will be prepared by branches. Then the seizing department will take these documents and check if the necessary procedures are taken care of. After that they will proceed to seizing the property.<sup>299</sup>

Regarding the service of notice as usual the primary preferred way is personal service of notice. If this is not possible it could be delivered to a person close to the tax payer; it could be a person working for or with him if not to any adult member of his family. If the mentioned ways are not effective the notice could also be posted in any noticeable place where the taxpayers or their agent perform their professional work or trading work or in residential abode of either of them.<sup>300</sup> The practice is not different from this. In addition to this, if , where the tax payer works is not owned by him, the owner of the building will be requested to contact the tax payer. Unless he does this and the taxpayer shows up, the place

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<sup>297</sup> Interview, W/oWeyeneshet Alemu በታክስ እዳ የተያዙ ንብረቶችን ገቢናወጪ ሰራተኞች ERCA head Quarters, Dec/9/2014, IT Proclamation cited above at note 114, Art.77(4) and “ግብር የመክፈል ግዴታቸውን ያልተወጡ ግብር ከፋዮችን ሀብት በመያዝና በመሸጥ የግብር አሰባሰብ የሚከናወንበትን ስርዓት ለመወሰን የወጣ መመሪያ ”፣ የገንዘብና ኢኮኖሚ ልማት ሚኒስቴር ፣(1996E.C), article 7(1)

<sup>298</sup> “ግብር የመክፈል ግዴታቸውን ያልተወጡ ግብር ከፋዮችን ሀብት በመያዝና በመሸጥ የግብር አሰባሰብ የሚከናወንበትን ስርዓት ለመወሰን የወጣ መመሪያ ”፣ የገንዘብና ኢኮኖሚ ልማት ሚኒስቴር ፣(1996E.C) article 7(2 (a,b,c))

<sup>299</sup> IT Proclamation cited above at note 144 , Article 80(1) and Interview, cited above at note 297

<sup>300</sup> The directive cited above at note 300, Art. 8(1,3)

will be sealed even if it is not the taxpayer's property. So the owner will be forced to contact the tax payer. Then the taxpayer will talk to the branch offices and if he did not pay on time then his property will be seized.

A taxpayer who has received a notice of seizure or whose property has already been seized can appeal to the tax authority to get additional period, to pay the tax he owes the government or a permission to pay the debt in an instalment.<sup>301</sup> For instance, there is a directive issued in the year 2001 governing the agreement between the taxpayer and authority as to the time of payment. The directive provides that, if a taxpayer asks for payment agreement after his property was seized, the taxpayer can pay 50% of the debt he owes to the government first and then he can pay the remaining amount in three month instalment.<sup>302</sup> However, asking for the 50% of the tax levied before getting the chance to pay the rest in an instalment seems a bit too much. One of the reasons for the taxpayer not to pay the tax he owes is inability. Thus, it might be difficult to come up with the 50% of the tax due to take advantage of the payment in instalment. Therefore, it seems reasonable to reduce the 50% requirement to a lesser amount to help the taxpayer use this chance before his property is sold out and have a smooth relationship with the tax authority. Seizure and sale of the taxpayers property should be the last resort.

The taxpayer can do this within the 30 days after he received the seizure notice but practically even after the 30 days are over and the property is seized the tax authority may allow the taxpayer to get additional time to pay his debt. Most of the time the taxpayer gets additional 30days to pay the debt.<sup>303</sup>

The tax authority will make its own investigation or collect information about the properties of the taxpayer in default, even starting from the time the later received notice of final assessment. If in this process the tax authority comes across any act which will jeopardize the tax payment, like if it is found that the later is trying to abscond or hide the properties from the authority, it could eventually proceed to seize the property and collect the tax due without worrying about the requirement of notice.<sup>304</sup>

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<sup>301</sup>Id , Art.6(4)

<sup>302</sup> ??? ?/? ?? ??? ? ?? ? ? ?? ???? ? ? ?? ?? ? 30/2001? Article 6 (2)

<sup>303</sup> Interview, cited above at note 297

<sup>304</sup> The directive cited above at note 300 ,Art. (6(1), (9)

After the tax authority decides to send a notice of seizure it will then make sure the properties of the taxpayer are attached.<sup>305</sup> In relation to this, article 11 of the directive has listed properties which cannot be attached by the tax authority. Where the taxpayer fails to pay the taxes due within the deadline set in the notice or failed to enter into an agreement for extension of period of payment, the tax authority seizes the property of the taxpayer.<sup>306</sup>

The taxpayer or his agent has to be there at the time of the seizure to witness the properties seized and confirm that by his signature<sup>307</sup>. After the property is seized the case will be handed over to the department responsible for the sale of the property. The properties will get the necessary protection until it is sold.<sup>308</sup>

The seized goods will be sold in an auction or in other ways the authority deems appropriate within not less than 10 days after the seizure. The exception to the 10 days requirement is when the goods are perishable in which case the authority may sell the goods after any reasonable period having regard to the nature of the goods in question.<sup>309</sup> After the decision of selling the seized property the tax authority is expected to make sure that the value of the property is estimated in a fair way. The estimated value of the property will be used as a minimum value for the auction or a starting price for the bid.<sup>310</sup> The auction for the sale of the property seized shall be publicized widely to gain a great number of bidders. Furthermore, for immovable and movable properties the authority shall wait for 30 and 15 days after the announcement of the auction in a newspaper, respectively.<sup>311</sup> In practice, mainly they announce the auction via Ethiopian Television and Addis Zemene Newspaper.

This process of seizure and selling will continue until the taxpayer's tax debt and other expenses are fully paid.<sup>312</sup> However, the tax authority shall refund the money left from the sale after it has covered all debt owed to the government.<sup>313</sup>

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<sup>305</sup>Id , Art. 10

<sup>306</sup> Kinfe Micheal cited above at note 293, p198

<sup>307</sup> The directive cited above at note 300, Art. 12(1,4)

<sup>308</sup> Interview, cited above at note 297

<sup>309</sup> IT Proclamation cited above at note 114, Art.77(1,2)

<sup>310</sup> The directive cited above at note 297 , Article 20

<sup>311</sup> Id Art.22(1,4)

<sup>312</sup> IT Proclamation cited above at note 114, Art.77(3)

<sup>313</sup> The directive cited above at note 114, Art. 31(1) and IT Proclamation cited above at noted 114, Art.83

It can be understood from the whole process of tax foreclosure that the tax authority is the judge and enforcer without the involvement of the court. Thus, the right of taxpayers is solely in the hands of a government agency. This power of the authority may be abused and leave the right of default taxpayers to property and access to justice at risk<sup>314</sup>. In relation to the right to property Kinfe Micheal argues as follows:

*“.....Pursuant to article 26 of the FDRE constitution, the right to privacy belongs to everyone regardless of his/her nationality and it involves one’s right not to be subjected, among others, to seizure of one’s property under personal possession. However, the right is not absolute; it may rather be restricted in accordance with specific laws on certain compelling circumstances. The restriction can therefore be made only if two conditions are met – first, there must be compelling reasons necessitating the seizure and second, there must be specific laws authorizing such restriction for purposes stated there under. It is clear from the wordings of article 26( 3)that the two conditions are cumulative suggesting that any restriction has to be exceptional. Whether tax laws have those purposes should not come as a point of contention, recovering delinquent taxes might easily be thought as protecting the rights and freedoms of others to get public services which depend on public revenue. The question then boils down to what circumstances constitute “compelling” to justify seizure of delinquent taxpayers’ property. One may plausibly construe compelling circumstances to include those cases jeopardizing the collection of taxes. This construction hence would hold that a sheer existence of tax laws authorizing seizure and a mere default on the part of taxpayers cannot itself warrant the constitutionality of the seizure. Seizure should be undertaken only when delinquent taxes cannot be recovered in any other possible means without affecting the fiscal interest of the government.....”<sup>315</sup>*

It has been indicated in above discussions that the taxpayer may enter to an agreement with the tax authority as to the extension of the time of payment of the tax debt. This is one method the tax authority can use before resorting to the seizure of the property of the taxpayer.

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<sup>314</sup> Kinfe Micheal cited above at note 293, p199

<sup>315</sup> Id p.201-202

He further argues that the very fact that the tax authority is the sole decision maker whether there is a 'compelling' circumstance warranting seizure of property is a cause for concern. If the determination of the existence of this circumstance is in the hands of tax authority it will be very prone to arbitrary decision which will risk the rights of tax payers. He refers to other countries experience of presenting judicial warrant before seizing a property; for instance in USA prior judicial warrant is needed before taxpayer's property is taken away if not it will be a clear violation of right to privacy. The involvement of the judiciary at least in this way might help to have some sort control on the discretion of the tax authority and also to build the confidence of the tax payer on the system.<sup>316</sup>

The fact that the tax authority is vested with the prerogative of seizing and selling delinquent tax payers' property without going to the court is an arguable issue among different people. Since, it affects taxpayers' right to property and privacy. Regardless of these ideas practically still the authority is exercising its power.<sup>317</sup>

As it has been discussed earlier somehow, it is obvious that the tax authority may encroach up on taxpayers' right in the process of seizure and sale of the property. Rights of taxpayers' may be affected in different times for instance, seizing a property which the law prevented from attachment, setting an irrational and unfair minimum value for the property to be sold, other problems which might be caused in the process of the auction, and corruption. When the taxpayer faces problem as a result of this, he shall get a forum to appeal and get a resolution.<sup>318</sup> According to our constitution everyone has a right to bring a justifiable matter to the court or any other competent body with a judicial power<sup>319</sup>. Thus, the right of access to justice does not however necessarily require the right to appeal to court; administrative remedies will in many cases be adequate in so far as right holders have the legitimate expectation that administrative tribunals would live up to the necessary requirements of the ICCPR.<sup>320</sup>

It can be seen from the tax foreclosure rules that there is no much of room for the taxpayer to lodge complaints, if any, in the whole proceeding. The taxpayer may be aggrieved as a result of irregularities and abuses of power committed in the course of foreclosure processes, for instance irregularities in the sending out notifications, in the actual seizure, undervaluation of

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<sup>316</sup> Id , p.204

<sup>317</sup> Aschalew cited above at note 4 , p.40

<sup>318</sup> Ibid

<sup>319</sup> FDRE constitution, \_cited above at note 182 ,Article 37(1)

<sup>320</sup> Kinfe Micheal cited above at note 293, p212 and p208

seized properties and, irregularities that might occur during the process of the auction<sup>321</sup>. The procedures of the seizure and sale of taxpayer's property is wholly under the tax authority without the involvement of the court . The fact that the court has no say in the process will have a risk of abuse of taxpayer's right by the authority. This can be manifested by the lack of a procedure to hear the taxpayers' grievance related to foreclosure. This will definitely affect the constitutional right to access to justice of taxpayers. The right to bring one's matter to judicial bodies is the right of everyone so long as the matter is justifiable. The possible grievances identified earlier are clearly justifiable matters.<sup>322</sup>

None of the forums prepared for the taxpayer to appeal his case allow taxpayers dissatisfied with the tax foreclosure proceeding to lodge their grievances. For instance, a taxpayer can present his grievances to the 'review committee' only to request 'waiver of tax liability' and/or 'compromise of penalty and interest'. Also in the tax appeal commission, only cases of objection on the assessment of the tax can be lodged. And the judiciary only cases appealed from the TAC are entertained.<sup>323</sup>

The tax payer has the right to appeal to the authority; before the property is sold, only if he has a claim that a certain property should not be seized for instance ,because it is a property that is prohibited to be attached by law. The authority will give back the property if the claim is found justified.<sup>324</sup> This provision is the only provision that might seemingly give the right to lodge complaint against tax foreclosure processes.

It is clear from the constitution that the taxpayer should be able to take his grievance to the court or any other body with a judicial power. Aschalew argues that, having this constitutional background it could be argued that the taxpayer has a right to take his grievance from enforcement procedures to the review committee, TAC or the regular courts. Since there is no provision which prevents these institutions from taking cases related to enforcement. But then again it is clearly stipulated in the tax laws, that both the review committee and the TAC can only deal with issues related to tax assessment. And the regular courts would not accept a case which is not entertained in the TAC. The currently available forums are not open to entertain cases related to tax enforcement. Thus, the only solution is amending the tax laws and adding this matter to the prerogatives of the forums available for a

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<sup>321</sup> Id p.206

<sup>322</sup> Ibid

<sup>323</sup> IT Proclamation cited above at note 114, Article 106,107(1),112

<sup>324</sup> The directive cited above at note 300, Art. 16(1)



tax payer to take his case<sup>325</sup>. The writer of this essay agrees with Aschalew's proposition of amending our laws. It is doubtful if taxpayers would invoke their constitutional rights in controversies with authorities in the absence of clear statutory and administrative recognition of their basic rights. It would also be naive to expect harmonious, abuse free execution of tax seizures in the time to come in the face of unclear legislative guidance.<sup>326</sup> Since the constitutional right of access of justice is at stake the legislature should take this matter seriously. And given the circumstance the only option seems to be, clearly stipulating in the tax laws that, cases related to enforcement measures should be entertained in the already existing administrative forums and also enable taxpayers exercise their right to bring their case to courts. Explicit recognition of taxpayer rights is in the interest of both taxpayers and authorities. In addition to establishing a reliable and sustainable revenue source based on voluntary compliance, recognition of and respect for basic taxpayer rights uphold constitutionalism and rule of law.<sup>327</sup>

Chapter Four: Procedural Due Process Rights of Taxpayers During Tax Dispute Settlement

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<sup>325</sup> Aschalew cited above at note 4, p41

<sup>326</sup> Kinfe Micheal cited above at note 293, p212

<sup>327</sup> Ibid

## Chapter Four: Procedural Due Process Rights of Taxpayers During Tax Dispute Settlement

### 4.1. General Remarks

After considering the rights of taxpayers and their relation with the Tax Authority it is imperative to consider how disputes which occur between the two, could be taken care of. Thus, this chapter will try to touch up on the different appeal forums for the taxpayer when he is aggrieved by the action of the Tax Authority. The review committee, Tax Appeal Commission and Regular Courts will be seen mainly in terms of their establishment and composition, independence and impartiality and the right to be heard of the taxpayers in those forums.

### 4.2. An Overview of Tax Dispute Settlement in Ethiopia

The complexities of the modern world forced governments to delegate some of their powers to administrative agencies. It becomes impossible for the executive to supervise every activity, and for the courts to adjudicate every dispute regarding administrative actions.<sup>328</sup> This trigger the need to create administrative agencies to share the burden, empowered to legislate certain rules and also entertain some cases instead of the legislature and the judiciary. As administrative agencies are extensions of the government they need to implement the government's policies but at the same time they are expected to respect rights of the individual. We need a mechanism to ensure the balance between the demands of the executive and protecting freedom and justice of private citizens.<sup>329</sup> One way of insuring that is coming up with procedural safeguards.

Disagreements between the tax authority and the tax payer may be caused as a result of, confusion as to the scope of application of given tax law; the ambiguity and vagueness of certain provisions of the law; not being able to understand the correct meaning or interpretation of a given legal provision( by both parties); when the tax payer fails to observe the legal obligations imposed specifically on him . These and several other reasons could be a

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<sup>328</sup> Semahagn cited above at note 9, p.10-11.

<sup>329</sup> Id p.11-12

cause for a disagreement between the tax authority and taxpayer.<sup>330</sup> Whatever the cause of these disagreements, they need to be handled properly before they have their repercussions on the economy, since taxation is an important wheel to a country's economy. Countries have been working on ways of handling disagreements and the same is true for our country Ethiopia since the introduction of modern taxation system.<sup>331</sup>

The concept of grievance handling developed with the introduction of modern tax laws and administration. Different laws after the modern tax system is introduced included a forum to solve disagreements between the taxpayer and the tax authority. For instance, the 1936 income tax proclamation included an appeal committee which was empowered to entertain cases submitted to it by the tax payer within 21 days after the receipt of the tax assessment notification, similar to this the 1948 and 1956 proclamations also included grievance handling system expanding the forum to different parts of the country. Appeal commissions established by the 1956 proclamation contained 5-7 members including representatives of the tax payer. The taxpayer could take his case to these commissions within 30 days after the receipt the tax assessment notification. The commissions had a power to confirm, adjust or change a decision rendered by the revenue authority after entertaining the complaints before them. If the taxpayer was not still satisfied with the decision rendered by the commission, he had the right to take the case to the high court within 30days on issues of law. The last resort for a taxpayer was his majesty's supreme court.<sup>332</sup>

The 1960s reform in tax law had also played a major role in the history of modern grievance handling in tax cases. The reform, which was in practice until 1994, dedicated certain provisions for grievance handling. It provides that a tax appeal commission will be established containing at least seven members including the team leader and his deputy. Taxpayers were represented in this commission. To take a case to this commission the taxpayer was expected to fulfil certain conditions like the payment of at least 75% of the decided amount beforehand though there are exceptions when only 50% had to be paid, the appeal had to be in writing and a copy will be sent immediately to the tax authority and the appeal has to be taken to the commission within 30 days after the receipt of the assessment notification. The commission had the power to confirm, adjust or change a decision rendered

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<sup>330</sup> Aschalew cited above at note 4 ,9-10

<sup>331</sup> Ibid

<sup>332</sup> Id p. 10-11

by the revenue authority after entertaining the complaints. If either the taxpayer or authority is dissatisfied with the decision, they had the right to appeal to the mandated court on issues of law within 30 days. They were also allowed for a second appeal to the next appellate court, again on issues of law.<sup>333</sup>

Though there were few changes here and there, the regime change in 1974 did not result in a major change regarding tax laws. One law issued in 1975 was rural land usage and agricultural income tax proclamation which also included grievance handling system. The Wereda's Tax Appeal Committee entertain cases which are brought to it by the taxpayer within 30 days after the authority gave decision. However, here also the taxpayer was expected to pay 75% of the decided amount of tax. If the taxpayer still wants to appeal to the court regarding issue of law he could do so after he paid the full amount of tax that the committee decided. The court would only deal with the issue of law and return the case to the committee and the decision of the court is final. There were also similar other proclamations containing a forum for the taxpayer. The transitional government (1990-94) did not come up with a major change in the tax laws.<sup>334</sup>

The regime change in 1990 come up with a federal system which also resulted in the decentralization of the tax system. The 1994 constitution of Ethiopia states clearly that the country will be ruled by the federal system which comprises the federal government and member states having their own legislative, executive and judicial powers. All financial requirements necessary to carry out duties and responsibilities that have been given to the federal government and the regional states are envisaged to be covered by the respective organs and the sharing of revenue between the federal government and regional states follow the arrangements of the powers of the government.<sup>335</sup> The Constitution classifies taxation powers as taxes exclusive to the Federal Government and the Regional States, taxes concurrent to both the Federal Government and the Regional States and taxes undesignated.<sup>336</sup> Both the Federal Government and the Regional States enjoy full legislative, executive, and judicial powers with respect to taxation powers reserved to them.<sup>337</sup>

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<sup>333</sup> Aschalew cited above at note 4, p. 11-13

<sup>334</sup> Id ,p. 14-15

<sup>335</sup> Mesfin Gebeyehu cited above at note 177, p.37

<sup>336</sup> FDRE Constitution cited above at note 182, Art. 96-99,

<sup>337</sup> Taddese cited above at note 179, P.331

We can also understand from the constitution that both the federal and regional governments are entitled to handle case arising between the tax authority and the taxpayer.<sup>338</sup>

Since 2001, the federal government made major reforms to the tax law and system. The regional governments are not witnessed when coming up with their own tax laws, though they have the authority to do so as per the constitution.<sup>339</sup> Ethiopian Revenues and Customs Authority (ERCA) is established as an autonomous federal government agency having its own legal personality in charge of tax administration and enforcement of all Ethiopian tax and customs laws.<sup>340</sup> And it is accountable to the Prime Minister.<sup>341</sup> One of the objectives of ERCA is to make sure the tax payer voluntarily discharge their tax obligations.<sup>342</sup> To achieve this aim the authority need to work together with the taxpayer. However, it will be difficult to always have a good relation; unavoidable disagreements may be caused while working together. Since the tax authority is an administrative agency it has the power to enact laws, to execute and adjudicate cases. In addition, while executing its power it might encroach up on the rights of taxpayers; this will result in disagreements. These disagreements must be solved in a way that won't affect the right of the taxpayers, following the relevant procedures.<sup>343</sup> Currently the taxpayer can take his case to the Review committee, Tax Appeal Commission and Regular Courts when he is in disagreement with the tax authority action.

Administrative agencies may, while discharging their powers and functions infringe individuals' rights. There should be mechanisms whereby a party who is substantially affected must be redressed. Remedies available to an administratively aggrieved party can be broadly divided in to two: administrative remedies and judicial remedies. Administrative remedies are those remedies which are provided for by statute and do not involve recourse to a court of law. These remedies as opposed to the judicial remedies, are characterized by complete re-examination of the administrative decision. There may often, if not always, be two stages of an administrative remedy. One stage is an internal administrative review and the second is an administrative appeal to pertinent tribunal. Judicial remedies are court of law remedies. There can generally be two forms of judicial remedies; judicial appeal and judicial

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<sup>338</sup> FDRE constitution cited above at note 182, Art.51(10) and 52 (2e)

<sup>339</sup> Aschalew cited above at note 4, p. 17

<sup>340</sup> ERCA Establishment Proclamation cited above at note 191, Art. 3(1),

<sup>341</sup> Id Art 3(2)

<sup>342</sup> Id Art. 5(2)

<sup>343</sup> Aschalew cited above at note 4 , p.9-10

review. While judicial review is inherent power of court of law, appeal can be pursued only where statute expressly provides for it.<sup>344</sup>

Administrative agencies will be granted with the power to legislate laws, execute and adjudicate cases by their establishing instruments. Judicial power is the most essential power in an administrative agency. While exercising this power they will be forced to respect and protect individual rights. Due process of law is an imperative tool to control violation of individual rights by administrative agencies. The main concern is insuring the actions taken by a government body are fair and reasonable.<sup>345</sup> Starting from the constitution due process guarantee is indicated directly or indirectly in the country's different tax laws. Ethiopians can challenge arbitrary administrative decisions in different channels. When an agency carries out its judicial function it is engaged in adjudication, a process very much similar with a trial court. While adjudicating a case, it will conduct many activities like cross examination and collect evidences in order to reach to the most appropriate decision. Taxpayers whose rights are affected by the decisions of the tax authority may seek resort in reviewing body. The available remedies for an aggrieved taxpayer in Ethiopia are:

- The review committee,
- The Tax appeal commission and,
- Regular courts

### 4.3. Procedural Due Process of Law at the Review Committee

#### 4.3.1. Establishment, Composition and Accountability

The first opportunity taxpayers have to resolve disputes exists within the tax administration itself with the assessors. The other forum Taxpayers have when they are aggrieved by the tax authority's action is the review committee, a body erected within the tax administration. The committee is different from the tax assessors or inspectors because they enjoy a certain level of autonomy.<sup>346</sup>

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<sup>344</sup> Melkamu Belachew ,Powers And Functions of The Federal Inland Revenue Authority And The Position of The Tax Appeal Commission, (May,2003), p.58

<sup>345</sup> Semahagn cited above at note 9, p.1,8

<sup>346</sup> Taddese , cited above at note 179, p.372-373

Grievances are unavoidable between the tax authority and the taxpayer in their relationship. These grievances need to be handled either by internal or external controlling mechanisms. The existence of internal controlling mechanism is important though it is not effective like that of the external one. The review committee in our system is one type of internal controlling mechanism.<sup>347</sup>

Before directly seeking a remedy in the Tax Appeal Commission or the Regular Courts, an aggrieved taxpayer may lodge an appeal to the review committee for reconsideration of the tax assessment or collection. The committee's review helps the agency to correct unfair tax assessment at the grassroots level before it entails unfair expenses and inconveniences on the taxpayers. Additionally, this kind of review is relatively speedy and inexpensive.<sup>348</sup>

This is where the first formal step of adjudication starts. If a person has any grievance with the way things were handled in the agency, this is where they first come to appeal.

The directive on the establishment of the review committee provides that the committee could be established both in the Head Quarters and branches containing 3 to 5 members (the chair person, secretary, and members).<sup>349</sup> The members of the review committee established at the Head Quarters are appointed by the General Director or his rep. Members of those committees established in the branch offices are appointed by the Manager.<sup>350</sup> They will have two years in office and can be re-elected only once. The secretary will be a permanent member of the committee while the others may be permanent or not.<sup>351</sup> The review committee shall be accountable to the general director of ERCA or his representative.<sup>352</sup>

The review committee established in the main office can entertain cases:

-Higher tax payers- 10,000,000 ( ten million ) and above

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<sup>347</sup> Aschalew cited above at note 4, p.18

<sup>348</sup> Melkamu cited above at note 344. p.65

<sup>349</sup> የኢትዮጵያ ገቢዎችና ጉምሩክ ባለስልጣን የአቤቱታ አጣሪ ኮሚቴ ማቋቋሚያና የአሰራር መመሪያ ቁጥር 91/2006 (Art.5,6)

<sup>350</sup> የኢትዮጵያ ገቢዎችና ጉምሩክ ባለስልጣን የአቤቱታ አጣሪ ኮሚቴ ማቋቋሚያና የአሰራር መመሪያ ቁጥር 91/2006 Art.7(1,2)

<sup>351</sup> Id , Art.7

<sup>352</sup> IT Proclamation cited above at note 114, Art.105(1)

and የኢትዮጵያ ገቢዎችና ጉምሩክ ባለስልጣን የአቤቱታ አጣሪ ኮሚቴ ማቋቋሚያና የአሰራር መመሪያ ቁጥር 91/2006 Art.4

-Medium- 1,000,000 and above

-Small tax payer- 100,000 and above

Cases which will not be entertained in the Head Quarters of ERCA will be handled by Review Committee established in branch offices.<sup>353</sup>

The law does not indicate who shall be the member of the committee. Practically, it is witnessed that members of the review committee are the employees of the tax authority. The taxpayer is not represented in any way in the committee.<sup>354</sup>

some of the powers and duties of the committee are:-

- to examine and decide on all applications submitted by tax payers for compromise of penalty, interest, and waiver of tax liability;
- waive administrative penalties in accordance with the directives issued by ERCA
- coming up with a recommendation after investigating appeals made regarding tax assessments
- confirming whether decisions rendered by ERCA are in line with the proclamations and regulations
- to gather any written evidence or information relevant to the matter submitted;
- to summon any person, who directly or indirectly has dealt with the assessment, to appear before it for questioning him about the case under its investigation; and
- to review determination made by the Tax Authority for accuracy, completeness, and compliance with this Proclamation.<sup>355</sup>

The committee is expected to prepare a recommendation after entertaining the case which shall contain the claim, issues entertained, collected and evaluated information/ evidences documents, statement of witnesses, dissenting opinion on the presented recommendation, if

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<sup>353</sup> Id Art. (10.11)

<sup>354</sup> Aschalew cited above at note 4, p.19

<sup>355</sup> IT Proclamation cited above at note 114, Art.105 (1),106 cum የኢትዮጵያ ገቢዎችና ጉምሩክ ባለስልጣን የአቤቱታ አጣሪ ኮሚቴ ማቋቋሚያና የአሰራር መመሪያ ቁጥር 91/2006 Art.9



any and signatures of the members of the Review Committee.<sup>356</sup> The recommendation will be decided by majority vote.<sup>357</sup>

This recommendation will be presented to the General Director or his rep and if the recommendation is prepared by a review committee in branch offices then the recommendation will be submitted to the Manager.<sup>358</sup> The general director may approve the recommendations or remand the case, with his observations, to the committee for further review.<sup>359</sup>

Thus the approval of the recommendation by the general director in the main office or the manager in branch offices makes it a final decision.<sup>360</sup>

### 4.3.2. Impartiality and Independence

In the previous chapters it has been discussed that impartiality and independence is an important element of fair hearing. Impartiality and neutrality is essential to the effective operation of forums which are establish to check the government's action. Tribunals should be free from interference or direct influence by the government bodies from which they hear appeals.<sup>361</sup> It can be understood that a person aggrieved by the action of the government is entitled to impartial decision maker. The decision maker needs to be free from both personal and pecuniary interest in the case at hand. It is clear that, if the judge has an interest on the subject matter of the case it will be difficult to trust its impartiality.<sup>362</sup>

Administrative forums like the review committee are criticized for not being impartial.<sup>363</sup> One way of checking independence and impartiality of a forum could be referring to the appointment of the members. When we see the appointment of the members of the committee

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<sup>356</sup> የኢትዮጵያ ገቢዎችና ጉምሩክ ባለስልጣን የአቤቱታ አጣሪ ኮሚቴ ማቋቋሚያና የአሰራር መመሪያ ቁጥር 91/2006 Art.13

<sup>357</sup> Id, Art.8

<sup>358</sup> IT Proclamation cited above at note 114, Art.105 (3) cum የኢትዮጵያ ገቢዎችና ጉምሩክ ባለስልጣን የአቤቱታ አጣሪ ኮሚቴ ማቋቋሚያና የአሰራር መመሪያ ቁጥር 91/2006 Art.12 (1,2)

<sup>359</sup> IT Proclamation cited above at note 114, Art.105 (3) cum የኢትዮጵያ ገቢዎችና ጉምሩክ ባለስልጣን የአቤቱታ አጣሪ ኮሚቴ ማቋቋሚያና የአሰራር መመሪያ ቁጥር 91/2006 Art.14 (1)

<sup>360</sup> የኢትዮጵያ ገቢዎችና ጉምሩክ ባለስልጣን የአቤቱታ አጣሪ ኮሚቴ ማቋቋሚያና የአሰራር መመሪያ ቁጥር 91/2006 Art.14 (2,3)

<sup>361</sup> Peter Cane cited above at note 77, p.389-90

<sup>362</sup> Douglas A. Clark et al v. city of Hermosa Beach cited above at note 78

<sup>363</sup> Aschalew cited above at note 4, p.22

those at the Head Quarters are appointed by the General Director or his rep and those at the branches by the Manager.<sup>364</sup> As a result of this, it is indicated by some researches that the decision of the committee seems partial.<sup>365</sup>

In relation to this the committee members claim that, tax cases are different in a sense that they are objective in nature. Meaning they are decided based on evidence on books and accounts kept by the taxpayer and tax laws. Furthermore, the members assert that they argue freely on what should be decided on a particular case based on the law and evidence at hand. If a member did not agree on a case with the rest of the members he can write a dissenting opinion. They provide that, having the right to state dissenting opinion is one indication that they are free to deliver recommendations. They explain that, the fact that their impartiality is questioned is the result of wanting to be free of tax debt from the side of the taxpayers.<sup>366</sup>

Despite this argument from the side of the committee, it seems unavoidable that the committee may be partial sometimes; since the law does not indicate who shall be the member of the committee. Practically, it is witnessed that members of the review committee are the employees of the tax authority. And also the tax payer is not represented in any way in the committee. This situation may make us question the independence of the committee since they are entertaining cases which are decided by other employees of ERCA, like the tax auditors. Hence, this will have an obvious effect on the rights of the taxpayer.<sup>367</sup>

During the hearing in the committee the taxpayer or his agent must be present. In addition to that, he could bring a person who could help him establish the case like his spouse and other relatives, lawyers and other professionals. It could be any person who the tax payer thinks, knows the case better. But other persons who are not related to the case are not allowed to be there to witness the case.<sup>368</sup> Thus, the hearing is closed to other people unrelated to the case. However, one way to develop the trust that the public has on the committees is making the hearing open to the public. Though the committee explains that one reason for not allowing

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<sup>364</sup> የኢትዮጵያ ገቢዎችና ጉምሩክ ባለስልጣን የአቤቱታ አጣሪ ኮሚቴ ማቋቋሚያና የአሰራር መመሪያ ቁጥር 91/2006 (Art.7(1,2))

<sup>365</sup> Aschalew cited above at note 4 , p.22

<sup>366</sup> Interview, Ato Abreha Webet (member) and Abayenesh Abate (chairperson) , a member and chair person in the review committee in the Head Quarters (ERCA) , respectively ; Dec 9/2014

<sup>367</sup> Aschalew cited above at note 4, p.19

<sup>368</sup> Interview, cited above at note 366

other people in the sessions is the size of the hearing room, but this hindrance can be solved easily; since the advantage of open session is undeniable.

In addition to the above points, the members of the committee should not be involved personally or financially in the case. Having personal and financial interest will have a direct effect on the right of the taxpayer, since the forum will be partial the moment this interests are involved.

### 4.3.3. Opportunity to be Heard of the Taxpayers

According to the Income tax Proclamation and the directive establishing the review committees provides that the committee can only entertain applications submitted to it within 10 days of receipt of tax assessment notification.<sup>369</sup> It is understood that there is no other precondition to get a review by the committee. However, the application for review will not be accepted after the 10days are over. The 10days requirement is a hindrance to the right to be heard of the taxpayer as it is very short.<sup>370</sup> The tax authority claims that those 10days are enough for a taxpayer who keeps his books and accounts correctly. The only thing expected from the taxpayer is coming up the assessment decision, documents which will help as evidence, stating the reasons of his disagreement with the authority's decision.<sup>371</sup> And he knows the case well since the tax payer will get a chance to discuss the case thoroughly with the auditor.<sup>372</sup> They further explain their stand, saying that, naturally the taxpayer will not be willing to pay the tax due to him at the same time he does not want to breach the law. He wants to take his time while the case is pending; because until the case is decided the authority cannot force him to pay. Thus, if more days are given to the taxpayer it will be subject of abuse; which will affect the tax system by being a hindrance to the timely collection of taxes.<sup>373</sup>

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<sup>369</sup> IT Proclamation cited above at note 114, Art.105 (2) and የኢትዮጵያ ገቢዎችና ጉምሩክ ባለስልጣን የአቤቱታ አጣሪ ኮሚቴ ማቋቋሚያና የአሰራር መመሪያ ቁጥር 91/2006 Art. 9(2),17

<sup>370</sup> Aschalew cited at note 4, p.43

<sup>371</sup> Interview, cited above at note 366

<sup>372</sup> Aschalew cited above at note 4,p.20

<sup>373</sup> Interview, cited above at note 366

The argument of the tax authority is not convincing; since the fact that the tax payer needs to prepare his application with evidence is exactly why he needs more time. The fact that there is no prior money paid to get a review does not mean the 10 days are enough. In relation to this we can see the customs Proclamation No.622/2009 and Proclamation No. 612/2008 of Stamp Duty (Amendment) which forward more days to present a grievance to the review committee. The stamp duty proclamation puts that any person who is dissatisfied with the amount of stamp duty assessed by the Authority may, within 30 days of the receipt of the assessment notifications, appeal to the committee.<sup>374</sup> The customs proclamation provides that a person with grievance may appeal to a review committee, within 15 days after the date of payment.<sup>375</sup> It can be understood from this legislations that more days are provided. It is not clear why the income tax gives only 10days. Thus, it does not seem right to make a difference between tax payers to allow them exercise their right to be heard.<sup>376</sup> If we are to respect the right to be heard of the taxpayer we shall makes sure such hindrances are avoided.

The other problem that can be raised in relation to review committee is the fact that they only entitled to hear cases related to tax assessment. But this should not be the case since a lot more issues can cause disagreement between the tax authority and the taxpayer. One could be cases related to foreclosure. As it has been discussed in the previous chapter it is obvious that the tax authority may encroach up on tax payers' right in the process of seizure and sale of the property. Rights of tax payers' may be affected in different times for instance, seizing a property which the law prevented from attachment, setting an irrational and unfair minimum value for the property to be sold, other problems which might be caused in the process of the auction, and corruption. When the taxpayer faces problem as a result of this, he shall get a forum to appeal and get a resolution.<sup>377</sup> And one of such forums is the review committee which is currently entertaining cases only related to tax assessment. Thus, the committees' authority should expand to review various cases other than tax assessment.<sup>378</sup> If this is not done, it will in one way or another affect the right to appeal of the taxpayer, which is constitutionally guaranteed.

It is discussed that the taxpayer is expected to present his case in a written form with relevant evidences in 10days after he receives the assessment notification. The Committee is not

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<sup>374</sup> Stamp Duty Proclamation (2008) (Amendment) , Art.2(2), Proc. No. 612, Neg. Gaz. 15<sup>th</sup> Year No. 9

<sup>375</sup> Customs Proclamation (2009) Art. 87(2), Proc. No.622, Neg. Gaz. 15<sup>th</sup> Year No.27

<sup>376</sup> Aschalew cited above at note 4, p.20

<sup>377</sup> Aschalew cited above at note 4, p.40

<sup>378</sup> Id, p.43

constrained by procedural requirements while entertaining cases before it. They just have their own guidance in practice; other than that there is no law governing the procedures.<sup>379</sup> The authority argues that not having this procedures fixed has the advantage of shaping the procedures to fit every case. If it is fixed by law, like the procedures used in courts it will be difficult to accommodate certain cases which need to be clarified more.<sup>380</sup> But this argument does not seem to hold water, since the fact that a procedure is fixed by law does not make it difficult to deal with different cases. The law needs to provide the procedures to be followed, to reduce arbitrariness in the action of the review committee. Furthermore, it will be easier for the taxpayer to challenge the procedure followed by the committee, if there is any arbitrariness. If it is not fixed by law by what bases could he be able to challenge the procedures? Thus, to challenge any arbitrariness which will affect taxpayer's right to be heard, it is better for the law to fix the procedures somehow.

When we see the procedures used practically, first they accept the claim of the taxpayer. They will try to confirm the point of contention with the taxpayer after reading the claim. After this the two parties will be asked for an oral argument. The tax authority will be asked to explain every point that the taxpayer is not satisfied with. They will explain why they have decided in such a way relying on their evidence before the review committee. Audit report, working paper and evidences collected by the auditor from different sources will be presented. The tax payer gets another chance to present his evidences and challenge the decision of the authority. After the authority gets the opportunity to explain the questions raised on the previous explanation, the committee will ask questions to get a clearer picture of the case at hand. After enough information is collected from both oral argument and documentary evidence the committee will frame an issue. Then they will try to review the issue relating it to the relevant law and evidences.<sup>381</sup>

They will prepare a recommendation after assessing the case carefully, to be submitted to the director for confirmation.<sup>382</sup> In the decision, the taxpayer could be freed from all his debt or the decision of the authority could be confirmed. Some times in one case there could be

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<sup>379</sup> Interview, cited above at note 366

<sup>380</sup> Interview, Ato Geletawe, Review Committee( ERCA Head Quarters), Dec9/2014

<sup>381</sup> Interview, cited above at note 366

<sup>382</sup> IT Proclamation cited above at note 114, Art .105(3) and የኢትዮጵያ ገቢዎችና ጉምሩክ ባለስልጣን የአቤቱታ አጣሪ ኮሚቴ ማቋቋሚያና የአሰራር መመሪያ ቁጥር 91/2006 Art. 12

different decisions some part of it could be affirmed and the other could be amended<sup>383</sup>. The recommendation shall contain the claim of the taxpayer, issues framed, explanation of evidences referred to ( both oral and witness) and arguments raised briefly, dissenting opinion ( if any) and signature of the members.<sup>384</sup> Both parties to the case will get the copies of the final the decision.

There is no time limit provided in the law for the committee to render its decision. Similarly in practice the time to decide on a given case is dependent on the complexity of the case. The authority claims that the time needed to review a case in terms of law and evidence differs from case to case. In addition to this, lack of transparency in the side of the tax payer in presenting evidence and lack of human resource to handle the cases, are raised as reasons by the authority to justify the lack of time limit.<sup>385</sup> However, here we are talking about basic right of taxpayer to property and his right to be heard when there is a disagreement. Thus, even if the authority needs time to entertain cases carefully, having a maximum legal limit is important to protect the right of taxpayer from arbitrariness of the committee. Because, if there is no legal limit it is clear that the committee may not deliver its decision on a reasonable time. And this in turn will affect the right of the taxpayer.

Handling cases at the review committee is advantageous for the taxpayer since there is no prior payment required to present a case. And the authority will be able to correct its mistakes at a grass root level before the case goes further. However, to achieve these goals it is imperative to solve the mentioned hindrances to the right to be heard of the taxpayer.

#### **4.3.4. The Right to Get Reasoned Decision**

In previous chapters it has been indicated that, administrative agencies are empowered to adjudicate cases in addition to rule making and execution. In the adjudication process, it is clear that the agency will entertain the cases like courts by applying the relevant laws to the situation at hand. When they exercise their judicial power they are one way or another determining the rights of an individual for instance, the right to property in tax cases. We have also mentioned in the previous sections of this chapter that the review committees in the

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<sup>383</sup> Interview, cited above at note 366

<sup>384</sup> የኢትዮጵያ ገቢዎችና ጉምሩክ ባለስልጣን የአቤቱታ አጣሪ ኮሚቴ ማቋቋሚያና የአሰራር መመሪያ ቁጥር 91/2006 Art. 13

<sup>385</sup> Interview, cited above at note 366

Tax Authority, are expected to gather information about the case in hand from written arguments and oral hearing, hear evidences and decide on the admissibility. After collecting the necessary information and evidences related to the case, they will analyze the case with the relevant law. The analysis is expected to result in a reasoned decision since right of a person is at stake; thus, when a given administrative body renders its decision it shall be reasoned and based on sound information.<sup>386</sup> Being reasonable is being fair or proper under the situation at hand.<sup>387</sup> The availability of reasoning in an administrative decision is one of the standard features of fair hearing.<sup>388</sup>

When the review committee explains, the procedures they use practically they assert that, after accepting the appellants claim they will listen to the oral arguments of both parties. After the tax authority explains his action and the taxpayer gets its chance to challenge such response, the authority will frame issues.

Then they will prepare recommendation after analyzing the facts and evidences with relevant law.<sup>389</sup> The recommendation shall contain the claim of the tax payer, issues framed, explanation of evidences referred to (both oral and witness) and arguments raised briefly, dissenting opinion ( if any) and signature of the members.<sup>390</sup>

Having this in mind, let's see some cases decided by the review committee to examine whether the decisions rendered by the committee are reasoned enough.

The first case to consider is Murade Shamil Naser Vs. ERCA(East District).<sup>391</sup> This case is appealed by Murade Shamil Naser on 02/04/06 to the review committee. The appellant claims that they have been selling out shares for about 4 months to increase their capital. Thus, there was no business activity. But despite this fact they were asked to pay Business Profit Tax and VAT. The appellant presented its documentary and financial experts to explain the case to the committee. The tax authority responded to the claim by explaining that

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<sup>386</sup> David H.Rosenbloom and Robert. S.Kravchek , Public administration understanding management, politics and law in the public sector ,(2005), p.331

<sup>387</sup> *The Black's Law Dictionary* cited above at note 12, p.1379

<sup>388</sup> Jerry L. Mashaw, cited above at note 85, p.106

<sup>389</sup> Interview, cited above at note 366

<sup>390</sup> የኢትዮጵያ ገቢዎችና ጉምሩክ ባለስልጣን የአቤቱታ አጣሪ ኮሚቴ ማቋቋሚያና የአሰራር መመሪያ ቁጥር 91/2006 Art. 13

<sup>391</sup> Murade Shamil Naser Vs. ERCA(East District)( 18/06/06 E.C )( unpublished)

the appellant sold the shares beyond the price written on them thus, it is only fair that they pay the taxes due to them. They also added that the applicant has agreed to the audit outcome during the exit conference though, the appellant responded that they were not able to present documents needed during the audit procedure.

The committee after listening to the arguments should have clearly identified the issues at hand, which are crucial elements to the decision but it failed to do so. They did not even try to come up with their own reasoning, they just used the tax authority's argument and decided in favour of the authority. The committee should have at least ask the appellant to present those documents if they can be presented, to confirm the decision of the auditors. The recommendation is not written thoroughly with enough reasoning. Only one article from the commercial code is mentioned and used the reasoning raised by ERCA auditors to conclude their recommendation.

We have said that, the committee claims that they will thoroughly look in to the documentary evidence and also oral arguments. But in this case the documentary evidences are not explained clearly and it is not clear if oral argument was conducted and what exactly is gained from the argument. The applicant has the right to get a reasoned decision. However, this recommendation lacks that important element of enough analysis. It took the committee about 2 months to decided the way it did however, the way the recommendation is written is not fair to the applicant since it is not reasoned well.

In another case, Tegaye Tadese Vs ERCA(Nefase Seleke Lafto sub city branch office<sup>392</sup>. The applicant claims that there was no business activity and he was abroad for some time. Thus, the decided Business Profit Tax and VAT is not right since there was no business activity. And he presented Documentary evidences that can prove he was out of business for some time, and that he was abroad. The tax authority claimed that the business is registered still in the applicant's name, thus he is expected to declare his income and pay tax. Since he failed to do so ERCA claims that the assessment was made by estimation. After considering the documents presented by the applicant the committee confirmed the decision of the authority, after rejecting the applicants documents which were intended to prove his absence. Thus, the committee decided in favour of the authority indicating that, as long as the business is registered in the applicant's name, he is expected to declare his income and pay tax.

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<sup>392</sup> Tegaye Tadese Vs ERCA(Nefase Seleke Lafto sub city branch office) (unpublished)



This recommendation is written with not more than two pages. However, the issue is not the page number but the omission of the details needed to be included in a decision . From the start the applicants claim is written in a very short term that cannot be easily understood. The explanation given by the applicant as to his claim is not written with the necessary details. When we see the response given by the tax authority on the applicant's claim, it is very difficult to understand what exactly has been the response. The response should have been written including why they decided a certain amount of tax and based on which law and evidence. However, the only thing mentioned is that, the tax is assessed by daily income estimation.

Given this lack of explanation by the authority's representative, it is not clear how the committee understood their response and confirmed the decision. The analysis of the documentary evidences presented by the applicant is not included. The issue is not identified clearly, which should have been the starting point for the recommendation. The committee did not bother to mention on what bases of law the decision was rendered. Thus, no sufficient fact, law and evidence analysis.

In House ware Mart vs. ERCA/Higher Tax Payers Branch Office<sup>393</sup> case the Applicants claim that since the profit gained is not divided among the share holders according to Art. 34(1) of IT proclamation. We shall not be subjected to dividend tax. Additionally, the VAT and the business profit tax are not assessed correctly and there are errors during the determination of tax credit. The committee mentioned the name of persons from ERCA that came to explain how the tax is assessed; other than that what has been explained regarding the assessment was not mentioned at all.

In this decision the committee tried to separately explain the recommendation on each type of tax, which is a good thing. However, this alone won't make the recommendation a reasoned and well analyzed. As mentioned earlier the reason why the tax authority decided accordingly was not mentioned at all in the recommendation. The fact that the representatives of ERCA was present and explained the issue, was the only thing mentioned in the recommendation. Though the article numbers of the relevant laws are mentioned, they are not analyzed well with the relevant facts of the case.

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<sup>393</sup> House ware Mart vs. ERCA/Higher Taxpayers Branch Office(10/10/2005) (unpublished)

In another case Techno style PLC vs. ERCA/ Higher tax payers branch office<sup>394</sup> Techno style PLC presented its claim to the review committee on 15/04/2006 E.C. At the beginning of the recommendation we can not understand on what specific tax the issue is raised. It just only mentioned that, there was a complain on the tax assessment rendered by the tax authority. This explanation is very general. It is only after reading the rest of the recommendation carefully that one will be able to understand that the issue is related to dividend tax, share value and other related issues. Relevant articles of the law are not mentioned and explained related to the issue at hand. What has been respond by the tax authority is not mentioned at all.

From all this cases and also others we can understand that the review committee is not rendering a reasoned decision for the taxpayer. As we have seen the problem starts from lack of explanation of the case in hand clearly. Which is manifested by failing to state the claim of the taxpayer and the argument raised by the tax authority. And this failure shows its repercussion on the issue of the case. It is evident from the decisions of the committees that issues are barley framed. As we know Issue framing is one step to solving the problem. The other problem noticed is related to evidences. We can see from the recommendations written by the committees that evidences presented by the taxpayers were not considered correctly or even if they were considered we have no means to know that since they are not written clearly in the recommendation. There is a trend to relay only on the arguments presented by the authority without examining the fairness and legality of the action. When we come to the analysis part of the recommendation, cases considered show that the committee won't bother to explain the relevant laws relating it to the case at hand thus, making the recommendation shallow. We have stated earlier that the decisions rendered by the committee will have a direct effect on the fundamental right of the taxpayer. If this is the case it is only logical that the claims submitted by the taxpayer aggrieved by the authority, be explained thoroughly and analyzed with relevant laws and evidence. This will ultimately help to make sure the taxpayer got a reasoned decision for the claim raised and if understand the decision well he will be able to know on what point he needs to appeal, if he wants.

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<sup>394</sup> Techno style PLC vs. ERCA/ Higher tax payers branch office(unpublished)

## 4.4. Procedural Due Process of Law at the Tax appeal Commission

### 4.4.1. Establishment, Composition and Accountability

We need appellate tribunals to hear appeals against decisions made in exercise of public function. There are many appellate tribunals dealing with a wide variety of matters e.g. social security appeal tribunals, immigration tribunals, taxation tribunal.<sup>395</sup>

These tribunals are advantages in terms of cost, speed and informality. The tribunal system is relatively cheaper for the government to run than the court system, they are good for claimants because it costs much less to appeal to a tribunal than to initiate court proceedings and because tribunals deal with cases relatively quickly and informally. Informality makes tribunals somewhat less intimidating and more accessible especially for claimants who are poor and ill educated. Tribunals are more specialized than courts in two ways. They typically deal with just one sort of issue. Many courts on the other hand, deal with a very wide range issues and judges tend to be specialist in no more than a couple of areas. The other benefit could be while appellate tribunals are typically chaired by a lawyer, many tribunals have majority of members who are non lawyers. This would help to provide a lay elements in the civil justice system. These members are included in the tribunal particularly because they have relevant professional expertise or knowledge and experience relevant to the subject matter of the tribunal. The main advantage of non legal specialization is they will assist the decision makers to give effect to the policy behind the legislation in a way that makes sense of the realities of matter regulated by the legislation and reflects current social conditions<sup>396</sup>.

The appeal right provided for the taxpayer can be considered as an essential safeguard or remedy against the wide discretionary power of the authority. The income tax proclamation provides that if a taxpayer is dissatisfied with a tax assessment he can either appeal directly to the Tax Appeal Commission or he could first file his application to the Review Committee.<sup>397</sup> The Tax Appeal commission is concerned with reviewing the exercise of discretionary power of the authority on tax assessment. The basic function of appellate tribunals is adjudication at the appellate level. It can substitute its decision for the decision appealed from and can reconsider any issue relevant to the initial decision. Thus, an appellate tribunal can decide

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<sup>395</sup> Peter cited above at note 77, p.387-89

<sup>396</sup> Id , p392-95

<sup>397</sup> IT Proclamation cited above at note 114 ,Art.(105,107(1))

issues of law, issues of fact and issues of policy.<sup>398</sup> Thus, while looking in to the facts of the case the tribunals are expected to insure that the administrator has properly applied any statutory rules or regulations relevant to the situation under consideration. Tribunals often have to decide questions of law like ordinary courts of law. The tribunals may have to interpret the relevant legal provisions of law that are often highly technical and complex.<sup>399</sup>

The laws enacted since 1943 clarify that, separate laws did not establish Tax Appeal Commissions. Rather they were erected by proclamations enacted for tax issues. However, in 2001 the Tax Appeal Commission was established by separate legislation.<sup>400</sup> The need for examination and deciding on appeals lodged by taxpayers against the assessment of tax revenue, which are designated by law for collection of taxes, by the Federal Government resulted to the establishment of Federal Tax Appeal Tribunal by Proclamation No. 233/2001. The current Income Tax Proclamation 286/2002 has repealed this proclamation.<sup>401</sup>

Taxpayers dissatisfied with the recommendations of the Review Committee or the decisions of tax authorities may appeal to the Tax Appeal Commission (TAC), a tribunal set up within the executive branch under the Ministry of Justice. Although the Commission is still within the executive branch of government, the Tax Appeal Commission enjoys relative autonomy and independence as it is organized outside the Tax Administration.<sup>402</sup>

A taxpayer who did not agree with the assessment of the tax due to him, has the option of taking his case to the Tax Appeal Commission (TAC).<sup>403</sup> The TAC is an organ erected outside the structure of the tax authority to entertain tax issues. This organ is an administrative tribunal which entertains appeals from the review committee or the tax authority by an aggrieved taxpayer. The TAC is expected to be established in different levels. These are Federal Appeal Commission, at the Federal level; Regional Appeal Commission, in each Regional Government town; Zonal Appeal Commission, in each Zonal town; and Woreda Appeal Commission, in each Woreda Administrative town.<sup>404</sup>

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<sup>398</sup> Peter cited above at note 77. p387-89

<sup>399</sup> Melkamu cited above at note 344, P.70

<sup>400</sup> Aschalew cited above at note 4 ,p.22-23

<sup>401</sup> IT proclamation cited above at note 114 ,Art. 119(3)

<sup>402</sup> Taddese cited above at note 179, p.373

<sup>403</sup> IT proclamation cited above at note 114, Art.107(1)

<sup>404</sup> Id, Art 113(1)

The Federal Appeal Commission shall be accountable to the Minister of Justice; City administration, appeal commissions to the executive organs of city administration, region, zone, woreda, depending on the level of establishment<sup>405</sup>. Though the detailed criteria to select, appoint and decide on the composition of the commission will be explained in a directive to be issued by the Ministry of Justice, the income tax proclamation stipulates that members of the commission shall be selected from persons who:

- Have good reputation, acceptability, integrity, general and professional knowledge, and
- from among persons who have not committed any offense in connection with tax and tax administration.

Based on the criteria, the selection and appointment of the members is done by the Minister of Justice or the appropriate city administration, regional, zonal or woreda executive organ, as the case may be.<sup>406</sup> According to article 114(3, 4) of the IT proclamation and its amendment Proclamation 608/2008 article 2(13) the Appeal Commission's President shall be appointed by the appropriate organs from among persons referred to under 114(3).

The Federal Tax Appeal commission is only located in Addis. There are no other federal TAC branches in the other parts of the country. As a result, people are forced to come to Addis to appeal their case. This situation is making it difficult for federal taxpayers in the states to appeal their cases. It is inconvenient, time taking and costly. The taxpayer has to come to Addis to file his appeal, for oral argument, for final decision etc... and if they use the postal service to file the application the 30days might expire. To avoid these and other related problems the Federal TAC tries to at least let the two parties exchange documents from where they are, no need to come to Addis. But, this won't be a permanent solution to the problem. The TAC claims that establishing the branch tribunals needs a budget, which the commission is lacking.<sup>407</sup> However here the tax payer's fundamental right to appeal is at stake thus the establishment of branch offices must be seriously considered.

Each appeal commission may have more than one panel and each panel contains five members including the chairperson. The members including the chairperson serve for 2

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<sup>405</sup> Id Art. 113(3)

<sup>406</sup> Id Art. 114(1,2,3 )

<sup>407</sup> Interview, W/o Wegeayehu Feyesa የፕላን ፀሀፊ in the Federal TAC Dec/15/2014

years.<sup>408</sup> The composition of the Commission is to reflect the interests of the major stakeholders in tax administration the government and taxpayers. Although the composition of the Commission is to be determined by a directive, no such directive has yet been issued. Though some think that the existence of the directive will not have much relevance<sup>409</sup>, it is imperative to have detail rules to determine the composition of the commission, since the composition of a tribunal will have a direct effect on the decisions rendered. The members are drawn from the Ministry of Trade and Industry, the Ministry of Finance, the Ethiopian Customs and Revenue Authority and the Ministry of Justice, the last occupying the position of a chairperson in the Commission.<sup>410</sup> In addition to this to balance this government representatives, representatives from the Tax Payers and the Chamber of Commerce are included in the commission.<sup>411</sup>

Article 2(12) of proclamation 608/2008, an amendment to proclamation 286/2002, stipulates that sub article 1 of 114 of IT proclamation is repealed and replaced by:

*“members of the TAC at every level shall be appointed from among persons, including representatives of business communities having good reputation acceptability, general and professional knowledge and who have not committed any offence in connection with tax and tax administration”*

Since most of the members of the TAC are from the government, the representatives of the taxpayer will help the TAC consider the taxpayer’s perspective. The representatives of the taxpayer should be people who are trusted by the taxpayer for their hard work and honesty.<sup>412</sup>

The law provides that taxpayers who have not committed any offence in connection with tax and tax administration should not represent the taxpayer in the commission. However, this does not seem correct since a person who commit other economic crimes should not qualify to represent the tax payer community.<sup>413</sup>

The commission is also convinced that the representatives of the taxpayer should not be involved in other economic crimes in addition to tax related crimes. As this is one way of

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<sup>408</sup> IT proclamation cited above at note 114, Art. 114(5,6)

<sup>409</sup> Interview, cited above at note 407

<sup>410</sup> Taddese cited above at note 10, p.374

<sup>411</sup> Interview, cited above at note 407

<sup>412</sup> Ibid

<sup>413</sup> Aschalew cited above at note 4, p.25

showing their honesty, hard work and integrity. However, they stipulate that the only thing the TAC can do is ask the taxpayers to send their trusted representatives. Thus, it is up to the tax payers to check the credentials of the representatives, since, the TAC cannot say it won't accept a representative.<sup>414</sup>

The powers and duties of the commission are<sup>415</sup> -

- to confirm, reduce, or annul any assessment appealed against on the basis of established factual grounds and the law, and make such further consequential order thereon as may seem just and necessary for the final disposition of the matter;
- to instruct the Tax Authority or the taxpayer to submit new facts, if any; and
- to order the Tax Authority or the taxpayer or any other person or governmental department or agency, as the case may be, to produce supporting evidence relevant to the taxpayer's allegation.

The chair person will have a duty to make preliminary examination of the memorandum of appeal, prepare the agenda for the panel; preside over and guide the proceedings; ensure that the arguments are properly recorded in the minutes and that the decision conforms to the prescribed form; and submit an annual report about the performance of the commission he presides over.<sup>416</sup>

#### **4.4.2. Impartiality and Independence**

Independence is essential to the effective operation of tribunal as it is an external check on government's decision making. Appellate tribunals, like courts should be free from interference or direct influence by the government bodies from which they hear appeals. The mode of appointment of tribunal chairpersons and members and the organization structure of the tribunal system can help to foster independence. Most tribunals are staffed by employees of the agency whose decisions are to be reviewed and are administratively supported by the them. This may create the activity of bias. External review is more likely than internal review to make complaints feel that public power is subject to substantial check and to make individuals feel that they are being treated fairly. The provision of an independent dispute

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<sup>414</sup> Interview, cited above at note 407

<sup>415</sup> IT proclamation cited above at note 114, Art.115(1)

<sup>416</sup> Id, Art. 115(1,2)

settling mechanism may make people more willing to accept change in substantive rules they do not like. Appellate tribunals have been seen as alternatives to courts for the adjudication of disputes between citizens and government. Tribunals allow complaints to participate in the decision making process and providing an assurance of impartiality.<sup>417</sup>

An impartial and independent judge is a fundamental aspect of the rule of law. However, complete impartiality is impossible to realize. The law therefore has to compromise and has done so by distinguishing between different kinds of decisions and different kinds of biases. The rationale is not only that of fairness to the parties but also of public confidence in the integrity of the decision making process. A decision maker who becomes aware that he or she is subject to a biasing factor must disqualify him or herself, irrespective of the cost, delay or inconvenience that may result. Financial interest, however small will automatically disqualify the decision maker, the law conclusively presuming bias. Personal connections-social family or professional relationship with the parties, previous involvement with the same decision making process.<sup>418</sup>

We need to secure the independence of the personnel of tribunals from the agencies concerned. Thus, the appointment of members of tribunal should not rest with the ministers concerned with the subject matter of the adjudication. Not only the mode of appointment but also the organizational structure of the tribunal system needed to be designed to foster independence. Independence is demonstrable if the following conditions are met:

- The appellate decision makers should not have any connection with the department or office responsible for initial decision;
- The relevant department or agency should not appoint the decision makers;
- The agency should not train them;
- Nor should it provide them with advice or other assistance;
- Nor administer the appeals system.<sup>419</sup>

It has been discussed previously under this section that the members of the TAC are drawn from the Ministry of Trade and Industry, the Ministry of Finance and Economic

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<sup>417</sup> Peter cited above at note 77, p389-92

<sup>418</sup> John Alder cited above at note 88, p.410-11

<sup>419</sup> Melkamu cited above at note 344, p. 68



Development(MOFED), the Ethiopian Customs and Revenue Authority(ERCA) , the Ministry of Justice and representatives from the taxpayers and the Chamber of Commerce.<sup>420</sup>

Some argue that the impartiality of the commission might be in doubt since the Commission included that representatives of MOFED and ERCA as its members. This argument based its reason on the fact that, the decision from which the appeal came is rendered by ERCA; thus if the representatives of this authority are members of the appellate tribunal, this would be like being a judge on your own case.<sup>421</sup> When we see this in relation to natural justice, the first principle of natural justice is ‘No man shall be a judge in his own cause’; meaning the deciding authority must be impartial and without bias. No man can act as a judge for a cause in which he himself has some interest, pecuniary or otherwise.<sup>422</sup> This argument also explains that, MOFED representatives should not be members of the TAC since MOFED is responsible for the issuance of tax related directive and also interpret ambiguous terms.<sup>423</sup>

The other issue raised in relation to independence of the TAC is that it is established under the Ministry of Justice and dependent on the Ministry for its budget.<sup>424</sup> Though the commission claims that being under the Ministry will not affect their independence<sup>425</sup>, it might have its own effect on the independence of the tribunal and also being dependent on the Ministry for budget might affect the operation of the commission.

#### **4.4.3. Opportunity to be Heard of the Taxpayers**

The TAC is one of the forums in which the taxpayer could appeal whenever he is aggrieved by the decision of the tax authority on tax assessment issues. A Taxpayer aggrieved by the assessment decided can appeal to the TAC only if he deposits fifty percent (50%) of the disputed amount and the appeal is lodged within thirty (30) days following the day of receipt of the Assessment Notice or from the date of decision of the Review Committee.<sup>426</sup>

There are some arguments as to the 50% requirement to get the opportunity for a case to be reviewed in the TAC. Some argue that, this requirement of deposition on the part of the tax

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<sup>420</sup> Taddese ciited above at note 179, p.374 and Interview, cite above at note 407

<sup>421</sup> Aschalew cited above at note 4, p.24

<sup>422</sup> Justice Brijesh Kumar cited above at note 20

<sup>423</sup> Aschalew cited above at note 4, p.24

<sup>424</sup> Id ,p.23-24

<sup>425</sup> Interview, cited above at note 407

<sup>426</sup> IT proclamation cited above at note 114 ,Art. 107(2)

payer is not surprising. In the first place, it is an indication of the taxpayer's obligation to be ready to discharge his tax obligation as a citizen. Secondly, there seems to be a presumption that to whatever extent the taxpayer objects the amounts of the tax assessed, it may not go down below 50% of the amount upon the decision of TAC. Third, the deposited amount serves as a security for the supposed liability of the taxpayer. If otherwise is true upon the decision of the tribunal, the excessive assessed amount will be refunded to him.<sup>427</sup>

The other argument is that, though this requirement seems easy to implement it will have its own effect on the right to be heard of the taxpayer. It is practically witnessed that the tax debt imposed on the taxpayer would be too much for him that the tax payer would not be able to pay even the 50%. This results to the denial of his right to appeal one way or another. Thus, some suggest that the 50% should be reduced to a lesser amount or the law should provide another options rather than paying in cash for instance using financial guarantee bond. Having this options will help the taxpayer to better use of his right to appeal. Getting the chance to appeal in the TAC is also a get way to further appeal to the regular courts on issues of law, if the taxpayer is not satisfied by the decision rendered in the TAC.<sup>428</sup>

The other issue raised in relation to the 50% is, if the interest and fine are included to the tax debt to calculate the 50%? Practically, they add the interest and fine to the tax debt and then calculate 50% of that to pay in advance, to seek remedy in the TAC. Taxpayers are very much aggrieved by this fact. They claim that the 50% should be calculated from the tax debt only<sup>429</sup>. This claims seems justified, since we have already mentioned that paying the 50% itself is unfair. If the interest and fine are added to the tax debt then it will be more that difficult for the taxpayer to pay this amount. Then, the consequence will be losing the constitutional right to be heard in the TAC and also in the regular courts.

The other prerequisite to appeal to the TAC is, the fact that the application should be delivered to the commission within 30days following the day of receipt of the assessment notice or from the date of decision of the Review Committee.<sup>430</sup> Some say the 30days are not enough for the taxpayer to take his case to the TAC fulfilling all the needed perquisites and documents.<sup>431</sup> This concern seems valid since one of the requirements to take a case to the

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<sup>427</sup> Melkamu cited above at note 344, p. 70-71

<sup>428</sup> Aschalew cited above at note 4, p.26

<sup>429</sup> Interview, cited above at note 407

<sup>430</sup> IT proclamation cited above at note 114, Art. 107(2b)

<sup>431</sup> Aschalew cited above at note 4, p.27

commission is to pay 50% of the tax debt assessed. As a result the tax payer needs more time to prepare the 50% and other documents required for the case. Thus, to make sure the taxpayer uses this forum it is necessary to avoid hindrances like this.

The other issue raised in light of the 30days requirement is related to the confusion of the words under Art.107(2b) of the income tax. The article stipulates that the appeal is lodged with the Appeal Commission within thirty (30) days following the day of receipt of the assessment notice or from the date of decision of the Review Committee. It has been discussed in the previous chapters that the review committee's decision is not final. The committee will have to submit a recommendation to the Director to finalize the decision. Thus, the law should have clearly expressed that the 30days should be counted from the day the Director gave its decision, since the day the committee rendered its recommendation is definitely different from the day the director gives the final decision.<sup>432</sup> Practically, the 30days are counted from the day the taxpayer received the Review Committee's decision confirmed by his signature.<sup>433</sup> To avoid all this confusions the law could clearly stipulate from which day the 30days starts to run, since this could be one preliminary objection from the side of the tax authority to deny the appeal right of the taxpayer in the TAC.

There are certain researches under way to understand the problems mentioned above related to the 50% requirement and the 30days time limit. The research is being conducted by representatives of MOFED, ERCA and taxpayers.<sup>434</sup> It is hoped that this research will bore a fruit and make it is easier for taxpayers to enjoy their right to appeal.

The taxpayer has to prepare a memorandum of appeal which shall be served on the tax authority by the appeal commission.<sup>435</sup> The memorandum shall contain a statement of the specific subject matter of the appeal and the reason for the appeal; the taxpayer's name, address, and TIN, and any relevant supporting documents and a copy of the receipt for the appeal deposit. Even if this requirement are there, the 1965 civil procedure code will have its own relevance; like the memorandum of appeal shall contain the relief sought in the appeal.<sup>436</sup> If any one of this requirements are not fulfilled the commission will reject the

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<sup>432</sup>Id p.27-28

<sup>433</sup> Interview, cited above at note 407

<sup>434</sup> Ibid

<sup>435</sup> IT proclamation cited above at note 114, Article 110(1a)

<sup>436</sup> Civil Procedure Code of the Empire of Ethiopia, Neg. Gaz. (No. 3, 1965) Article 327 (1)(f)

appeal if the taxpayer did not make the correction within 5 days.<sup>437</sup> The five days stipulated under the law to correct the memorandum of appeal is too short that it will have its own effect on the right to appeal of the taxpayer.<sup>438</sup>

The tax authority is expected to come up with response for the appeal. The copy of the response shall be served to the taxpayer who has the burden of proving that the decision regarding an assessment is wrong.<sup>439</sup>

The taxpayer can send his appeal to the commission; either delivers it in person or by post office through registered mail. The date on which an appeal is submitted will be, if it is delivered personally it will be the date of its registration by the archives and if it is by registered mail the date registered by the post office.<sup>440</sup>

It is recommended that documents relating to tribunal proceedings should be designated as documents of the tribunal and not of the agency concerned. This greatly helps the tribunal to have good control over its procedures as an independent entity.<sup>441</sup>

The commission will review the case after checking the fulfilment of the legal requirements of the appeal. The commission will render its verdict after hearing the case. The verdict could be confirming, reducing or annulling the assessment appealed.<sup>442</sup> The decision is expected to include the TIN of the appellant and the date of decision, the names of the panel members and the panel's chair person, and a statement of the decision. The statement of decision shall contain:

- the holding (whether the appellant's claim is justified and accepted partly or wholly, whether the claim is remanded with instructions to the Tax Authority; and the amount the appellant is required to pay, if any, and other necessary details of appellant's liabilities);
- the factual findings, citation to the applicable law, legal interpretation, a conclusion on each relevant issue presented; and any dissenting opinion.
- a summary of the appellant's appeal rights.

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<sup>437</sup> IT proclamation cited above at note 114 Article 109(1,2)

<sup>438</sup> Aschalew cited above at note 4, p.29

<sup>439</sup> IT proclamation cited above at note 114 Art. 110(1b), 110(2) and 116

<sup>440</sup> Id Art.108

<sup>441</sup> Melkamu cited above at note 344, p.71

<sup>442</sup> IT proclamation cited above at note 114 Art 115/1/

- signature of the panel member and seal of the commission<sup>443</sup>

The parties must be given adequate opportunity of attending or due service of the documents. And this has to do with one essential component of natural justice, the right to be heard.<sup>444</sup> The applicant has an obligation to follow up the appeal process. The appeal commission may decide, ex parte when any appellant fails to give counter reply when necessary, or to appear before it on two occasions, after lodging appeal; or the Tax Authority, after receiving the memorandum of appeal, fails to give reply or to appear before it on two occasions.<sup>445</sup>

The TAC has the power to make the decision of the tax authority null and void which will help to reduce, any arbitrary decision that might affect the taxpayer's right. This indicates us that the TAC has a power to give final disposition on a case unlike review committee and the courts. The review committee has a power only to present recommendation; the final disposition is up to the director. Similarly the courts only entertain question of law and refer the case back to the Tax Appeal Commission.<sup>446</sup> The commission is not bound by law to follow its prior decision like a precedent however because they deal with issues of repetitive nature, it is hard to believe that they will fully disregard their previous decisions.<sup>447</sup> In practice the commission uses previous decisions as a ground to render decisions on current cases but it is only on certain cases for instance, cases related to Cash Register machine, depreciation and tax exemption.<sup>448</sup> Following a precedent is just a way of acting consistently and basic fairness requires that every decision maker should act consistently. It is only possible to follow earlier decisions in any organized way if there is a reliable system of the recording and reporting of decisions.<sup>449</sup> The commission has cases previously decided in a compiled and organized way for each year. However, they are not published which will make it difficult for the taxpayer to know how the commission will react on certain cases.<sup>450</sup>

It is evident from the law that there is no provision that governs the time limit to render decision. It is noticed practically that cases are delayed. Some cases may even require the

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<sup>443</sup> Id , Art. 111 (1,2,3)

<sup>444</sup> Melkamu cited above at note 344, p.72

<sup>445</sup> IT proclamation cited above at note 114 Art. 111 (4(a, b))

<sup>446</sup> Id Art 105(3) and 112(2)

<sup>447</sup> Taddese cited above at note 179, p.375

<sup>448</sup> Interview, cited above at note 407

<sup>449</sup> Peter cited above at note 77, p388-89

<sup>450</sup> The writer has noticed this during a visit to the Federal Tax Appeal Commission

issuance of a directive by the concerned body; before decision is delivered, and following that directive, arguments will be raised if that law will be applicable on them or not, this and other things make the delivery of decision delayed. There are cases currently, which took more than one year but not yet concluded. In addition to this, the fact that the commission will only have a session three times a week and the members are busy with other engagements (since they are not regular employees) will make the procedure delayed. Complaints as to the slow pace of the procedures will be communicated to the commission. However, there is no much of a solution to it.<sup>451</sup> The writer has witnessed a taxpayer asking to discontinue the process of appeal and just pay the tax debt, because of the delay. Thus, it is clear that the right to appeal of the taxpayer is being affected. We have mentioned earlier in this section that one of the advantages of administrative tribunals is rendering decisions in shorter time than regular courts. Thus, the law needs to specify certain time limit for the TAC to render its decision.<sup>452</sup> In addition to that the members should be regularly employed to this job so that they could see cases more often than it is now.

Law is silent on whether the cases are seen in an open trial or not. As to the parties to case, their counsels, professionals and other witnesses the court they can attend freely. As a matter of rule the commission does not close its doors to any interested person to the extent the hearing room permits. This promotes public confidence in the administration of justice.<sup>453</sup> Exceptionally, there are some cases which need to be seen in camera. The first situation is where public security or morality so requires. The second type of a case in which privacy is desirable is where the public hearing is such that personal or financial circumstances have to be disclosed. A third situation which demands privacy is when the argument involves professional capacity and reputation.<sup>454</sup>

With respect to evidence, though expert witnesses are also heard the commission gives considerable emphases on documentary evidence , record books of account and the like. The commission has the power to instruct either party to submit new facts, if any and also it can order the tax authority, the taxpayer or any other person or agency to produce supporting

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<sup>451</sup> Interview, cited above at note 407

<sup>452</sup> Aschalew cited above at note 4, p.33

<sup>453</sup> Melkamu cited above at note 344, p.72 and Interview, cited above at note 407

<sup>454</sup>Id , p.72-73

evidence relevant to the taxpayer's allegation. Therefore, it could be said that the commission has a subpoena power.<sup>455</sup>

The commission follows the adversarial procedure where it takes relatively little part in the proceeding. Either party has the right, to examine his own witnesses directly or to cross examine directly the witnesses of his opponent.<sup>456</sup>

The members of the Commission are not expected to adhere strictly to judicial procedures. This can be as a result of members of the Commission not being necessarily lawyers. The Commission's composition from the stakeholders in tax administration is in large measure designed to address disputes in ways that satisfy the interests and demands of the various stakeholders, even if that sometimes means going off the judicial procedures.<sup>457</sup>

According to Art. 337 of the civil code the appellate court has a power to hear the applicant and to dismiss the appeal without calling on respondent if it thinks fit and agrees with the judgment appealed from. Unless the Appellate Court dismisses the appeal under Art. 337, it shall cause the memorandum of appeal to be served on the respondent, fix a day for hearing the appeal and summon the respondent to appear and answer on such day.<sup>458</sup> The TAC also has an obligation to send the summon to the respondent. But unlike the courts the TAC has no obligation to see the case before calling the respondent if the case is fit to be entertained in the commission. If the memorandum of appeal fulfilled the necessary requirements then, it is enough to entertain the case after sending summons to the respondent.<sup>459</sup>

In addition of exchanging of documents the parties should be allowed to have oral argument which would also help the commission to clarify some points not clear in the documents and able to identify the exact issue at hand. Though the law did not provide whether oral argument should be conducted or not, practically it is a process, which is not disregarded.<sup>460</sup>

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<sup>455</sup> Id p.73 and Interview cited above at note 407

<sup>456</sup> Id p.74

<sup>457</sup> Taddese cited above at note 179 , p.374

<sup>458</sup> Civil Procedure Code cited above at note 436, Art 337 and 338(1)

<sup>459</sup> Aschalew cited above at note 4 ,p.29-30 and Interview cited above at note 407

<sup>460</sup> Ibid

The other issue that need to be raised here is the issue of where the burden of proof lies during tax related cases. In the regular civil proceeding the burden of proof falls on the person who is claiming something.<sup>461</sup>

Burden of proof refers most generally to the obligation of a party to prove its allegations in a trial. Burden of proof is defined by the Black's Law Dictionary as a party's duty to prove a disputed assertion or charge that it includes both burden of persuasion and production. Burden of persuasion is defined as a party's duty to convince the fact finder to view the facts in a way that favours that party.<sup>462</sup> The party that is deemed to have the burden of persuasion will continue to have the burden throughout the trial.<sup>463</sup>

The burden of producing evidence means that the party that cites a given fact for the substantiation of its claim also has the burden of producing credible evidence to sustain the case.<sup>464</sup> While the burden of production may shift if a sufficient amount of evidence is presented, in contrast the burden of persuasion is fixed and does not change during the course of a trial.<sup>465</sup>

In civil proceedings it is generally the plaintiff who has the burden of proof for facts supporting a claim, unless this burden has been shifted to the defendant.<sup>466</sup> There is a general rule that the party who has burden of proof has the right to begin. The party entitled to begin must state his case and produce his evidence in support of the issue, which he is bound to prove.<sup>467</sup>

In criminal proceedings it is the prosecution that bears the burden of proof for all relevant facts. What this means is that the defendant is presumed innocent until proof is not presented or as long as doubts still remain. The burden of proof serves as a practical starting point for resolving a dispute it is a means by which a neutral arbiter can ascertain the existence or

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<sup>461</sup>Id , p.30

<sup>462</sup> *The Black's Law Dictionary*; cited above at note 12 ,p.223

<sup>463</sup> Maria Italia; "Taxpayers' in Australia Bear the Burden of Persuasion and Burden of Production" :International Review of Business Research Papers (Jan, 2011) Vol. 7. No. 1. p. 232 ( [WWW.Vu.edu.au](http://WWW.Vu.edu.au) last visited on 12/01/2015)

<sup>464</sup> "**evidence.**" Encyclopædia Britannica. Encyclopaedia Britannica Ultimate Reference Suite. Chicago: Encyclopædia Britannica, (2010)

<sup>465</sup> Maria Italia cited above at note 463, p. 232

<sup>466</sup> Ibid

<sup>467</sup> Robert Allen Sedler; Ethiopian Civil Procedure; (1968) p.199-200



nonexistence of the facts. If a party is unable to persuade the neutral arbiter that a fact exists, then that party will fail to achieve their desired result.<sup>468</sup>

In an administrative or judicial proceeding that involves a civil tax issue, the taxpayer should generally have the burden of proof. In some jurisdictions, as a general matter the burden of proof lies with the party normally in possession of the relevant evidence. In tax matters, this party is typically, but not always, the taxpayer. Richard argues that it may be preferable to state explicitly that the burden lies with the taxpayer, except in such instances where the tax department has sole access to the necessary evidence. There should also be a presumption that an assessment issued by the tax department is correct. The taxpayer then has the burden of rebutting this presumption by demonstrating the inaccuracy of the assessment<sup>469</sup>. Thus, it is for the taxpayer to demonstrate that the authority's assessment is incorrect. The burden of proof is upon the taxpayer to prove not only that the determination of the tax was wrong but to produce evidence from which another and proper determination could be made.<sup>470</sup>

Burden of proof in tax cases before 1998 in USA was on the taxpayer. The rationale was the plaintiff or the initiator of an action must take the burden of proving his case and the tax authority could not maintain this burden because the taxpayer possessed the relevant evidences. The point made at that time was if we state the purpose of burden of proof is to provide guidance then the party in possession of relevant evidences shall maintain the burden of proving.<sup>471</sup>

Under law in effect since 1998, the taxpayer may shift the burden of proof to the government in a civil tax matter by producing credible evidence in support of his position<sup>472</sup>. The aim was to make litigation less difficult for the taxpayer. The law placed a requirements on the taxpayer to fulfil the burden of production by introducing some credible evidence relating to the tax liability in question. Thus the shifting of burden of proof to the tax authority, relates to the burden of persuasion.<sup>473</sup> The credible evidence that the taxpayer should produce would

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<sup>468</sup> Maria Italia cited above at note 463, p. 231

<sup>469</sup> Richard K. Gordon cited above at note 24, p.12 -13

<sup>470</sup> Maria Italia cited above at note 463, p. 233

<sup>471</sup> Id p. 234

<sup>472</sup> Henry Ordower; United States of America, the Burden of Proof in Tax Matters: Saint Louis University School of Law, (2011),p.3-4([WWW.slu.edu/colleges/law/slulaw/sites/default/files/cvs/ordower2014.pdf](http://WWW.slu.edu/colleges/law/slulaw/sites/default/files/cvs/ordower2014.pdf)) last visited on 12/01/2015

<sup>473</sup> Maria Italia cited above at note 463, p. 236

overcome the presumption that the government's assessment is correct. In order to shift the burden, the taxpayer must have (i) met her obligations to substantiate her reporting of tax items, (ii) maintained records (iii) cooperated with the tax authority when it requested information, witnesses, documents, meetings and interviews.<sup>474</sup>

Where factual issues are in dispute, those issues often are a matter of degree and not of a matter of whether or not liability exists. For instance, in cases involving a determination of whether or not the taxpayer should have tax liability, courts decide on the basis of the preponderance of the evidence that both parties produce rather than on the basis of which party bears the burden of proof. It would be a rare case in which the evidence is so balanced that the court would use the burden of proof as a tie-breaker rule. The government has the burden of proof in criminal matters since it initiates the proceedings. The government must prove beyond a reasonable doubt that the individual it has charged criminally sought to evade or defeat a tax or wilfully aided another in evading or a tax. A criminal conviction is determinative on the issue of the taxpayer's civil liability. Acquittal does not eliminate civil tax liability because of the difference in the burden of proof.<sup>475</sup>

In Spain, the general rule concerning the division of the burden of proof is provided in Article 105 of the Spanish General Tax Law, which states that a person who desires to make a right effective must prove the facts underlying this right. Based on Spanish law, this rule has mostly been interpreted by the tax courts to mean that the tax administration has to prove the income-side and the taxpayer has to prove the cost-side. In tax courts, this general rule is usually combined with other criteria such as the requirement for each party to provide the evidence that is easiest for it to gather, which usually leads to the same result since it is normally easier for the tax administration to prove that income has been received and for the taxpayer to prove that costs have been made.<sup>476</sup> The same principle applies in Sweden.<sup>477</sup>

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<sup>474</sup> Ibid

<sup>475</sup> Henry, cited above at note 472 p.3-6

<sup>476</sup> Prof. Dr. Maria Rodríguez-Bereijo León1, QUESTIONNAIRE "THE BURDEN OF PROOF IN TAX MATTERS", EATLP CONFERENCE, MAY 2011, ATHENS, GREECE, p. 1-2 (WWW. Eatlp.org) last visited on 12/01/2015

<sup>477</sup> Roman Seer, The burden of proof – National Report: Germany, (June 2011), p. 3-4 (WWW. Eatlp.org) last visited on 12/01/2015

When we see the Canadian law, it stipulates that the burden of proof is wholly on the taxpayer. And if the tax payer is not able to proof his claim the decision rendered by the tax authority will be affirmed.<sup>478</sup>

When we come to the case of Ethiopia we can understand form the tax laws that the burden of proving that an assessment is excessive or that a decision of the Authority is wrong lies on the person objecting to the assessment or decision ( taxpayer).<sup>479</sup>

Though this system is not different from what some countries in the world follow, it could have its own effect on the process of appeal. For instance, this could inspire some tax assessors and auditors to decide unfair tax debt on the taxpayer using their power unlawfully. Since the decision is not based on fact on the ground it will be difficult for the tax payer to prove his case. And if they cannot prove their claim there is no point of taking the case to a tribunal. As a result their right to be heard will be at risk<sup>480</sup>.

However if the law provides that the tax authority should share the burden of proving a given fact this problem could be easily solved. Because on certain matters it will be easier for the authority to produce evidences on how it come up with a certain assessment than the taxpayer. Thus, though in principle the taxpayer should bear the burden of proof but in certain cases the authority should be able to share that burden.<sup>481</sup>

Any party dissatisfied with the decision of the Appeal Commission may appeal to the competent court of appeal on the ground that it is erroneous on any matter of law within 30 days from the date of receipt of the written decision of the Appeal Commission.<sup>482</sup>

#### **4.4.4. The Right to Get Reasoned Decision**

Respect for an individual's right, dignity and equality are the prominent justifications for giving a well reasoned decision. It also strengthens public confidence in decision-making process and organ, and helps to challenge decisions. The TAC is also expected to render its decisions after it has analyzed the case on the basis of facts, evidences presented to support this facts and the law. If tribunal proceeding are to be fair, reasons should be given to the

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<sup>478</sup> Aschalew cited above at note 4, p.30

<sup>479</sup> IT proclamation cited above at note 114 Art. 110(2) and 116

<sup>480</sup> Aschalew cited above at note 4, p.31

<sup>481</sup> Id p.31-32

<sup>482</sup> IT proclamation cited above at note 114 Art 112 (1)

fullest extent practicable. This will also help the applicant to understand if he has a base for an appeal.<sup>483</sup> The fact that the TAC rendered its decisions after making sure they are thoroughly reasoned, is an indication of the endeavour of the commission to deliver a fair hearing. We can refer to some cases to see if the commission is really delivering a reasoned decision for the taxpayer's claim.

In the case, Rabico East Africa vs. ERCA<sup>484</sup> the appellant appealed its case to the commission because of a disagreement the tax authority on the assessment of business profit tax and VAT made without considering evidence presented well. Thus, they are claiming that, they are required to pay tax on an income which was not yet gained by the company. Additionally, they asserted that the interests and fine added to the tax are wrong and they listed expenses that should have been deducted.

The Tax authority responded that its decisions were based on relevant activities of the company . They also indicated that the claim of the applicant is not supported by evidence, the expenses listed by the applicant are not supported by the law and also there is no evidence presented to proof the existence of such expenses.

The decisions are explained separately for every claim. However, in some parts, for instance, when the issue of income is analysed the commission mentioned only that , the decisions are based on statements made by the experts from both sides . But, summary of the statements made by the experts are not mentioned. Relevant laws are not stated. It is necessary to relate the relevant laws with relevant facts and evidences though, the commission failed to do so. Moreover, in some parts they only mentioned the article numbers without any analysis of the premise of the law well with the facts. Only some of the evidences presented by the taxpayers are explained as to why they are accepted or rejected; the rest are just stated without any explanation.

The failure of the commission to paraphrase what has been testified by the experts may make us question how and why the commission decided in a certain way; because the commission stated that the decisions are based on the experts testimony. So if such testimony is not stated there is no way we could be able to evaluate whether the decision is made arbitrarily or not. In addition to this, the decision should mention and explain why a given law is used to render

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<sup>483</sup> Melkamu cited above at note 344 p.74

<sup>484</sup> Rabico East Africa vs. ERCA (File no. 603), Federal Tax Appeal Commission (July 27/2001 E.C) (unpublished)

the decision. These all are necessary to deliver a well reasoned decision for an aggrieved taxpayer; who would accept any decision even against him if the decision is well reasoned.

In another case , Mecob Enterprise PLC vs. ERCA<sup>485</sup> the applicant Mecob Enterprise PLC is an importer PLC; it presented its case to the TAC because they are aggrieved on the way ERCA assessed the tax due. The issues are based on the taxes due for the years 1998,1999, and 2000 E.C. The point of difference is, on the bases the authority used to calculate the Business profit tax.

It is noticed in the decision rendered by the TAC, that though it stated that the tribunal collected information from oral argument of the parties, there is not much said about what exactly was said by the parties. When the tribunal sees a case it is obvious that they should first gather information from both parties and this could be gained either from oral or written arguments.

Here in this case, the TAC failed to discuss first what has been the counter reply of the written response of the respondent, even briefly. And secondly, what has been gathered from the oral argument is not stated clearly. In addition to this, the court indicated that auditors and accounting professionals were summoned to explain the particular case relating it to their professions. However, what has been testified by these experts is not clearly indicated.

Evidences that the tribunal relied up on to give its verdict should be indicated during the analysis of the case; which evidence it accepted and rejected and with the reasons behind. We can only understand what evidences are used in the case, when we read the parties' written argument but it is essential that the commission indicates which evidences are used for the decisions and if it rejects, then the reasons behind that.

The other thing is the laws the tribunal make use of ; besides indicating that the authority has a legal right to do this or that, there is no mentioning of what laws are referred to establish that legal right and how it is related to the facts in issue.

Article 182 (1) of the Civil Procedure Code states that the judgment shall contain the points for determination, the decision and the reasons for such decision. This is imperative for a judgment to include the reasons why the case is determined in a given way. Evidences

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<sup>485</sup>Mecob Enterprise PLC vs. ERCA (File No. 605) Federal Tax Appeal Commission (Sep. 17/2002 E.C) (unpublished)

presented, arguments of the parties and relevant laws are main basis to provide reasons for a decision but if these things are not analysed well then it will be difficult see the fairness of the decision. Though, this kinds of administrative tribunals are not expected to strictly adhere to procedural requirements not providing enough reasoning for a decision is intruding the right of the taxpayer to get a fair remedy for his problem.

In the case, Mulu Amen PLC vs ERCA<sup>486</sup> the applicant appealed to the TAC in disagreement to the tax assessed by ERCA. The PLC lost its accounting documents because of a fire which occurred in 1998. Thus, the tax authority should relay on estimation to assess the tax due to the company. But the issue is the PLC claiming the profit margin should be calculated only based on 1.65% because they could not sale beyond this margin because of a contract they have with the producer of the products. But ERCA assessed the tax based on 7.5% profit margin.

Though the case was first appealed to the review committee the committee decided the fact that the accounting records are destroyed will only help during the assessment of fine other than that the issue of profit percentage is correctly used by the authority. Thus, the case is again appealed to the TAC. The PLC claimed that the fact that the authority decided to use 7.5% profit margin, if they cannot bring the accounting documents that are already lost in the fire, is not fair.

The authority claims that it is, the authority's legal right to assess by estimation if there is no accounting record kept by the PLC. And the profit margin used is correctly used to assess the tax due relaying up on the directive concerned. The only thing TAC bother to do in this case is that the authority has right to assess the tax by estimation since there are no accounting records.

In this case again there is no indication if they conducted an oral argument and what has been gathered from that. The tribunal also did not even try to mention the evidences that it have considered to decide the case. The appellant has presented in its appeal that there has been a fire accident resulting to the loss of documents; the TAC did not ask evidences to check if the accident really happened and the documents were lost as a result. And they did not also examine whether the authority checked the occurrence of the accident and the loss of the

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<sup>486</sup> Mulu Amen PLC vs ERCA (File No. 706) Federal Tax Appeal Commission (Tir 21/2004 E.C.) (unpublished)

records before deciding to resort to assessment by estimation. And if the estimation margin is correct or not. The commission just said ERCA is correct to resort to estimation, which is a clear violation of the taxpayer's right to be heard. The guarantee of this right should not be just for a show. There should be a chance for the applicant to present his case in that forum with evidences. And the forum should thoroughly consider the evidences presented and question why and how the authority come up with the assessment. Thus, this will affect the right to be heard of the appellant which is respected and protected by the constitution.

Thus, in this case let alone giving reason for its decision the TAC left out issues and evidences which needed to be considered.

We have said earlier in this section that the statement of decision of the commission should at least include the factual findings, citation to the applicable law, legal interpretation, a conclusion on each relevant issue presented; a summary of the appellant's appeal rights.<sup>487</sup> As we can see from the cases considered the decision of the TAC seems lacking in this regard. Failure to present the testimony of expert witness clearly, not considering the evidences presented by the taxpayer in a satisfactory manner and failure to clearly explain the laws referred for the decision, mainly resulted in a lack of reasoned decision. In addition, to this the verdicts rendered by the commission show us that it is not a trend for them to mention the right to appeal of the appellant of he is not satisfied with the TAC's decision. They should indicate this fundamental constitutional right of a taxpayer whenever decisions are rendered.

## 4.5. Procedural Due process Rights in Regular Courts

### 4.5.1. The Right to be Heard

Judicial review is the inspection of administrative rulings by an independent judiciary; which will help to prevent abuse of power by administrative agencies and this in return will protect fundamental rights of individuals. Judicial review will also ensure the legitimacy of administrative decision by insuring government officials respect the rule of law and improve public confidence. Judicial review can enhance the quality of administrative system by

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<sup>487</sup> IT proclamation cited above at note 114, Article 111 (1,2,3)

fighting against partiality and arbitrariness in agencies reasoning.<sup>488</sup> The objective of reviewing the record of the proceedings is to determine whether the administrative agency acted within the scope of its jurisdiction, whether there was any evidence to support its conclusion, whether the procedures were fair, and whether the governing law was correctly interpreted and applied.<sup>489</sup>

Judicial review is different from appeal in that in case of an appeal the court is allowed to see the merit of the case decided by the lower court, while in the case of judicial review the court is concerned on the legality of the decision. The court can replace the decision of the lower adjudicator during an appeal but at the time of judicial review the decision will be annulled or affirmed. There are arguments whether we need an administrative decision at the higher hierarchy for appeals or appeals from administrative decisions made to ordinary courts for judicial review. The supporters of judicial review suggest that, judicial review by courts will ensure the compatibility of agencies action with their statutes. Thus, it serves as a controlling mechanism. On the other hand, the propagators of appeal by the higher body of administrative agency claim that, ordinary courts have a lot of work load thus justice will be delayed if we leave the appeal to ordinary court. In addition to this, administrative issues need technical knowhow which the judges of ordinary courts lack so with the limited knowledge they have it will be difficult to deliver a reasoned and well researched justice<sup>490</sup>.

The review of abuse of discretion by administrative agencies by the courts is based on administrative record. Administrative record contains all materials that the agency had before it, when it made its decision. The reviewing court looks at the whole record, not just the evidence supporting the agency's decision. The on record requirement limits courts from considering new evidence and arguments which will in its way promote efficient resolution of disputes.<sup>491</sup> There are some prerequisites for judicial review like for instance, the case must be ripe for review, the petitioner must have exhausted all administrative remedies and the decision of administrative agency must be final before judicial review can be sought. The

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<sup>488</sup> Leslie Book cited above at note 25, P.1168

<sup>489</sup> "Procedural Law." Encyclopædia Britannica. Encyclopaedia Britannica Ultimate Reference Suite. Chicago: Encyclopædia Britannica, (2010).

<sup>490</sup> Bizuneh Beyene cited above at note 26, p.39-42

<sup>491</sup> Leslie cited above at note 25, p. 1172-75



requirement of exhaustion of administrative remedies might be escaped if the exhaustion will be in vain because the administrative agency is biased.<sup>492</sup>

Among the reasons that are applied to review of an agency's actions is abuse of discretion. In these cases the courts conduct a "thorough, in depth review" of the record.<sup>493</sup> To facilitate judicial review, even under the very deferential standards of abuse of discretion an agency must create a record that supports the agency's action. Administrative record is required even in an informal adjudication. The development of the record is important because of the reliance courts place on the record when reviewing agency actions. This standard is commonly applied when the agency is granted discretion in the performance of its duties. In these cases, the court does not substitute its judgment for that of the agency's; which will protect the agency's independence. Rather, the court considers whether the decision made by the agency was within the proper range of decisions it could make and was based on consideration of adequate and proper evidence; that is to check whether the decision was a result of abuse of discretion.<sup>494</sup>

When we come to tax issues in Ethiopia, not only the administrative remedies at two levels an aggrieved taxpayer has the option of taking his case to the courts. The remedies granted by the courts are suitably known as judicial remedies. There are two forms of judicial remedies appeal and judicial review.<sup>495</sup>

After a case is entertained by the Tax Appeal Commission the next ladder that the taxpayer can exhaust is the regular court. If a party is dissatisfied in a decision rendered in the TAC, he can take his case to the regular courts; though only on issues of law. Therefore, the court cannot decide on the merit or questions of fact but only on questions of law and their interpretation and application.

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<sup>492</sup> Basics Of Administrative Law cited above at note 10

<sup>493</sup> *Overtone Park v. Volpe*, (401 U.S At 415, US Supreme Court) (1971) (<https://supreme.justia.com/cases/federal/us/401/402/case.html>) last visited on 12/01/2015

<sup>494</sup> Danshera Cords; cited above at note 192, p. 452-53

<sup>495</sup> Melkamu cited above at note 344 p.76

He can appeal to the competent court, only if he takes his case to the court within 30 days from the date of receipt of the written decision from the commission. The courts can only entertain the erroneous matter of law and refer the case back to the TAC.<sup>496</sup>

Unlike the TAC, where only the taxpayer can take his grievance, in the courts the tax authority can also take its case. This can be understood from the wordings of the law under Art. 112(1) of the IT proclamation, where it says “*Any Party.....*” In both the review committee and the TAC only the tax payer can present his grievance. However, if these two bodies decide for the taxpayer and decline the authority’s decision then, the tax authority has the right to take the case to the regular courts in which case the taxpayer will appear as a respondent.<sup>497</sup>

As it is given under the Civil Procedure Code, the court could dismiss the appeal without calling the respondent if it thinks there is no error of law and agrees with the judgment appealed from. The other possibility is the court could fix a day for a hearing and summon the respondent to determine the error of law. After the court entertains the case it may confirm, vary or reverse the decision of the TAC.<sup>498</sup> The court has no final say regarding tax issues as they are required to return the case to the commission after determining whether there is error of law or not. Thus, if the High Court finds an error of law in the judgment of the TAC, it will identify the error and remands the case to the Commission for review based on the error of law identified. The High Court cannot go into the determination of the merits of the case.<sup>499</sup>

Article 112(1) of the income tax proclamation states that

*“Any party dissatisfied with the decision of the Appeal Commission may appeal to the competent Court of appeal ...” as the result of the federal system, both the federal and state administrations have their own first instance, high and supreme courts. Tax cases at the federal level can be appealed to the federal high court since the TAC is seen as the first instance.*<sup>500</sup>

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<sup>496</sup> IT proclamation cited above at note 114 Art.112(1,2)

<sup>497</sup> Aschalew cited above at note 4, p. 34

<sup>498</sup> Civil Procedure Code cited above at note 436 Art. 337,338(1),348(1) And Aschalew, cited above at note 4 p. 34-35

<sup>499</sup> Taddese cited above at note 179, p. 375

<sup>500</sup> Aschalew cited above at note 4, p.36

A party can apply to the next competent court if he is still dissatisfied with finding of the lower court; he can do so within 30 days of the decision of the lower court.<sup>501</sup> Thus, the supreme court will have the same mandate of determining whether there is an error of law in the judgment and remand the case.

The last bench the parties could resort to after this is the cassation bench, as it is a constitutionally recognized right to take a case on fundamental error of law to the cassation bench.<sup>502</sup> Before five judges in the cassation bench entertain the case it will be first presented before three judges who will confirm the existence of fundamental error of law. The applicant shall state the reasons for claiming the decision to contain a fundamental error of law. The copy of the decision protested and the decision of the lower courts should be attached to the application. This application shall be presented to the court within 90 days from the date of the final decision protested is rendered.<sup>503</sup> The decisions rendered by the cassation bench after with not less than five judges shall be binding on federal as well as regional council at all levels.<sup>504</sup>

Thus decisions rendered by the cassation bench on tax issues are binding on the lower courts.

Though there is no law as to what should be done if the cassation court decides on the existence of fundamental error of law we can refer to cassation court decisions for example ,

Mulu Amen PLC vs ERCA<sup>505</sup> In this case the court has returned the case to the TAC after clarifying the existence of fundamental error of law and identify points to be considered by the TAC. This decision is right since, there is no point for the cassation court to return the case to the high court and supreme court after it had rendered their decision.<sup>506</sup>

There are a some ideas raised in relation to this. One is the court should entertain both issues of law and fact. Since it is difficult to determine what constitute issues of law and issues of

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<sup>501</sup> IT Proclamation cited above at note 114, Art.112(3)

<sup>502</sup> FDRE Constitution cited above at note 182, Art. 80(3)(a) and The Federal Courts Proclamation (1996), Art. 10 Proc. No. 25 Neg.Gaz 2<sup>nd</sup> year -No.13

<sup>503</sup>The Federal Courts Proclamation cited above at note 502 , Art.22

<sup>504</sup> Aschalew cited above at note 4, p.38-39, see also A Proclamation To Remand The Federal Courts Proclamation (2005) Art.2(1) Proc. No. 454 Neg.Gaz. -No.42

<sup>505</sup> Mulu Amen PLC vs ERCA cited above at note 486

<sup>506</sup> Aschalew cited above at note 4 ,p.39

fact, it will affect the right to appeal of the taxpayer if we only allow the court see in to only issues of law.<sup>507</sup>

Two appeals are not allowed in the federal courts proclamation unless the High Court's decision is in variation of the lower court's decision.<sup>508</sup> However, Article 112(3) of the Income Tax Proclamation stipulates that either party has the right to appeal to the next court of appeal (supreme court) if he is dissatisfied with the decision rendered by the lower court within 30 days. Thus, we can understand that the IT proclamation is a bit different from the Federal Courts Proclamation. But, this difference can be seen positively since it widens the right to appeal of the tax payer.<sup>509</sup>

Determining questions of fact from questions of law is not an easy task , and it is not just in Ethiopia that distinguishing this questions is difficult, There are no hard and fast rules for distinguishing questions of fact from questions of law.<sup>510</sup>

The most controversial problem arises in determining a question of fact and questions of law there are two basic approaches to distinguish between question of law and questions of fact the analytical approach and pragmatic approach. According to the former, a question of fact is a question as to the existence of some phenomenon in the worlds about us; and a legal question is any question about the legal significance of such phenomenon. The analytical approach is literal, conceptual and emphasizes the layman's meaning of terms " law " and " fact". According to this approach, the court first asks whether an issue is one of law or fact and only when it has answered this question does it know if it can intervene or not. But it is very difficult to classify particular issues of law or issues of fact.

This problem is tried to be addressed by the pragmatic (policy) approach. By virtue of this approach, the court first decides, on policy grounds, whether it ought to intervene and then classifies the issue before it as one of law or fact.<sup>511</sup> It tries to designate a given case as issue of law and fact based on practical reasons by analyzing the association of functions between the courts and agencies than just relying on literal meaning of the terms law and fact.<sup>512</sup>

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<sup>507</sup>Id ,p.37

<sup>508</sup>The Federal Courts Proclamation cited above at note 502, Art.9(2)

<sup>509</sup>Aschalew cited above at note 4 ,p.37

<sup>510</sup>Taddese cited above at note 179, p. 375

<sup>511</sup> Melkamu cited above at note 344, p. 77

<sup>512</sup> Id p.78

As it has been discussed in earlier sections of this paper the tax dispute settlement schemes up to the supreme court are devised only for disputes arising from tax assessment; though there are plenty of issues that can arise in the relationship of the taxpayer and the tax authority. The jurisdiction of the Review Committee is limited to reviewing requests by taxpayers to compromise penalties, interest, and tax liabilities which are all related to assessments by the tax authorities and the TAC can only entertain a case related to assessment decided by the review committee or the tax authority. The Courts are limited to reviewing these decisions for errors of law only.<sup>513</sup>

Tax disputes are not only resulted from tax assessments. In other tax systems, these rights to challenge decisions of the tax authorities other than those related to tax assessments are often clarified and stipulated in other laws, like administrative and constitutional laws. For instance, in the U.K., taxpayers are allowed to challenge the tax authority's action on the grounds of illegality, procedural impropriety, or irrationality. And it can present this issues through the ordinary dispute settlement schemes for administrative disputes. In Australia, the actions of the tax authorities may be reviewed on grounds of denial of natural justice, failure to observe required procedures, lack of jurisdiction or authority and the.<sup>514</sup>

As far as the right to judicial review is concerned, it is not yet clear if Ethiopian taxpayers can raise objections on a given tax directives, and where they can go to raise objections. Until now, none of the tax directives issued by the Ministry of Finance and ERCA were challenged on grounds of being *ultravirius*.<sup>515</sup>

#### 4.5.2. Independence of the Court

The existence of the rule of law in a country requires the existence of an independent judiciary, which is vested with the power to interpret the constitutionality or otherwise of laws and government actions. To serve the protection of fundamental rights and preserving

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<sup>513</sup> Taddese cited above at note 179, p. 376-77

<sup>514</sup> Ibid

<sup>515</sup> Ibid

the rule of law, judicial review of legislations and administrative acts by an independent tribunal is very crucial.<sup>516</sup>

The independence of the judiciary can be achieved if the judiciary is functionally, institutionally, and in its personnel kept separate from the legislative and the executive organs. This is possible when there is adherence to the principle of separation of powers by all government branches.<sup>517</sup>

Different international instruments like the UDHR and ICCPR recognize the right to hearing by an independent and impartial tribunals. Judicial independence is important precisely for the reasons that the judiciary itself is important. If the judiciary cannot be relied up on to decide cases impartially, according to the law, its role will be distorted and public confidence in the government undermined. Independent and impartial judiciary contributes to the equitable and stable balance of power within the government. They protect individual rights and preserve the security of person and property.<sup>518</sup>

The independence of the judiciary shall be guaranteed by the state and enshrined in the constitution of law of the country. The judiciary shall decided cases before them with impartiality on the basis of facts and the relevant law, without any improper influences.<sup>519</sup>

The constitution of the Federal Democratic Republic of Ethiopia creates an independent judiciary. The judiciary is one of the three separate organs of the government. Courts are free from any interference from any governmental body, government official or from any other source. Any person who is serving in the legislative or executive branches or is a member of any political organization cannot at the same time be a Judge. Judges are expected to exercise their functions in full independence and shall be directed solely by the law.<sup>520</sup>

When we discuss the independence and impartiality of the Judiciary , there are many things which will have direct or indirect impact. Some of them are discussed below.

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<sup>516</sup> Yemane Kassa, The Judiciary and its Interpretive Power in Ethiopia: A Case Study of The Ethiopian Revenues And Customs Authority. (Nov. 2011), p.22-23

<sup>517</sup> Id , p.35

<sup>518</sup> Guidance for Promoting judicial independence and impartiality: Office of democracy and governance bureau for democracy, conflict and Humanitarian assistance US Agency for international development Washington, DC, (Jan 2002), P.5-6 ([pdf.usaid.gov/pdf\\_docs/PNACM007.pdf](http://pdf.usaid.gov/pdf_docs/PNACM007.pdf)) last visited on 12/01/2015

<sup>519</sup> Basic Principles on the Independence of the Judiciary: Milan, August 26- September 6 ,1985: General Assembly resolution 40/32 ([www.ohchr.org/EN/ProfessionInterest/pages/independence\\_judiciary.aspx](http://www.ohchr.org/EN/ProfessionInterest/pages/independence_judiciary.aspx)) last visited on 12/01/2015

<sup>520</sup> FDRE Constitution cited above at note 182 Art. 78(1), 79(2,3), and Establishment Proclamation of the Federal Judicial Administration Commission (1996) Art.8(2) Proc. No. 24, 2<sup>nd</sup> Year No. 12

#### ❖ The appointment process of the Judges

Common law and civil law countries follow distinct selection process. In common law countries, lower court judges are usually selected from among experienced, practicing lawyers for specific judicial positions. They may be appointed by some combination of executive and legislative action. Civil law countries have traditionally employed a “career” system. Recent law school graduates are selected through a merit-based process. They are usually required to take an exam, but the process may also include a review of their education, subsequent training, and practical experience. As with other civil servants, judges enter at the lowest ranks and are promoted as they gain experience. There are many countries which use different systems other than these two models.<sup>521</sup>

Judicial councils or commissions are used to improve the process of judicial selection in several countries. Judicial councils exist in both civil and common law countries, though they are prominent feature in civil law tradition. The role of the judicial councils varies from one country to the other. In some it goes beyond the selection process; in others, it may not include it. Protection of judicial independence is a common goal for most judicial councils, though the specific problems councils are erected to tackle are different. In many countries, the problem is executive, legislative, or political party domination of the judiciary. In others, the Supreme Court is perceived to have excessive control over lower court judges. The councils differ with respect to three basic variables; the role of the council, the composition of the council, and the manner in which the council members are appointed. Some judicial councils have oversight responsibility for different issues related to the judiciary, including administration of the court system. Others only deal with on appointment, evaluation, training, and/or discipline of judges, and they do not take on administration. Some councils are involved in the selection of judges of one level only higher or lower. Others participate in the selection of all judges, although their role may differ with respect to higher or lower courts.<sup>522</sup>

In Ethiopia, the Federal Judicial administration Council is established by proclamation No. 24/1996. The council consists of nine members chaired by the president of the federal Supreme Court. These are three representatives from the HPR, presidents of federal first instance court, high court and Supreme Court; the vice president of federal Supreme Court

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<sup>521</sup> Guidance for Promoting judicial independence and impartiality: cited above at note 518, p.13-14

<sup>522</sup> Id p. 15-16

and two most senior judges one from Supreme Court and the other from high court.<sup>523</sup> The council has other duties beyond presenting candidates for judgeships; these are: issuing the Disciplinary and Code of Conduct Rules for federal judges; to decide on the transfer, salary, allowance, promotion, medical benefits and placement of federal judges; suspend a judge until the decision is approved by the House of Peoples' Representatives, to forward its opinion on the list of Regional Supreme and High Court candidate-judges, submitted to it by a Regional Judicial Administration Commission pursuant to article 81 (4) of the Constitution.<sup>524</sup>

Those who will be selected for the judicial office are expected to be of integrity and ability with appropriate qualification in the law. During the selection of judges discrimination shall not be made on the bases of race, colour, sex, religion etc...<sup>525</sup>

According to the FDRE constitution, the President and Vice-President of the Federal Supreme Court will be appointed by the House of Peoples' Representatives(HPRs), upon recommendation by the Prime Minister.<sup>526</sup> The Federal Judicial Administration Council is expected to present candidates and recommend them to the prime minister who in return present them to the HPRs for appointment<sup>527</sup>. The members of the commission select the candidates based on the following criteria; an Ethiopian who: is loyal to the Constitution; has legal training or acquired adequate legal skill through experience; has a good reputation for his diligence, sense of justice and good conduct; consents to assuming judgeship; and is not under 25 years of age.<sup>528</sup>

The State Council for the appointment of the President and Vice president of the state supreme court, upon recommendation by the Chief Executive of the State. The council will also appoint State Supreme and High Court and First –Instance judges upon recommendation by the State Judicial Administration Council.<sup>529</sup>

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<sup>523</sup> Establishment Proclamation of the Federal Judicial Administration Commission cited above at note 520 Art. 3

<sup>524</sup> Id Art. 5 cum Art. 81(6) of the FDRE constitution cited above at note 182

<sup>525</sup> Basic Principles on the Independence of the Judiciary cited above at note 519

<sup>526</sup> FDRE constitution cited above at note 182 Art. 81(1)

<sup>527</sup> Id . 81(2) cum Establishment Proclamation of the Federal Judicial Administration Commission cited above at note 520 Art. 5(1)

<sup>528</sup> Establishment Proclamation of the Federal Judicial Administration Commission cited above at note 520 Art.8(1)

<sup>529</sup> FDRE constitution cited above at note 182 Art. 81 (3,4,5)



As we have seen all the three branches of government participate in the appointment of judges in Ethiopia. Though, the judiciary has no say on the appointment of the president and vice president of the regional supreme courts or federal Supreme Court.<sup>530</sup>

The selection process works best if it is transparent all along like advertise judicial vacancies, publicize candidates name, their backgrounds, selection process and criteria and invite public comment on candidates. The compositions and the transparency of the selecting body which is the judicial administration council in our case, is very important for the whole process of selection. Though the composition of the Federal Judicial administration council is fairly representative, to safeguard transparency, to reduce risk of executive intervention branch and enhance the quality of the candidate selection the participation of the general public in the council particularly lawyers and law professors can be of great help. This will ultimately affect one way or another the independence and impartiality of the judiciary.<sup>531</sup>

#### ❖ Security of tenure

Tenure security means that a judge cannot be removed from his or her position during a term of office, except for good cause pursuant to formal proceedings with procedural protections. Security of tenure is a basic issue for the promotion of judicial independence. It is universally accepted that when judges can be easily or arbitrarily removed, they are much more vulnerable to internal or external pressures in their consideration of cases.<sup>532</sup> Thus, the term of office and conditions of service for judges shall be secured by law and tenure shall be guaranteed until retirement or expiration of their term of office.<sup>533</sup>

One way to ensure tenure security is having appropriate promotion and disciplinary Procedures. When promotions are made and disciplinary measures are taken against judges transparency is important. Meaning, for instance, the criteria for decisions should be published. Opportunities for promotion should be advertised and judges should be able to compete in a transparent process. There should be objective criteria for both disciplinary and promotion decisions and receiving comments from the public, lawyers, and law professors.<sup>534</sup>

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<sup>530</sup>Id , Art. 81(1,3)

<sup>531</sup> Guidance for Promoting judicial independence and impartiality cited above at note 518 p.,17

<sup>532</sup> Id , p.19

<sup>533</sup> Basic Principles on the Independence of the Judiciary cited above at note 519

<sup>534</sup> Guidance for Promoting judicial independence and impartiality cited above at note 518 p.19

A well-structured disciplinary procedure is crucial to decrease the exposure to abuses that affects judicial independence. Judges subject to discipline should be afforded due process protections. Penalties should be proportionate to the offense.<sup>535</sup>

When we come to Ethiopia's case related to tenure security, the constitution provides that judge shall not be removed from his post before he reaches the age of 60. The only exceptions to these are if the judge are removed based on the following conditions: when the Judicial Administration Council decides to remove him for violation of disciplinary rules on the Disciplinary and Code of Conduct Rules for judges or on grounds of gross incompetence or inefficiency; or when the Judicial Administration Council decides that a judge can no longer carry out his responsibilities on account of illness; upon resignation, subject to a two-month prior notice; and when the House of Peoples' Representatives or the concerned State Council approves by a majority vote the decisions of the Judicial Administration Council.<sup>536</sup>

It is possible for any person to lodge a complaint against federal judge having transgressed what has been provided under the proclamation to the judicial administration commission.<sup>537</sup> Thus, to ensure tenure security, once the council makes sure that the conditions indicated under the constitution and proclamation for the establishment of the Federal Judicial Administration Commission No. 24/1996 are fulfilled it has to transfer the case to the HPR. The HPR which is also responsible for the appointment has to approve such decision of the council by majority vote to remove a certain judge for his position.

- ❖ Organization and administration of courts and the relationship of a judiciary's budget to judicial independence.

There are mainly two basic models for the organization of the judiciary these are : a judiciary which is dependent on an executive department, usually the ministry of justice, for administrative and budgetary functions and a judiciary which is a separate branch of government and has the same degree of self-government and budgetary control over its operations.<sup>538</sup>

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<sup>535</sup>Id p..20

<sup>536</sup> FDRE constitution cited above at note 182 Art.79(4) cum Establishment Proclamation of the Federal Judicial Administration Commission cited above at note 520, Art. 9

<sup>537</sup> Establishment Proclamation of the Federal Judicial Administration Commission cited above at note 520 Art. 10

<sup>538</sup> Guidance for Promoting judicial independence and impartiality cited above at note 518, p.23-26

It will be difficult to secure independence in a system in which the judiciary is dependent on the executive for their budget and administration of the courts, especially when coupled with executive control over appointments, promotions, and discipline. This will influence the public's perception and expectations with respect to its independence. After developing the capacity of judicial leaders to discharge their responsibilities effectively it will be best to transfer administrative and budgetary responsibility to the judiciary, which will help to enhance independence. And they need adequate budget to discharge their responsibilities. If the Judiciary has no adequate resources it will be difficult to offer the salaries, benefits, and pensions needed to attract and retain qualified candidates, and, in some cases, to reduce the likelihood of corruption.<sup>539</sup>

The FDRE constitution has established an independent judiciary under article 78(1). Thus, the judiciary is organized as an independent branch of the government, it is not under any of the other two branches of the government. As regards budget, the Federal Supreme Court is expected to prepare and submit to the House of Peoples' Representatives for approval the budget of the Federal courts, and upon approval, administer the budget. Similarly, the budgets of State courts shall be determined by the respective State Council.<sup>540</sup> Thus, the judiciary is authorized by the law of the land to administer its own budget which will enable them somehow be liberated from influence of the executive branch of the government.

- ❖ External monitoring of courts can help tool to enhancing the independence of the judiciary. Human rights organizations, bar associations, and legal service providers, a governmental organization taking the lead in justice reform , and academic organizations in carrying out research about the judiciary. It will be easier for this organs to monitor the courts, if the courts are transparent. Good case tracking and information systems not only allow courts to better manage their operations, and also enable the external watchdogs to observe trends and identify questionable matters.<sup>541</sup>

All the above situations considered to secure the independence of the judiciary are very important for the taxpayer and the issues he takes to the courts. Since one of the parties to the case is a government agency, if the courts are influenced by the executive it will be of

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<sup>539</sup>Ibid

<sup>540</sup> FDRE Constitution cited above at note 182, Art. 79(6,7)

<sup>541</sup> Guidance for Promoting judicial independence and impartiality cited above at note 518, p35-36

no used to take a case to the courts. It is important to make sure the independence and impartiality of the courts if we are to respect the fundamental constitutional right of appeal. Thus, the courts need to be free from the influence of other organs of the government and also the judged need to be free from personal and financial involvement a certain case to be able to render an impartial judgment for the taxpayer's claim.

### 4.5.3. The Right to Get Reasoned Decision

Requiring that judges state the reasons for their decisions deters rulings based on considerations other than law and facts. Courts should be obliged to present to the parties a statement of the decision sufficient to explain it, and the criteria they use to come up with a given verdict.<sup>542</sup> It is very important that the Judge make sure that the record of the case is complete and the decision shall be made only based on the information on the record. The decision must contain evidence justifying the court's decision.<sup>543</sup> The reliance of the decision maker on the legal rules and evidences adduced and the analysis made using that is crucial for a reasoned decision. This will make sure that the hearing is not pretence. Making sure that a decision is well reasoned will rectify that a person's right to hearing, present evidence, make legal arguments and the like are not looked over. As reasoning is one procedural requirement which helps a fair determination of a person's substantive right; when there is a conflict.<sup>544</sup>

When courts carry out a judicial review they will determine the reasons for the action based on the reasons explained in the administrative decision. Similarly, rendering a decision after a thorough explanation and reasoning why they decided in a certain manner is imperative for the appellate court. Thus, the existence of an understandable and comprehensive reasoning will facilitate the appeal process, if any.<sup>545</sup>

These merits of reasoned decision are similarly important when a tax case is entertained by a regular court. As it has been explained in previous sections the taxpayer has a option to take a case to the regular courts if he is not satisfied with the decision rendered by the tax appeal

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<sup>542</sup> Id p.33-34

<sup>543</sup> Semahagn cited above at note 9, p.29

<sup>544</sup> Jerry L. Mashaw, cited above at note 85, p.106-108

<sup>545</sup> Ibid, p.109,111

commission on question of law. The taxpayer is taking his case to the courts because he thinks his case is not entertained as the law orders. Thus, the courts are expected to entertain the case thoroughly, check if the tax authority made an error of law and give a well reasoned decision. The reasoning will help for the taxpayer to understand that the court has seen his case according to the law and if he is still not satisfied with that decision he will be able to identify a base for an appeal to the next ladder.

In relation to this lets consider a case we mentioned earlier, which was has been entertained starting from the review committee to the Federal Supreme Court Cassation Bench.

Mulu Amen PLC vs ERCA<sup>546</sup> The PLC lost its accounting documents because of a fire which occurred in 1998. Thus, the tax authority should relied on estimation to assess the tax due to the company. But the issue is the PLC's claim that the profit margin should be calculated only based on 1.65% because they could not sale beyond this margin because of a contract they have with the producer of the products the PLC sell. But ERCA assessed the tax based on 7.5% profit margin.

Though the case was first appealed to the review committee the committee decided the fact that the accounting records are destroyed will only help during the assessment of fine rather than that the issue of profit percentage is correctly used by the authority. Thus, the case is again appealed to the TAC. The PLC claimed that the fact that the authority decided to use 7.5% profit margin because they are not able to bring the accounting documents that are already lost in the fire, is not fair. The authority claims that it is, the authority's legal right to assess by estimation if there is no accounting record kept by the PLC. That the profit margin used was correctly assessed based the relevant directive. The only thing TAC bother to do in this case is that the authority has right to assess the tax by estimation since there are no accounting records. Thus because of this the appellatant was forced to appeal the case to the Federal High Court.

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<sup>546</sup> Mulu Amen PLC vs ERCA cited above at note 486

The case<sup>547</sup> was appealed to the Federal High Court. The only thing the court indicated in its one page decision is that it called the respondent and heard the arguments of both parties. Thus, decided that there was no error of law or fact committed by the TAC.

The court did not explain what has been argued by the parties and on what bases it decided that there was no error at all. It does not mention whether the evidences presented by the appellant were considered correctly by the TAC.

The purpose of an appellant court is to review the decisions of lower courts and figure out if mistakes are made and give solution to that error. Similarly here the Federal High Court is one way of checking whether the administrative tribunals are doing their job correctly. But here, the court repeated the mistakes done by the Commission by failing to reason well while rendering its decision and consider the appeal of the tax payer correctly. The court confirmed the decision of the TAC based on 348 (1) of the Civil Procedure Code.<sup>548</sup>

As a result on Feb 13/2005 the case<sup>549</sup> was appealed to the Federal Supreme Court but the court just mentioned that it agrees with the decision of the lower courts. Thus, using its right to close the case without calling the respondent on Art. 337 of the Civil Procedure Code. It did not correct the mistakes of the lower courts. Then the case<sup>550</sup> was taken to the cassation bench of the supreme court on May 22/2006 E.C. The court identified that the lower courts failed to consider the evidences as to the fire accident before deciding to use assessment by estimation. Thus, the court indicated that the lower courts should have seen evidence to prove, if the accident really occurred and that the accident destroyed the accounting records.

The Cassation Court decided that the way the case was entertained breaches the right to be heard of the appellate thus the case is returned to the TAC to be reconsidered on certain conditions. The problem could have been solved by the lower courts easily. The fact that the case was not thoroughly considered by the TAC in light of the argument of the parties and evidences presented, forced the appellant to take the case up to the cassation division. It is obvious that the appellant's time and money are wasted when it could have been remedied earlier. The case took about 2 years to get fair decision. Which is a lot of time for the

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<sup>547</sup> Mulu Amen PLC vs ERCA (File No118346.) Federal High Court (Dec 11/2005 E.C.) (unpublished)

<sup>548</sup> Art. 348(1) The judgment may confirm, vary or reverse the decree or order from which the appeal is preferred

<sup>549</sup> Mulu Amen PLC vs ERCA (File No86148.) Federal Supreme Court (Feb.13/2005 E.C.) (unpublished)

<sup>550</sup> Mulu Amen PLC vs ERCA (File No88446.) Federal Supreme Court Cassation Division (May22/2006 E.C.), Vol.16, p.302-306

taxpayer to waste. The TAC failed to give its fair and speedy solution before the case goes through all this. Even if the TAC is mistaken the high court could have corrected the mistakes, but they failed to do so. This all is the result of the ignorance of the forums to support their decisions with satisfactory reasoning. Thus, we can understand from this case the importance supporting once decision with reasons.

## Chapter 5

### 5. Conclusion and Recommendation

#### 5.1 Conclusion

Tax is a compulsory contribution payable by the citizens to a government without expectation of direct and equivalent return. It is very crucial to have a tax administration, which will improve the laws regarding registration, assessment and collection of revenue. In addition to this, the system should come up with an impartial and professional service, which is trusted to keep taxpayers information confidentially (save the exceptions).

Procedural due process identifies procedures that need to be followed before an individual's right to life, liberty or property is deprived; which includes notice, hearing, the right to counsel, impartiality on decisions making and reasonable decisions based on record.

A formal acknowledgement of taxpayers' rights is vital to restore and maintain taxpayers' confidence on administration of the tax laws by the Tax Authority. There is no uniformity in having a single document dealing with the rights of taxpayers. Some countries have a charter of taxpayers' rights and others do not. The fundamental rights which could be considered as common for all taxpayers are: the right to be informed, the right to quality service, the right to pay no more than the correct amount of tax, the right to challenge the tax authorities position and be heard, the right to appeal on tax authorities decision in an independent forum, the right to finality, the right to privacy, the right to confidentiality, the right to retain representation, and the right to a fair and just tax system, including access to the taxpayer advocate service. To achieve the purposes of taxation it is paramount to protect and respect the taxpayers' right since they are the source of the income. Ethiopia has not yet codified taxpayers' right under a single document they are found dispersed in different legal documents including the FDRE Constitution.

Since its beginning, the modern Ethiopian tax system has developed and evolved mainly as a result of increase in the need for revenue, change in economy and governments and the shift in international situations. The Ethiopian tax system went through some major revisions



and numerous piecemeal amendments. Currently the Ethiopian Revenues and Customs Authority (ERCA) is the body responsible for collecting revenue from customs duties and domestic taxes.

To determine the liability of the taxpayer assessment needs to be done. Tax assessment is crucial to avoid arbitrary imposition of tax on citizens and create a uniform and fair method of tax collection which can be applicable equally on all citizens. Assessments may be made in one of this two ways; assessment based on books of account and assessment by estimation. In case of assessment based on books of accounts , the records and accounts of the taxpayer will be examined by the concerned body for assessment. Assessment by estimation, on the other hand, is made without the books and records by the taxpayer. This kind of assessment can be made in different forms. ERCA has a directive that governs assessment by estimation. There are different means to make the estimation; one means being relying on the information gained from third parties. It is unavoidable that the taxpayer is at the mercy of the authority since the information they use to estimate the tax is subjective. Thus, the taxpayer will not be able to pay exactly what he owes; resulting to an unfair amount of assessment.

After making a timely tax assessment the tax authority has to send notice of tax assessment to the taxpayer to notify the assessment. In examining tax returns, the basic principle is that a return is assumed to be correct until the assessing official determines otherwise. However, if the authority finds the accounts presented suspicious then it will make an audit.

It has been identified in the course of the research that, the taxpayer usually gets 5 days to prepare the necessary documents after the receipt of the notification letter. It is observed in practice that a lot of complains are raised that the five days are not enough though the authority tries to see the complains case by case and add some period for the taxpayer to prepare documents. Thus, the law does not govern how many days are given for the taxpayer after notification to make the necessary preparation for the auditing. This is observed creating uncertainty and giving a lot of discretion for the tax officials to decide whether to give additional time or not. Since this procedure is prone to abuse it will have its own effect on the due process right of the taxpayer.

After the necessary procedures of auditing are completed the auditor is expected to prepare a report. The time in which the auditor is expected to be done with the report depends on the situation. In relation to this, though the manual provides 21 days to prepare a report, it is

evident from the practice that it could be extended sometimes even up to 2 months due to different reasons. The law did not put a limitation to the discretion that the authority is using to extend the time for an audit report. It is possible that the auditors could abuse this right to request for an extension for any reason pertaining to their fault. This will affect the rights of taxpayers one way or another.

Tax foreclosure is a public authority's seizure and sale of property for non-payment of taxes. The purpose of tax foreclosure could be securing public revenue and ensuring that taxpayers are not denied their rights to property and due process. It is necessary to give the opportunity to appeal when the taxpayer is aggrieved of the assessment made by the tax authority.

A taxpayer who has received a notice of seizure or whose property has already been seized can appeal to the tax authority to get additional period, to pay the tax he owes the government or a permission to pay the debt in an instalment. The taxpayer can pay 50% of the debt he owes to the government first and then he can pay the remaining amount in three month instalment. However, asking for the 50% of the tax levied before getting the chance to pay the rest in an instalment seems a bit too much. One of the reasons for the taxpayer not to pay the tax he owes is inability. Thus, it might be difficult to come up with the 50% of the tax due to take advantage of the payment in instalment.

The tax authority is the judge and enforcer without the involvement of the court in the tax foreclosure process. Thus, the right of taxpayers is solely in the hands of a government agency. This power of the authority may be abused and leave the right of default taxpayers to property and access to justice at risk. It can be witnessed from the tax foreclosure rules that there is no much of room for the taxpayer to lodge complaints, if any, in the whole proceeding. None of the forums prepared for the taxpayer to appeal his case allow the taxpayer dissatisfied with the tax foreclosure proceeding to lodge their grievances.

In addition to this, the fact that the court has no say in the process will have a risk of abuse of taxpayer's right by the authority. This will definitely affect the constitutional right to access to justice of taxpayers.

While working together the taxpayer and the tax authority will encounter disagreements as a result of different reasons; thus it is imperative to have a competent, impartial and

independent grievance handling forums. This grievance-handling organ could be within the tax administration or outside. Disputes that are raised in relation to tax can be entertained in the review committees, the TAC and, regular courts.

It is evident that the law does not indicate who shall be the member of the committee. Practically, it is witnessed that members of the review committee are the employees of the tax authority. The taxpayer is not represented in any way in the committee. It seems unavoidable that the committee may be partial sometimes; since the law does not indicate who shall be the member of the committee. This situation may make us question the independence of the committee since they are entertaining cases which are decided by other employees of ERCA, like the tax auditors. Hence, this will have an obvious effect on the rights of the taxpayer.

The 10 days requirement for the taxpayer to appeal to the tax authority is a hindrance to the right to be heard of the taxpayer. The taxpayer needs sufficient period of time to prepare his application with evidence. The other problem related to the committees is the fact that they are only entitled to hear cases related to tax assessment. However, this should not be the case since a lot more issues can cause disagreement between the tax authority and the taxpayer. One could be cases related to foreclosure. The law did not provide procedures to be followed by the review committee while entertaining cases. This will open a way for to arbitrariness in the action of the review committee and make it difficult for the taxpayer challenge the procedure. There is no time limit provided in the law for the committee to render its decision. The essay identified that in practice, the time to decide on a given case is dependent on the complexity of the case. If there is no legal limit it is clear that the committee may not deliver its decision on a reasonable time.

We have witnessed from considering some cases decided by review committees that the review committee is not rendering a reasoned decision for the taxpayer. which is manifested by lack of explanation of the case in hand clearly, failing to state the claim of the taxpayer and the argument raised by the tax authority, issues are barley framed, evidences presented by the taxpayers were not considered correctly or even if they were considered we have no means to know that since they are not written clearly in the recommendation, the committee won't bother to explain the relevant laws relating it to the case at hand thus, making the recommendation shallow. Thus, a decision rendered having all this flaws will have a direct effect on the fundamental right of the taxpayer.

There is no directive to govern the composition of the TAC which should have been issued by the Ministry of Justice. The lack of detailed rules as to the composition of the TAC will have a direct impact on the decisions rendered by the TAC. The members of the TAC are drawn from the Ministry of Trade and Industry, the Ministry of Finance and Economic Development(MOFED), the Ethiopian Customs and Revenue Authority(ERCA) , the Ministry of Justice and representatives from the taxpayers and the Chamber of Commerce. It is clarified that the impartiality of the commission might be in doubt since the commission included that representatives of MOFED and ERCA as its members. The decision from which the appeal came is rendered by ERCA; thus if the representatives of this authority are members of the appellate tribunal, this would be like being a judge on your own case. This will in danger the impartiality of the tribunal; which is a due process right of the taxpayer.

The other issues which are raised in relation to TAC are the unfairness of the 50% and 30 days requirement. It is practically witnessed that, the tax debt imposed on the taxpayer would be too much for him that the taxpayer would not be able to pay even the 50%. Since one of the requirements to take a case to the commission is to pay 50% of the tax debt assessed, 30 days might not be enough to prepare such amount of money including other documents necessary. Therefore, this will have a direct impact on the right to be heard of the taxpayer. Similarly as in the case of the review committee, there is no provision that governs the time limit to render decision. In addition to this, the fact that the commission will only have a session three times a week and the members are not regular employees will make the procedure delayed. The fact that the Federal Tax Appeal commission is only located in Addis is affecting the right to be heard of federal taxpayers in the other parts of the country.

Burden of proving that an assessment is excessive or that a decision of the Authority is wrong lies solely on the person objecting to the assessment or decision ( taxpayer). This could have its own effect on the process of appeal. There could be things that cannot be proved by the tax payer but in the contrary it is easy for the tax authority to do so, since for instance it is in possession of the documents needed. However, because the law only puts the burden of proof on the taxpayer sometimes they cannot prove their claim. Thus, there is no point of taking the case to a tribunal. As a result their right to be heard will be at risk.

It is observed from the cases decided by the TAC that there is a failure to present the testimony of expert witness clearly, not considering the evidences presented by the taxpayer

in a satisfactory manner and failure to clearly explain the laws referred for the decision, mainly resulted in a lack of reasoned decision.

When we see review by regular courts, one of the issues raised in relation to courts is the lack of hard and fast rule for distinguishing question of law and fact; which makes it difficult for the courts to easily determine issue of fact from law and entertain cases. The other issue is that the courts are like the other dispute settlement forums for taxpayer limited to addressing only disputes arising from tax assessment; though there are plenty of issues that can arise in the relationship of the taxpayer and the tax authority. Thus, the court is limited to reviewing cases entertained by the review committees and the TAC which are only on assessment issues. This will result to denial of the right to be heard of the taxpayers on other issues.

## **5.2 Recommendation**

The issues discussed in this paper include mainly, the lack of a law governing the appointment of the TAC and the effect on the right of taxpayers to an impartial tribunal, the adequacy of time limit provided to take a case to the Review Committee and the Tax Appeal Commission, the lack of time limit to render a final decision for both the review committees and the TAC, the reasoning rendered by the dispute settlement forums, the fairness of the audit and foreclosure procedures, the lack of a guidance to determine issues of law and fact to the court. Based on the analysis made in the paper regarding this problems the following recommendations are presented for consumption of different concerned bodies.

### **5.2.1 To the Taxpayers**

- ❖ Taxpayers are advised to keep their books and accounts in the right manner to reduce the chance of assessment by estimation.

### **5.2.1 To the Tax Authority**

- ❖ The directive governing assessment by estimation needs to be amended to include certain objective criteria to reduce the unfair taxation which is resulting from such assessment.
- ❖ Directives or manuals related to audit should include provision specifying the number of days available for a taxpayer after notification to make the necessary preparation for the auditing is served. This will help to reduce the discretion of the tax authority to give additional time.

The law did not put a limitation to the discretion that the authority is using to extend the time for an audit report. Thus, the law should provide for a limitation to reduce the abuse of discretion.

- ❖ The requirement of paying 50% beforehand to pay the tax due in an instalment should be reduced to a lesser amount; which will help the taxpayer to take advantage of this chance before his property is foreclosed.
- ❖ Trainings should be given to the members as to the importance of a reasoned decision and the rights of the taxpayers.

### **5.2.3 To the Ministry of Justice and other Federal Legislative bodies**

- ❖ The Ministry of Justice should enact the directive which regulates the appointment and composition of the members of the TAC.

The representatives of the tax authority and MOFED should not be included in the TAC to avoid being a judge on one's own case and insure impartiality of the tribunal.

- ❖ Establish branch offices of the Federal TAC in other parts of the country
- ❖ The 50% requirement should be reduced to a lesser amount; to make appeal to the TAC more accessible to taxpayers aggrieved by the decision of the tax authority. Related to this, the 30 days provided in the law to take a case to the TAC should be increased for the taxpayer to prepare the prerequisites of the appeal.
- ❖ The grievance handling institutions should also entertain cases other than tax assessment. Thus, the law needs to be amended to include other cases to insure the right to be heard of the taxpayers. One of such cases is disputes raised in relation to foreclosure procedures where the tax authority is the judge and enforcer without the involvement of the court. Therefore, the availability of a forum to hear the grievance of the taxpayer is necessary.

In relation to the involvement of the court Ethiopia should learn from the experience of United States of America where prior judicial warrant is needed before taxpayer's property is taken away.

- ❖ The law should indicate specifically who should be the member of the review committee. The members should not include the employees of the tax authority to avoid being a judge in one's case and insuring the right to an impartial and neutral organ entertaining a dispute. Furthermore, the taxpayer should be represented in the review committee to make the decisions rendered by the committee trusted. Hearings

conducted in the review committee should be open to the public to insure the impartiality, transparency and accountability of the members of the review committee, which will in turn make the verdict acceptable.

- ❖ The 10 days requirement for the taxpayer to appeal to the tax authority which is a hindrance to the right to be heard of the taxpayer should be increased. The increment will help the taxpayer to get sufficient period of time to prepare his application with evidence.

The law should come up with procedures to be followed by the review committee while entertaining cases. Which will help to reduce the arbitrariness in the action of the review committee. The law should also include a time limit for the committee to render its decision to decrease the delay of decisions.

The law should come up with strict regulations which require the members of the review committee to entertain cases presented before them carefully and render a well reasoned decision.

- ❖ Ethiopia should learn from other countries experience like Spain in relation to the issue of burden of proof. The law should introduce burden sharing between the taxpayer and the tax authority; where the tax authority will be asked to present certain evidences which are more easily accessible to the authority than it is for the taxpayer.
- ❖ A guideline which helps to determine issue of law and fact should be prepared. This will limit the court's discretion on determining whether a case contains question of law or fact.
- ❖ The country should enact a Taxpayers Bill of Right (TBOR) which will help a taxpayer to understand his rights easily without the need to refer to different codes as it provides the general rights that taxpayers have in an organized way.

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