

# The Ethiopian Tax System: Cutting Through the Labyrinth and Padding the Gaps\*

Taddese Lencho\*\*

*"Why may not that be the skull of a lawyer? Where be his quiddities now, his quillities, his cases, his tenures, and his tricks?"*

*William Shakespeare, Hamlet, Act 5, Scene 1, lines 100-101*

*"... and look at your laws: criminal law, civil law, property law, commercial law, international law, the law of the sea, law and order, legal codes, legal books..."*

*From 'Excess' by Sebhat Gebre-Egziabher, in SEED and Other Short Stories, Retold by Wendy Kindred, p. 4*

## Introduction

In a moment of dismissive hubris, Ethiopian tax system may be described as a loose agglomeration of proclamations, regulations, directives, rules, etc, which despite their loose ends and rough edges, seem to fulfill the singular purpose for which they are designed, namely raising revenues for the Ethiopian government. In the face of these loosely connected laws, one is tempted to conclude like Jacques Vanderlinden did more than forty years ago about the Ethiopian legal system as a whole: that is, it does not as yet exist.<sup>1</sup> The Ethiopian tax system has not been blessed with the excellent organization of many of the modern laws of Ethiopia - which (thanks to the codification project the country undertook in the 1950s and 1960s) were organized into well-written codes. A system (understood as an orderly arrangement of rules and institutions) is not the first impression that one gets out of coming face to

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\* This article is also slated to be published in Issue 20, No. 2 of Michigan State Journal of International Law.

\*\* Addis Ababa University, Faculty of Law, LL.B (Addis Ababa University); LL.M (University of Michigan Law School (Ann Arbor); PhD Candidate (University of Alabama, Tuscaloosa); I am grateful to my colleagues Gedion Timotheos, Martha Belete, Muradu Abdo, Seyoum Yohannes, Yazachew Belew for their comments on the earlier drafts of this article; and to professor Jim Bryce, of the University of Alabama, for his constructive comments on the earlier draft of this article. I would also like to express my gratitude to the DLA Piper Foundation for availing me with funds to do research on the Ethiopian tax system in general.

<sup>1</sup>Jacques Vanderlinden, *Civil Law and Common Law Influences on the Developing Law of Ethiopia*, 16 Buff. L. Rev. 250, 250-266 (1966-1967), at 250; Vanderlinden denied the Ethiopian legal system had yet existed after Ethiopia commissioned some of the most distinguished jurists at the time to codify 'its' laws - the Penal Code in 1957, the Civil, Commercial, and Maritime Codes in 1960, the Criminal Procedure Code in 1961 and the Civil Procedure Code in 1965

face with the dizzying array of taxes scattered almost haphazardly in so many disparate pieces of legislations.

Luckily, we don't have to subscribe to impossibly high standards (which appear to inform the opinions of Professor Vanderlinden) to qualify a given system as a legal system. If, in the words of John Henry Merryman, a legal system is understood merely as 'an operating set of legal institutions, procedures and rules', it is possible to qualify the rules of any sovereign state as a legal system, regardless of the degree of legal organization involved and the level of legal development in a given country.<sup>2</sup> In a sense, it is possible to speak in terms not only of a legal system as a whole, but also parts of that legal system, such as criminal justice system, revenue system, or as this article proposes, a tax system. To the extent it is possible to detect a hierarchy of institutions, laws, and procedures (however imperfectly these are understood), it is possible to write about a tax system like that of Ethiopia, without losing sight of the fact that some tax systems are better organized and more coherent than others. The Ethiopian tax system has an operating set of legal institutions (such as the parliament, tax authorities, and tax appeal tribunals and courts), procedures (for assessment, collection and complaints handling), and rules (the constitution, proclamations, regulations, directives, etc).

The modern 'Ethiopian tax system' (let's put it, provisionally, in quotation marks) is a product of more than half a century of experimentation in legislation and tax reform. It had neither the grand lawgiver to guide and direct it from behind nor a clear set of overarching policies to inform its directions.<sup>3</sup> Since its humble beginnings in the 1940s, the modern Ethiopian tax system has developed and evolved by fits and starts as the needs for revenue arise, as governments change and as the economy and international situations shift. Over the course of this period, the Ethiopian tax system went through some major revisions and numerous piecemeal amendments.<sup>4</sup>

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<sup>2</sup>John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America 1-4*, in John Henry Merryman, David S. Clark and John O. Haley, (2<sup>nd</sup> ed. 1985), *The Civil Law Tradition: Europe, Latin America, and East Asia*, Contemporary Legal Education Series, 1994, at 3

<sup>3</sup>As Eshetu Chole wrote, "it [the Ethiopian tax system] evolved in an *ad hoc* basis, in response to specific needs and pressures, i.e., in a planning vacuum"; see Eshetu Chole, *Towards a History of the Fiscal Policy of the Pre-Revolutionary Ethiopian State: 1941-1974*, in Eshetu Chole, *Underdevelopment in Ethiopia*, Organization for Social Science Research in Eastern and Southern Africa (OSSREA), 2004, at 63

<sup>4</sup>The major tax reforms in Ethiopia occurred in the 1940s, in the aftermath of the Ethiopian revolution of 1974, after the fall of the Derg in 1991 and most recently in the 2002 tax reforms.

This article will attempt to show that there is a system behind the apparently haphazard and disparate pieces of tax legislations of Ethiopia. No one has ever looked at the Ethiopian tax system as a whole (not as legal scholars would have liked it anyway) and it is therefore no surprise if the Ethiopian tax system strikes one as random, disorganized and incoherent in places. We are more accustomed to talking (if ever) about income taxes (even then, of specific income taxes), the value added tax or the customs duties than of the Ethiopian tax system as a whole.

Since the jurisprudence of Ethiopian taxation is yet to develop fully, the article will draw upon the comparative experience of some tax systems elsewhere to illuminate the 'gaps' in and suggest future directions for the Ethiopian tax system. Some of the terminologies used in this article are adopted from other tax systems for heuristic purposes. Due to the paucity of information on regional tax practice, the article will not deal with taxation at the regional level, except where federal laws impact the operation of regional tax systems.<sup>5</sup>

This article is divided into two parts. Part I of the article will address the constitutional and administrative issues surrounding the Ethiopian tax system. The second part will deal with the organization and sources of tax laws, including tax dispute settlement schemes in Ethiopia. The article will end with a conclusion and some recommendations. Through the legal and institutional arrangements that have made the Ethiopian tax system into what it is (in spite of the gaps and loose ends), the article aims to draw attention to the patterns that underlie the Ethiopian tax system.

## I

### 1. The Federal Arrangement in Ethiopia and Taxation Powers

The fundamental authority to tax is derived from the Constitution of 1995, which, following the federal structure, shares tax powers between the Federal Government and the Regional States.<sup>6</sup> The Ethiopian Constitution goes to greater lengths than other areas of power in allocating taxation powers between the Federal Government and the Regional States.<sup>7</sup> The Constitution

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<sup>5</sup>This is not a significant omission, as the Federal Government has had an overwhelming influence over the regional tax system, to the extent the latter is said to exist.

<sup>6</sup>See The Constitution of the Federal Democratic Republic of Ethiopia, *Federal Negarit Gazeta*, 1<sup>st</sup> year, No. 1, 1995, Articles 95-99

<sup>7</sup>On the implications of the specificity of the Ethiopian Constitution, see Taddese Lencho, *Income Tax Assignment under the Ethiopian Constitution: Issues to Worry About*, 4 *Mizan Law Review*, No. 2, (December 2010), at 31-51

classifies taxation powers as 'taxes exclusive to the Federal Government'<sup>8</sup>, 'taxes exclusive to the Regional States'<sup>9</sup>, 'taxes concurrent to both the Federal Government and the Regional States'<sup>10</sup> and 'taxes undesignated'.<sup>11</sup>

With the exception of customs duties, which are the exclusive preserve of the Federal Government, most other taxes are sliced into pieces by the Ethiopian Constitution and shared between the Federal Government and the Regional States on the basis of certain set formulas. Income taxes on employment income are, for example, shared on the basis of the identity of employers so that if an employer is a Federal Government or an international organization, the Federal Government exercises the power to impose tax on the employees, and if an employer is a state government or a private enterprise, state governments get to levy tax on the employees.<sup>12</sup> The Constitution follows similar patterns of tax-power sharing on most other taxes.<sup>13</sup>

The Ethiopian federal arrangement follows the dual structure in which all the three branches of government (legislative, executive and judicial) co-exist in respect of the Federal and Regional powers. This, in taxation, means in principle that both the Federal Government and the Regional States enjoy full legislative, executive and judicial powers in respect of taxation powers reserved to them. In practice, however, the Federal Government has had the most dominant presence in the legislation of taxation respecting not just 'federal exclusive taxes' but also 'concurrent taxes' and at times even 'regional exclusive taxes'.<sup>14</sup> Although Regional States have the prerogative to issue their own tax laws in respect of tax sources reserved to them by the Constitution, many of the Regional States for a while used federal tax laws to levy and collect regional taxes.<sup>15</sup> The Regional States did not immediately exercise their legislative powers of issuing their own tax legislations. Some of the Regional Governments have begun issuing their tax legislations recently. However, the

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<sup>8</sup> Constitution, *supra* note 6, Article 96; the Constitution headlines these powers simply as 'federal power of taxation', 'state power of taxation'; the word 'exclusive' is added here to highlight what these powers actually mean.

<sup>9</sup>Id, Article 97

<sup>10</sup>Id, Article 98

<sup>11</sup>Id, Article 99; there is an implicit fifth category: a tax designated by the Constitution but requiring re-designation via an amendment of the Constitution.

<sup>12</sup>Id, see Articles 96(2) and Article 97(1)

<sup>13</sup>Profit taxes are assigned on the basis of the legal status of the business enterprise subject to profit taxes; similarly, sales taxes appear to be assigned on the basis of the legal status of the business enterprise collecting sales taxes; taxes on federally owned and regional-state-owned enterprises are assigned to the federal and regional states respectively; see Taddese Lencho, *supra* note 7, at 38-40.

<sup>14</sup>Ibid

<sup>15</sup>See Taddese Lencho, *supra* note 7, at 43-45

exercise of the legislative power over taxation still remains a formal matter because the Regional Governments have yet to fully exercise their taxation powers. Many of the Regional States that have issued their own tax laws have used federal tax laws as models with the result that there is virtually no difference in substance between federal tax laws and regional tax laws.<sup>16</sup>

One of the striking features of the Ethiopian Constitution on matters of taxation is the unusual specificity and detail of provisions that assign taxation powers between the Federal Government and the Regional States. Since the Ethiopian Constitution is unusually concrete and specific in the area of tax powers, its language in this respect leaves very little room for argument about which layer of government has what tax powers. Nonetheless, some issues remain contentious. One is the exercise of concurrent powers. The Constitution gives out very little as to how the concurrent tax powers are to be exercised in practice.<sup>17</sup> Following the practice of other federal systems, several options may be open to both layers of the Ethiopian federation.<sup>18</sup> The Regional States may impose their own taxes in addition to the Federal Government taxes. The Regional States may choose to impose additional tax rates on an otherwise federal tax law. Or the Regional States may choose to agree with the Federal Government to share the proceeds of federally collected tax. In Ethiopia, it is the third option that prevails, presumably because there is a hint to that effect in Article 62(7) of the Constitution.<sup>19</sup> The Federal Government levies and

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<sup>16</sup>This form of tax legislation has created some curious developments in the Ethiopian Federation, casting doubts over the capacity and the will of the Regional States to chart their own autonomous course. The only area of tax law where the Regional States have not copied from federal tax laws is the agricultural income tax laws, presumably because there is no federal agricultural income tax law – agricultural income taxes are the exclusive preserve of the Regional States under the Ethiopian Constitution; see Article 97(2) and (3) of the Ethiopian Constitution; see also Deso Chemedo, *Agricultural Income Taxation in Oromia*, Senior Thesis, Addis Ababa University, Faculty of Law Library Archives, 2008 (unpublished); even today, many of the Regions invoke federal tax laws like the Federal Turnover Tax law of 2002 to collect turnover taxes.

<sup>17</sup>See Solomon Nigussie (2006), *Fiscal Federalism in the Ethiopian Ethnic-based Federal System*, Wolf Legal Publishers (WLP), at 136-137

<sup>18</sup>See Anwar Shah, "Introduction: Principles of Fiscal Federalism", in Anwar Shah (ed.), *The Practice of Fiscal Federalism: Comparative Perspectives, A Global Dialogue on Federalism*, vol. 4, (McGill: Queen's University Press), 2007, at 21.

<sup>19</sup>Article 62, sub-article 7, of the Ethiopian Constitution empowers The Federal House of Federation (HOF) to determine the division of revenues derived from joint Federal and State sources; which must be the case because the Federal Government collects joint/concurrent tax sources; See Constitution, *supra note 6*, Article 62(7); in this regard, it is also instructive to review the practice prior to the ratification of the Constitution. During the transition period, the division of revenues was regulated by a proclamation issued during the transition period; that proclamation has a clear

collects concurrent taxes. The revenues from concurrent taxes are shared on the basis of a revenue-sharing scheme approved in 2004 by the House of the Federation (HoF).<sup>20</sup>

The other contentious area is the meaning of 'undesigned taxes'. In the assignment of expenditure powers, the Ethiopian Constitution follows what might be described as the principle of residuality, which is stipulated in Article 52 of the Constitution. All expenditure powers which are not expressly stated as federal powers or concurrent powers of the Federal Government and the Regional States are assumed to be reserved as the powers of the Regional States. This is not the case for taxation powers. Taxes not designated as either 'federal exclusive' or 'state exclusive' or 'concurrent to both' should be referred to the joint session of the House of the Federation and the House of Peoples' Representatives, which shall determine by a two-thirds majority vote on the exercise of powers of taxation.<sup>21</sup>

What really constitutes 'undesigned' in the world of taxes has been a subject of some debate in practice. The Ethiopian Constitution refers to many types of taxes by name. The Ethiopian Constitution may have also mentioned some taxes in substance but not in name. A case in point is the value added tax (VAT). VAT is not mentioned in name but in substance (if we take it to be in the family of sales taxes in general), it is mentioned in several provisions of the Constitution.<sup>22</sup> If we take 'undesigned' to mean literally 'unmentioned', VAT

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provision regarding the levying and collection of 'joint' or 'concurrent' revenues'. It provides that 'joint' taxes shall be collected by the central (federal) government and the proceeds distributed among Regional States on the basis of derivative principles. There is reason to believe that this practice continued unabated after the Constitution has replaced the proclamation in 1995; see Proclamation No. 33/1992, a Proclamation to Define the Sharing of Revenues between the Central Government and the National/Regional Self-Governments, *Negarit Gazeta*, 52<sup>nd</sup> year, No. 7, Article 8(4); see also Taddese Lencho, *supra note 7*, at 42

<sup>20</sup>The revenue sharing scheme instructs the Federal Government to share with the Regional States 50% of the proceeds of profit and dividend taxes, 30% of the indirect taxes and 40% of the mineral taxes; the Federal Government also controversially took over the administration of VAT (part of which would have fallen under the jurisdiction of the Regional States) and decided to return the proceeds to the Regional States based on the sources from which VAT is being collected (i.e., derivative principle); see Solomon Nigussie, *supra note 17*, at 140 and 210

<sup>21</sup>Constitution, *supra note 6*, see Article 99

<sup>22</sup>*Id.*, see Articles 96(1), (3), 97(4), (7), and 98(1); the literature on VAT invariably classifies VAT as a sales tax; see, for example, Alan Schenk & Oliver Oldman, *Value Added Tax: A Comparative Approach, with Materials and Cases*, Transnational Publishers, 2002, at 24; John F. Due and Ann F. Friedlaender, *Government Finance, Economics of the Public Sector*, 2002, at 404ff; at the time of the ratification of the Constitution in 1994, VAT was unknown in Ethiopia and it could not have been mentioned by the

qualifies as an undesignated tax and therefore falls under Article 99 of the Constitution. When VAT was first proposed as a new source of tax at the beginning of this century, some members of the Joint Houses questioned whether VAT was indeed an Article 99 matter, or whether its introduction as a federal tax required the amendment of the Constitution.<sup>23</sup> Apparently, not many put much stock in the merit of those debates, and when the matter came to the vote, the Joint Houses unanimously gave the power to impose VAT to the Federal Government (apparently taking VAT as an undesignated tax).<sup>24</sup> But in an apparent U-turn, the Federal Government later agreed to return to the Regional States the proceeds of VAT collected from sources reserved to the Regional States.<sup>25</sup> If VAT were a federal tax as the Joint Houses at first seemed to think, there would be no need to share the revenues with the Regional States. The Federal Government could have treated VAT as any of the federal exclusive taxes and used the proceeds either for its direct budgetary needs and/or distributed the proceeds in the form of federal grants. The Federal Government probably realized upon assuming the power to levy and collect VAT that VAT was after all not an undesignated tax but a designated tax (as a sales tax) requiring the exercise of power over VAT at multiple jurisdictions – federal, Regional State and concurrent. In any case, the decisions reached over the years with respect to the introduction of VAT illustrate the practical problems arising from characterizing ‘undesignated-ness’ under the Ethiopian Constitution.

The subject of ‘undesignated taxes’ is not always contentious, however. There are many clear cases in which the Constitution failed to designate the power over certain taxes and the Joint Houses appropriately intervened to designate these taxes. Excise taxes on private enterprises, income taxes on royalties from the exercise of copy rights and patents, income taxes on interest from bank deposits are not designated in the revenue provisions of the Constitution. The Joint Houses met and designated excise taxes on private enterprises as ‘concurrent taxes’, income taxes on interest accruing from bank deposits as ‘federal taxes’, income taxes on royalties derived by individuals as ‘regional taxes’, and income taxes on royalties derived by enterprises as ‘concurrent

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drafters in name. At that time, Ethiopia had a general sales tax law that applied upon manufacturers or producers and importers of goods and services only, and it is therefore little surprise that the Constitution mentions this type of sales tax, and not the VAT.

<sup>23</sup>See Berhanu Assefa, *“Undesignated Powers of Taxation in the Distribution of Fiscal Powers between the Central and State Governments under the FDRE Constitution,”* Senior Thesis, Addis Ababa University, Faculty of Law Library Archives, 2006, unpublished, at 59-60

<sup>24</sup>*Id.*, p. 60; VAT was issued as a federal tax law in 2002; see Value Added Tax Proclamation No. 285/2002, *Federal Negarit Gazeta*, 8<sup>th</sup> Year, No. 33

<sup>25</sup>See Solomon Nigussie, *supra note 17*, at 140

taxes'.<sup>26</sup> Since none of these taxes could be said to be designated either in name or substance, there would be little debate over the decisions the Joint Houses took.

## 2. Constitutional Limits on Taxation Powers

Apart from the limitations federalism imposes upon the powers of taxation, a number of provisions in the Federal Constitution impose additional limitations upon the taxation powers of the Federal Government and Regional States. Constitutional issues pertaining to taxes are perhaps as numerous as the constitutional issues themselves. Taxes may affect the right to property, equality, privacy, freedom of expression, speech, religion, etc.,<sup>27</sup> which shows that issues of taxation may be co-extensive with constitutionally recognized liberties and freedoms. Here we shall limit ourselves to those limitations that are distinctly and commonly tied to taxation powers.

In writing about the limits on taxation powers, we cannot (unfortunately) go beyond the bare language of the Ethiopian Constitution - for there are no cases as yet, to the best of the writer's knowledge, to illuminate for us what the Constitution might mean in this regard. Our principal reference in this regard is Article 100 of the Ethiopian Constitution. Although it carries an unfortunate title 'directives on taxation' - which downplays and understates the force of the provision - there is little doubt that Article 100 of the Constitution is intended as a limit on taxation powers of the Federal Government and Regional states.<sup>28</sup> Since the objective of this article is not simply to restate the principles and limitations laid down in the Constitution but also to highlight gaps (if any) in it, we shall have recourse below to some other limitations that are not clearly recognized under the Ethiopian Constitution.

### 2.1. The Principle of Tax Legality

The first limitation found in some constitutions is the principle of tax legality. The modern principle of tax legality is a derivation from the great historical

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<sup>26</sup>Minutes of the 1<sup>st</sup> Joint Session of the House of Federation and the House of Peoples Representatives (Meskerem 26, 1996 E.C. in Amharic), -quoted in Berhanu Assefa, *supra* note 23, at 62-63

<sup>27</sup>See Tracy A. Kaye and Stephen W. Mazza, *United States - National Report: Constitutional Limitations on the Legislative Power to Tax in the US*, 15 Mich. State J. Int'l L.2, (2007), at 489-490; David Glikberg, *Israel - National Report*, 15 Mich. State J. Int'l L.2, (2007), at 371ff; see also Stephen W. Mazza and Tracy A. Kaye, *Restricting the Legislative Power to Tax in the United States*, 54 Am. J. Comp. L., (Fall 2006), at 641-670

<sup>28</sup>The Amharic version of the Constitution has the final authority in the event of conflict between the English and Amharic versions of the Constitution. The Amharic version of the Constitution uses the word '*merihowoch*', which roughly translates as 'principles'. In this regard, the Amharic version is closer to the spirit of the Constitution; Constitution, *supra* note 6, see Article 106



battles fought between legislative and executive bodies over the power of taxation. Taxation is historically the crucible of the struggle for supremacy of powers between the legislative and executive bodies.<sup>29</sup> From the *Magna Carta* to the English Revolution of 1688, to the American Independence, taxation was the battle cry of those who sought to keep the power of taxation in the hands of the legislative (representative) bodies of the government - hence the colorful slogan 'no taxation without representation'.<sup>30</sup>

At the minimum, the principle of tax legality means that taxation must have a legal basis, and this is recognized as a constitutional precept in most legal systems.<sup>31</sup> This requirement is written into the constitutions of many countries, and even in those countries where it has not obtained explicit constitutional recognition, it has been derived from other constitutional principles like 'equality in taxation' (Switzerland) or constitutional provisions guaranteeing personal freedom (Germany).<sup>32</sup>

Beyond the threshold consensus that taxation must have a legal basis, there is no agreement as to what else the principle of tax legality requires in a given tax system.<sup>33</sup> One area where the principle of tax legality has some relevance is over the extent to which legislatures can delegate tax law making authority to the other branches of government.<sup>34</sup> The principle of tax legality can be understood not only as a principle that ensures the supremacy of the legislature over tax matters but also as a precept that constrains the powers of the legislature (in this case its power to delegate taxation powers to the other branches of government). In this regard, the principle of tax legality can be understood to mean 'no delegation of taxation powers whatsoever' and at the other extreme it can also mean delegation of taxation powers is permissible for the legislature so long as a constitution allows delegation of legislature powers

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<sup>29</sup>As William B. Barker writes: '...one of the most important movements' in the development of the modern state 'has been the struggle to remove the power to tax from monarchs and to place that power exclusively in the hands of legislators.' See William B. Barker, *The Three Faces of Equality: Constitutional Requirements in Taxation*, 57 Case W. Res. L. Rev. 1, 2006; see also Frans Vanistendael, "Legal Framework for Taxation", in Victor Thuronyi (ed.), *Tax Law Design and Drafting*, International Monetary Fund, vol. 1, 1996, at 16

<sup>30</sup>See William B. Barker, *supra note 29*; Frans Vanistendael, *supra note 29*, at 16 and 18

<sup>31</sup>Frans Vanistendael, *supra note 29*, at 16

<sup>32</sup>*Id.*, pp. 16-17

<sup>33</sup>*Id.*, p. 17; tax legality may be understood to prohibit tax authorities from entering into agreements with individual taxpayers, or to limit administrative discretion in granting tax privileges, or to enjoin courts and tax tribunals to construe tax laws strictly; see Victor Thuronyi, *Comparative Tax Law*, Kluwer Law International, 2003, at 71

<sup>34</sup>Frans Vanistendael, *supra note 29*, at 17

generally.<sup>35</sup> The position that appears to have won acceptance in many systems is the intermediate position that makes delegation of certain taxation powers permissible so long as the legislature has specified the so-called 'essential' or 'basic' elements of the tax in the enabling act or principal tax statute.<sup>36</sup> Some Constitutions are very particular about what elements of tax should be specified in a tax act approved by parliaments. The Constitution of Greece, for example, requires that parliamentary tax acts should set out in the tax law a definition of the basic elements of taxation, such as the subjects of the tax, the property subject to tax, the tax rate, and exemptions.<sup>37</sup> On the question of delegation, the constitution of Greece prohibits delegation of the 'basic' or 'essential' elements of tax to the executive branches.<sup>38</sup> The Constitution of Greece goes so far as to specifically proscribe the retroactive application of tax statutes.<sup>39</sup>

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<sup>35</sup>Ibid

<sup>36</sup>Ibid

<sup>37</sup>Theodore Fortsakis, *Greece – National Report*, 15Mich. State J. Int'l L.2, (2007), at 328; in the United States, courts have reached similar conclusions over the power of US Congress to delegate taxation powers to the executive branches. US courts have held that the power of taxation is not subject to delegation 'to either the other departments of the government, or to any individual, private corporation, officer, board or commission'. The legislature cannot leave too much discretion with the executive as to enable the latter to select the property to be taxed, or determine 'the basis for the measurement of the tax' or define 'the purpose for which the tax' is levied. The powers of taxation that are delegable are those that are 'merely advisory or ministerial in their nature, such as computing the levy, fixing the rate or enforcing the payment'. Powers that are advisory or ministerial in their character have been interpreted to include 'the power to value property, the power to extend, assess and collect the taxes and the power to perform any of the innumerable details of computation, appraisal and adjustment'; see 84 C.J.S. Taxation §8, at 56 and 59

<sup>38</sup>Quoted in Theodore Forstakis, *supra* note 37, at 329

<sup>39</sup>A partial quote from Article 78 of Greece Constitution may be instructive here:

1. No Tax shall be levied without a statute enacted by Parliament, specifying the subject of taxation and the income, the type of property, the expenses and the transactions or categories thereof to which the tax pertains;
2. A tax or any other financial charge may not be imposed by a retroactive statute effective prior to the fiscal year preceding the imposition of the tax;
3. Exceptionally, in the case of imposition or increase of an import or export duty or a consumer tax, collection thereof shall be permitted as of the date on which the Bill shall be tabled in Parliament, on condition that the statute shall be published within the time-limit specified in article 42 paragraph 1, and in any case not later than ten days from the end of the Parliamentary session;

The current Constitution of Ethiopia does not explicitly require that taxation must have a firm basis in law passed by the Parliament, but this can be derived from a provision of the Constitution that grants the Federal Parliament the power to impose taxes and duties on sources reserved to the Federal Government.<sup>40</sup> In addition, the Federal Government has issued a public financial administration law which appears to recognize the principle of tax legality as requiring that any tax must have a firm basis in law.<sup>41</sup> Although this law does not have constitutional status, it shows at least that the principle of tax legality in its minimum requirement is recognized in Ethiopia.

Beyond this, it is unclear if the principle of tax legality is recognized in the sense of strictly regulating the delegation of taxation powers and/or prohibiting the retroactive application of taxation. The current Constitution of Ethiopia contains no provision that might even remotely constrain the Ethiopian parliament from delegating the essential elements of taxation powers to the executive branches. The question is whether, in the face of the silence of the Constitution, the Ethiopian parliament can delegate wholesale taxation powers to the executive branches, and if, in particular, the Ethiopian parliament can give full powers to the Council of Ministers or the Ministry of Finance or for that matter the Ethiopian Revenues and Customs Authority (ERCA) to define by regulations or directives the tax base, the tax rates and the taxpayers? A recent amendment to the income tax law of Ethiopia – which introduced windfall profits tax into Ethiopia – came close to doing just that. After broadly defining ‘windfall profits’, the income tax amendment law delegated to the Ministry of Finance broad powers to define ‘windfall profits’ and to determine the tax rates through directives.<sup>42</sup> This law clearly devolves

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4. The object of taxation, the tax rate, the tax abatements and exemptions and the granting of pensions may not be subject to legislative delegation; quoted in footnote 2, Theodore Forstakis, *supra note 37*, at 328-329.

Non-retroactivity is treated by some writers as a separate limitation on taxation powers; see Victor Thuronyi, *supra note 33*, at 76- 81

<sup>40</sup>Constitution, *supra note 6*, Article 55(11)

<sup>41</sup>Article 10(1) of the Federal Financial Administration law states that ‘no public money shall be collected except when authorized by law’; see the Federal Government of Ethiopia Financial Administration Proclamation No. 648/2009, *Federal Negarit Gazeta*, 15<sup>th</sup> year, No. 56

<sup>42</sup>See Income Tax (Amendment) Proclamation No. 693/2010, *Federal Negarit Gazeta*, 17<sup>th</sup> year, No. 3; the relevant provision of the amendment Proclamation empowers the Minister (of Finance) to prescribe (by directives) the amount of income to be considered as windfall profit, the businesses that are subject to tax on windfall profits, the date on which the tax will become effective, and the manner in which the tax is to be assessed and the factors to be taken into account for assessment; see Article 2 (2) and 2(3).

broad discretionary powers of taxation upon an executive branch of government.

However this type of delegation is viewed in the future (if at all such an issue is taken to the House of the Federation – the body with the power to handle issues of constitutional interpretation in Ethiopia), the constitutional constraints upon the delegatory powers of the Ethiopian parliament appear to be weak at best. We may infer this from the practice of tax power delegation – which, although not conclusive, does suggest that delegation of taxing powers is not frowned upon as in some other systems.

The Ethiopian parliament makes extensive use of delegation – if the tax laws are anything to go by. One of the powers that the Parliament routinely delegates to the executive branches is the power to exempt taxpayers – sometimes with a proviso and at other times without any strings attached. Tax exemption powers are liberally delegated to the executive branches. We can cite many examples of liberal delegation of exemption powers in the Income Tax Law of Ethiopia, which has a provision that, for example, empowers the Council Ministers to exempt income for ‘economic, administrative or social reasons’.<sup>43</sup> We can also cite examples from the Ethiopian Value Added Tax Law which authorizes the Ministry of Finance to exempt supplies from VAT without having to seek the approval of the Parliament.<sup>44</sup>

It is not just exemption powers that are liberally delegated to the executive branches. The Ethiopian Parliament makes extensive use of delegations that tend to create new obligations or increase existing obligations of taxpayers. These types of delegations are not couched in as clear a language as the powers of exemption, but the consequence is all the same – these delegations confer broad powers of taxation upon the executive to define the obligations of taxpayers (in effect create new obligations). An example of this form of delegation is found in the VAT Proclamation of 2002. The Proclamation empowers the Ministry of Finance to increase or reduce VAT registration threshold<sup>45</sup>, which may not, at first sight, appear to increase the tax obligations of taxpayers, but whenever the Ministry moves to redefine the administrative

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<sup>43</sup>Income Tax Proclamation No. 286/2002, *Federal Negarit Gazeta*, 8<sup>th</sup> year, No. 34, Article 13(e); the Council of Ministers has used this power to exempt some types of employment income from tax; see Council of Ministers Income Tax Regulations No. 78/2002, *Federal Negarit Gazeta*, 8<sup>th</sup> year, No. 37, Article 3

<sup>44</sup>VAT Proclamation, *supra note 24*, see Article 8(4); the Ministry has used this power to exempt certain transactions from VAT; see, for example, the exemptions for supplies of medical supplies, bread and milk and fertilizers; in Federal Democratic Republic of Ethiopia, Ministry of Finance and Economic Development, 1995 E.C., in Amharic, unpublished

<sup>45</sup>See VAT Proclamation, *supra note 24*, Article 16(2)

reach of the VAT (by reducing the threshold), the consequence is bringing within the VAT network more and more registrants - in effect increasing their tax obligations or at least their tax burdens in the process.<sup>46</sup>

The most recent example of a liberal delegation (perhaps too liberal for comfort) is to be found in a recent amendment to the Income Tax Proclamation of 2002.<sup>47</sup> The amendment has introduced a 'new' source of taxable income into the income tax regime of Ethiopia - windfall profits. After broadly defining 'windfall profits' as 'any profit obtained by any person as a result of a change occurred (*sic*) in local or international economic or political situations without its efforts',<sup>48</sup> the amendment Proclamation confers extensive powers upon the Ministry of Finance to determine from time to time the sources of income which are to be subject to the windfall profits tax and the tax rates.<sup>49</sup> The Ministry has issued a directive shortly after the issuance of the Proclamation targeting 'windfall profits' derived by banks from devaluation of Ethiopian currency - Birr.<sup>50</sup> An interesting feature of the directive is that it purports to apply the tax upon 'windfall profits' derived by banks before the Proclamation and the Directive were issued (both the Proclamation and the Directive were issued in November, 2010, but the taxes were to be applicable upon profits allegedly obtained by banks from foreign exchange holding back in September, 2010, when the Ethiopian Government devalued Birr by almost 20%).<sup>51</sup> The directive is therefore not only an evidence of broad exercise of executive powers but also of retroactivity.

To sum up, the liberal use of delegation of taxing powers to the executive does seem to indicate that the principle of tax legality is not recognized in Ethiopia.

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<sup>46</sup>Another example of a delegation which empowers the executive branch to increase tax obligations is found in Articles 64 and 117 of the VAT Proclamation and the Income Tax Proclamation of 2002 respectively. These provisions delegate to the Council of Ministers the power to issue regulations for the 'proper implementation' of the respective proclamations. The Council of Ministers has used these provisions to issue a regulation for the obligatory use of cash register machines; the Council has also used this power to delegate its delegated power to the Ministry of Revenues and the latter has issued directives defining the obligations of various parties in the use of the sales register machines; see Council of Ministers Regulation to Provide for the Obligatory Use of Sales Register Machines No. 139/2007, 13<sup>th</sup> year, No. 4 and Ministry of Revenues, Directive No. 46/2007 - Directive to Provide for the use of Sales Register Machines, unpublished

<sup>47</sup>See Income Tax Amendment Proclamation, *supra* note 42

<sup>48</sup>*Id.*, see Article 2(1)

<sup>49</sup>*Id.*, see Article 2(2)

<sup>50</sup>See Federal Democratic Republic of Ethiopia, Ministry of Finance and Economic Development Directive No. 29/2003, A Directive to Impose Tax on Windfall Profits of Banks, in Amharic, unpublished, 2003 E.C.

<sup>51</sup> *Id.*, see Article 5

However, simply because tax delegations are liberally employed does not mean that the practice is right. Unfortunately, there are no formal channels for challenging delegations of taxing powers and even if there are, there has never been this tradition of challenging discretionary administrative actions in courts or other tribunals,<sup>52</sup> and as a result, the practice of delegation has never been subjected to scrutiny by courts or other tribunals.

### *2.2 The Principles of Fidelity to Sources of Taxes and Procedural Fairness*

Unlike the principle of tax legality, the principles of fidelity to sources of taxes and procedural fairness are recognized in the Ethiopian Constitution - in Article 100(1). Article 100 (1) is perhaps the most inscrutable of all the limitations we find in the Ethiopian Constitution. It is so inscrutable that even finding a proper title for it has been a challenge. It states that both the Federal Government and Regional States 'shall ensure that any tax is related to the source of revenue taxed and that it is determined following proper considerations'. We notice from the language of Article 100 (1) that it is a composite of two related limitations. One of the limitations is on the relationship between the tax and the source of revenue taxed and the other is a variant of due process required in the levying of taxes.

The first requirement in Article 100(1) is that the taxes the Federal Government or the Regional States impose be related to the 'source of revenue' taxed. The phrase 'source of revenue' may be construed as the sources of revenue assigned to the two layers of the Ethiopian federation. We have already seen how the Ethiopian Constitution assigns taxes between the Federal Government and the Regional States (see above). Some 'sources of revenue' are designated as 'federal exclusive' (Article 96), some as 'state exclusive' (Article 97), some as 'concurrent' (Article 98), and there are some that are yet to be designated by the Joint Houses (Article 99). We may say Article 96 taxes are sources of revenue for the Federal Government, Article 97 taxes are sources of revenue for the Regional States, and Article 98 taxes are sources of revenue for both layers. Article 100 (1) appears to be saying that the two layers should ensure that the taxes they impose in practice be faithful to the sources designated as theirs in Articles 96, 97 and 98 of the Constitution.

This begs some inconvenient questions. Can either of the two layers of the Ethiopian federation levy and collect taxes, which are related to, but not

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<sup>52</sup>Taxpayers may, of course, challenge the constitutionality of delegations whenever the Tax Administration or the executive in general are suspected of violating some provisions of the Constitution; so far, no such challenges have been known to have been mounted by taxpayers; Constitution, *supra note 6*, see Article 62 (1) and 83; see also Ibrahim Idris, *Constitutional Adjudication under the 1994 FDRE Constitution*, 1Eth. L. Rev., (August 2002), at 67-75

expressed in, Articles 96-98 of the Constitution? Can the Federal Government, for example, impose payroll taxes on 'Federal Government employees' and justify that as a federal tax because the payroll taxes are imposed on employees of the Federal Government? Can the Regional States impose 'education taxes' or 'health taxes' on farmers and cooperative societies as in the old times when these taxes were tied to agricultural land and income? Are these related enough to Articles 96 and 97 of the Ethiopian Constitution? If they are deemed related, how do we distinguish 'related' taxes from 'undesigned' taxes?

The lines between 'related' taxes and 'undesigned' taxes are not well-defined in the Ethiopian Constitution. Nonetheless, both the Federal Government and Regional States have in practice continued to levy and collect taxes which are not expressly stated in the Constitution as theirs. The Regional States, for example, have authorized the levying and collection of municipal/property taxes although these taxes are not expressly mentioned in the Constitution as regional government taxes.<sup>53</sup> The Federal Government has, on its part, introduced surtax on imports - which is probably the most perfect example of a tax which is related to the sources of revenue assigned to the Federal Government.<sup>54</sup> The Constitution does not make direct reference to surtax on imports, but since, the Federal Government has exclusive jurisdiction over taxes on imports and exports, the Federal Government may have been justified in introducing surtax on imports without having to go to the Joint Houses for designation.<sup>55</sup>

So far these practices have gone uncontested because both levels of governments tend to tolerate one another in the levying and collection of certain taxes. The Federal Government has not challenged the levying and collection of municipal taxes, and nor have the Regional States really challenged the Federal Government over the levying and collection of some taxes which are not designated by the Constitution.

The absence of contest from either side does not show that the tension between 'related' taxes and 'undesigned' taxes is a chimera. The tensions may come to the surface when opposing political forces control Federal Government and

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<sup>53</sup>See, for example, Addis Ababa City Government Revised Charter Proclamation No. 361/2003, *Federal Negarit Gazeta*, 9<sup>th</sup> year, No. 86, Article 52(6)

<sup>54</sup>See Import Sur-Tax Council of Ministers Regulations No. 133/2007, *Federal Negarit Gazeta*, 13<sup>th</sup> year, No. 23

<sup>55</sup>Constitution, *supra note* 6, see Article 96(1); the introduction of sur-tax on imports is consistent with the power of the Federal Government to 'levy and collect customs duties, taxes and other charges on imports and exports'; although sur-taxes are not mentioned, they are related to the exclusive jurisdiction of the Federal Government over international trade taxes.

regional government bodies.<sup>56</sup> There is nothing in the Constitution that prevents either the Federal Government or the Regional States from triggering the 'undesigned' button in Article 99 - which is simply referring controversial taxes to the arbitration of the Joint Houses.

In any event, Article 100 (1) should be construed so strictly as to permit both layers of governments to levy only taxes which are so related to the taxes expressly stated in the Constitution that there may not be a need to refer the matter to the verdict of the Joint Houses. Article 99 of the Ethiopian Constitution has already stated that taxes which are undesigned by Articles 96-98 are to be determined by the Joint Houses. There is a reason why the Ethiopian Constitution has departed from its approach in the area of expenditure assignment, which is based on the principle of residuality. The Constitution is very particular about the assignment of taxes in Articles 96-98. The Constitution is also very particular about the fate of 'undesigned' taxes in Article 99. It does appear that neither the Federal Government nor the Regional States are willing to cede powers over 'undesigned' taxes. In cases of doubt, all undesigned taxes, including those that are 'related' to the sources of revenue assigned in Articles 96-98 should be referred for arbitration of the Joint Houses and be designated properly. Otherwise, the potential for abuse of 'related tax' powers is innumerable.<sup>57</sup> The Constitution that has gone to great lengths to specify the taxation powers of both layers of government cannot be read as to condone the liberal use of 'related' tax powers.

As for the second limitation in Article 100(1), we shall have recourse to constitutional limitations elsewhere in search of clues as to what the limitation might mean. One limitation we find in some constitutions is the 'principle of equality', which may be taken to have two meanings: procedural and substantive.<sup>58</sup> In its procedural context, the principle of equality may require the law (in our case, tax law) to 'be applied completely and impartially, regardless of the status of the person involved'.<sup>59</sup> Substantively, the principle

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<sup>56</sup>At the moment, the ruling party (the Ethiopian Peoples' Revolutionary Democratic Front - EPRDF) controls all the reins of power in both the Federal Government and Regional States either through its constituent parties or through its affiliates.

<sup>57</sup>Unless one of the two layers complains about the levying of 'related taxes' or unless taxpayers challenge the levying of 'related taxes', there is a possibility that the Federal Government or the Regional States may establish their right to impose these taxes, as it were, by tradition - despite what Article 99 of the Constitution states.

<sup>58</sup>See Frans Vanistendael, *supra note 29*, at 19, see also Victor Thuronyi, *supra note 33*, at 82-92

<sup>59</sup>Frans Vanistendael, *supra note 29*, at 19; in some countries, equality is understood in its procedural aspect only, requiring merely that governments apply the law as written although the law itself may discriminate among different categories of



has been understood in some countries to require equal treatment of 'persons in equal circumstances'.<sup>60</sup> The obvious prohibition in this regard is the differential taxation of persons on grounds of ethnicity, religion, gender or political affiliation.<sup>61</sup> In France, for example, the principle of equality has been construed to prohibit the denial of procedural rights to some citizens but not to others,<sup>62</sup> while in Germany, the Constitutional Court interpreted it as calling for equal taxation of similarly situated persons and held that *de facto* unequal taxation of interest income was unconstitutional.<sup>63</sup>

Another principle of tax limitation, which might throw some light on the meaning of Article 100(1) of the Ethiopian Constitution, is the principle of fair play or public trust in tax administration.<sup>64</sup> The principle addresses the rights of tax payers during tax administration. The principle has been held to require tax administration to notify a taxpayer of any action it may take relating to the taxpayer and to afford a taxpayer all the rights of process.<sup>65</sup> The principle has also been held in some countries to mean that taxpayers 'can rely on the statements of tax administration' provided that taxpayers have given the tax administration 'a full and fair representation of the facts'.<sup>66</sup>

Still another limitation might be of some relevance – the principle of proportionality, which has been used by western European courts to require proportional relationship between the goals to be attained and the means used by the legislator.<sup>67</sup> This principle is said to have prohibited excessive taxes, which may, incidentally be, proscribed by constitutional guarantees of private property and the freedom of commerce and industry.<sup>68</sup>

In the end, we cast about so many constitutional limitations in other tax systems in the hopes of approximating the meaning of Article 100(1) of the Ethiopian Constitution. We can only speculate as to the meaning of the two limitations in Article 100(1) until a dispute arises and somehow, those charged with the interpretation of the Constitution (the HoF in Ethiopia) explain for us what it means. The best clue to the meaning of these limitations is to be found in actual cases, of which there are none at the moment.

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taxpayers; see David Elkins, *Horizontal Equity as Principle of Tax Theory*, 24Yale Law & Policy Review1(Winter, 2006), at 63

<sup>60</sup>See Frans Vanistendael, *supra note 29*, at 19

<sup>61</sup>Ibid

<sup>62</sup>See Id, at 20

<sup>63</sup>Ibid

<sup>64</sup>See id, at 21-22

<sup>65</sup>Id, at 21

<sup>66</sup>Ibid

<sup>67</sup>See id at 22-23

<sup>68</sup>Id, at 23

### 2.3. Intergovernmental Immunity

It is quite common for federal structures and constitutions to impose the limitation of 'intergovernmental immunity'. We shall take the development of intergovernmental immunity in the United States to highlight the issues surrounding the doctrine of intergovernmental immunity. In the US, the limitation of intergovernmental immunity grew out of a series of cases in which the US Supreme Court defined and redefined the limits of intergovernmental immunity.<sup>69</sup> At first the doctrine of intergovernmental immunity was used by the US Supreme Court to prohibit the Federal Government from imposing taxes on income derived from state bonds, extending the immunity even to those who made contracts with the states.<sup>70</sup> The limitation worked both ways - in other words, it served as a limitation on states to impose taxes on those who made contracts with the US Federal Government. This limitation was gradually relaxed in later cases. Under the modern doctrine of intergovernmental immunity, the states can impose taxes on private persons who do business with the US Federal Government and the Federal Government can do the same, even though the financial burden of the tax falls indirectly upon the states or the Federal Government. As long as the tax does not discriminate against those who do business with either the Federal Government or the states, the tax will stand constitutional scrutiny.<sup>71</sup> What does not stand constitutional scrutiny is a tax that imposes a direct burden upon either the Federal Government or the states.<sup>72</sup>

The Ethiopian Constitution is fairly explicit about intergovernmental immunity. In Article 100(3), it states that neither the Federal Government nor the Regional States can impose taxes on each other's property, unless the property is a profit-making enterprise. However, it can be argued that the modality of revenue assignment in the Ethiopian Constitution already precludes the possibility of most cases of intergovernmental taxation in Ethiopia. As we saw above, the Constitution divides tax powers between the Federal Government and the Regional States on the basis of set formulas that assign taxes based on their association with either of the levels of the Ethiopian Federation. Although the Ethiopian Constitution excepts profit-making federal or state government enterprises from 'intergovernmental immunity', it is unlikely that these enterprises will become the subject of taxation, as the Federal Government has been assigned the power to 'levy and collect most

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<sup>69</sup>Federal Tax Course, CCH Editorial Publication, Chicago, 2000, at.118; see also Kenneth W. Dam, *the American Fiscal Constitution*, 44 Univ. Chi. L. Rev.2 (Winter 1977), at 290

<sup>70</sup> See *Pollock vs. Farmers Loan and Trust Co.*, 157 U.S. 429 (1895), quoted in Federal Tax Course, *supra note 69*, at 119

<sup>71</sup> Federal Tax Course, *supra note 69*, at 118-119

<sup>72</sup> *Id.*, at 119

taxes on enterprises it owns as Regional States are assigned the power to levy and collect taxes on the profit-making enterprises they own. Currently, the value added tax (which is a federal tax) is levied upon private contractors that have supply or service contracts with Regional States, which means that Regional States pay the VAT to the Federal Government. It is not clear if Regional States may challenge this and similar other taxes on grounds of 'intergovernmental immunity'. So far, none of the Regional States have raised challenges.

#### 2.4. Principle of Non-Discrimination

Another limitation closely associated with federal structures is the prohibition of discrimination in taxation. Unlike 'intergovernmental immunity', however, the principle of non-discrimination (or against discrimination) is mostly invoked against the constituent states of a federation. When states in a federal system are entrusted with the power of taxation, a distinct threat of discrimination arises particularly against out of state residents, businesses or goods. In the US, the principle of 'non-discrimination' is developed through judicial review to curtail the power of states from discriminating against out of state residents, businesses or goods.<sup>73</sup> Taxpayers challenged and succeeded in getting state taxes struck down on the ground that these taxes are discriminatory. In *Toomer vs. Witsell*,<sup>74</sup> the US Supreme Court struck down one licensing fee on non-resident shrimp boat owners imposed at a rate a hundred times greater than residents. In *Lunding vs. New York Tax App. Trib.*,<sup>75</sup> the US Supreme Court struck down a New York law that prevented non-residents from deducting alimony payments. In *Davis vs. Michigan Department of Treasury*,<sup>76</sup> the state of Michigan granted blanket exemption from state taxation of all retirement benefits paid by Michigan or its political subdivisions while keeping in place taxation of retirement benefits paid by all other employers, including the Federal Government. The US Supreme Court held that the exemption by Michigan State was discriminatory and failed constitutional scrutiny.<sup>77</sup>

The US Supreme Court has also used the so-called 'dormant commerce clause' doctrine to limit the powers of states in this regard.<sup>78</sup> The doctrine has been held to prohibit state discrimination of interstate commerce as well as undue

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<sup>73</sup>See Kenneth W. Dam, *supra note 69*, at 282-287

<sup>74</sup>334 U.S. 385 (1948), cited in Tracy A. Kaye and Stephen W. Mazza, *United States - National Report*, *supra note 27*, at 511

<sup>75</sup>522 U.S. 287 (1998), cited in *ibid*

<sup>76</sup>89-2, USTC ¶ 9456, cited in Federal Tax Course, *supra note 69*, at 119

<sup>77</sup>See Federal Tax Course, *supra note 69*, at 119

<sup>78</sup>Tracy Kaye and Stephen Mazza, *United States - National Report*, *supra note 27*, at 511-512; see also Kenneth W. Dam, *supra note 69*, at 282-283

burdens on commerce.<sup>79</sup> In *Boston Stock Exchange v. State Tax Comm*,<sup>80</sup> for example, the U.S. Supreme Court held that a state that provides a direct commercial advantage to local business is imposing a tax which discriminates against interstate commerce.

The principle of non-discrimination, which in the U.S. is developed through judicial review, is explicitly recognized in the Australian Constitution.<sup>81</sup> The Australian court has used the Constitution to strike down exemptions that were available to in-state residents on discriminatory basis.<sup>82</sup> The Ethiopian Constitution does not contain a non-discrimination clause specifically for taxes. There is a general equality clause in Article 25 of the Constitution, and there is a provision that gives to the Federal Government the power to regulate interstate commerce.<sup>83</sup> It is not clear if these provisions in the Ethiopian Constitution may be used to constrain the power of the states from discriminating against out of state residents, businesses or goods. Once again there are as yet no cases in which any of the regional state taxes have been failed on grounds of discriminatory treatments of out-of-state citizens or businesses.

### *2.5. Adverse Impact and Benefit Principles*

At the outset, it must be stated that these two limitations are not related, except for the fact that the Ethiopian Constitution (for some curious reasons) treats the two in one sub-article. Article 100(2) of the Ethiopian Constitution states two limitations on tax powers but given the ambiguity of the limitations involved, it is difficult to say that these are indeed limitations. The first limitation is the 'adverse impact' limitation. The Constitution enjoins the Federal Government and the Regional States from exercising their tax powers in ways that would adversely impact the tax powers of the other. The opportunities for adverse impact are too numerous to count here. Let's take some examples if only to raise questions.

The Federal Government has issued investment incentive laws that have an impact on the capacity of the Regional States in raising revenues from sources assigned to them by the Constitution.<sup>84</sup> The ostensible rationale of these

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<sup>79</sup>Tracy Kaye and Stephen Mazza, *United States – National Report*, *supra* note 27, at 512  
<sup>80</sup>428, U.S. 318, 329 (1977) quoted in *id*, at 513

<sup>81</sup>Section 117 of the Australian Constitution, quoted in Miranda Stewart and Kristen Walker, *Australian National Report*, 15Mich. J. Int'l L.2 (2007), at 238

<sup>82</sup>*Commission of Taxes v. Parks*, (1933) St R Qd 306, quoted in Miranda Stewart and Kristen Walker, *supra* note 81, at 238

<sup>83</sup>Constitution, *supra* note 6, see Article 51(12)

<sup>84</sup>See Investment Proclamation No. 280/ 2002, *Federal Negarit Gazeta*, 8<sup>th</sup> year, No. 27; Investment Amendment Proclamation No. 373/2003, *Federal Negarit Gazeta*, 10<sup>th</sup> year, No. 8; Council of Ministers Regulations on Investment Incentives and Investment

investment laws is the attraction of investment –foreign and domestic.<sup>85</sup> The principal instrument for attraction of investments in this country has been the use of tax incentives in various forms. For example, investments in agro-processing and manufacturing industries at the moment enjoy a five-year income tax holiday, which may be extended under certain circumstances.<sup>86</sup> Should the Regional States be constrained by the federal investment laws and restrain themselves from taxation of investors who enjoy a tax holiday under the federal investment laws? The answer to this question depends on which side of the federal aisle we wish to take sides. If we look at the issue from the vantage point of the Federal Government, we may argue that the Regional States are constrained by the federal investment policy from levying taxes on investors who are exempted from tax by the Federal Government. But we may also look at the issue from the vantage point of the Regional States. The investment laws (no matter how well-intentioned they may be) have an adverse impact on the capacity of the Regional States to raise revenues from sources assigned to them by the Constitution. Shouldn't the Federal Government exercise equal restraint when it comes to the legitimate revenue interests of the Regional States? There are many contentious issues like these that require resolution through practical cases –of which we can adduce none at this point.

The second prong of Article 100(2) appears to make 'benefits received' by members of the public as a consideration for levying of taxes by both the Federal Government and the Regional States. The 'benefit principle' is a well-known and established principle in the literature of taxation, although the constitutional recognition of it is of doubtful value. It is a principle that is often invoked for sentimental and rhetorical reasons in tax literature than for explaining the practice of taxation.<sup>87</sup> It may have limited application in the area of fees and a few other taxes but that is just about it. It is extremely difficult for taxpayers to challenge a tax on the ground that no benefits are received by them, and it is equally difficult for the government to establish correspondence between what it collects from taxes and the public services it provides to taxpayers. The apparent incorporation of the 'benefits principle' in the Ethiopian Constitution is one of the reasons why we should cast doubts about

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Areas Reserved for Domestic Investors No. 84/2003, *Federal Negarit Gazeta*, 9<sup>th</sup> year, No. 34

<sup>85</sup>See Investment Proclamation No. 280/2002, *supra note 84*, the preamble

<sup>86</sup>Council of Ministers Regulations on Investment Incentives and Investment Areas Reserved for Domestic Investors No. 84/2003, *Federal Negarit Gazeta*, 9<sup>th</sup> year, No. 34, see Article 4

<sup>87</sup>See, Laurie Reynolds, *Taxes, Fees and Assessments, Dues and the "Get What You Pay for" Model of Local Government*, *Florida Law Review*, April 2004; Joseph M. Dodge, *Theories of Tax Justice: Ruminations on the Benefit, Partnership and Ability-to-Pay Principles*, 58 *Tax L. Rev.*, (summer 2005); see also John F. Due and Ann F. Friedlaender, *supra note 22*

the binding force of constitutional limitations upon the powers of taxation in Ethiopia.

### 3. The Federal Tax Administration

For a long period of time, tax administration in Ethiopia was an appendage of ministries that did not have administrative specialization over the assessment and collection of taxes - the Ministry of Trade and Industry before the Italian occupation (1936) and the Ministry of Finance after the Italian occupation (1941).<sup>88</sup> Administrative units or departments within these Ministries were charged with tax administration. The preferred mode of organization was the organization of administrative units around the types of taxes rather than the functions of tax administration.<sup>89</sup>

One mode of organization that prevailed for a long time was an organization of tax administration units or departments for assessment and collection of taxes on international trade (customs duties, sales and excise taxes on imports and exports) and another one for domestic (internal) taxes or revenues (income taxes, sales and excise taxes, stamp duties on domestic transactions). The administrative units for assessment and collection of international trade taxes were organized under the 'customs departments' or 'customs authorities' while those for the administration of domestic taxes were organized under 'inland revenue departments' or 'inland revenue authorities'. There were also times when specific taxes had their own tax administration units or departments within the Ministries (e.g., income tax departments, excise tax departments). The separation of tax administration for domestic and

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<sup>88</sup>Tax administration was the domain of the Ministry of Commerce and Customs (established in 1907) before the Italian occupation; see Bahru Zewde, *Economic Origins of the Absolutist State in Ethiopia (1916-1935)*, in Bahru Zewde, *Society, State and History, Selected Essays*, Addis Ababa University Press, 2008, p. 113. See also Mahteme Sillassie Wolde Meskel, *Zikra Nagar*, 2<sup>nd</sup> Issue (in Amharic), 1962 E.C., pp. 171-174; Abebe Hunachew, *About the Ethiopian Customs Authority*, in *Gebi Lelimat*, vol. 3, No. 3, May 2007, in Amharic, p. 37; the Ministers (Definition of Powers) Amendment No. 2) Order, No. 46 of 1966 (repealed), Article 29: one of the powers of the Ministry of Finance is the power to 'ensure that tax laws are properly enforced and that all revenues due from taxes, customs and excise duties, fees and monopoly dues and other sources are properly assessed, collected and accounted for; Ministers (Definition of Powers), Order, 1943 (repealed), Article 29(d); Proclamation No. 145/1955 (repealed); Income Tax Proclamation No. 173/1961 (repealed), Article 20

<sup>89</sup>See Melkamu Belachew, *Powers and Functions of the Federal Inland Revenue Authority (FIRA) and the Position of the Tax Appeal Commission*, Senior Thesis, Addis Ababa University, Faculty of Law Library Archives, unpublished, 2003; tax administration may be organized by the type of tax, function (e.g., processing, auditing, etc) or by the type of taxpayers (e.g., large taxpayers offices) or by the type of businesses or ownership; see Catherine Baer, Oliver Benon, Juan Toro, *Improving Large Taxpayers' Compliance*, International Monetary Fund, Washington D.C., 2002, at 6

international transactions had the effect of parallel tax administrations for those taxes which were levied on both domestic and international transactions. For example, customs departments or administrations assessed and collected sales taxes on imports and Inland Revenue Departments assessed and collected sales taxes on domestic transactions.<sup>90</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.<sup>91</sup> 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.<sup>92</sup> A reorganization of Ethiopian tax administration in 2001 elevated tax administration to a ministerial level, creating the Ministry of Revenues (MoR). Like its predecessor, the Federal Government Revenue Board, the Ministry of Revenues was established to coordinate and supervise the three revenue agencies of the Federal Government, namely, the Federal Inland Revenue Authority (FIRA), the Ethiopian Customs Authority (ECuA) and the National Lottery Administration.<sup>93</sup>

The most recent reorganization and restructuring of tax administration – which occurred in 2008 – merged the three revenue agencies of the Federal Government into one authority – the Ethiopian Revenues and Customs Authority (ERCA).<sup>94</sup> This reorganization of Federal Tax Administration has relegated the task of tax administration from ministerial level to an authority, but, in substance, the reorganization has in fact strengthened the powers of the

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<sup>90</sup>See Income Tax Proclamation No. 173/1961 (now repealed), Article 20; Alcohol Excise Tax Proclamation No. 217/1965 (repealed), Articles 31-35; Proclamation to Consolidate and Amend the Law Relating to the Customs No. 145/1955 (repealed), Article 5

<sup>91</sup>The Federal Government Revenues Board was established as an autonomous organ of the Federal Government with accountability to the Council of Ministers at the time; see Federal Government Revenues Board Establishment Proclamation No. 5/1995, *Federal Negarit Gazeta*, 1<sup>st</sup> year, No. 5, Articles 2(1), 2(2); some Regional States have continued coupling tax administration with the functions of regional finance bureaus, and some regions have established revenue bureaus separate from finance bureaus; see, for example, a Proclamation of Oromia National Regional Government Revenue Bureau No. 98/2005, *Megeleta Oromia*, 13<sup>th</sup> year, No. 12

<sup>92</sup>Federal Government Revenues Board Proclamation, *supra note* 91, Article 4 (2)

<sup>93</sup>See Reorganization of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 256/2001, *Federal Negarit Gazeta*, 8<sup>th</sup> year, No. 2 (repealed and replaced by Proclamation No. 471/2005)

<sup>94</sup>By the way, the National Lottery retained some autonomy even after the merger under the supervision of the ERCA; See Council of Ministers National Lottery Administration Re-establishment Regulation No. 160/2009, 15<sup>th</sup> year No. 21

Tax Authority.<sup>95</sup> Recent tax administration reforms have introduced a number of changes to Ethiopian tax administration, only some of which are mentioned here under for their instructive value.

For the first time, the tax authority (ERCA) has assumed the powers to investigate and prosecute tax and customs offenses directly, without having to rely upon the goodwill of the regular police and prosecution offices as was previously the case. Under the reforms of 2008, most of the investigation and the prosecution work are to be handled within the tax authority.<sup>96</sup> The elevation of the tax authority to that of 'prosecutor and investigator' of tax and customs crimes relegates the regular police and prosecution offices to mere supporting acts like the apprehension of suspects, production of witnesses, seizure and control of contraband and the accompanying of customs transit goods and vehicles.<sup>97</sup> The technical matters of tax and customs crime investigation and prosecution are now the exclusive preserve of tax administration.

The other significant reform of recent times is the decision to create special personnel administration rules and procedures for employees of ERCA. Shortly after the major reorganization of Ethiopian tax administration, special personnel administration regulations were issued in 2008 governing employees of ERCA. The 'Special Personnel Administration Regulations' of 2008 is a *sui generis* legislation governing most issues pertaining to the employment relationships of the personnel of ERCA. The Regulations have special rules for the personnel of ERCA governing classification, salary, allowances, recruitment, promotion, internal transfer, re-deployment, training, performance evaluation, incentives and benefits.<sup>98</sup> The Regulations have special rules even for working hours (the maximum weekly working hours is 43, not 48), annual leave, and special leaves.<sup>99</sup>

Some of the special rules and procedures of the 'Special Personnel' Regulations are bound to become controversial for they depart from and at times conflict

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<sup>95</sup>ERCA is organized as an authority with direct accountability to the Prime Minister. It is headed by a Director General and Deputy Director Generals appointed by the Prime Minister. Under them, the Authority has prosecutors and administrative employees; Ethiopian Revenues and Customs Authority (ERCA) Establishment Proclamation No. 587/2008, *Federal Negarit Gazeta*, 14<sup>th</sup> year, No. 44, see Article 9

<sup>96</sup>Id, see Article 16

<sup>97</sup>Id; see also Customs Proclamation No. 622/2009, *Federal Negarit Gazeta*, 15<sup>th</sup> year, No. 27, Articles 18(2) and 86

<sup>98</sup>Administration of Employees of the Ethiopian Revenues and Customs Authority Council of Ministers Regulation No. 155/2008, *Federal Negarit Gazeta*, 14<sup>th</sup> year, No. 49, see Articles 4, 5, 6, 7, 8, 9, 10, 15-17 and 18

<sup>99</sup>Id, see Articles 20-23



with the general rules of civil service regulations in Federal Civil Service laws. In the section on 'Duties, Ethics and Disciplinary Measures', for example, the Regulations introduce several novel requirements and procedures, which are not contemplated in the Federal Civil Service Laws.<sup>100</sup> The Regulations are one of the first to require prospective and existing employees (of ERCA) to submit property held in their names or in the name of their spouses or minor children for registration, no doubt to combat corruption.<sup>101</sup> The Regulations contain a long list of offenses which entail rigorous penalties for infractions of the various duties detailed in the Regulations, once again intended to combat corruption.<sup>102</sup> The new rules might have been well-intentioned (driven probably by the desire to stamp out corruption), but they are bound to raise concerns largely because of the possible conflicts between the special Regulations and the existing Federal Civil Service Laws.

The new Regulations confer sweeping powers upon the Director (of ERCA) to dismiss any employee upon mere suspicion of corruption.<sup>103</sup> The decision of the Director is final, taking away the rights employees of the Authority had had under Ethiopia's Federal Civil Service Laws.<sup>104</sup> A former employee of the Authority who was dismissed under the new Regulations maintained that the Regulations denied him the right to contest the decision in courts and challenged the Regulations before the Federal Service Agency Administrative Tribunal.<sup>105</sup> The Administrative Tribunal, however, held that the issue raised an issue of constitutional interpretation and referred the matter to the Council of Constitutional Inquiry.<sup>106</sup> The Council did not see anything unusual about denying judicial review and ruled that the matter did not raise constitutional interpretation. The decision of the Council strengthens the now powerful arm of ERCA in tax administration. The establishment laws, the personnel regulations as well as the decisions reached over their legality signal the ever increasing powers of ERCA in all aspects of tax administration. It is quite evident that ERCA has assumed hitherto unheard of powers of prosecution

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<sup>100</sup>Id, see part seven

<sup>101</sup>Id, see Article 26

<sup>102</sup>These include accepting or seeking any kind of benefit from customers, divulging confidential information, and obstructing the proper course of service delivery; id, see Article 31

<sup>103</sup>Id, Article 37(2)

<sup>104</sup>Federal Civil Servants Proclamation No. 515/2007, *Federal Negarit Gazeta*, 13<sup>th</sup> year, No. 15, see Article 74

<sup>105</sup>*Ato Ibrahim Mohammed vs. Ethiopian Revenues and Customs Authority*, Federal Administrative Tribunal, Appeal File No. 00852/2001, *Yekatit* 26, 2002 E.C., in Amharic, unpublished

<sup>106</sup>*In a Matter of Federal Civil Service Agency Administrative Tribunal*, Council of Constitutional Inquiry, File No. 101/12/2001, *Yekatit* 1, 2002 E.C, in Amharic, unpublished

and investigation of tax and customs offenses as well as regulation of its own employees, perhaps untroubled by the country's Federal Civil Service Laws in the latter case.

Recent tax administration reforms have clearly concentrated the powers over tax administration in ERCA, but ERCA is by no means the sole player in tax administration. Other government bodies are involved in tax administration, albeit in a limited capacity. The Ministry of Finance may have ceased as a tax administration body since 1995, but it is still involved in some capacity in tax administration.<sup>107</sup> 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. The Ministry receives applications for exemptions and grants tax exemptions on case by case basis. The Ministry is also involved in the formulation of the fiscal policy of the Federal Government, whose instruments happen to be taxes and duties, among others.<sup>108</sup> Other governmental bodies, like the Federal Investment Agency, the Ministry of Mines and Energy, Ministry of Tourism and Culture and the National Bank of Ethiopia, are also involved in tax administration in more limited capacity.<sup>109</sup> The Ethiopian Investment Board (now Agency) is active in the area of tax incentives, where it has issued directives to define and determine the extent of tax incentives provided by the Investment laws of the country.<sup>110</sup>

The diffusion of tax administration in the hands of multiple government bodies may have been unavoidable but it has side effects. Sometimes, conflicts of jurisdiction may arise between the different government bodies. Jurisdictional conflicts may, for example, arise between the regular prosecution offices or the Federal Anti-Corruption Commission on the one hand, and the prosecutors of ERCA on the other, over the characterization of certain offenses, which, depending on who is looking at them, may be characterized either as corruption offenses or customs/tax offenses. The chances for conflicts of

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<sup>107</sup>Income Tax Proclamation, *supra* note 49, see Article 13 (d) (iii) and VAT Proclamation, *supra* note 24, Article 8(4)

<sup>108</sup>See Definition of Powers and Duties of the Executive Organs of the FDRE Proclamation No. 471/2005, *Federal Negarit Gazeta*, 12<sup>th</sup> year, No. 1, Article 19(10))

<sup>109</sup>Council of Ministers Regulation on Investment Incentives and Investment Areas Reserved for Domestic Investors No. 84/2003, *Federal Negarit Gazeta*, 9<sup>th</sup> year, No. 34, see Articles 4(4) (7), 9, 10(2); Ministry of Mines and Energy, Directive to Determine the type and quantity of vehicles to be imported free of duty for mining projects, *Sene* 2001 E.C., in Amharic, unpublished; Ministry of Culture and Tourism, Directive to Determine conditions for Duty Free Importation of vehicles by tour operators and tour guides, *Ginbot* 2000, in Amharic, unpublished.

<sup>110</sup>See Ethiopian Investment Commission, Directive Issued by the Ethiopian Investment Commission to determine the agricultural products that enjoy five year income tax holidays, in Amharic, unpublished.

jurisdiction or lack of coordination have been considerably reduced as a result of recent reforms to merge the authorities that are directly involved in tax administration, but there are still many government bodies involved (at least indirectly) in tax administration, raising concerns of mis-coordination and conflicts of jurisdiction.

## II

### 1. The Organization of Tax Laws in Ethiopia

A logical organization of laws, particularly of tax laws, is critical for the proper comprehension of the tax system.<sup>111</sup> Different legal systems organize their tax laws differently, ranging from those countries that organize their tax laws in codes to those that issue tax laws in scattered pieces of legislation. The organization of tax laws in different legal systems is one minor paradox in and of itself. The status of a country as a civil law country has not had any impact on codification of tax laws. A number of countries, such as Cameroon, Colombia, Cote d'Ivoire, France, Gabon, Kazakhstan and the United States, have organized their tax laws in a code.<sup>112</sup> While France has a tax code, many other civil law countries remain without tax codes.<sup>113</sup> The United States has a tax code although it is a common law country.<sup>114</sup>

Organization of tax laws in a code has many advantages. Judged purely in terms of accessibility and intelligibility, the organization of rules in a formal code with logically coherent arrangement of rules is without doubt the most preferred form of rule organization. By organizing all general areas of definitions and administrative provisions in a single section, codes help eliminate duplication of definitions and administrative provisions in individual pieces of legislation.<sup>115</sup> Codes overcome the possible treatment of general definitions and administrative provisions in separate pieces of tax legislations and help avoid differing and at times conflicting interpretations.<sup>116</sup> Codes are excellent media for rationalizing the organization of the whole tax system as they force tax reformers to think about how the parts fit into the whole. It may be feared that codes make frequent amendments difficult (and are therefore unfit for fast changing areas of the law, such as tax laws) but

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<sup>111</sup>Victor Thuronyi, "Drafting Tax Legislation", in Victor Thuronyi (ed.), *Tax Law Design and Drafting*, vol. 1, International Monetary Fund, 1996, at 79

<sup>112</sup>*Id.*, at 80, footnote 29

<sup>113</sup>*Id.*, at 81

<sup>114</sup>As the US experience attests, having a tax code is no guarantee to simplicity of taxation; see Michael Graetz, *Essay: One Hundred Million Unnecessary Returns: A Fresh Start for the U.S. Tax System*, 112 *Yale L. J.* 2, (Nov. 2002), at 261-310; see also Sanford M. Guerin and Philip F. Postlewaite, *Problems and Materials in Federal Income Taxation*, 6<sup>th</sup> edition, Aspen Law and Business, 2002, at 885ff; Victor Thuronyi, *supra note 33*, at 17-19

<sup>115</sup>Victor Thuronyi, *supra note 111*, at 80

<sup>116</sup>*Ibid*

subsequent amendments can be automatically consolidated into the code, by adding section or articles or repealing and replacing obsolete sections and provisions.<sup>117</sup> This process of amendment – called ‘textual amendment’ – can make the whole body of tax laws more accessible (at least physically) with regular updates of amendments and changes.<sup>118</sup> In sum, the organization of tax laws in codes can contribute immeasurably to taxpayer compliance and reduce the uncertainty of what the law is, as taxpayers can be confident that they have all the tax laws before them.<sup>119</sup>

Organizing tax laws in a tax code is not always desirable, even if possible. Only rules of general application with the power to endure the test of time can be organized in codes, while ephemeral rules should be contained in specific tax laws that are more amenable to frequent revisions and amendments.<sup>120</sup> Some countries that do not have tax codes have opted for the next best thing, i.e., consolidation, which by careful organization of the separate tax laws with cross references, achieves virtually the same result as the tax codes.<sup>121</sup> Another option, followed in some countries, is to consolidate and issue tax rules of general application (e.g., administrative provisions) in a ‘revenue’ or ‘fiscal’ law and flank these by an array of individual tax legislations.<sup>122</sup>

In the organization of its formal laws, Ethiopia is squarely in the camp of civil law countries. Since 1950s and 1960s, Ethiopia has organized most of its civil, commercial and criminal laws and procedures in codes. However, many laws, most notably in the tax area, have remained outside the code system of organization. The country has not attempted to organize the tax laws since modern tax laws were introduced in the 1940s. The closest Ethiopia has come to organizing tax laws into a systematic body of laws is through the

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<sup>117</sup>Id, at 81

<sup>118</sup>Id, at 82; the organization of tax laws in a code would have received endorsement from Adam Smith who, in his famous treatise “the Wealth of Nations”, developed four maxims of a good tax system, one of which happens to be ‘certainty’ of tax obligations. Adam Smith thought of his maxim of certainty so important as to place it above all of the other maxims: “The certainty of what each individual ought to pay is, in taxation, a matter of so great importance, that a very considerable degree of inequality, it appears, I believe, from the experience of all nations, is not near so great an evil as a very small degree of uncertainty.” Adam Smith, *An Enquiry Into the Nature and Causes of the Wealth of Nations*, with an Introduction by Max Lerner, the Modern Library, New York, 1937, at 778

<sup>119</sup>Id, at 81

<sup>120</sup>Victor Thuronyi, *supra* note 111, at 81

<sup>121</sup>Ibid

<sup>122</sup>Victor Thuronyi cites Germany, Belgium, Austria, Spain, Russia, Chile and Brazil as examples of countries that have general revenue or fiscal laws; *ibid*

Consolidated Laws project, which was unfortunately terminated in 1975.<sup>123</sup> Since then, partial attempts were made to organize some tax laws. Several pieces of tax legislations in the area of excise taxation were brought together in 1990<sup>124</sup> and similar attempts were made for income taxes in the 2002 income tax reforms. Sadly, these attempts were soon forgotten and the situation went back since then to the old system of issuing piecemeal legislations whenever a need arises for revision of this or that tax law.<sup>125</sup>

The tax laws of Ethiopia are presently found scattered not just in different tax laws but in other laws of Ethiopia. Many other laws of Ethiopia contain tax rules and provisions. In some forms of legislations, tax matters feature significantly while in others tax matters may appear in one or two articles in a body of legislation dealing with many other matters, taxation being one insignificant side note. Tax rules are found in significant numbers in investment laws, for obvious reasons. Tax incentives are some of the major instruments of attracting investment (domestic or foreign) and it is no surprise

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<sup>123</sup>The Consolidated Laws of Ethiopia arranged legislations other than those in the codes of Ethiopia by subjects, one of which was taxes. All taxes in force at the time were consolidated by subject and any amendments to specific provisions were inserted after each provision (under consolidation note), and what is more, the Consolidated Laws even included some court decisions of the Ethiopian high courts and the Supreme Court (note of decision) so readers of the laws would immediately know any amendments made to specific provision and decisions reached on specific subject of tax law. But the Consolidated Laws of Ethiopia was not an official publication of the Government at the time. It was initiated by the Faculty of Law of Addis Ababa University in collaboration with the Office of the Prime Minister at the time. Although *Consolidated Laws* was not official, its utility in making tax legislations accessible was undeniable. The *Consolidated Laws of Ethiopia* was in part an attempt to systematically organize laws outside the codes of Ethiopia but the project was discontinued after 1975 and has since never been revived; the 1975 Supplement of the Consolidated Laws of Ethiopia appeared with a strange apology for consolidating laws of the feudal regime; see Consolidated Laws of Ethiopia, Supplement 1, The Faculty of Law, Haile Sellassie I University, 1975.

<sup>124</sup>See Sales Tax Council of State Special Decree No. 16/1990, *Negarit Gazeta*, 49<sup>th</sup> year, No. 11

<sup>125</sup>In 2008 alone, several tax law amendments were issued separately; see Income Tax (Amendment) Proclamation No. 608/2008, *Federal Negarit Gazeta*, 15<sup>th</sup> year, No. 5; Value Added Tax (Amendment) Proclamation No. 609/2008, *Federal Negarit Gazeta*, 15<sup>th</sup> year, No. 6; Turnover Tax (Amendment) Proclamation No. 611/2008, *Federal Negarit Gazeta*, 15<sup>th</sup> year, No. 8; Excise Tax (Amendment) Proclamation No. 610/2008, *Federal Negarit Gazeta*, 15<sup>th</sup> year, No. 7; Stamp Duty (Amendment) Proclamation No. 612/2008, *Federal Negarit Gazeta*, 15<sup>th</sup> year, No. 9; Council of Ministers Income Tax (Amendment) Regulations No. 164/2009

that the rules about tax incentives occupy a central position in these laws.<sup>126</sup> In many other laws of Ethiopia, however, tax rules may appear in one or two articles, if at all.<sup>127</sup>

To date, the Ethiopian tax legislation field is chaotic, disorganized, uncoordinated and worse, making it difficult for an average taxpayer to make sense of her obligations under the various tax laws in force. Because tax laws are uncoordinated, most tax legislations repeat certain provisions as if this were not already provided for in other tax legislations. One area where so much ink could surely have been saved is in the definition areas, where certain terms appear repetitively as if these terms were not already defined in another tax law. One can, for example, take the definition of 'body' for tax purposes - which is found in many tax proclamations of Ethiopia. There is reason to believe that the definition of 'body' should be uniform for all tax laws, but because of the absence of a tradition of having certain general tax laws, we find ourselves reading the same definition repeated in so many tax laws of Ethiopia.<sup>128</sup> The same can be said for the definition of terms like 'person', 'related person', and 'authority' in different tax laws of Ethiopia.

Similarly, administrative provisions (which are of general application) are repeated in individual legislations without reference to other legislations - something which could have been avoided had Ethiopia had something like 'general tax administration' law or 'general fiscal' law, as in some countries. The result of these repetitions has at times been the provision of incompatible or contradictory administrative procedures in different tax legislations of Ethiopia. We may cite a few examples to illustrate the problems. In the Income Tax and VAT proclamations, taxpayers dissatisfied with assessment of tax must first appeal to the Tax Appeal Commission before going to courts, but in the Stamp Duty Proclamation of 1998, taxpayers could appeal directly to the High Court from the assessment made by the Tax Authority. This procedural

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<sup>126</sup>See, for example, Council of Ministers Regulations on Investment Incentives and Investment Areas Reserved for Domestic Investors No. 84/2003, *Federal Negarit Gazeta*, 9<sup>th</sup> year, No. 34, Articles 4-11

<sup>127</sup>See, as examples, the Labor Proclamation No. 377/2003, *Federal Negarit Gazeta*, 10<sup>th</sup> year, No. 12, Article 112; Public Servants Pension Proclamation No. 345/2003; *Federal Negarit Gazeta*, 9<sup>th</sup> year, No. 65, Article 51; Proclamation to Provide for the Issuance of Government Bonds No. 172/1961, *Negarit Gazeta*, year 20, No. 11, Article 6 of the Proclamation to Provide for the Issuance of Government Bonds No. 262/1969, *Negarit Gazeta*, Year 28, No. 12, Article 7.

<sup>128</sup>Please compare the definition of 'body' in the Income Tax Proclamation No. 286/2002, *supra note* 43, Article 2(2) with almost identical definitions in the Value Added Tax Proclamation No. 285/2002, *supra note* 24, Article 2(5) and in the Excise Tax Proclamation No. 307/2008, *Federal Negarit Gazeta*, 9<sup>th</sup> year, No. 21, Article 2(3)

discrepancy was later discovered and corrected by an amendment.<sup>129</sup> Such a discrepancy was probably created inadvertently, but these kinds of errors are inevitable when similar matters are to be dealt with in individual legislations. Similarly, there is some discrepancy in the administrative schemes of complaints handling in disputes involving stamp duties and other types of taxes. In many other tax disputes, an administrative tribunal called the 'Review Committee' has been established since 2002, but the tribunal is not available for disputes involving stamp duties. Such a discrepancy can only be explained by the existence of separate legislations pertaining to the same matter, namely dispute settlement.

Ethiopia has an admirable track record in organizing some of its modern laws into codes, which have stood the test of time, but it has not followed this with respect to tax laws. What has prevented Ethiopia from collecting its general tax provisions in a single body of rules? It has in part to do with the approach to reform taken with respect to taxes, which is different from the approach taken in many other aspects of Ethiopian law. The approach to tax reform has been one of gradualism or incrementalism, which piles one amendment over another until the original tax legislation is eventually obliterated as a result of numerous subsequent amendments to the original legislations. This approach to tax reform has for so long prevented Ethiopian tax reformers from looking at tax laws in their totality. Not even the comprehensive tax reforms of 2002 could overcome this problem of obsessing with individual sections of separate tax legislations rather than the impact of the amendment or revisions of a part upon the consistency of the whole.

## **2. The Sources of Tax Law**

### ***2.1. Tax Proclamations and Regulations***

Most substantive and procedural rules pertaining to taxation flow from tax proclamations and regulations. Tax proclamations are quite easily the most important sources of substantive tax obligations in Ethiopia. Some tax proclamations are bulkier and more detailed than others. Some have layers of subsidiary legislations under them and others are their lonely self.

The difference between tax proclamations and regulations is more a matter of form than substance. To be sure, tax regulations are derivative legislations – issued only pursuant to the authority given in tax proclamations. But in terms of the subject matters covered, there is really very little difference between tax proclamations and regulations. We may be predisposed to associate tax proclamations with more substantive (not to say weightier) matters than tax regulations but the situation on the ground is really haphazard.

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<sup>129</sup> Stamp Duty (Amendment) Proclamation No. 612/2008, *Federal Negarit Gazeta*, 15<sup>th</sup> year, No. 9, see Article 2(2)

In theory, tax regulations should be limited to details and technical matters<sup>130</sup> but in practice tax regulations cover as many substantive issues as the tax proclamations. Upon reading some provisions, we wish some provisions in tax regulations were addressed in tax proclamations and some provisions in tax proclamations were relegated to the regulations.<sup>131</sup> The subject matter of tax exemptions is a perfect example of how little difference exists between the subject-matters of tax proclamations and regulations. Tax exemptions are found in both the tax proclamations and regulations. Indeed, we may attribute as many tax exemptions to the regulations as to the proclamations.<sup>132</sup> In the end the one reliable (and surefire) distinction between tax proclamations and tax regulations is that the former pass through the scrutiny of the parliament while the latter are issued by the Council of Ministers.

The whole idea of delegating power to issue regulations to an executive body like the Council of Ministers is in order to attend to details that cannot be dealt with in tax proclamations.<sup>133</sup> But ironically, tax regulations in Ethiopia are issued almost at the same time (or immediately thereafter) as the tax proclamations. The Council can hardly have time to consider and develop the

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<sup>130</sup>See James C.N Paul and Christopher Clapham, *Ethiopian Constitutional Development*, Source Book, Vol. 2, at 532; see also Henry Ordower, *General Report*, Michigan State Journal of International Law, Vol. 15, No. 2, 2007, at 177-178

<sup>131</sup>Consider the following provisions for contrast; Article 72 of the Income Tax Proclamation (2002) requires taxpayers to include certain details in the income tax assessment notification (gross income, taxable income, rates, taxes due, penalty, interest, etc) and Article 3 of the Income Tax Regulations (2002) lists the types of income from employment that are exempted from employment income tax (medical allowance, transportation allowance, traveling allowance, etc). Article 72 deals with a matter that is purely procedural and technical while Article 3 is as substantive as it can get. If we seriously think about it, Article 3 of the Regulations should have been included in the Income Tax Proclamation and Article 72 could have been safely relegated to the Regulations. The same subject matter is sometimes treated in tax proclamations and sometimes in tax regulations. The rate and method of depreciation is determined for income tax purposes in the Income Tax Proclamation, while the same subject matter is determined in a directive for purposes of exemptions from customs duties; the rate of depreciation of vehicles under the Income Tax Proclamation is 20% while under the customs directives, it is 10%; compare Article 23 of Income Tax Proclamation No. 286/2002 with Ministry of Revenues Directive No. 3/1996 E.C., in Amharic, unpublished.

<sup>132</sup>For example, the exemptions from employment income tax for transportation, traveling, hardship, and medical allowances are found in the income tax regulations, not in the Proclamations; see Income Tax Regulations, *supra note* 43, Article 3

<sup>133</sup>Legislative bodies delegate certain legislative powers to the executive bodies for different reasons: pressure of work, to achieve flexibility and for reasons of technicality; see Paul & Clapham, *supra note* 130, at 532; see also Henry Ordower, *General Report*, 15Mich. State J. Int'l L.2, (2007), at 177-178



technical details needed to complete the tax proclamation in the interval between the issuance of tax proclamations and tax regulations. So the wisdom of issuing some rules in the tax regulations as opposed to in the tax proclamations is questionable. And the tax regulations have in the past been as inflexible as the tax proclamations. Indeed the regulations are revised less frequently than the tax proclamations, which should have been the other way around. One must therefore wonder if the tax regulations are issued for the objectives they are intended for, which is to give the executive some flexibility to provide for details as the changes dictate. One would also expect the regulations to be more numerous and voluminous, but in practice, the proclamations actually far outnumber the regulations and they are more voluminous.<sup>134</sup>

## 2.2. Tax Directives

Tax directives do not get as much attention in academic writing and court cases as they deserve but they are issued in large numbers by administrative agencies or bodies associated with taxation. In the galaxy of laws in Ethiopia, tax directives occupy a rank below tax regulations which are issued by the Council of Ministers. Both the tax proclamations and tax regulations of Ethiopia anticipate that the legislative field of taxes is hardly complete until tax directives are issued covering a wide-range of issues.<sup>135</sup>

Tax directives are issued by either ministerial bodies (most notably the Ministry of Finance) or other public bodies organized as authorities or commissions. In the past, tax directives were far and few in between, but directives have increased in sheer number and diversity in recent times. All the public bodies connected with tax administration have been busy issuing one or another form of directives in the area of taxes. Recent tax administration reforms have clearly had an impact in this regard. With the strengthening of the tax administration bodies, we have seen an increasing number of directives in taxation.

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<sup>134</sup>At least in the tax area, one cannot help feeling that the whole business of the Council of Ministers issuing tax regulations was more a matter of following the custom than the commitment to looking after the details and technical matters. The proof for this is that the regulations issued simultaneously with the Income Tax Proclamation of 2002 simply continued the tradition established back in the 1950s and 1960s; compare Council of Ministers Regulation No. 78/2002 with Council of Ministers Regulation No. 258/1962.

<sup>135</sup>There are many provisions in our tax laws that delegate powers of ruling making to executive bodies; see for example, Income Tax Proclamation, *supra* note 43, Articles 13(d)(iii), 13(e), 42, 46, 68(2), 68(3), 69(2), 114(2), 117; Income Tax Regulations, *supra* note 43, Articles 3(h), 24(3), 27; VAT Proclamation, *supra* note 24, Articles 8(3), 16(2), 22(2), 22(6), 22(7), 30 and 64

The sheer number and diversity of these directives makes it difficult to classify them, but we must classify them if we wish to understand the role of directives in the Ethiopian tax system. In terms of the administrative bodies that issue these directives, we may find tax directives from authorities as diverse as Ministry of Finance and Ministry of Education.<sup>136</sup> Many of the tax directives hail from the Ministry of Finance, but there are significant numbers of directives from the Ethiopian Revenues and Customs Authority (ERCA) or its predecessors. The tax laws anticipate directives from the Ministry of Justice (on the subject of the composition, membership, etc of the Tax Appeal Commission),<sup>137</sup> the Ethiopian Investment Agency (on the subject of tax incentives accorded to investors) and National Bank of Ethiopia (NBE) (on the subject of special (technical) reserves required of financial institutions and deductible under the income tax law).<sup>138</sup>

Because of the extensive delegating-provisions scattered throughout the tax laws of Ethiopia, the directives issued by administrative agencies cover a wide-range of subjects, so much so that it is difficult to pin them down into categories or patterns. One way of making sense of the field of directives is to employ a classification adopted in other tax systems. A useful classification may be that between 'legislative', 'interpretative' and 'procedural' directives, as developed by the US courts for 'regulations', which are the equivalent of directives in Ethiopia.<sup>139</sup> In the US, legislative directives (regulations)<sup>140</sup> are distinguished from interpretative ones in the sense that 'legislative' directives may 'create, modify or extinguish rights and obligations' of taxpayers, and 'set down additional substantive requirements'.<sup>141</sup> 'Legislative' regulations have the 'force and effect of law' unless the issuing authority has exceeded 'the scope of its delegated power or is contrary to the law, or is unreasonable' in

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<sup>136</sup>For directive from the Ministry of Education, see Ministry of Education, Higher Education Institutions Cost Sharing Scheme Directive No. 002/1995, in Amharic, unpublished.

<sup>137</sup>Although the law authorizes the Ministry of Justice to issue directives regarding the composition, membership, etc of the Tax Appeal Commission, we have yet to see one

<sup>138</sup>See Income Tax Proclamation, *supra* note 49, Article 26; one characteristic of tax directives (not a very important one) is that they are issued by diverse administrative bodies.

<sup>139</sup>See Federal Tax Course, *supra* note 69, at 132; see also James W. Pratt and William N. Kulsrud, *Individual Taxation*, Dame Publications, Inc., Taxation Series, 1999 Edition, at 2.22

<sup>140</sup>'Regulations' in the US is the equivalent of our 'directives'. In the hierarchy of Ethiopian laws, 'regulations' occupy a higher rank than directives, because while 'regulations' are issued by the Council of Ministers, 'directives' are issued by individual ministries, authorities or commissions.

<sup>141</sup>Federal Tax Course, *supra* note 69, at 132; 73 C.J.S., Public Administrative Law and Procedure §87

issuing these types of regulations.<sup>142</sup> Legislative regulations that pass muster according to these standards are generally binding both upon the IRS and taxpayers.<sup>143</sup> 'Interpretative' regulations are not accorded the 'force and effect of law' although courts have attached considerable weight to them arguing that these regulations 'express a long-continued administrative practice' and constitute 'body of experience and informed judgment'.<sup>144</sup> "Procedural Regulations" (directives) - identified by the subject matters treated in them - give directions to taxpayers on what information they need to supply and how tax administration is internally organized and conducted.<sup>145</sup>

As administrative jurisprudence is yet to develop in Ethiopia, no distinction is drawn among directives. If we make distinctions based on jurisprudence developed elsewhere, it is not because the administrative agencies that issue directives are aware of the distinctions nor because Ethiopian courts know them as such but because it is a helpful heuristic device to make sense of the world of tax directives in Ethiopia. All types of directives exist in an undifferentiated mass in practice. There are as many legislative (perhaps more) directives as there are the interpretative and procedural ones in Ethiopia. If we define legislative directives as those issued pursuant to a specific authority in the higher ranked tax laws (proclamations and regulations), almost all directives in Ethiopia will qualify as legislative directives because we can trace the authority for issuing all directives to provisions in higher ranked tax laws. A fact which is seldom acknowledged in the Ethiopian tax system is how frequently the Ethiopian tax administration engages in interpretation of tax laws through the various directives it issues.<sup>146</sup> There are many tax directives which define, restrict and expand upon the meanings of terms and concepts mentioned in principal tax legislations. These directives define the scope of benefits and/or of obligations mentioned in principal tax legislations. They define technical concepts that are left undefined or ambiguous in the principal laws.

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<sup>142</sup>Federal Tax Course, *supra note* 69, at 132

<sup>143</sup>*Ibid*

<sup>144</sup>*Ibid*; *Skidmore v. Swift and W.* 323 U.S. 134 (USSC, 1944), cited in Pratt and Kulsrud, *supra note* 139, at 2.22

<sup>145</sup>Pratt and Kulsrud, *supra note* 139, at 2.22

<sup>146</sup>Tax administrations have made considerable forays into the interpretative function/field as a result of the incomplete or contradictory and unworkable nature of many of the provisions of tax laws and the impossibility of immediate judicial clarification, but doubts are raised over the impartiality of the tax authorities, and courts are generally seen as the last arbiters in matters of interpretation; see Notes and Legislation, *Judicial Review of Regulations and Rulings under the Revenue Acts*, Harvard Law Review, vol. 52, No. 7 (May, 1939), at 1163-1164

An income tax directive issued in 2003, for example, states that 'technical services', which are mentioned as taxable in the Income Tax Proclamation, include 'satellite services' provided by providers abroad.<sup>147</sup> Another income tax directive, issued by the Ministry of Revenues delimits the scope of transportation allowance excluded from the income tax and restricts the amount of allowance that can at any one time be excluded from the tax.<sup>148</sup>

We may also find directives whose chief objective is to explain administrative procedures, help taxpayers understand the procedural steps needed to pay taxes or simply provide details of information that taxpayers need to furnish in order to fulfill their various obligations. For lack of a better term, we may call these procedural directives.<sup>149</sup> The role of procedural directives is in the main to assist taxpayers in the understanding of tax laws – applied to tax laws, this is no mean task. They help bring the technical and complex language of tax laws down to the level of the average taxpayer. They simplify, clarify, and explain tax proclamations and regulations. A directive issued in 2003, for example, simplifies the process of income tax computation for all the classes of income taxpayers in Ethiopia.<sup>150</sup> The directive simplifies the computation of tax by providing a much easier table of computation for schedule A, B, C and D taxpayers. It also provides directives on subjects like accounting year, tax declaration forms and rewards for providing information leading to the discovery of undeclared income. This type of directive adds very little to the substance of the income tax laws, but it helps taxpayers and tax administrators wade through the complex structure of the tax system.<sup>151</sup>

The third types of directives– the legislative directives – are actually more numerous than the purely interpretative directives. We may identify these directives either by their targets or subjects treated in them. By their targets, we may distinguish specific legislative directives from general legislative directives. Specific legislative directives aim at specific taxpayers and are usually limited by time. These types of directives are most common among

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<sup>147</sup>Federal Democratic Republic of Ethiopia, Ministry of Finance and Economic Development, 1996 E.C., in Amharic, unpublished

<sup>148</sup>Federal Democratic Republic of Ethiopia, Ministry of Revenues, *Hamle 1*, 1995 E.C., in Amharic, unpublished

<sup>149</sup>Procedural directives may also be called 'administrative' directives; see Notes and Legislation, *Judicial Review of Regulations and Rulings under the Revenue Acts*, 51 Harv. L. Rev. 7 (May, 1939), at 1163

<sup>150</sup>Federal Democratic Republic of Ethiopia, Federal Inland Revenues Authority, Directives No. 1/2003, unpublished

<sup>151</sup>For procedural directives, one may also look at directives like a directive issued to provide for the use of sales register machines (Directive No. 46/2007) and its amendment (Directive No. 51/2007); A directive to provide for the Issue and Implementation of Tax Identification Numbers (Directive No. 11/2008)

directives that grant tax exemptions. We can take directives that grant exemptions to the Ethiopian Airlines (from the payment of all taxes on its Aircraft purchases), to Cuban expatriates (from the payment of income tax) and Addis Ababa City Administration (from the payment of VAT on acquisition of construction materials for its low cost housing projects) as examples of specific legislative tax directives.<sup>152</sup> Specific tax directives are often sent as letters or memos to members of the relevant tax administration for purposes of giving full effect to the contents of the directives. As such, these directives do not contain much of the formalism that characterizes legal documents. They are usually not made public and as such they are probably only known to the relevant members of the tax administration and of course the beneficiaries of the tax exemptions.

General legislative tax directives, on the other hand, are easily identifiable as legal texts because they are couched in a language of formal law, with all the paraphernalia of legal jargons, definitions and legal provisions (some even contain preambles stating the general objectives of the directives). Many of these directives are numbered by the issuing authorities, although they are no longer published in the *Negarit Gazeta* – the official outlet of legal publications in Ethiopia.

By the subjects commonly treated in general legislative tax directives, we may identify two types of directives – those that grant tax exemptions and those that tend to increase the obligations of taxpayers. One feature of Ethiopian tax system is the wide diffusion of the power of tax exemption powers. The Ethiopian parliament has granted a number of tax exemptions in proclamations, but has also delegated extensive exemptions powers to the Council of Ministers as well as the various administrative agencies of the Federal Government. The general legislative directives that exempt taxpayers are the result of these delegations by the Parliament. The Ministry of Finance has, for example, been empowered to exempt goods and services from VAT and the Ministry has so far issued directives to exempt imports or domestic supplies of medicine and medical supplies, bread and milk, agricultural inputs and stationeries.<sup>153</sup> There are also general legislative directives which tend to increase the obligations of taxpayers. Administrative agencies obtain the power to issue these types of directives, like those that exempt taxpayers, from the tax

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<sup>152</sup>See Federal Democratic Republic of Ethiopia, Ministry of Finance and Economic Development, 1998 E.C., in Amharic, unpublished; Federal Democratic Republic of Ethiopia, Ministry of Revenues, 1998 E.C., in Amharic, unpublished; Federal Democratic Republic of Ethiopia, Ministry of Finance and Economic Development, 1996 E.C., in Amharic, unpublished.

<sup>153</sup>See Federal Democratic Republic of Ethiopia, Ministry of Finance and Economic Development, 1995 E.C., in Amharic, unpublished.

proclamations and sometimes the tax regulations. These types of directives are particularly prominent among VAT directives.<sup>154</sup>

Directives that grant exemptions are virtually unknown among the wider population of taxpayers, presumably because their effect is to relieve some taxpayers from payment of taxes. They may (surely do) have an impact upon the overall equitability of the tax system, but tax equity is too abstract a matter at the moment to lead to controversies. On the contrary, those directives that tend to increase the obligations of taxpayers (as in the examples given above) stir controversies among taxpayers – which is as it is to be expected.<sup>155</sup>

Directives have increased in sheer size and numbers in recent times, partly as a result of the reorganization of the tax authorities. The size of tax directives is estimated to be at least three times thicker than that of tax proclamations and regulations combined. While directives are clearly useful in making tax laws more intelligible to average taxpayers, a worrying development of recent times is that almost all of the directives remain unpublished and therefore inaccessible to the majority of taxpayers. Ethiopia has certainly regressed in this regard. In the past, all laws of the government, including directives and the other subsidiary forms of legislation like public notices, were issued in the *Negarit Gazeta* (the official legal gazette of the Ethiopian Government).<sup>156</sup> Even appointments of public officials were published in the *Negarit Gazeta*.

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<sup>154</sup>The Ministry of Revenues (the predecessor of ERCA) has issued a number of directives which are perceived by the taxpaying community as increasing their tax obligations. The Ministry has issued directives to extend the registration obligations to certain types of business *en bloc*; flour factories, jewelry stores, computer and electronic stores, plastic products factories, shoe manufacturers, leather products stores, and contractors have been subjected to obligatory registration regardless of their annual turnover as a result of these directives; see Ministry of Revenues, FDRE, Ref. No. 01/A29/306/45, *Sene* 17, 1995 E.C., in Amharic unpublished; Ministry of Revenues, FDRE, Ref. No. 2A VAT – 72/42, *Nehassie* 27, 1996 E.C., in Amharic, unpublished

<sup>155</sup>By the way, these controversies are rarely fought in courts because of the absence of administrative laws that show taxpayers the ways of challenging administrative directives. Taxpayers are therefore reduced to raising their complaints informally to the tax authorities or voicing their objections in newspapers; see 'Business Community Twice Dissatisfied with Customs Authority Talks', *Addis Fortune*, 13 September 2009; 'Over fifty Face Tax Authorities to Question Enforcement', *Addis Fortune*, 2 July 2009.

<sup>156</sup>The *Negarit Gazeta* establishment Proclamation No. 1/1942 required the publication of proclamations, decrees, laws, rules, regulations, orders, notices and subsidiary legislations; it also required publication of notices concerning appointments, dismissals, titles, decorations, and honors and notices for the general information concerning matters of public interest; see *Negarit Gazeta* Establishment Proclamation No. 1/1942, *Negarit Gazeta*, Year 1, No. 1

Nowadays, only proclamations and regulations are issued in the *Negarit Gazeta*, with most of other subsidiary forms of legislations kept in the files of respective government authorities.<sup>157</sup> The result is that many taxpayers are unaware that these directives even exist let alone understand their imports. Because directives are no longer published in official gazettes, the tax authorities do not show as much attention to the language of directives as they do with the proclamations and regulations. A recent ruling by the Cassation Division of the Federal Supreme Court to the effect that directives do not have to be published in the *Negarit Gazeta* to have a legally binding effect only helps to entrench a disturbing development of administrative agencies issuing directives without having to publicize them in *Negarit Gazeta*.<sup>158</sup>

So far we have focused upon the content of directives and the various forms they may assume in practice. Another issue of perhaps no less importance in the field of tax directives is the procedures for issuing directives. The procedures for issuing tax proclamations are well-established by law, as the Ethiopian Parliament has issued law-making procedures for laws approved by the Parliament.<sup>159</sup> Some tax systems have well-established and detailed administrative rules for issuing tax directives or regulations. In the US tax system, for example, the US Treasury first publishes a proposed regulation (the equivalent of our directive here) in the form of "Notice of Proposed Rule Making".<sup>160</sup> It then waits for at least thirty days to allow taxpayers to comment on the proposed rule. After a review of taxpayer comments, the proposed regulation (directive) is revised and re-proposed for another round of commenting by taxpayers, and only after that is it issued in its final form. There are no known procedures for issuing directives in Ethiopia. The administrative agencies empowered to issue directives (e.g. the Ministry of Finance) are not bound to follow any specific procedures before they issue directives. They may issue directives without consulting anybody or they may consult some of the stakeholders when they feel like it. It may be necessary to develop procedures so that all interested parties (or stakeholders, as the cliché has it) are consulted before a directive becomes a law and binding upon taxpayers. Consultations give taxpayers the opportunity to submit views, data,

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<sup>157</sup>This in spite of a law that requires all laws of the Federal Government to be published in the Federal *Negarit Gazeta*; see Federal *Negarit Gazeta* Establishment Proclamation No. 3/1995, *Federal Negarit Gazeta*, 1<sup>st</sup> year, No. 3, Article 2(2)

<sup>158</sup>*Ethiopian Revenues and Customs Authority (ERCA) vs. Ato Daniel Mekonnen*, Federal Cassation Court, File No. 43781, Federal Supreme Court, Research and Legal Support Department, *Hidar* 2003 E.C., in Amharic, at 388

<sup>159</sup>See Federal Democratic Republic of Ethiopia House of Peoples' Representatives Working Procedure and Members' Code of Conduct (Amendment) Proclamation No. 470/2005, *Federal Negarit Gazeta*, 11<sup>th</sup> Year, No. 60

<sup>160</sup>See Sanford M. Guerin and Philip F. Postlewaite, *supra* note 114, at 30; see also Pratt and Kulsrud, *supra* note 139, pp. 2.21ff ; Federal Tax Course, *supra* note 69, at 131

and arguments to the tax authorities enabling the latter to make appropriate revisions and take corrective measures or even withdraw directives which are counterproductive.<sup>161</sup>

### 2.3. *Advance-rulings*

Advance rulings, or administrative rulings have become important instruments in the implementation of tax laws in many tax systems.<sup>162</sup> Developed tax systems have had a long tradition of issuing advance rulings upon request.<sup>163</sup> And many developing countries have incorporated procedures in their laws for seeking authoritative statements from the tax authorities through advance rulings.<sup>164</sup> Advance rulings provide taxpayers with the opportunity 'to obtain a more or less binding statement from the tax authorities concerning the treatment of a transaction or a series of contemplated future (sometimes past) actions or transactions'.<sup>165</sup> Advance rulings are fact-specific opinions of the tax administration in response to a taxpayer request based on contemplated transactions. Since they are fact specific, a taxpayer is generally required to give a full and fair representation of all the relevant facts.<sup>166</sup>

The practice of issuing advance rulings in other tax systems is developed to 'avoid conflict and litigation by establishing in advance an authoritative interpretation of the tax law, so that a taxpayer has full security in the way the tax law will work out in a specific situation'.<sup>167</sup> Rulings are similar to what courts would do in specific cases except that rulings make use of hypothetical cases or transactions and they apply to cases with similar factual situations set out in hypothetical case or transaction of a ruling. Their objective is to inform and guide taxpayers and tax officers.<sup>168</sup> They inform taxpayers of the position of Tax Administration on a certain transaction and 'help avoid future controversy and litigation' with the tax administration and they promote voluntary compliance by taxpayers.<sup>169</sup>

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<sup>161</sup>See Guerin and Postlewaite, *supra* note 114, at 30

<sup>162</sup>Frans Vanistendael, *supra* note 29, at 61

<sup>163</sup>Frans Vanistendael cites countries such as Australia, Canada, the Netherlands, the United Kingdom and the United States; see *id.*, at 61

<sup>164</sup>Countries like Ghana, South Africa, Uganda, Mauritius, and Tanzania from Africa have rules or procedures for obtaining authoritative advance rulings from the tax authorities of the respective countries.

<sup>165</sup>Carlo Romano, *Advance Tax Rulings and Principles of Law: Towards a European Tax Rulings System*, 2002, Doctoral Series, International Bureau of Fiscal Documentations, p. 78, accessed at Googlebooks

<sup>166</sup>Frans Vanistendael, *supra* note 29, at 61

<sup>167</sup>*Ibid*

<sup>168</sup>Corpus Juris Secundum 47 A.C.J.S. Internal Revenue §9, Data updated June 2009

<sup>169</sup>*Ibid*



According to Frans Vanistendael,<sup>170</sup> a systematic approach to the practice of advance rulings must respond to the following questions:

- i) Whether the ruling is limited to the taxpayer who requested the ruling, or whether others can also rely upon the ruling provided their factual situations fit in it;
- ii) Whether the ruling is regularly published or not;
- iii) Whether the ruling is public or private, with the distinctions;
- iv) the administrative official issuing the advance rulings;
- v) Whether the issuing of advance ruling is confined to the central Tax authorities, or whether regional or local authorities can also issue the rulings in their respective jurisdiction (an important consideration in federal systems);
- vi) the procedures for requesting advance rulings, and for deciding on and issuing the rulings; and
- vii) the circumstances under which the tax administration may change its position as expressed in its advance ruling;

As it is to be expected, different tax systems approach 'advance rulings' differently, to the extent they recognize them in their tax administrations. In some countries, advance rulings may be issued by a tax inspector,<sup>171</sup> and in other countries, tax administration cannot issue binding advance rulings at all, because in these countries, the very idea of an administrative branch issuing binding rulings goes against the principle of legality.<sup>172</sup> Sweden offers perhaps a unique example of a system in which an independent council is established to entertain requests for and issue advance rulings.<sup>173</sup>

In some tax systems, the practice of ruling-making has developed to such an extent as to create various categories of rulings. The IRS (the equivalent of ERCA) in the US issues a number of guidelines in the form of rulings for taxpayers. The most prominent examples of rulings are the 'revenue rulings', 'revenue procedures' and 'private letter rulings'.<sup>174</sup> Revenue rulings are issued in the form of memorandum of law (containing issues to be addressed, the facts pertaining to these issues and a legal analysis of the issues).<sup>175</sup> Revenue rulings are official pronouncements of the IRS and are published in the official publication of the IRS - Internal Revenue Bulletin.<sup>176</sup> Revenue Procedures

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<sup>170</sup>Frans Vanistendael, *supra* note 29, at 61

<sup>171</sup> Frans Vanistendael cites Netherlands as an example; *ibid*

<sup>172</sup>*Ibid*

<sup>173</sup>*Id*, at 62

<sup>174</sup>James R. Lapenti, the United States, in Hugh J. Ault and Brian J. Arnold, *Comparative Income Taxation, A Structural Analysis*, 3<sup>rd</sup> edition, Aspen Publishers, 2010, at 192

<sup>175</sup>*Ibid*

<sup>176</sup>See Federal Tax Course, *supra* note 69, 136; see also Pratt and Kulsrud, *supra* note 139, at 2.23 - 2.24

explain the procedural issues that taxpayers face in dealing with the IRS.<sup>177</sup> Private letter rulings are addressed to a specific taxpayer who has requested guidance from the IRS.<sup>178</sup> They are 'written statements issued to a specific taxpayer interpreting and applying tax laws to the taxpayer's specific set of facts'.<sup>179</sup>

In the US, taxpayers may rely upon revenue rulings unless the law upon which the ruling is based has changed.<sup>180</sup> Taxpayers other than the taxpayer to whom private letter rulings are addressed may not rely upon the position of the IRS in private letter rulings.<sup>181</sup> Both revenue rulings and letter rulings mostly result from taxpayer requests for letter rulings. The difference is that revenue rulings are extrapolations from the private rulings and are therefore intended for the general population of taxpayers whose situations fall within the factual transactions described in the revenue rulings.<sup>182</sup>

The practice of issuing advance rulings is not as well known and established in Ethiopia as it has been in other countries. In fact, one cannot even say that they exist as distinct legal categories. However, there have been few occasions in which the Ethiopian tax authorities were asked to furnish what can only be described as an advance ruling in the circumstances. It is not clear if the tax authorities were consciously engaged in the practice of advance rulings or doing this just as a matter of administrative courtesy.

*Employees of St. Paul Hospital vs. Ministry of Health* involved dispute over the exclusion from taxable income of special allowances paid to doctors and other staff of St. Paul Hospital in consideration of their exposure to bad smells and other risks connected with their operation on dead bodies.<sup>183</sup> St. Paul Hospital used the expression 'hardship allowance' to refer to the special allowance paid to its employees to describe the special hardship faced by these employees while operating on dead bodies. The employees at St. Paul Hospital believed that this allowance should fall within the meaning of 'hardship allowance' as that expression is known in the Income Tax Regulations of 2002

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<sup>177</sup>James R. Lapenti, *supra note 174*, p. 192; see also Federal Tax Course, *supra note 69*, at 133; see also Hoffman Smith Willis (ed.), *Individual Income Taxes*, West's Federal Taxation, 1996 Edition, at 2-9

<sup>178</sup>James R. Lapenti, *supra note 174*, at 192

<sup>179</sup>Federal Tax Course, *supra note 69*, at 134.

<sup>180</sup>James R. Lapenti, *supra note 174*, at 192

<sup>181</sup>*Ibid*

<sup>182</sup>Sometimes, the IRS develops revenue rulings from technical advice to district offices of the IRS, court decisions, suggestions from tax practitioner groups and various tax publications; see Willis, *supra note 177*, at 2-9.

<sup>183</sup>For details, see Solomon Teshome, "The Scope of Tax Exclusions under the Ethiopian Employment Income Tax Regime," Senior Thesis, Addis Ababa University, Faculty of Law, 2008, unpublished, at 15ff

and demanded that the payments be excluded from the base of the income tax.<sup>184</sup> The people at the Ministry of Health were not so certain.

The Ministry of Health wrote a letter to the Tax Administration asking for its opinion on whether the special allowance constituted 'hardship allowance' within the meaning of the Income Tax Regulations. In an internal memo written by the Legal Division of the Tax Authority and addressed to the head of the Authority, which was eventually communicated to the Ministry of Health, the Tax Authority sought to rely upon the Amharic version of the Income Tax Regulations in which the expression 'hardship allowance' is rendered as '*yeberaha abel*' in Amharic, which in English literally means 'desert allowance', a much narrower and more specific rendition than the English version of 'hardship allowance'.<sup>185</sup> The position of the Tax Authority was that the meaning of hardship allowance should be limited to payments made in consideration of extreme weather conditions (the weather conditions may be too hot or too cold climates). Upon receiving the letter from the Tax Authority, the Ministry of Health and St. Paul Hospital decided to withhold tax due upon the special allowance made to employees of St. Paul Hospital

This case involving the meaning of 'hardship allowance' in the aforementioned case and many cases like it would have been an excellent opportunity for the tax administration to inform taxpayers in general about its position on what the scope of hardship allowance is. It would also have been an opportunity for developing a distinct legal category known elsewhere as 'advance rulings'. The Tax Authority responds to taxpayers individually rather than publishing its opinion to a general population of taxpayers.<sup>186</sup> What we can say at this

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<sup>184</sup>See Income Tax Regulations, *supra* note 49, Article 3 (c)

<sup>185</sup>The position of the head of the Tax Authority is incidentally consistent with the rule of interpretation that gives precedence to the Amharic version in cases of conflict between the English and Amharic versions of the law; see Federal Negarit Gazeta Establishment Proclamation No. 3/1995, 1<sup>st</sup> year, No. 3, Article 2(4)

<sup>186</sup>There was reportedly a similar issue over the meaning of 'hardship allowance' before the *St. Paul Hospital* case, this time involving employees of Muger Cement Factory. Muger Cement Factory paid (or used to anyway) its employees a special allowance for undergoing exposure to the heat and dust of heavy machinery, and for lack of a better expression, this allowance was called 'hardship allowance'. Informally, some officers of the Tax Authority stuck to the literal meaning of 'hardship allowance' in the Amharic version of the Income Tax Regulations and rejected the exclusion of the allowance from the income tax. Solomon Teshome, who wrote his senior essay on exclusions from employment income tax, gives another instance in which the meaning of hardship allowance can be a source of controversy. He offers the example of a collective agreement in the Ethiopian Telecommunications Corporation in which the expression of hardship allowance is used to refer to payments for not just enduring the hardship of harsh weather conditions but also of

moment is that many of the issues surrounding advance rulings (including the question of its very existence) are not yet settled in the Ethiopian tax system. We don't know if these rulings are binding or even persuasive, whether they should be published (and be available in the public domain), which administrative unit should issue these rulings, and questions of that nature.

Granted that these practices are not yet fully developed in our tax system, there is a lot to be said for their development in Ethiopia. Even where they are merely persuasive, advance rulings have a lot of advantages to commend them. They cut down future conflicts considerably by informing taxpayers in advance of the position of the Tax Authority on certain transactions. They cut down costs arising from litigation, helping the courts to concentrate only on matters over which there is disagreement on the ruling. They also build the capacity of the Tax Authority to expand on the jurisprudence of taxation in the country. Advance rulings can also be used as precursors to what the Tax Administration may legislate through directives, if need be. What is originally couched in the advance rulings may crystallize into directives, regulations and proclamations, putting the rules on a firmer and more solid ground than hastily concocting rules to suit the times.

#### *2.4. Administrative Publications, Tax Guides, Tax Forms, and Public Notices*

It has become an unavoidable feature of modern tax administration to assist in tax administration with voluminous administrative commentaries, manuals, guides and circular letters. Some of these administrative commentaries, manuals, guides and circular letters are available for internal use only while others are published as exegesis for the taxpaying community. Whether they go by the name of 'statement of revenue practice' (as in the UK), or 'interpretation bulletins' (as in Canada), 'IRS Publications' (US) or in general by the names of administrative commentaries, instructions, guides, manuals or circular letters, there is little question that these materials are interpretative documents controlling the behavior of countless tax administration officers and taxpayers.<sup>187</sup> In those countries where their legal status has been called into

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high cost of living. The first allowance paid for harsh weather conditions (for places like *Dalol Depression* and *Gambella*) is rendered in Amharic as '*yebereha abel*' - consistent with the Amharic version of the Income Tax Regulations- while the second type of allowance is rendered as '*yenuro wudenet abel*' - roughly translating into English as 'cost of living allowance'. But it is possible to render both as 'hardship allowance' in English. Whatever our position may be in each case, issues like these could have been resolved for all taxpayers through the devices of 'advance rulings' rather than through individual and informal communications between taxpayers and the Tax Authority. See Solomon Teshome, *supra note* 183, at 19-20

<sup>187</sup>See Frans Vanistendael, *supra note* 29, p. 60; Federal Tax Course, *supra note* 69, p: 135

question, courts have held them not to be binding upon the taxpayers.<sup>188</sup> Should taxpayers choose to rely upon interpretations put upon the various tax laws by the tax administration, however, they have been held to be binding upon the administration which issued them.<sup>189</sup> If the tax administration inserts a disclaimer in administrative commentaries, manuals or guides, however, it is difficult for taxpayers to invoke interpretation in these administrative documents as authority.

Tax administration commentaries are not unknown in Ethiopian Tax Administration. The introduction of the Value Added Tax in 2002 for the first time was accompanied by the issuance of a VAT Guide for taxpayers (and tax administrators) both in English and Amharic.<sup>190</sup> The Ethiopian Tax Authority also developed some manuals to help tax officers' deal with some murky and technical issues in their operations.<sup>191</sup> The administrative manuals are primarily for internal consumption of the tax administration officers, and they are usually not made available to the taxpayers. In addition, because Ethiopian Tax Authorities have yet to create their own official publications, the tax guides that have so far surfaced appear only informally and often remain unpublished. These manuals make constant reference to the tax laws, but it is naive to expect that all the terms in these manuals are consistent with the tax laws.

Supposing there is a challenge on their legality, should courts have recourse to these manuals? And how far can taxpayers rely upon these manuals? How public should these internal manuals be for taxpayers not just to know what the tax authorities do but also even to challenge them when they find them to be inconsistent with the laws? How different is a tax guide issued by the Tax

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<sup>188</sup>Courts in Belgium, Canada, Germany and Spain have specifically rejected administrative interpretation of tax laws in administrative manuals, circular letter or guides; see Frans Vanistendael, *supra note 29*, at 60, see footnote 208

<sup>189</sup>*Id.*, p. 60

<sup>190</sup>The Guide was reportedly developed by the drafter of Ethiopian VAT law - Professor Alan Shenck- who must have realized the difficulties ahead in coming to terms with this new form of taxation. The drafter produced the VAT Guide upon his own initiative and not as a consequence of some tradition to provide a guide to newly introduced tax laws; see Value Added Tax (VAT): Basic VAT Guide for Tax Payers, Tax Reform Office, VAT Sub-program, June/2002, Addis Ababa, Ethiopia, unpublished

<sup>191</sup>These manuals include Collection Manual, Value-Added Tax Audit Manual, and Assessment and Audit Operating Manual; see Federal Inland Revenue Authority, **Revenue Collection Manual**, January 2005, Addis Ababa; Ministry of Revenue, Federal Inland Revenue Authority, **Value-Added-Tax (VAT) Audit Manual**, January 2005, Addis Ababa; Ministry of Revenue, Federal Inland Revenue Authority, **Assessment and Audit Operating Manual**, January 2005, Addis Ababa, unpublished.

Administration from a textbook written by a tax expert for classrooms in the universities or even a consultancy firm for use by its clients? These are at the moment unanswered questions because taxpayers have never challenged the few administrative manuals and guides issued by the Ethiopian Tax Administration. Besides, there are no administrative rules that fix the status and rank of administrative publications in controlling the meaning of the various taxes in Ethiopia.

Apart from the tax guides and manuals, which are far and few in between, we have the tax forms, which should not be underestimated as 'interpretative' documents. More than even the tax guides or manuals, they are essential in the implementation of the tax laws. Tax forms are interpretative instruments, 'perhaps the only interpretation that most people ever see and read'.<sup>192</sup> They are the ones that bring taxes from the firmament of abstractions to the actuality of computation and payment of taxes. In the words of Stanley Surrey, the tax forms perform the task of 'compressing the vast body of statutory and administrative material into the compact, readily understood and readily administered set of forms required for a mass tax'.<sup>193</sup>

The tax forms are more numerous and widely available than the tax guides and manuals. Many of the tax forms are issued in the form of directives (for example, the directive cited above on computation of income tax under the different schedules of Ethiopian income tax has tax forms attached to it) and therefore assume the status of directives in Ethiopian tax law hierarchy. But there are many more out there which are issued or reproduced informally to help taxpayers cope with the many intricacies of tax laws.<sup>194</sup>

Again the legal status of tax forms in the interpretation of tax laws (whether they come in the form of directives or not) is shrouded in mystery. There has never been an occasion for challenging the tax forms in the past. This is certainly not because the forms are unimpeachable. In fact, an expert scan of these forms will reveal so many loopholes in the forms as to justify a serious challenge to the forms.

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<sup>192</sup>Stanley S. Surrey, *Treasury Department Regulatory Material under the Tax Code*, Policy Sciences 7(1976), at 517

<sup>193</sup>Ibid

<sup>194</sup>The following tax forms are issued via directives: a Directive on VAT invoices; see Ministry of Revenues, date unknown, in Amharic (with English subtitles), unpublished; A directive on the Implementation of Income Tax Proclamation No. 1/1995 E.C., Federal Inland Revenue Authority, in Amharic (with English sub-titles), unpublished; there are many directives that are used informally within the tax authorities; see FDRE, Ministry of Revenues, Federal Inland Revenue Authority, Business Income Tax Declaration (with Annex); Excise Tax Declaration Form; Value Added Tax Declaration Form, etc, unpublished

Finally, we have the “public notices”, which are becoming more and more common in the recent practices of Ethiopian Tax Administration. Like the directives, “public notices” flow from a special provision in a higher law, usually a directive.<sup>195</sup> They are issued to a group of taxpayers to inform them of their duty, say, of registration by a certain date. The Ethiopian Tax Administration does not have its own regular publications in which these notices appear. In stead, Ethiopian tax authorities use daily and weekly newspapers to reach the targeted taxpayers. Presently, the “public notices” are published in *Addis Zemen*, the government Amharic daily newspaper.<sup>196</sup>

The question that arises with respect to “public notices” is once again whether they have any legal significance? They are not entirely devoid of legal significance if we examine their contents, although they look like simple announcements. The “public notices” often set a deadline for registration or for use of sales register machines which are connected to the tax authorities as information transmitters. These deadlines may be considered ‘unreasonable’ or ‘unfair’ but there are presently no administrative procedures available to taxpayers to challenge these notifications before administrative tribunals or courts.

### 2.5. Tax Dispute Settlement: Tax Cases as Sources of Law

As in many other countries, tax disputes in Ethiopia follow a slightly different channel of dispute settlement from other forms of disputes.<sup>197</sup> The first

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<sup>195</sup>See Ministry of Revenues, Directive Issued to provide for the Use of Sales Register Machines No. 46/2007, in Amharic, unpublished.

<sup>196</sup>One example of a public notice will suffice. Article 5 of Directive No. 46/2007; - (a Directive to Provide for the Use of Sales Register Machines) - states that the Tax Authority will announce the commencement period of the obligation to use sales register machines for each category of taxpayers. A public notice was issued following this Directive informing hotels, restaurants, bars, cafeterias, patisseries and supermarkets of their duty to make preparation for the use of the sales register machines. A second public notice was issued ordering all large taxpayers (with the exception of public institutions, banks, insurance companies and public and freight transport companies) to purchase the machines and start using them within one month of the notice; see Ministry of Revenues, in Amharic, unpublished; *Addis Zemen*, Amharic daily, Tir 16, 2000 E.C; *Addis Zemen*, Ginbot 30, 2001 E.C.,

<sup>197</sup>It is quite common to establish special dispute settlement schemes for taxation in many countries; in the UK, taxpayers can appeal to General Commissioners (a body of lay persons assisted by a qualified clerk) or Special Commissioners (who are highly qualified persons). The Commissioners in the UK are the equivalent of our Tax Appeal Commissions. A further appeal lies to High Court from the Commissioners but only on questions law, just like in our case; see John Tiley, *Revenue Law*, 5<sup>th</sup> ed., Hart Publishing, 2005, at 75; under the Australian tax system, a taxpayer dissatisfied with the results of the Commissioner’s( the equivalent of the

opportunity taxpayers have to resolve disputes exists with the tax administration itself - with the assessors, where most of the errors or misunderstandings should be resolved. Taxpayers who find themselves in disagreement with the tax administration have another opportunity once again within the tax administration, but this time, a body set up within the tax administration composed of four members drawn from the different units of the tax administration, will entertain their case - the Review Committee.<sup>198</sup> Members of the 'Review Committee' are different from the tax assessors or inspectors, and in that sense they enjoy a certain level of autonomy and independence. But they are appointed by the head of the Tax Authority (and are still part of the Tax Administration in a way).

The Review Committee has the power to receive applications of taxpayers and reduce, or waive penalties, interest and tax imposed by the tax administration.<sup>199</sup> The Committee is not constrained by procedural or judicial niceties. At times, the Committee deals with several, even disparate cases *en masse* if all the applicants in these cases request, say, waiver of penalties.<sup>200</sup> In the end, the Review Committee has the power to make recommendations only. The head of the Tax Authority may accept the recommendations of the Committee, in part or as a whole or may completely reject it - but in a diplomatic sense, when the head of the Tax Authority disagrees with their recommendations, s/he simply remands the case to them with observations for further review.<sup>201</sup>

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Tax Authority (ERCA) in Ethiopia) internal review has the right to proceed to the Federal Court or the Administrative Appeals Tribunal; Graeme S. Cooper et al, Cooper, Krever & Vann's Income Taxation, *Commentary and Materials*, Thomson Legal & Regulatory Ltd, 2005, at 891.

<sup>198</sup>See Income Tax Proclamation, *supra note* 49, Article 104; by the way, there is another review committee, organized along similar lines, for the purpose of settling 'minor customs regulations violations'. This Committee is established under the authorization of the Customs Proclamation of 1997 (now replaced); Minor customs regulations are defined as differences of not more than 10% between the customs declarations by taxpayers and the findings of inspections by the customs officers. The ostensible rationale for the establishment of the review committee was to save the time and the cost that would otherwise have been spent in litigation in courts; See Article 8(2) of Customs Proclamation No. 60/1997 (now replaced by Proclamation No. 622/2009) and Ministry of Revenues, Administrative Settlement of Customs Regulations Violations Directive No. 37/1998, in Amharic, unpublished.

<sup>199</sup>See Income Tax Proclamation, *supra note* 43, Article 105(1) (a)

<sup>200</sup>In one case, the Committee reviewed a case involving 29 different complainants and forwarded its opinion that the complainants be made to be pay 10% of the penalties imposed on them; see A.S.G. Magdlinos et al, unpublished.

<sup>201</sup>See Income Tax Proclamation, *supra note* 43, Article 105(2): the members of the Review Committee have some directives to guide them on matters like waiver of



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.<sup>202</sup> 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. The members of the Commission are to be drawn from 'among persons having 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'.<sup>203</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 to be issued by the Ministry of Justice, no such directive has yet been issued.<sup>204</sup> Nonetheless, the composition of the Commission somehow reflects the diversity of the stakeholders in tax administration: 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>205</sup>

Like the Review Committee, the members of Tax Appeal Commission are not expected to adhere strictly to the niceties of judicial procedures – after all most of the members of the Commission are not necessarily lawyers, although the stakeholders incline to sending members with legal background to these kinds of tribunals. 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 beaten path of judicial procedures. That is why the Commissioners in some instances make up their own rules as they go along particularly in cases where the law is silent.

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penalties; see Ministry of Revenues, FDRE, Waiver of Tax and Duty Administrative Penalties Directive No. 5/1996, in Amharic, unpublished

<sup>202</sup>Income Tax Proclamation, *supra* note 43, Article 107

<sup>203</sup>Id, Article 114 (1)

<sup>204</sup>Id, see Article 114(2)

<sup>205</sup>In the old days, the Commission had members of the business community (represented from the Chambers of Commerce) in its ranks, but this was discontinued recently; there are apparently plans to recall the Chambers to its membership; interview with Ato Dawit Teshome, Ministry of Justice, on May 20, 2010; the old income tax laws required members of the business community to be represented in the Commission; the 1961 Income Tax Proclamation for example provides that 'at least half of all members of each commission shall be chosen from amongst merchants and persons carrying on professional occupations'; Article 50 of Income Tax Proclamation No. 173/1961 (now repealed)

In *Ghion Industrial and Commercial PLC v. IRA*,<sup>206</sup> the Commissioners were faced with, among others, the question of whether travel expenses for some of Ghion's executives who traveled abroad (sometimes with high officials of the Ethiopian government on trade promotions) were deductible from its gross income. IRA (the Inland Revenue Authority) rejected these expenses on the ground that the documents presented to prove the expenses were not reliable. The Commissioners accepted the contention of the Tax Authority but allowed deduction of 25% of the expenses allegedly made by Ghion, apparently exercising their power of equity. In *Metebabber Hotel v. IRA*,<sup>207</sup> the Commissioners allowed deduction of 75% of some costs like transportation expenses and 50% of costs allegedly incurred for the repair of the Hotel, once again exercising their power of equity.

It is difficult to assert with certainty what role the Tax Appeal Commissioners play in the establishment of tax norms in Ethiopia. They are not bound to follow the dicta of their prior rulings, but because they deal with issues of repetitive nature, it is hard to believe that they willfully disregard their prior rulings. In fact, one who reads the decisions of the Tax Appeal Commission cannot but conclude that the Commissioners repeat their prior rulings in subsequent cases without acknowledging it. Unfortunately, the decisions of the Tax Appeal Commission are not published. Taxpayers cannot therefore know how the Commissioners will react to certain factual situations.

An appeal from the decisions of the Tax Appeal Commission lies to the High Court - the first opportunity the regular courts have to entertain tax cases; even then, only when an error of law (rather than fact) is found in the judgment of the Tax Appeal Commission.<sup>208</sup> If the High Court finds that an error of law is made in the judgment of the Commission, it points the error out and remands the case to the Commission for review of the case based on the error of law found.<sup>209</sup> The High Court cannot go into the determination of the merits of the case.

Determining questions of fact from questions of law has never been easy, and it is not just in Ethiopia that this question has defied clear distinctions.<sup>210</sup> There

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<sup>206</sup>Tax Appeal Commission, File No. 368, in Amharic, unpublished

<sup>207</sup>Tax Appeal Commission, File No. 523, in Amharic, unpublished

<sup>208</sup>Income Tax Proclamation 286/2002, *supra note 49*, Article 112 (1); by the way, the cited sub-article does not say 'high court', but the repealed tax laws specifically refer to the 'high court' from which the practice of appealing to the high court has been derived.

<sup>209</sup>Income Tax Proclamation 286/2002, *supra note 49*, Article 112(2)

<sup>210</sup>In the UK, the construction of documents or statutes is considered as a question of law while the question of whether the document was signed on a certain date was held as a question of fact; similarly the question of whether a trade is being carried

are no hard and fast rules for distinguishing questions of fact from questions of law. There are many reported cases in Ethiopia addressing this issue, albeit in an inconclusive manner.<sup>211</sup>

A second appeal lies from the judgment of the High Court to the Supreme Court which has the same power of finding errors of law in the judgments of the lower tribunals and remanding the case for further review.<sup>212</sup> Those aggrieved with the decision of the Supreme Court (or for that matter, the High Court) have one last opportunity to seek review if the decisions of the Supreme Court or the High Court 'contain fundamental error of law'.<sup>213</sup>

In the pure civilian tradition of the role of courts, judicial interpretation is not a source of binding law for other cases.<sup>214</sup> But it may have persuasive power, which is acknowledged by jurists.<sup>215</sup> Modern Ethiopian legal system subscribed to the civilian tradition of confining the role of courts to just disposing of cases before them. The interpretation of laws by courts may be persuasive at various levels, but because of the limited diffusion of judicial interpretation among courts and the academia, even the persuasive power of judicial interpretation is limited in the best of times.

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on is a one of fact but the question of the meaning of trade is one of law; in an apparent swipe at the difficulty of distinguishing a question of law from a question of fact, Dickinson wrote memorably that 'matters of law' grow downwards into the roots of fact while matters of fact reached upwards without a break into matters of law' (Administrative Justice and the Supremacy of Law (1927), quoted in John Tiley, *supra* note 197, p. 76

<sup>211</sup>See, for example, *Barnadoni Guisepe v. Inland Revenue Department* (High Ct., Addis Ababa, 1965), 2J. Eth. L., at 334), where the High Court quashed the decision of the TAC on the ground that the Commission's decision to impose a fine on a taxpayer was based on allegations not made by either party to the appeal; *Mulugeta Ayele vs. Inland Revenue Department* (High Ct., Addis Ababa, 1965), 2J. Eth. L., at 340), where the High Court reversed the decision of the TAC on the ground that the Commission increased tax assessment on its own motion; see, however, *Mosvold (Ethiopia) Ltd. v. Inland Revenue Department* (High Ct., Addis Ababa, 1967), 4J. Eth. L., at 104), in which the High Court held that the decision of the TAC that disallowed the deduction of a sum, as being interest on an alleged loan, was a question of fact and therefore not subject to review by the Court;

<sup>212</sup>Income Tax Proclamation, *supra* note 49, Article 112(3)

<sup>213</sup>See Federal Courts Proclamation No. 25/1996, *Federal Negarit Gazeta*, 2<sup>nd</sup> year, No. 13, Article 10

<sup>214</sup>See George Krzeczunowicz, *Code and Custom in Ethiopia*, 2J. Eth. L.2, (Dec. 1965), at 434

<sup>215</sup>M. Planiol and G. Ripert, *Treatise on the Civil Law* (12<sup>th</sup> ed. 1939) (translation, Louisiana State Law Institute, 1959). Vol. 1, No. 227, quoted in Krzeczunowicz, *supra* note 214, at 434.

The role of courts in the creation of legal norms through interpretation received a boost in 2005 when a law was passed conferring binding effect upon the interpretation of law by the Cassation Division of the Federal Supreme Court in a decision involving not less than five judges.<sup>216</sup> The interpretation binds both federal and regional courts at all levels except the Cassation Division itself, which has apparently the power to reverse and even contradict itself in subsequent decisions.<sup>217</sup> Putting aside the various controversies surrounding this power of the Cassation Division of the Federal Supreme Court,<sup>218</sup> there is little doubt that the 2005 law elevated the decision of the Cassation Division from one that was limited to disposing of cases before it to having a binding effect upon cases having similar factual situations before lower courts.

The tax dispute settlement schemes all the way up to the Supreme Court follow the narrow strip of disputes that arise from assessment of taxes, as if all the disputes taxpayers may have with the tax administration arose from assessment only. The language of tax laws has been unwittingly restrictive in this regard. This has the unfortunate consequence of limiting the choice of taxpayers to challenging the actions of tax authorities only when the actions have something to do with tax assessment.<sup>219</sup> 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. The jurisdiction of the Tax Appeal Commission is also limited to reviewing appeals from the assessment of tax by the Tax Administration or the decisions of the Review Committee. The Courts are limited to reviewing these decisions for errors of law only.

From this restrictive channel of dispute settlement in taxation, we may be inclined to conclude that all disputes in taxation have something to do with tax assessments. Tax disputes are not confined to tax assessments. Some disputes may have nothing to do whatever with tax assessments. Taxpayers may wish to challenge the 'legality' of tax directives. It may be that the conventional tax dispute settlement channels are never meant to accommodate disputes arising from the exercise of so many discretionary powers by the tax authorities. Even in other tax systems, these rights to challenge decisions of the tax authorities

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<sup>216</sup>See Federal Courts Proclamation Re-Amendment Proclamation No. 454/2005, *Federal Negarit Gazeta*, 11<sup>th</sup> year, No. 42, Article 2(1)

<sup>217</sup>Ibid

<sup>218</sup>See Muradu Abdo, *Review of Decisions of State Courts over State Matters by the Federal Supreme Court*, 1Mizan L. Rev.1, Vol. 1, No. 1, June 2007, at 66ff; see also Kalkidan Abera, *Precedent in the Ethiopian Legal System*, 2 Eth. J. L. Education1, January 2009, at 23ff.

<sup>219</sup>All cases that appear before courts have something to do with assessment; there have never been cases challenging the other actions of the tax authorities, interview with Ato Mustafa Ahmed, Federal High Court, Tax Division, June 22, 2010

other than those related to tax assessments are often clarified and stipulated in other laws, like administrative and constitutional laws. We may take the UK and Australian tax systems for illustration.

In the UK, taxpayers may challenge the actions of tax authorities on grounds of ‘illegality’, ‘procedural impropriety’ or ‘irrationality.’<sup>220</sup> These kinds of disputes follow the ordinary dispute settlement schemes for administrative disputes.<sup>221</sup> Under Australian legal system, 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’, ‘an exercise of the power for improper purpose’, ‘the making of an error of law’, ‘a decision based upon irrelevant consideration’.<sup>222</sup> Taxpayers have additional opportunities to challenge tax authorities before the office of the ombudsperson.<sup>223</sup>

As far as the right to judicial review is concerned, it is not yet clear if Ethiopian taxpayers can raise objections to, say, tax directives, and where they can go to raise objections. To date, none of the innumerable tax directives issued by the Ministry of Finance and ERCA have faced any challenges on grounds of being *ultra vires*. However, a recent case before Ethiopian courts, though not on tax directives, promises that Ethiopian courts might be open to challenges to directives.<sup>224</sup> It is also legally possible to bring these kinds of challenges to the Ethiopian Office of Ombudsperson, which has the authority, among others, “to supervise that administrative directives ... by executive organs ... do not contravene the constitutional rights of citizens and the law...”<sup>225</sup> However, the fact that no cases have as yet been filed in this regard shows how narrowly tax disputes are viewed in Ethiopia.

## Conclusion and General Recommendations

With all its imperfections, there is a system underlying all of the taxes in Ethiopia. This article has attempted to bring to light the patterns that under

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<sup>220</sup>See John Tiley, *supra note 197*

<sup>221</sup>*Ibid*

<sup>222</sup>Cooper et al, *supra note 197*, at 895

<sup>223</sup>*Ibid*

<sup>224</sup>See *National Bank of Ethiopia (NBE) vs. Hibret Bank S.C., Ato Iyesuswork Zafu, and Workshet Bekele Demissie*, Federal Supreme Court, Cassation Division File No. 44226, Tahsas 15, 2003 E.C., in Amharic, unpublished. In this case, the respondents challenged a directive issued by the National Bank of Ethiopia as *ultra vires*, and the lower courts concurred with their arguments, but the Cassation Division of the Supreme Court overruled the decisions of the lower courts in the regard, holding that directives can override an earlier Proclamation as long these directives are issued pursuant to the power given in a later Proclamation.

<sup>225</sup>See Institution of the Ombudsman Establishment Proclamation No. 211/2000, *Federal Negarit Gazeta*, 6<sup>th</sup> year, No. 41, Article 6(1)

gird the Ethiopian tax system, all be it through the prisms of tax systems elsewhere. It was the modest aim of this article to go beyond the usual suspects – tax proclamations and tax regulations- to understand how the system works from top to bottom. In all candor, many aspects of the Ethiopian tax system are yet to be worked out and some recent developments promise that the system is working on some of its gaps. Having said that, however, there is still a long way to go before we spell and pronounce every word in the 'Ethiopian tax system'. The attempt to look at the system as a whole should not blind us to the major gaps of the Ethiopian tax system. We can only mention here some of the major gaps and problems of the Ethiopian tax system.

The first problem is the accessibility of tax laws. This problem is not limited to tax laws, of course, but because of the nature of taxes, the problem is more pronounced. The first problem of accessibility is the whole organization of tax laws. The legislative field of taxes is so chaotic and disorganized that it is difficult for an average taxpayer to have a clear idea of her obligations under the various tax laws of Ethiopia. There are many pieces of legislation for one type of tax alone. Amendments are made piecemeal, and the tax administration has so far made no attempt to organize these systematically and logically in order to make them accessible and intelligible to taxpayers.

The other problem on the subject of accessibility is that some of the laws are not available in official publications. Although the law requires publication of all laws of the Federal Government in the Federal Negarit Gazeta, directives and other subsidiary legislations have stopped coming through the Negarit Gazetta. In the old times, even appointments of public officials and some other weighty notices were published in the Negarit Gazeta. Nowadays, all we get from the Negarit Gazeta is the proclamations and the regulations. A large of body of rules issuing from different administrative agencies is simply kept in the files of the respective agencies with the public kept in the dark about the extent and content of these directives. To their credit, the Ethiopian Tax Authorities have put most of the directives on line,<sup>226</sup> but how many people know that these directives are available online and how many in Ethiopia have access to the internet to be able to access these directives? Since these are official documents, the proper place for them is the official gazette for legal publications- Negarit Gazetta. The least the Ethiopian Tax Administration can do for taxpayers is to publish them in the Negarit Gazetta. Of course, it should do more than that. It should provide a compendium of all tax legislations and regulations in force, with updates on regular basis.

Another area of concern is the issue of delegation of taxing authority to unrepresentative administrative agencies. That administrative agencies should

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<sup>226</sup> visit [www.erca.gov.et](http://www.erca.gov.et) last visited on June 18, 2011

have rule making power, there can be little question about it. The only question is whether administrative agencies should have wide discretion and be able to determine whether one should pay tax or not, or by what rate one should pay tax. Great historical battles (from the *Magna Carta* onwards) were fought on this question of whether unrepresentative branches of government can impose taxes or exercise the power of exemption. Blanket exemption powers are often delegated to executive bodies with little restraint over how these important powers are exercised in practice. These exemption powers have far-reaching implications on the equitability of the tax system in general and must not be seen lightly. Tax laws that delegate to the executive the power to define the nature and the rate of taxes are even more of a concern than those that grant the executive the power to grant tax exemptions.

Tax directives (in all forms) have proliferated in recent times. The size of directives is estimated to be three times thicker than the tax proclamations and tax regulations. The subject matter of directives is as diverse as the number of directives out there. We must recognize that directives affect the lives of taxpayers as much as (if not more than) tax proclamations and regulations. Their numbers and volumes are only going to increase as the Ethiopian tax administration gains experience and resources. It is therefore about time that we direct our attention to directives- the procedures, the issuing authorities, and the like. Except in some purely technical matters, directives should be preceded by consultative forums and invite comments from the taxpaying community and even think-tanks (if there are any in the tax field) before they are written into law. Consultations overcome many a rancor and create a tax compliance environment based on voluntary compliance rather than compulsion.

The role of the Ethiopian Tax Administration in the area of facilitating uniform interpretation of tax laws through such tools like advance rulings or letters and manuals has been quite negligible. If anything, the Ethiopian Tax Administration has been tentative, sometimes making forays into the field and then ceasing these kinds of services to the taxpaying community. Much of it is understandable, given the resource constraints of the Ethiopian Tax Administration. Again as the authority gains in strength (as it should), it should take advantage of these avenues of 'tax awareness' and facilitate 'voluntary compliance' by taxpayers- as its goal is or should be.

More importantly, the status of advance rulings and other subsidiary legal documents should be clarified. How much can taxpayers actually rely upon the advance rulings of the Tax Authority in their future dealings? A strong tradition of challenging the procedures and rules of the Tax Authority has not taken root in Ethiopia, with the result that we do not know how courts will

view some trailblazing administrative developments, particularly in the area of advance rulings.

The channels of tax dispute settlement seem to restrict the appeal process to cases having something to do with assessment by the Tax Authority. This has the tendency of discouraging taxpayers from challenging the actions of the Tax Authority that are not in the nature of assessment. There is a plethora of directives issuing from the Tax Authority in recent times. These directives affect the rights and obligations of taxpayers in one way or another. Taxpayers should be able to challenge these directives, their legality and consistency with higher laws.

Almost all cases that appear before the Tax Appeal Commission and the courts have been in reaction to assessment of tax and of penalties. It is surmised that the tax laws may have been responsible for this state of affairs. Even if a taxpayer contemplates challenging the other actions of the Tax Authority, she would not know where to start and to go. A strong tradition of judicial review of administrative directives, interpretations and actions has not developed in Ethiopia to give taxpayers the opportunity to challenge the tax authorities on matters that have little to do with tax assessments. Although this is not a matter of taxation *per se*, the need for administrative law and procedure for challenging the various actions of the tax authorities is probably more urgently felt in taxation than in any other area of governmental action.