



Delegated Tax Legislation under the Ethiopian Laws: Broad or Narrow?

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Abstract

Delegated tax legislation is treated differently from other categories of delegated law making. Accordingly, Constitutions of several countries differ in the extent to which they allow the legislature to delegate tax law making authority. At one extreme, no delegation is permissible (Non-delegation doctrine); at the other extreme, excessive-delegation doctrine requires only that taxes have a legal basis under the constitution. The third and widely accepted is an intermediate position which places limits on delegation holding that for a tax to have a firm basis in law, its essential elements must be provided in an enabling law. However, the FDRE Constitution is silent on issue of delegated tax legislation. Due to this reason, the extent of delegation under the Ethiopian tax laws are controversial. The extent of executive body delegation to enact secondary laws in Ethiopian tax laws are doubtful as to their limit. There is great confusion on the extent to which legislatures can delegate tax law making authority to the other branches of government. Likewise, the interplay between delegated tax legislation and principle of legality is not clear under the Ethiopian tax laws. Thus, the purpose of this article is, to examine the extent of delegated tax legislation under the Ethiopian tax laws and their conformity to the principle of legality. A doctrinal research methodology is employed to examine the stated purpose. The FDRE Constitution, Ethiopian tax Laws and other legislations are used as primary data source. Additionally, books, articles, journals, and other relevant materials in the area are scrutinized as secondary data sources. Finally, the author concludes that the liberal delegation in the Ethiopian tax laws in making of secondary legislation is against principle of legality and contradicts with the widely accepted slogan of “no taxation without representation” and lastly commands the executive body delegation should be limited to details.

Key words:

Delegation, Taxation, Legality Principle, Legislation

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Introduction

Delegation refers to the act of entrusting another authority or empowering another to act as an agent or representative. From this, delegated legislation means the exercise of legislative power by an executive that is subordinate to the legislature. It includes statutory rules which include but not limited to, regulations, directives and various other instruments made by the executive body. The very reason for delegated legislation is to serve a technique to relieve pressure on legislature's time so that it can concentrate on principles and formulation of policies. After this, it has to leave technical and detailed matters which are necessary to fill the gaps in the primary legislation.¹

However, there are differences on the extent to which legislatures can delegate tax law making authority to the other branches of government. Mainly, some countries delegate the executive body broadly and some others narrowly. But, 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. Because, this delegation of taxation power of the executive branch conforms with the principle of legality and not contradicted with the slogan of "no taxation without representation" which is found on the notion of "social contract".

The Ethiopian tax laws which includes both direct and indirect taxes deal out with this delegated legislation. Some of the provisions of tax Proclamations, Regulations and sometimes directives empower the executive body a broad power which affects the basic or essential rights of the tax payers. But those articles of the law which delegate the executive body broadly and contradict with the principles of legality are not well investigated. Thus, the major goal of this article is to examine the extent of delegated legislation of tax in different countries in general and in Ethiopian tax laws in particular. This piece discusses the delegation of taxation power in the Ethiopian Income tax laws, VAT laws, Turn over tax laws, Custom laws, excise tax laws and stamp duty laws.

Accordingly, doctrinal/library-based research methodology is employed to examine the extent of delegated tax legislation in Ethiopia. Both primary and secondary data sources are used to attain the objectives of the investigation. In the secondary source, different Books, articles, journals, and other relevant materials are reviewed and deep analyses of laws are made. In the

¹Abraham Yohannes & Desta G/michael, The Nature and Definition of Delegated Legislation, <https://abyssinialaw.com/online-resourc/study-on-line/>, Last visited on March,20, 2020, p.4

primary source, the FDRE Constitution, Ethiopian tax Laws including Tax Proclamations, Regulations and other legislations are used as primary data source.

The Article is structured as follows: The first piece attempts to deal with the concept and purpose of delegated power of tax in general. The second part critically examines the extent of delegation in tax law making of continental and common law countries. It mainly focuses on the constitutional approach of delegation. The third part dedicated to analyze the relationship between delegation of taxation power and legality principle which conveys the slogan of “no taxation without representation”. The fourth part critically examines the delegated tax legislations under the FDRE Constitution in general and tax laws in particular to evaluate the extent of delegation. Finally, it comes with conclusion and recommendation.

1. Delegated power of Tax

Democracies subscribe to the doctrine of the separation of powers, according to which there are three branches of government: the legislative, the executive and the judiciary.² The legislative organ of the government has the power to make laws on every matter concerning the lives of its citizens and the government subject to the limitations imposed by the constitution. Whether there is a clear limitation or not, the legislature is in charge of making laws in the form of primary legislation. Any other legislation that is subordinate or auxiliary to primary legislation is known as delegated (or sometimes “ancillary”) legislation. Delegation of legislative powers means the transfer of law-making authority by the legislature to the executive, or to an administrative agency. In line with the power granted to them by the legislature, administrative agencies can issue rules, regulations and directives, which have a legally binding effect.³

The distinction between lawmaking and administration is not always clear-cut, because administration necessarily involves an element of discretion in interpreting the law. In addition, the administrative branch may be allowed to enact norms with a greater or lesser legally binding force in order to carry out the law.⁴ Regulations are among the laws which have a legal force and used to fill in gaps and details that are not dealt with in the statutes. Therefore, the division of subject matters between laws and regulations varies greatly from country to country. Due to

² Frans Vanistendael (1996), ‘Legal Framework for Taxation, Chapter 2: In Victory Thuronyi,’ *International Monetary Fund Journal*, Vol.1, p.42.

³ Abraham Yohannes & Desta G/Michael, *Supra Note*1, p.5

⁴ Vanistendael, *Supra Note* 2, p. 42

this, it is important to design tax laws to fit within the countries scheme of administrative law.⁵ In some countries, very short statutes and detailed regulations are routinely written;⁶ in other countries, the constitution may leave a very narrow scope for regulations, there by requiring all necessary details to be put into the statute.⁷ These all indicates, the delegation of the executive body should be guided and controlled in any case.

Particularly, in tax law unlike other laws which allow broad delegation, the legislative body tightly limits the scope of delegation. In a democratic country levying tax is exclusively the function of the legislature.⁸ Thus, until now the controversies on the delegation of tax legislation is unanswered question.

2. Extent of Delegation in tax legislation

The very concept of delegation is opposing to the idea of rigid separation of power. Among the three branches of government, there is flexible separation of power. The legislative body can delegate to the executive to make laws. However, there is great confusion on the extent to which legislatures can delegate tax law making authority to the other branches of government. In this regard, some countries follow the absolute Non-delegation doctrine and other countries follow excessive delegation doctrine though both have their own pros and cons.

Absolute Non-delegation doctrine is akin to mark twain's famous cable to New York Journal: "The report of my death is an exaggeration".⁹ This doctrine is so rigidly applied as to prevent conferral of significant authority on the executive branch. Scholars argue that non-delegation doctrine can serve democratic values and should continue to exist.¹⁰ In Common law countries, such as, the United States, the United Kingdom and Canada, there is generally no constitutional delegation of the law-making power to the executive branch of government. Rather, such delegation was by statute.¹¹ For example, the US Constitution of Article I vest all powers to the legislative body by saying "all legislative powers herein granted ...in a congress of the

⁵ Id., p.43

⁶ W.E. Butler (1988), Soviet Law 42, 2nd ed. p. 44-45 as cited in Frans Vanistendael, p.43

⁷ The Constitution of Guatemala's entered in to force in 1985, Amended in 1993.

⁸ James R. Hines Jr. & kyle D. Logue(2015), 'Delegating Tax,' *Michigan Law Review*, Vol.114:235, p.236

⁹ Mark Twain (1897), 'The Reports of my Death are Greatly Exaggerated', *New York Journal*, Cited in Alekaw Dargie, 'Legality Principle of Taxation in Ethiopia: At the State of Porosity or its Non-existent from Inception?'. 12

¹⁰ Ronald J. Krotosyznnski (2005), 'Reconsidering the Non-delegation Doctrine: Universal Service, the power to tax and the Ratification Doctrine,' *Indiana Law Journal*, Vol.80, p. 242

¹¹ Vanistendael, *Supra Note 2*, p.44

United States” and “this text permits no delegation of those powers”.¹² The U.S Supreme Court justified delegation of legislative power to executive branch by taking two main approaches; these are the “fill up the details” approach where no violation exists due to the basic structure and standards embodied in the legislation create the skeletal outline limiting the authority of the delegated organ and the second the “intelligible principle” approach where no violation appears because the Congress provided the delegated organ an “intelligible principle” by the reviewing court could determine the delegated organ action conformity as dictated by the statute.¹³

Likewise, in the United Kingdom, the executive branch may issue such delegated legislation as it is authorized to do by act of Parliament.¹⁴ The power to make laws is vested in Parliament. However, nothing prevents parliament from delegating this power, in other words, authorizing governmental bodies to make law by administrative order and even to amend acts of parliament if so authorized.¹⁵ Delegated legislation must be within the scope of the delegated power; otherwise, it can be struck down by the courts. There are names in the United Kingdom for delegated legislation (e.g., regulations, rules, orders), although they are prohibited in a uniform series of statutory instruments. In the tax area, there are voluminous regulations, although their text is not as long as that of the laws themselves (about 1 ½ volumes of statutory instruments to 3 ½ volumes of laws). In contrast to the tax regulations of the United States, which are arranged according to the arrangement of sections of the statute, the various U.K. regulations stand alone, which obscures their relation to the statute?¹⁶

On the other hand, *Excessive delegation doctrine* is on the ground of relative expertise, meaning that regulatory agencies have greater knowledge and focus in particular areas and specific issues than legislature does or realistically can. Recently, some U.S tax scholars argue that the broad delegation in other areas of law should also apply to the tax context as well, congress should at least consider doing more broad tax delegation in US.¹⁷ Broad delegation of taxing power is not without precedent. Other governments sometimes grant relatively broad

¹² Whitman v. AM (2001); ‘Trucking Ass’ns, 531 U.S. 457, 472’ cited in Ronald J. Krotoszynski, Jr (2005),, Reconsidering the Non-delegation Doctrine, Universal Service, the Power to Tax, and the Ratification Doctrine, *Indiana Journal*, Vol 80, p.241

¹³ J.W. Hampton, Jr., & co. v. U.S 394 (1928); Touby v. U.S., 500 U.S 160 (1991): Cited in Alekaw Dargie, ‘Legality Principle of Taxation in Ethiopia: At the State of Porosity or its Non-existent from Inception?’. p.12

¹⁴ H.W.R. Wade (1982), ‘Administrative Law 733-47 (5th ed.)’, as cited in Frans Vanistendael, Legal Framework for Taxation, p.45

¹⁵ Ibid

¹⁶ Vanistendael, *Supra Note 2*, p.46

¹⁷ James R.Hines Jr & Kyle D. Logue (2015), ‘Delegating Tax,’ *Michigan Law Review*, Vol. 114, issue 2, p.236

policy making discretion to their tax enforcement agencies. In Ireland, for example, the legislature enacted general anti-avoidance provision (known as section 811) that delegates the power to determine when tax avoidance has occurred to the Irish Revenue Commissioners, permitting them in so doing to disregard lenitively enacted tax statutes.¹⁸ Similarly, the law passed by the California legislation in 2006 (known as “Assembly Bill 32”) requiring the California in Environmental Protection Agency Air Resources Board to design and implement a market-based system to reduce Californian’s greenhouse gas emissions. This grant of tax policy making authority took effect in 2011 when the California environmental regulator adopted regulations that took the form of a cap-and-trade system roughly equivalent to carbon taxes.¹⁹

However, both extreme positions of delegated tax legislation are not free from defects. The first doctrine of Absolute non-delegation is untenable to achieve tax efficiency consideration because the legislative body cannot enact all laws. The broad delegation doctrine on the other hand also would destroy legality principle of taxation.²⁰ Therefore, striking the delicate balance (adopting *intermediate or middle position*) which is granting skyrocketing trust to executive that would hamper democratic character of tax law and monopoly of law making that consumes time and energy of legislature is the hallmark of modern good government.²¹ 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.²²

Some Constitutions are very particular about what elements of tax should be specified in a tax act approved by parliaments.²³ 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 tax, the tax rate and exemptions. On the

¹⁸ Paul Brady (2008), ‘General Anti-Avoidance: Time for a Re-Think?’, IRISH TAX REV., section 811, as cited in James R.Hines Jr & Kyle D. Logue, ‘Delegating Tax,’ P.273

¹⁹ Struan Little Et Al. (2013), ‘Development of Tax Policy in New Zealand: The Generic Tax Policy Process 13,’ as cited in James R.Hines Jr & Kyle D. Logue, ‘Delegating Tax,’ P.273

²⁰ M.Bourgeois (2005), ‘Constitutional Framework of the different types of income: in The Concept of Tax in EU Member States: General Introduction and Comparative Analysis,’ Part 1, p.111

²¹ Augustin Jose Menendez, ‘The Purse of the Policy Tax power in the EU, Center for European Studies, University of Oslo, p.8. cited at Alekaw Dargie, The Principle of Legality in Ethiopia, P.10

²² Tadesse Lencho (2012), ‘The Ethiopian Tax systems: Excesses and Gaps,’ *Michigan State International Law Review*, Vol.20.2, p.336

²³ Ibid

question of delegation, the Constitution of Greece prohibits delegation of the “basic” or “essential” elements of tax to the executive branches.²⁴

Similarly, in the European continental tradition, the executive branch has the power to establish rules for the implementation or administration of tax laws by way of regulation, provided that the statute approved by parliament contains sufficiently specific rules defining the essential elements of the tax.²⁵ This means that the act of parliament must contain the rules defining the taxpayer, taxable events, tax base, tax rates, and rules for the collection of tax. This power of the executive branch of government to execute or implement the tax laws is based on a general or specific delegation of power in the constitution. A regulation that extended the scope on tax law, changed its conditions, or altered the meaning of the law would have to be declared illegal and inapplicable by the courts.²⁶

The tax administration will be bound by the regulations issued by the executive branch, as long as they have not been declared illegal by a court. In many cases, there will be specific delegation of powers in the tax law, but such specific delegation of power does not add anything to the delegated power of the executive branch of government if a general or specific delegation of such power already exists in the constitution.²⁷ In exceptional and very limited circumstances, the legislator may give a full delegation of power to the executive branch to establish tax laws or essential elements of tax laws by decree. Such delegation of power may be specifically provided for in the constitution or in the constitutional doctrine. In such cases, the law containing the delegation often requires post factum ratification of the decree by an act of parliament.²⁸

3. The Interplay Between Legality Principle and Delegated Tax Legislation

Tax law is a branch of public law that shares the attributes of legality principle. The modern principle of tax legality is a derivation from the great historical battles between legislative and executive bodies over the power of taxation. Taxation is historically the crucible of the struggle

²⁴ Theodore Fortsakis (2007), ‘Greece National Report,’ 15 MICH.ST.J.INT’L.328 As cited in Tadesse Lencho, ‘The Ethiopian Tax systems: Excesses and Gaps,’ p.336

²⁵ Vanistendael, *Supra Note 1*, p.43

²⁶ *Id.*, p.44

²⁷ *Ibid*

²⁸ *Ibid*

for supremacy of powers between the legislative and executive bodies.²⁹ 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.*”³⁰ The reason for this slogan is due to the historical abuse of taxing power of American colonies by England that gave impetus for founders to demand all federal taxation to be subject to the consent of the governed.

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. 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.³¹ The principle of tax legality can be understood not only as principle that ensures the supremacy of the legislature over tax matters but also as a precept that ensures the supremacy of the legislature 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 legislature so long as a constitution allows delegation of legislature powers generally and mostly intermediate position as discussed above.³²

However, if the delegation of taxation power of the executive branch is too broad, it is against the principle of legality. This excessive delegation contradicts with the slogan of “no taxation without representation” which is found on the notion of “social contract”. Thus, the limitless tax delegation is arbitrary taxation which is opposed by US and other western countries discussed above. The consent of the people is not taken in to consideration. Because, their consent is mirrored by their representative which are mostly called House of People Representative in Ethiopia. The laws enacted by the executive body might be against the interest of taxpayers and arbitrary if the delegation is so liberal.

²⁹ William B. Barker (2006), ‘The Three Faces of Equality: Constitutional Requirements in Taxation,’ 57 case W. Res. L. Rev. 1, as cited in Tadesse Lencho, *The Ethiopian Tax Systems: Excesses and Gaps*, p. 335

³⁰ Tadesse Lench, *Supra Note 22*, P.335

³¹ Vanistendael, *Supra Note 1*, p.17

³² Tadesse Lencho, *Supra Note 22*, p.335

4. Delegated Tax Legislation under the Ethiopian Tax Laws

4.1. Delegation Under the FDRE Constitution

The power of taxation comprises of two powers, the power to set a tax rate and the power to collect the tax paid. These fundamental authorities to tax are derived from the constitution of 1995 shares tax powers between the federal government and the regional states.³³ In comparative speaking the constitution is replete with specificity in detailing at greater length than other areas of power in allocating taxation powers between two tiers of government.³⁴ However, the FDRE Constitution is silent on the issue of delegation to other branches of government with regards to the power of taxation. It contains no provision that might even remotely constrain the Ethiopian parliament from delegating the essential elements of taxation powers to the executive branches. Only Article 77 sub article 12 and 13 of the FDRE Constitution deals a little about legal basis for delegation of Council of Ministers. From this, we can infer that, the FDRE constitution unlike the Continental Europe, there is no constitutional delegation of the tax law making power to the executive branch of government. Rather, like the Common law countries, the FDRE Constitution delegation is done via subsidiary legislation.

The absence of limit of delegation depicts the possibility of contradiction with principle of legality. Principle of tax legality means that taxation must have a legal basis, and this is recognized as a constitutional percept in most legal systems. This principle at its minimum protection is attached to the slogan “no taxation without representation” and at its maximum or extreme linked to “no delegation of taxation powers whatsoever”.³⁵ Thus, excessive tax delegation is against the principle of legality which is highly recognized principle in worldwide.

The FDRE Constitution rather classifies taxation powers as “taxes exclusive to the federal government”,³⁶ “taxes exclusive to the regional states”,³⁷ “taxes concurrent to both the federal government and the regional states”,³⁸ and “taxes undesignated.”³⁹

³³ The Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution) of 1995, Negarit Gazeta, year 1, No.1, Article 95-99

³⁴ Alekaw Dargie (2016), ‘Legality Principle of Taxation in Ethiopia: at the State of Porosity or its Non-existent from Inception,’ p. 14, Available at: <http://ssrn.com/abstract/2733017>

³⁵ Id., p. 18,

³⁶ FDRE Constitution, *Supra Note* 33, Article 96

³⁷ FDRE Constitution, Id., Article 97

³⁸ FDRE Constitution, Id., Article 98

³⁹ FDRE Constitution, Id., Article 99

Article 96 of the constitution provides the exclusive power of taxation of the federal government which include custom duties, taxes and other charges on imports and exports; personal income tax on employees of federal government and international organizations, personal income, profit, sales and excise taxes on enterprise owned by the federal government, income and winning of national lotteries and other game of chance. In addition, taxes on the income of air, rail and sea transport services; income collected from taxes on monopolies and federal stump duties etc.

Because Ethiopia is a federal country, regional states are conferred with exclusive power of taxation. This exclusive power of taxation of the regional states is clearly provided in Article 97 of the constitution. Accordingly, regional states are empowered to levy and collect taxes on employees of the states and of private enterprises, collects fees for land usufructuary rights; taxes on the private farmers and farmers incorporated in cooperative associations; profit and sales taxes on individual traders carrying out a business within their territory; taxes on income from transport services rendered on waters within their territory; profit, sales, excise and personal income taxes on income of enterprises owned by the states; collect fees and charges relating to licenses issued and services rendered by state organs; collect royalty for use of forest resources; fees and charges relating to licenses issued and services rendered by state organs and taxes on income derived from mining operations, and royalties and land rentals on such operations.

Moreover, in Ethiopia the regional governments and the Federal government have concurrent powers of taxation as provided under Article 98 of the FDRE Constitution. Its meaning under the constitution is much different from what most federal countries take it to be. Due to this reason, the FDRE Constitution is replete with ambiguity as to how concurrent power of taxation is practiced. The phrase “...shall jointly levy and collect...” in the FDRE Constitution is not clear and makes this article problematic.

The practice of other federal system tabled three options where regional state may impose taxes in addition to federal government taxes, or regional states may opt to impose additional tax rates on an otherwise federal tax law or regional states may choose to conform to federal government share the proceeds of federally collected taxes. It is argued that in the constitution last option prevails as inferred from Article 62(7) of the constitution when federal government levies and collects concurrent taxes.⁴⁰

⁴⁰ Alekaw Dargie, *Supra Note 34*, p.14

Because one cannot be sure as to what tomorrow may have in store, the FDRE Constitution has cautiously provided a provision dealing with undesignated power of taxation in Article 99. Undesignated power of taxation is power which is given neither to the Federal government nor to the regional states. In this case, the solution is in the hands of the joint session of the two federal houses unlike Article 52(1) of the FDRE Constitution. This means that where the country feels to introduce a new tax base, the power of levying and collecting such tax will be decided by the joint session of the House of Peoples' Representatives and the House of Federation. The two houses assign the power either to the Federal Government or the Regional States taking into consideration a number of factors.

4.2. Delegated Legislation Under the Ethiopian Tax Laws

The division of power between the legislature (who enact proclamations) and executive (enact secondary legislation) varies greatly from country to country. Quite often proclamations have adopted very brief language setting out basic principles or elements in their dictation, often elaborating on those principles in secondary legislation or implementing legislation that comprises regulations, decrees, directives, circulars or other similar administrative pronouncements. On the other hand, some proclamations have adopted more elaborate and extensive language in their dictation and few is left to be covered in secondary legislation.⁴¹ There is incongruity in the extent of delegation of taxation power.

It is clear that there is a need for the legislature to delegate some tasks to its executive. The existence of this need is to fill in gaps and details that are not dealt in the proclamation. In some countries, detailed secondary legislations and very short proclamations are routinely written, in others, the constitution may leave a very narrow scope for secondary legislations, there by requiring all necessary details to be put in to the primary legislation (Statute). This variety on the drafting approach depends on the countries legal system followed. One mode of approach is primary tax legislation should be drafted in general principles offering framework on which secondary detail tax legislation basis and compelled parliament to conduct scrutiny through check and balance.⁴²

Particularly, in Ethiopia the executive bodies have the power to enact secondary legislation which has the force of law. This secondary legislation with regard to tax is enacted by Council of Ministers (COM), Ministry of Finance (MoF) and Ministry of Revenue (MoR)) by delegating the legislative body of the government. The question that can be raised here is

⁴¹ Id., p.19

⁴² Judith Freedman (2010), 'Improving (Not Perfecting) Tax Legislation: Rules and Principles Revisited,' *British Tax Review*, Issue 6, p.719

whether, in the face of silence of the Constitution, the Ethiopian parliament can delegate wholesale taxation power to the executive branches, and if, in particular, the Ethiopian parliament can give full powers to the above stakeholders (COM, MoF or MoR) to define by regulations or directives the tax base, the tax rates and the taxpayers, exemptions and others? Therefore, these and other related issues can be investigated in all Ethiopian tax laws here under.

4.2.1. The Ethiopian Income Tax Laws

The Modern income tax laws were adopted in Ethiopia after the liberation from Italian Invasion. Some laws dealing with income tax were promulgated between 1942 and 1960. However, these laws were short lived. The most comprehensive income tax law was adopted in 1961 which served the country for more than four decades and later in 2002 (Proclamation No. 286/2002).⁴³ Recently, this 2002 proclamation is totally repealed and replaced by the current proclamation adopted in 2016 (Income Tax Proclamation No. 979/2016) and this is implemented by Council of Ministers Federal Income Tax Regulation No.410/2017. Thus, let's investigate the extent of delegation of taxation power on the income laws which contain five schedules here under.

In the first schedule, Schedule "A" (income from employment), Article 12 (4) of the Income Tax Proclamation No. 979/2016 Delegates Council of Ministers to make regulations for determining the value and taxation of fringe benefits. Accordingly, the Income Tax Regulation No. 410/2017 puts several articles of fringe benefit which are essential elements of tax and increase the duty of tax payers from Article 8 up to Article 18 and deals with;

- The benefits which can be considered as fringe benefits⁴⁴
- The benefits not treated as fringe benefit⁴⁵
- The definition and method of valuing of several fringe benefits⁴⁶
- Residual fringe benefits and its calculating method⁴⁷
- Limitations of tax liability on fringe benefits i.e., the aggregate tax liability on fringe benefits shall under any circumstance not exceed 10% of the salary income of the employee.⁴⁸

⁴³ Asechalw Ashagre (2013), 'Tax Law Teaching Material,' College of Law and Governance Studies, School of Law, Addis Abeba University, p.80

⁴⁴ Income Tax Regulation 410/2017, Negarit Gazeta, year 23, No.82, Addis Abeba, 25th August 2017, Article 8(1)

⁴⁵ Id., Article 8(4)

⁴⁶ Id., Article 9-17

⁴⁷ Id., Article 17

⁴⁸ Id., Article 19 (1)

Generally, Fringe benefit which is considered as employment income in Article 12(1b) of the current income tax proclamation is broadly delegate to the COM to determine wither the income of the employee from the employer is fringe benefit or not, determine the rate and value of the fringe benefit etc. Thus, Ethiopian parliament broadly delegates the COM with regard to fringe benefit that tends to create new or increase obligations of tax payers and is against the principle of legality principle.

Furthermore, the third schedule of income tax, schedule “C” (income from business) lists enormous provisions of deductible expenditures of the tax payer.⁴⁹ Particularly, Article 22(1a) of the proclamation puts down the requirements for deduction of tax payers expense generally and the income regulation puts several articles⁵⁰ to implement this provision of the proclamation. However, in this current Income Tax regulation, the COM give broad discretion to the MoF to limit the deductions allowed for expenditures incurred in the provision of food and beverage services by Hotels, Restaurants or other similar establishments for their employees by the directive in Article 22(2). Similarly, in Article 31 of the regulation the limit to the deduction of business promotion expenses incurred locally or abroad pursuant to article 22(1a) of the proclamation shall be determined by a directive to be issued by the minister. These provisions delegate the MoF extensively to limit the deduction of tax payer and this may affect the right of the tax payer.

The other deductible expense from the gross income in calculating taxable income is depreciation.⁵¹ Mainly, Article 25(2) of the proclamation offers the COM to determine the amount by which the depreciable assets or business intangibles of a tax payer decline in value during a tax year shall be computed in accordance with the regulation. Accordingly, the Income Tax Regulation comes up with detail provisions on the depreciation deduction (i.e., From Article 36-41). However, Article 39 of the regulation which determines the rate of depreciation applicable to a depreciable asset or intangible business shows the Ethiopian Parliament makes extensive use of delegation that tend to increase obligations of tax payers. As discussed above, the Constitution of Greece and others countries require that parliamentary tax acts should set out in the tax law “...*the tax rates*...” as it is essential or basic element of the tax. Unlike this,

⁴⁹ Id., Article 27-43

⁵⁰ Id., Article 29-31

⁵¹ Income Tax Proclamation No. 979/2016, Negarit Gazeta, year 22, No.104, Addis Abeba, 18th August 2016, Article 25

the income tax regulation delegates to the COM to set the rate of depreciation for each good (i.e., ‘depreciable assets’⁵² and ‘Business intangibles’⁵³).

Similarly, the Income Tax Proclamation allows the tax payer who incurred loss in the previous year carried forward and can be taken as a deductible expenditure.⁵⁴ The detail of this provision can be taken an inference from article 26(5) of the proclamation which delegates to the COM and is found in Article 42 of the regulation. But this current Income tax regulation comes with new idea of loss carry (i.e., *Loss Carry backward*⁵⁵) which is not raised in the proclamation. This provision which allows loss sustained in the performance long term contract may be carried backward until the loss is fully deducted is new idea not raised in the proclamation.

On the other hand, Article 27 listed several expenditures and losses which are not deductible which include expenditure incurred in the provision of entertainment “*except to the extent that the expenditure is allowed as a deduction under a Directive issued by the Minister relating to food provided for free to employees by an employer conducting a mining, manufacturing, or agricultural business.*”⁵⁶ This provision refers the MoF determines the extent of deductible expenditure by directive and an excessive delegation is highly reflected because it can increase the obligations of tax payers while they set the extent of tax. Similar excessive delegation is reflected in Article 27(1n) of the regulation by stating that deduction is not allowed to expenditures to the extent disallowed under Regulation to be issued by the COM.

Moreover, under the accounting period, there are some deductible loss reserves of Financial Institutions and Insurance Companies which the rules of such deduction are provided by the COM in the regulation.⁵⁷ As a result, Article 45-47 of the current Income Tax Regulation deals with these points and determine bank shall be allowed a deduction for a tax year for eighty percent (80%) of its loss reserve for the year,⁵⁸ an insurance company carrying on the business of general insurance shall be allowed deduction for a tax year of the balance of its reserve for unexpired risks,⁵⁹ and the calculation of taxable income of an insurance company from the conduct of the business of life insurance for a tax year.⁶⁰

The new Income Tax Regulation No.410/2017 also comes up with huge *schedule* of assessing the presumptive business tax to be paid by category “C” tax payers and are found attached at

⁵² *Supra Note 44*, Article 39 (1)

⁵³ *Id.*, Article 39 (2)

⁵⁴ *Supra Note 51*, Article 26

⁵⁵ *Supra Note 44*, Article 43

⁵⁶ *Supra Note 51*, Article 27(1j) (2)

⁵⁷ *Supra Note 51*, Article 31

⁵⁸ *Supra Note 44*, Article 45,

⁵⁹ *Id.*, Article 46,

⁶⁰ *Id.*, Article 47

the end of the regulation. But the Income proclamation does not put any standard to limit except stating that the mode of payment of category “C” determined by regulation.⁶¹ Due to this, there are several complains with regard to presumptive taxation as the Minister can revise every three years and the COM set their own standard. Thus, the parliament delegates to the COM without limit and the slogan “No taxation without representation” highly affected.

The other example of liberal delegation (perhaps too liberal for comfort) is “windfall profits” taxation which is to be found in the new Income Tax Proclamation No.979/2016.⁶² After broadly defining “windfall profits” as “any unearned, unexpected, or other non-recurring gain”, the proclamation confers extensive powers up on the “Minister to determine the amount of income to be considered as windfall profit, businesses that are subject to tax levied on windfall profits, the date on which such tax shall become effective and the manner in which the tax is assessed and factors that need to be taken in to consideration.”⁶³ Similarly, the Minister may, taking into consideration the nature of the business, prescribe different amounts to be considered as windfall profits and rates for different types of businesses.⁶⁴ This article clearly devolves broad discretionary powers of taxation upon an executive branch of Government.

Moreover, in the fifth schedule of income tax which deals with exempt income liberally delegates the executive body. Particularly, Article 65(2) of the proclamation delegates the COM to exempt any income for economic, administrative, or social reason. From this, the new Income regulation exempts⁶⁵ several incomes of employees which are not stated in the proclamation.

The other provision is Article 68(9) which delegates the COM to provide further rules for determining the cost of an asset. With regard to income splitting, MoF has a lion’s share delegation power in valuing the transfer to determine whether a person has attempted to split income.⁶⁶ Similarly, Article 79 of the proclamation excessively delegates to MoF to deal with transfer pricing. With regard to advance payment of tax in relation to imports, The MoF delegates to issue directive defining “commercial use” in Article 85(4) and this may increase the obligation of tax payers by defining broadly.

Finally, the other provision which extensively delegates to the executive body is withholding of tax from domestic payments.⁶⁷ Particularly, Article 92 sub 1 states that those who have got

⁶¹ *Supra* Note 51, Article 49

⁶² *Id.*, Article 60

⁶³ *Id.*, Article 60(2)

⁶⁴ *Id.*, Article 60(3)

⁶⁵ *Supra* Note 44, Article 54

⁶⁶ *Supra* Note 51, Article 78(3)

⁶⁷ *Id.*, Article 92

legal or physical personality are required to withhold tax by a directive of the authority at 2% of the gross amount of payment made for the supply of goods involving more than 10,000 Birr in single transaction or the supply of services involving more than 3000 in one supply contract. However, MoF is allowed to change the amount of 10,000 Birr or 3000 by directive.⁶⁸ This shows as the Minister has great discretion on determining the amount and can even increase the duties of the tax payers. Similarly, the contrary reading of Article 92(4) refers that the supplier should provide a Tax Identification Number (TIN) to the withholding agent to withhold 2% otherwise 30% will be withhold in the transaction. In order to withhold 2%, not only TIN number but also trade license is necessary. The requirement of Trade License is found in Article 63 of the Income Regulation and this shows new obligation is levied to the tax payer by the COM which is not stated in the proclamation.

Even though, the current income laws unlike the repealed income laws, to some extent comply with the principle of legality but still there are provisions in the new tax law which delegate excessively to COM, MoF, or MoR as discussed above.

4.2.2. The Ethiopian Value Added Tax (VAT) Laws

Like all other sales taxes, VAT is a tax on consumption which is to be paid ultimately by consumers of a taxable product as measured by the price they pay for goods and services. With regard to delegation, the Ethiopian VAT proclamation No. 285/2002 and its Amendment Proclamation No. 609/2008 is so generous to delegate tax law making power to the executive body and let's investigate these provisions here under.

Under the Ethiopian VAT proclamation, supply of goods and services has been regulated under Article 4 and 5 of the Proclamation. However, Article 4 which provides the guiding rules dealing with supply of goods and rendition of services excessively delegate to COM for the treatment of other transactions as supplies of goods or rendition of services, or neither supplies of goods or rendition of service.⁶⁹ Accordingly, the COM list out several activities which can be considered as supply of goods or rendition of services in Article 3 of the VAT Regulation which can create new obligation on individual persons.

With regard to imposition of tax, zero rate which is an exception to the flat rate of 15% is listed down in Article 7(2) and in this sub- "a" the COM is delegated to fix the extent of export, subject to zero rate. Depending on this article of the proclamation, the VAT Regulation defines the phrase "export country" and "export from Ethiopia" and come with extensive lists of zero

⁶⁸ Ibid, Article 92(6)

⁶⁹Value Added Tax Proclamation No. 285/2002, Negarit Gazeta, year 8th, No.33, Addis Abeba, 4th July 2002, Article 4(13)

rate exports.⁷⁰ Similarly, the details of other zero rate supplies are found in the VAT regulation and some provisions increase the obligations of tax payers by putting several requirements.

Moreover, there are supplies of goods (other than by way of export) and rendering of service exempted from payment of VAT in Article 8(2) of the proclamation. However, the extent of the exemption is determined by COM regulation, accordingly Article 19-43 of the VAT Regulation lists out the details and some provisions are the “basic” or “essential” elements of the exemption tax which can highly increase the obligations of the tax payers. Similarly, Minister of Finance is empowered to exempt other supplies of goods and services by directive from VAT without having to seek the approval of the parliament.⁷¹ The Ministry has used this power to exempt certain transactions from VAT which include but not limited the exemptions for supplies of medical supplies, bread, Injera, Milk and Fertilizers. Generally, with regard to exemption, there is liberal delegation to COM and Minister of Finance.

The other provision which broadly delegates to the executive body is Article 11 (1) of the proclamation by stating “*except as provided in this Article or in Regulations issued by COM...*” and the Council of Ministers put several provisions of time of supply in the Tax Regulation.⁷² Similarly, “*...the time when other supplies occur may be provided by directives issued by the Minister of Revenue*”⁷³ shows excessive delegation. Article 12(5) of the VAT Proclamation also gives broad discretion to Minister of Revenue to provide for the calculation of the value of supply of goods or rendition of services for supplies not covered in Article 12 (1-4) of the VAT Proclamation.

Moreover, the Ethiopian Parliament also makes extensive use of delegations that tend to increase obligation of tax payers. An example of this delegation is found in Article 16(2) of the VAT Proclamation which empowers the Ministry of Finance to increase or decrease VAT registration threshold. Accordingly, the Minister of Finance and Economic Development increased the amount of money by the circular from half a million to one million depending on the power given in Article 16(2) of the 285/2002 VAT proclamation. Mean that, the Minister of Finance and Economic Development states in the circular that “a person who carries on taxable transaction whose annual volume of trade exceeded 1million birr or at the beginning of any period of 12 colander months there are reasonable grounds to expect that the total value

⁷⁰ Value Added Tax Regulation No. 79/2002, Negarit Gazeta, year 9, No.19, Addis Abeba, 31st Dec. 2002, Article 35

⁷¹ *Supra Note* 69, Article 8(4), Tax Synopsis, Ministry of FIN. & ECON. DEV., <http://www.mofed.gov.et/english/inforrmation/pages/TaxSynopsis.aspx> as cited in Tadesse Lencho, The Ethiopian Tax System: Excess and Gaps, p. 338

⁷² *Supra Note* 70, Article 6

⁷³ *Supra Note* 69, Article 11(10)

of taxable transaction to be made by the person during that period will exceed 1Milliion Birr, they are required to file an application for VAT Registration”.⁷⁴ This increment from 500,000 birr to a million is on the ground of minimizing tax duty on small businesses, solving problems related with tax administration and smoothly go VAT law with other tax laws. In addition, the new VAT Draft proclamation also increases the amount from 500,000 birr to 1 million similar to the circular of Minister of Finance and Economic Development though the writer has doubt on repealing laws by circular/letter. Similarly, sub Article 6 of the above Article delegates to Minster of Revenue set such conditions and restrictions of branch or division registration.

Among the tax payers in VAT is a non-resident person who/which is not registered for VAT in Ethiopia renders services in Ethiopia for a customers which is known as reverse taxation is excessively delegate to the executive by stating “...the amount of tax is determined by a method of calculation to be determined by Regulations issued by COM”.⁷⁵ As a result the COM come up with complicated calculation in the VAT Regulation of Article 12 i.e., “...the tax fraction is $r(100+r)$...”. Moreover, Article 25 broadly delegates to the Minister of Revenue issue directives when the rules in the proclamation to apply to calculate the tax liability of suppliers of gambling, lottery, and travel agent services, sales on commission, sales of second hands, and suppliers of other industries.

The other VAT provision which liberally delegates to the Minister of Finance and Economic Development is with regard to VAT refunds which is empowered to determine the manner in which and the amount of the tax collections that will be retained for VAT refunds.⁷⁶ Similarly, sub-Article 6 of this Article and Article 15(3) of the VAT Regulation also runs broad delegation to ERCA, the current Ministry of Revenue. Article 42 of the 2002 Proclamation which is amended by Article 2(14) of the VAT Amendment Proclamation No. 609/2008 also delegates excessively to ERCA, the current Ministry of Revenue to issue directives for waiver of administrative penalties.

4.2.3. The Turn Over Tax Laws

Turn over tax, like a VAT which is imposed on persons who supply goods and services liberally delegates to the executive body as follows.

The Turn Over Tax Proclamation No. 308/2002 extensively delegates to the Minister of Finance to exempt supply of goods or services i.e., “unless exempted under Article 7 of this

⁷⁴ Minister of Finance and Economic Development, Circular Number 5/161, on 26/03/2010 E.C

⁷⁵ *Supra Note* 69, Article 23(3)

⁷⁶ *Id.*, Article 27(4)

Proclamation, or Directive to be issued thereunder...”.⁷⁷ Accordingly, Article 7(2) empowers the Minister of Finance and Economic Development to exempt other goods and services by Directive not listed in sub-Article 1. Similarly, sub-article 3 broadens the delegation by empowering the Ministry of Revenue to determine the scope and manner of exemptions provided in Article 7.

Moreover, the Turnover Tax (Amendment) Proclamation No. 611/2008 repeals Article 20 of the previous 2002 proclamation and delegates broadly to ERCA, currently Ministry of Revenue by stating, “administrative penalties may be waived in accordance with directives issued by the tax Authority”.⁷⁸ Finally, the 2002 Proclamation liberally delegates to the Minister waive in whole or in part the tax levied under the proclamation for economic, social, or administrative reasons or for reasons specified under the Income Tax Proclamation No.286/2002.⁷⁹

4.2.4. The Ethiopian Custom Laws

The Ethiopian Custom Proclamation No. 859 /2014 empowers to ECRA, the current Ministry of Revenue to put such conditions in the Directive to get priority in undergoing customs procedure.⁸⁰The goods that meet the conditions specified in the directives show as the Authority can list out several conditions which can increase the obligation of the tax payers. Similarly, the conditions under which travelers entering or leaving the customs territory may use their private means of transport is determined by directives to be issued by ERCA, the current Ministry of Revenue.⁸¹

The other liberal delegation to the COM is found in Article 59(2) of the proclamation which the rate of customs warehouse fees shall be determined by regulation enacted by the above executive body. Moreover, under Article 67(1) of the proclamation, the Ministry may determine by Directive the duty and tax applicable to the goods together with penalties to be payable if the compensating products are not re-imported in accordance with Article 66(3) of this proclamation.

The MoF also is empowered to determine conditions other than those stated under sub article (1) of this Article under which temporary importation of goods without payment of duties and

⁷⁷ Turn Over Tax Proclamation No. 308/2002, Negarit Gazeta, year 9th, No.21, Addis Abeba,31st Dec.2002, Art. 3

⁷⁸ Turn Over Tax (Amendment) Proclamation No.611/2008, Negarit Gazeta, year 15th, No.8, Addis Abeba, 25th Dec. 2008, Article 2(3)

⁷⁹ *Supra Note 77*, Article 37

⁸⁰ Customs Proclamation No.859/2014, Negarit Gazeta, year 20th, No.82, Addis Abeba, 9th Dec. 2014, Article 23(8)

⁸¹ *Id.*, Article 33(6)

taxes may be permitted by the Directive.⁸² The other copious delegation in the Proclamation is found in Article 74 which permits the MoF to determine the conditions under which the temporary admission procedure may be used with partial or total relief from import duties. Additionally, ERCA is allowed to issue on the manner of application of the valuation methods stipulated in this proclamation, and to prescribe other methods to be applicable in the case where the methods to be applicable in the case where the methods stipulated under this proclamation could not be applied and be applicable in the case of second hand.⁸³

The unlimited delegation of parliament to COM is found in Article 102 of the proclamation which refers the duties on goods imported in to the custom territory shall be paid at the rates specified in the Customs Tariff Regulation.⁸⁴ The Ministry is also “...allowed the customs duty for the entire consignment be charged on the basis of the tariff classification of the goods which are subject to the highest rate of customs duty” in sub-article 2 of Article 102 and this increases the duty of tax payers. With regard to service charges, COM is generously delegated that the service charges to be collected by the Authority for services it renders in connection with customs formalities shall be determined by the regulation.⁸⁵

Moreover, the customs proclamation excessively delegates to MoF to grant exemption for imported and exported goods from duty and taxes by directive.⁸⁶ The last but not least Article which delegates liberally to COM is Article 176(4) i.e., “the detail conditions under which customs warehouse are established are established, utilization of such warehouse and the rate of customs warehouse permit issuance and renewal fees shall be determined by regulation.” And also, ERCA, the current Ministry of Revenue is empowered to prescribe the validity period and conditions of renewal and revocation of customs warehouse permit by Directive.⁸⁷

4.2.5. The Ethiopian Excise Tax Laws

The new Excise Tax Proclamation No. 1186/2020 like the other tax laws, hold several provisions which delegate too broadly to the executive body. Among these, Article 9 (1e) delegates to the Minister to exempt goods and services from excise tax for economical, social and administrative reasons. The other Excise tax provision which liberally delegates to the executive is found in Article 11, i.e., “The Minister may adjust the rate of excise tax specified

⁸² Id., Article 71(2)

⁸³ Id., Article 89(4)

⁸⁴ Id., Article 102 (1)

⁸⁵ Id., Article 115

⁸⁶ Id., Article 129

⁸⁷ Id., Article 176(3)

in Part I of this Proclamation by an amount not exceeding 10%”⁸⁸ and “the Authority shall, in accordance with the directive issued by the Minister, adjust the specific rate of excise tax specified in part I of this proclamation at least once a year to take inflation in to account”⁸⁹. The power delegated to Minister of Finance and Minister of Revenue is so broad and can increase the obligations of tax payers by increasing the tax rate.

Moreover, Under Article 13(5) of the Proclamation, Minister of Revenue is empowered to determine and specify the allowance for tare or wastage that may be granted and the conditions under which it is granted by directive. Similarly, the Minister of Finance is allowed to put such requirements in the directive and should comply with these⁹⁰ and the Minister of Revenue also permitted to specify the requirements of a measuring or metering device and such other equipment as may be required by directive⁹¹. Lastly, Article 29 (1) and (2) of the proclamation provides huge power of delegation to specify the excisable goods to which excise stamps shall be affixed, the place and time of affixing excise stamps and type and prescriptions of excise stamps to be affixed in the goods by directive.

4.2.6. The Ethiopian Stamp Duty Laws

Finally, stamp duty tax is a tax raised by requiring stamps sold by the government to be affixed to designated documents. Unlike the other tax laws, Stamp Duty Proclamation No. 110/1998 delegates to the executive body only in few provisions. Among these few provisions, the parliament liberally delegates the Minister of Finance to grant exemption from payment of stamp duty if they have a good cause.⁹² It is the discretionary power of the Minister to determine whether or not the cause is a good cause.

The other legal provision which shows excessive delegation is found under Article 9 and this article is repealed by the Stamp Duty (Amendment) Proclamation No. 612/2008 by saying “Administrative penalties may be waived wholly or partly in accordance with the directives issued by the ERCA, the current Ministry of Revenue.”⁹³ This shows ERCA, the current Ministry of Revenue is delegated by the parliament broadly to waive administrative penalties.

Conclusion and Recommendation

⁸⁸ Excise Tax Proclamation No. 1186/2020, (Not Published in Negarit Gazeta), Article 11(1)

⁸⁹ Id., Article 11(2)

⁹⁰ Id., Article 26(1f)

⁹¹ Id., Article 26(1) cum 26(2)

⁹² Stamp Duty Proclamation No. 110/1998, Negarit Gazeta, year 4th, No.36, Addis Abeba, 12th May 1998, Article 11

⁹³ Stamp Duty (Amendment) Proclamation No. 612/2008, Negarit Gazeta, year 15th, No.9, Addis Abeba, 25th Dec. 2008, Article 2(3)

In investigating tax law making, the extent of delegation of taxing authority to unrepresentative executive body varies depending on the absolute non-delegation doctrine, excessive delegation doctrine, and middle position. Middle (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 have won acceptance in many systems as it obeys with legality principle.

However, in the silence of the Constitution, the Ethiopian parliament delegated wholesale taxation power to the executive branches to define by regulations or directives the tax base, the tax rates, the calculation method, waiver and exemptions etc. Ethiopian tax laws almost everything is delegated generously to COM, MoF, or MoR in the secondary legislation. Especially, comparing with other tax laws, income tax and VAT laws hold massive provisions which delegate the executive body without limit.

Ethiopian tax laws liberal delegation to the stakeholders in making of secondary legislation is against the principle of legality and contradicts with the slogan of “no taxation without representation” which is found on the notion of “social contract”. This limitless tax law making delegation to the Ethiopian executive body is arbitrary taxation.

Therefore, the author recommended that the stakeholders in making of secondary legislation (i.e., COM, MoF or MoR) in Ethiopia should not snatch the power of parliament. The executive body should only deal to fill in gaps and details that are not dealt in the proclamation instead of enacting the “basic” or “essential” elements of the tax. Ethiopia House of people representative should devise check and balance mechanism in delegated tax law making matters to avoid tax payer’s tyranny and respect “no taxation without representation”. The delegated power of tax legislation of the executive body should be limited to fill in gaps and details not essential elements of tax.

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Conflict of Interest

None



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