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THE LEGAL POSITION OF TAXPAYERS IN TANZANIA

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university of
 groningen

The legal position of taxpayers in Tanzania

A Comparative Study of the Tax System of Tanzania and The United Kingdom on The Promotion of Taxpayers Rights Especially with Respect to Legal Persons Subjected To Corporate Income Tax

PhD thesis

to obtain the degree of PhD at the
University of Groningen
on the authority of the
Rector Magnificus Prof. C. Wijmenga
and in accordance with
the decision by the College of Deans.

This thesis will be defended in public on

Thursday 5 December 2019 at 11.00 hours

by

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Taxpayer's rights are believed to be a growing concept in Africa. This concept is still under construction. I was privileged to get the opportunity to write about the situation of taxpayers' rights in Tanzania, especially for corporate taxpayers. The study describes important features of the corporate tax structure of Tanzania and the UK. Furthermore it reflects extensively on the tax administration and practices in Tanzania and the UK with respect to taxpayers' rights. It explains to what extent the tax authorities abide with taxpayers' rights in their day to day activities.

This dissertation is submitted for approval for obtaining the degree of doctor at the University of Groningen. It was not an easy task to undertake a research covering the issue of taxpayers' rights specifically in an African context where the idea of human rights is still under construction.

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Talib. S Zahor

December 2019

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1 CHAPTER ONE: INTRODUCTION

1.1 Taxpayers' rights

Taxpayers' rights have a long history. In the UK, for example, it is believed that the discussion about taxpayers' rights started in 1215 through Magna Carta; the document that is deemed to be one of the sources of UK law until today.¹ In Europe in general, several actions have been taken to promote taxpayers' rights. The efforts have increased after the French Revolution in 1789. A similar situation existed in America. Taxation was among one of the reasons that started the American Revolution in the late 1760s.² Americans protested against the decision of the British Parliament to impose tax on them, without being represented in the British Parliament. The American therefore protested having the motto “*no taxation without representation*”.³

Taxpayer's rights are derived from human rights; they are treated as a special type of human rights.⁴ In most countries especially in the developed world the extension of human rights into various fields of social and economic life, including taxation, has frequently been discussed. One of the scholars' concerns in these countries is the attitude of states towards their taxpayers.⁵ The discussion of taxpayers' rights, similar to that of (other) human rights, is a matter of dealing with the relationship between states and citizens. It is a discussion which explores and reveals how the state uses its strong powers towards its own citizens. It is likewise a discussion which explains how citizens fight against the abuse of governments' powers.

¹ Hatice Yurtsever, 'Anatomy of Taxpayers' Rights: Case Study of Turkey', *Pakistan Journal of Social Sciences* Vol. 7 2010, pp. 334-346.

² <https://history.state.gov/milestones/1776-1783/declaration>, last visited 14 February 2017.

³ John Richard Alden, *The American Revolution, 1775-1783*, In the Hands of a Child, New York, 1954, p. 15.

⁴ Anders Hultqvist, 'Taxpayers' Rights in Sweden', *Revenue Law Journal*, Vol. 7, 1997 available at <http://epublications.bond.edu.au/rlj/vol7/iss1/4/>, last visited 13 February 2017. It can also be accessed through <http://www.hultqvist.se/artiklar/TaxpayersRightsinSweden.pdf>, last visited 2 September 2019.

⁵ Adrian Sawyer, 'A Comparison of New Zealand Taxpayers' Rights with Selected Civil Law and Common Law Countries, Have New Zealand Taxpayers Been "Short-Changed"?', *Vanderbilt Journal of Transnational Law*, Vol. 32, 1999.

It is not only in Europe that the attention for the promotion of taxpayers' rights has a long tradition; the same is true for the USA. The developments in Europe and the USA have also influenced the political and economic policies of developing nations. That influence has been made possible by among others, the political and economic strength of Europe and the USA, and globalization. It is said that due to global economic forces, governments worldwide have adjusted their behaviour with regard to abusing the power they have over their citizens.⁶

The demand for taxpayer rights does not focus on individual taxpayers only (natural persons). Legal persons (corporate taxpayers) want to enjoy similar rights.⁷ Several cases have arisen in domestic and international law in which corporate taxpayers claim their taxpayer's rights. Courts have ruled in favour of corporate taxpayers many times.⁸ This issue is in more detail covered in the next chapter.

Generally corporate taxpayers require the promotion of the following rights:⁹

- the right to pay no more than the correct amount of tax due,
- the right to be informed,
- the right to certainty,
- the right to be assisted,
- the right to be heard,

⁶ Caroline Libman Mandell, A book review of "Gavin W Anderson, *Constitutional Rights after Globalization*", The University of Toronto Law Journal, Vol. 56, No. 3, 2006, pp. 281-283.

⁷ Anders Hultqvist, 'Taxpayers' Rights in Sweden', *Revenue Law Journal* Vol. 7, 1997 available at <http://epublications.bond.edu.au/rlj/vol7/iss1/4/>, last visited 13 February 2017; It can also be accessed through <http://www.hultqvist.se/artiklar/TaxpayersRightsinSweden.pdf>, last visited 2 February 2019.

⁸ Elspeth Berry, 'The zone of Interaction Between Partnerships, LLPs and Human Rights in United Kingdom Law', *Human Rights Law Review* Vol. 11, 2011, pp. 503-526.

⁹ These rights have been promoted in the UK Taxpayers' Charter and the Tanzania Taxpayers Charter. Similar rights are discussed in the OECD Centre for Tax Policy and Administration's Practice Note on Taxpayers' Rights and Obligations, see <http://www.oecd.org/dataoecd/4/16/14990856.pdf>, last visited 20 July 2018.

- the right to appeal,
- the right to a fair trial which includes the right to be judged by a competent and impartial court or tribunal,
- the right to respect of one's privacy, and
- the right to confidentiality.

The right to equality before the law (non-discrimination) is not mentioned in this list, although taxpayers sometimes invoke this right with respect to the way they are taxed. In most cases the tax base will be a central issue in these cases and taxpayers may feel they are unfairly treated because their tax burden is higher than that of similar taxpayers who pay less. Given the technical nature of discussions about the tax base the right to equality will not be discussed in this context in this dissertation. However, the right may sometimes be discussed in relation to the other rights mentioned above.

The above rights are promoted by various sources: domestic law and international law. In the latter case the following treaties or declarations can be mentioned: the Universal Declaration of Human Rights, the European Convention on Human Rights, the EU Charter of Fundamental Rights, the African Charter of Human and Peoples Rights. Moreover, some tax authorities provide Taxpayers' Charters. These administrative manuals also promote these taxpayers rights.

A detailed explanation of each of these rights will be provided in this dissertation.

Recently the OECD and the EU have taken steps towards fighting Base Erosion and Profit Shifting (BEPS). The OECD, supported by the G20 countries, has published 15 reports (action plans) aimed at reducing the possibilities of Multinational Enterprises (MNE's) to erode their tax base by shifting profit from one tax jurisdiction to another. From mid-2014, several deliverables on actions plans and discussion documents have been issued to the public. These action plans were published in October 2015. In some of them the OECD proposes to extend the mandate of the revenue authorities in obtaining information from MNE's. For example, action plan 13 requires MNE's to file country-by-country reporting. Part of this plan is that countries share

information on taxpayers automatically.¹⁰ The OECD also proposes that countries should introduce mandatory disclosure rules. Action plan 12 requires companies to disclose tax planning arrangements or schemes before they are implemented.¹¹ These proposals together with other proposals made on the basis of other action plans, may lead to the reduction of BEPS. The downside is however that the proposals may infringe taxpayers' rights. The taxpayers' right that is most likely to be infringed is the right to confidentiality. A detailed discussion on this matter is contained in section 9.6, below.

Currently, there are insufficient scholarly articles that discuss to what extent taxpayers' rights are promoted particularly in Tanzania. However, there is need for such a study. Tanzania just like any other country in the world needs to assess its tax policies. Therefore, a study that reveals the extent to which the tax authority promotes taxpayers' rights will portray the current strength and weakness of tax administration in Tanzania, particularly in promoting taxpayers' rights. Hence, the study will assist the Tanzanian government towards improving tax administration.

In order to contribute to the promotion of taxpayers' rights this book aims at exploring these rights in Tanzania and the UK. The domestic legislation and administrative manuals of these countries that deal with the rights of taxpayers will therefore be reviewed. The study will also review how the domestic courts of both countries protect taxpayers' rights, and, in particular, will analyze the structure, the role and the independency of these courts.

The influence of regional integration on the promotion of taxpayers' rights will also be discussed. In particular the influence of regional integration on the promotion of taxpayers' rights in Europe and Africa is examined. For Europe, the influence of the European Union and the Council of

¹⁰ OECD/G20 Base Erosion and Profit Shifting Project; Transfer Pricing Documentation and Country-by-Country Reporting Action 13, Final Report, 2015, p. 37, see https://www.oecd-ilibrary.org/taxation/transfer-pricing-documentation-and-country-by-country-reporting-action-13-2015-final-report_9789264241480-en, last visited 2 September 2019.

¹¹ OECD/G20 Base Erosion and Profit Shifting Project; Mandatory Disclosure Rules, Action 12, Final Report, 2015, p. 18, see <http://www.oecd.org/tax/mandatory-disclosure-rules-action-12-2015-final-report-9789264241442-en.htm>, last visited 9 July 2017.

Europe is considered. Likewise, the influence of the East African Community (EAC) and the African Union on the promotion of taxpayers' rights in Tanzania will be examined.

The role of promoting and protecting taxpayers' rights does not seem to be as difficult in Europe as it is expected to be in Africa. This is because Europe has so far been more advanced in the promotion of human rights than Africa. Based on the history of human rights in Europe, the issue of taxpayers' rights there is expected to be an extension of the applicability of human rights generally. However in Africa things are different. The campaign for the promotion of human rights in general is still in progress there, let alone taxpayers' rights. Especially with regard to political and economic rights, the completion and success of protection are as yet unachieved. The legal situation in Africa has not adequately promoted an atmosphere for the promotion of taxpayers' rights. This is because Africans until today are fighting for pure democracy and the rule of law. Sometimes killings and other abuse of human rights are still reported in the region and attract therefore more attention.

Some scholars and human rights activists¹² have associated civilisation and the promotion of human rights. According to them human rights cannot exist in any social or economic environment that lacks a well civilized culture. Unless society is well-civilized, human rights cannot be fully applied. These scholars and activists do therefore not believe in the universal application of human rights. They may be correct to some extent that cultural aspects have a great influence on human rights. However, cultural diversity cannot be taken as an excuse for allowing the infringement of human rights.¹³ For that reason this dissertation could not consider the current situation of human rights in Africa as a reason not to study taxpayers' rights in

¹² Jack Donnelly, 'Human Rights: A New Standard of Civilization?' *International Affairs* (Royal Institute of International Affairs) Vol. 74, 1998, pp. 1-23 read with Raimon Panikkar, 'Is the Notion of Human Rights a Western Concept?' *Diogenes* Vol. 30, issue 120, 1982, pp. 75-102, available through <http://www.derechoshumanos.unlp.edu.ar/assets/files/documentos/is-the-notion-of-human-rights-a-western-concept.pdf>, last visited 3 September 2019.

¹³ Bonny Ibhawoh, 'Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State', *Human Rights Quarterly*, Vol. 22, 2000, pp. 838-860.

Tanzania. Taxpayers in Africa and all over the world deserve their rights to be effectively promoted by states.

Some guidance on the analysis of taxpayers' rights in this dissertation was derived from Duncan's *Taxpayers rights: Theory, Origin and Implementation*. It is taken as a guideline in classifying taxpayers' rights in this dissertation.

1.2 Objectives of the dissertation and research questions

The general research question of this dissertation is:

Are corporate taxpayer's rights sufficiently promoted in Tanzania?

In order to answer this question, the following more specific research questions are answered:

1. What is the relationship between human rights and taxpayers' rights?
2. Which taxpayer's rights are promoted in Tanzania and the UK in particular with respect to corporate taxpayers?
3. How does international law influence the promotion of corporate taxpayers' rights in Tanzania and the UK?
4. How are corporate taxpayer's rights influenced by recent developments with respect to anti-BEPS measures for corporate taxpayers?

With respect to the word 'promoted' mentioned in question 2 the word 'promoted' stands for the question whether the taxpayers' rights are known in the hard and soft law of Tanzania and the UK. The word also refers to how the known taxpayers' rights are guaranteed in the hard and soft law of Tanzania and the UK. For this work hard law means statutory law, treaties and jurisprudence. Soft law – for this work – is the term applied to measures, such as guidelines and

recommendations, which – in contrast to hard law – are not binding on those to whom they are addressed.

The main reason that influenced the researcher to ask the above questions is that taxpayers' rights are a crucial factor in the process of levying and collecting tax. Taxation can only be sustainable if the rules by which taxes are levied and collected are acceptable to the taxpayers. Taxpayers' rights can help secure the acceptance of taxes by the taxpayers. Sustainable taxations also involves a number of obligations for the taxpayers, such as filing a tax return, paying the required amount of tax in time, giving required information and so on. Fulfilling these obligations is also essential for an effective and efficient tax system.¹⁴ Therefore taxpayers can only effectively claim their rights if they have sufficiently met their obligations. Because of the prevailing connection between taxpayer's rights and taxpayer's obligations, I decided to discuss, in summary, the taxpayer's obligations that are described in the Taxpayers' Charters of the UK and Tanzania.

In answering the above questions the dissertation follows the methodology and techniques discussed below.

1.3 Methodology and the countries of study

The methodology of this dissertation consists of a comparative study that compares the tax systems of Tanzania and the United Kingdom. The data were collected and analysed based on the domestic law of the United Kingdom and Tanzania covering human rights, corporate tax and corporate taxpayer's rights. International treaties governing human rights in Europe and Africa were also used. Furthermore, domestic and international tax case-law has been used to make the analysis. Scholarly articles and other official reports made by the Tanzania Revenue Authority, Her Majesty's Revenue and Customs, the OECD, the EU and the AU were also used.

¹⁴ See, generally, Adrian Sawyer, 'A Comparison of New Zealand Taxpayers' Rights with Selected Civil Law and Common Law Countries, Have New Zealand Taxpayers Been "Short-Changed"?', *Vanderbilt Journal of Transnational Law*, Vol. 32, 1999, p. 1345.

1.4 Reasons of the choice of the countries of study

The choice of the countries of study is highly influenced by the historical background and the legal structure of Tanzania and the United Kingdom. The United Kingdom colonised Tanzania for years. That history still has a great influence on the legal structure of Tanzania. Several laws in Tanzania originate from the United Kingdom. It should also be understood that common law and the doctrine of equity of the United Kingdom is applicable in Tanzania; see section 3.2.3.1 below.

The development of taxpayers' rights in the United Kingdom has substantially been influenced by international law, such as the European Convention on Human Rights, and the United Kingdom's membership of the European Union, the Council of Europe, and the OECD.¹⁵ Moreover the United Kingdom is a major international trading partner and has an attractive business climate. For these reasons too, the United Kingdom can be seen as an example for Tanzania; an African country that is in a continuing process of developing, adjusting and strengthening the rule of law.

1.5 The relevance of the study

The study is expected to be useful to Tanzania, since it explores the existing law concerning taxpayers' rights. It is hoped that the Tanzanian tax authority will consider this study as feedback on its operations. The dissertation may also be an interesting document to Tanzania because it recommends possible changes of the Tanzanian legal system when dealing with the promotion of taxpayers' rights.

The study is also expected to be useful for academic purposes; especially to researchers and students studying the tax law of African countries because it is expected to contribute to the literature about the tax administration especially in Tanzania where the issues of taxpayers' rights have not been extensively explored. The study is also important to companies expecting to invest in Tanzania because it provides information about Tanzanian tax matters

¹⁵ Among the objectives of the OECD to look at the issues that directly affect the lives of ordinary people, like how much they pay in taxes and social security, and how much leisure time they can take, see http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1,00.html, last visited 5 October 2014.

1.6 Layout of the study

The dissertation consists of ten chapters. Following this Introduction, Chapter 2 provides the justification for the application of human rights to natural and legal person. Similarly, it explains human rights which are currently promoted by several international treaties that are directly applicable to legal person in tax matters.

Chapters 3-5 cover the Tanzanian part. Chapter 3 explains the political profile of Tanzania. In this chapter, the sources of law in Tanzania are also explained. The analysis to which extent the Tanzanian legal and political structure is compatible with the rule of law is made.

Chapter 4 covers matters concerning the provision of taxpayers' rights in Tanzania that are currently promoted within Tanzanian domestic law, as well as taxpayers' rights that are promoted through the Taxpayers' Charter. Prior to analysing the extent to which taxpayers' rights are promoted in Tanzania, the chapter provides information concerning the background of taxation in Tanzania. The corporate tax structure and the tax administration are discussed. The chapter also discusses the tax appeal procedures in Tanzania.

Chapter 5 reviews the influence of regional integration to the promotion of taxpayers' rights in Tanzania. It examines briefly the existing regional integration in Africa and the evolution of the African Union. Furthermore, attention is given to the influence of the African Court on Human and Peoples Rights and the African Commission on Human and Peoples Rights towards the promotion of taxpayers' rights.

Chapters 6-8 cover the United Kingdom. A similar structure to that used in the Tanzania part is also applied in the UK part. Chapter 6 explains the profile of the UK: the country structure is explained and the sources of law are examined. Chapter 6 also contains a review of the position of human rights in the UK prior to, and after, the incorporation of the European Convention on Human Rights into domestic law. Finally, the UK corporate tax system is explained.

Chapter 7 provides an overview of taxpayer's rights. Attention is also given to the UK tax administration (HMRC), covering HMRC's powers of HMRC and the UK Taxpayers' Charter. Finally the tax appeal procedures are also discussed in detail.

Chapter 8 examines the influence of regional integration on the promotion of taxpayers' rights in the UK. The influence of the Council of Europe is analysed in detail. The influence of the European Union (EU) is not analysed in as much detail as that of the Council of Europe, because the EU is highly focused on ensuring the successful operation of the common market in the EU, and specific human and taxpayers' rights as such play only a minor role in this respect (even though the promotion of human and fundamental rights are part of the objectives of the EU).

Chapter 9 deals with the fight by the EU and the OECD against Base Erosion and Profit Shifting (BEPS). The chapter demonstrates briefly techniques which are commonly used by MNEs in BEPS. Likewise, the for this study most relevant action plans of the OECD and some decisions made on these action plans are analysed. The same is done for the EU. The main focus in this chapter is on the protection of taxpayers' rights with respect to measures taken against BEPS.

Chapter 10 provides an overall conclusion to the dissertation and summarises the conclusions from the previous chapters to answer the research questions. Finally, some recommendations are made.

2 CHAPTER TWO: GENERAL OVERVIEW OF HUMAN RIGHTS

2.1 Introduction

This chapter provides a general overview of human rights applicable to both natural persons and legal persons, and human rights that are applicable to natural persons only. Generally this chapter justifies why in certain circumstances in this dissertation the term “*human rights*” is sometimes used interchangeably with taxpayers' rights.

In attempting to justify the application of human rights to natural and legal person, human rights treaties are reviewed, in particular the European Convention on Human Rights (ECHR) and the African Charter on Human and Peoples Rights (Banjul Charter). Similarly, taxpayers' rights explained in the OECD practice note on taxpayers' rights and obligations¹⁶ will be discussed. These treaties have been used because the ECHR is the most commonly used treaty on the promotion of human rights in Europe, and the Banjul charter is the main charter on the promotion of human rights in Africa. The OECD practice note is used because the OECD has to a great extent influenced many domestic laws on taxation globally.

2.2 The application of human rights for natural and legal persons

2.2.1 Introduction

This section discusses the nature and evolution of human rights in the European Convention on Human Rights (ECHR) and the African Charter on Human and Peoples Rights (the Banjul Charter). The section also provides evidence of the applicability of human rights to legal and natural persons. In explaining human rights, subsection 2.2.2 of this explains human rights that are applicable to natural persons only, and subsection 2.2.3 explains human rights that are applicable to both natural persons and legal persons.

¹⁶ http://www.oecd.org/tax/administration/Taxpayers'_Rights_and_Obligations-Practice_Note.pdf, last visited 2 September 2019.

2.2.2 Human rights for natural persons

2.2.2.1 Introduction

The struggle for human rights accelerated after the end of the Second World War in 1945. Many declarations and treaties appeared in order to serve the promotion of human rights. A good example is the Universal Declaration of Human Rights by the General Assembly of the United Nations on 10 December 1948. This declaration contains human rights which are applicable to all men, and which are universally protected.¹⁷ Another example is the human rights promoted in the ECHR. This convention aims to secure effective recognition and observance of the Universal Declaration of Human Rights in European nations, specifically in the Member States of the Council of Europe.¹⁸ A third example is the African Charter on Human and Peoples' Rights (the Banjul Charter). This charter explains human rights to Africa. The preamble of the charter states that the human rights promoted within it, have taken into consideration the historical tradition and values of African civilization.¹⁹

The above treaties have a thing in common. The aim of the treaties is to secure the interest of humans (better: citizens) against nations. Historically, a natural person can be the relatively weak victim of the violation of human rights by a powerful state. As a result, most of the human rights introduced in these treaties are based on the following rights, discussed in the next paragraphs:

2.2.2.2 Right to life

Both the ECHR and the Banjul Charter have promoted this right. However both ECHR and the Banjul Charter have allowed this right to be infringed upon fulfilment of certain conditions. The ECHR states in article 2:

¹⁷ <http://www.ohchr.org/EN/UDHR/Pages/Introduction.aspx>, last visited 3 September 2019.

¹⁸ http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf, last visited 2 October 2017.

¹⁹ http://www.africa-union.org/official_documents/treaties_conventions_protocols/banjul_charter.pdf, last visited 5 October 2014. It can also be accessed through <http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf>, last visited 3 September 2019.

“Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which his penalty is provided by the law.”

The same right is propounded in article 4 of the Banjul Charter, which states that:

“Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.”

2.2.2.3 Prohibition of torture

The ECHR has promoted the right of prohibition of torture in article 3:

“No one shall be subjected to torture or inhuman or degrading treatment or punishment.”

However, in the Banjul Charter this right has been promoted together with the right that prohibits slavery and slave trade. Article 5 of that charter provides that:

“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”

2.2.2.4 Right to liberty and security

The right of liberty and security is a right which prohibits arbitrary arrest and detention of natural persons. In the Banjul Charter this right is explained in a few lines. Article 6 of the charter states that:

“Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for the reasons and conditions previously laid down by the law. In particular, no one may be arbitrarily arrested or detained.”

However, the ECHR has provided detailed clarification for the full enjoyment of this right. The ECHR has explained this right in a general clause followed by exceptions that may limit the enjoyment of this right. Article 5 of the ECHR explains:

“Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases....

The lawful detention...lawful arrest...”

The ECHR has also provided a solution for any person who believes his right of liberty and security has been infringed. The same article of the convention provides that:

“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful...”

2.2.2.5 Right to worship

The right of worship is guaranteed in a similar manner in both the ECHR and in the Banjul Charter. This right requires everyone to enjoy freedom of worship whether alone or in a group and whether in private or in public. The ECHR requires the freedom of worship to be compatible with the interest of public safety and order. The convention states that:

“Freedom to manifest one's religion or belief shall be subject only to such limitations as are prescribed by the law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

The Banjul Charter has dealt with this right in Article 8 as follows

“Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.”

2.2.2.6 Right to marry

The right to marry is explained in the ECHR. This right permits men and women of marriageable age to marry and found a family. Article 12 of the ECHR explains:

“Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

In the Banjul Charter however, the right to marry has not been explicitly mentioned. Article 18 of the Banjul Charter simply mentions the family, and the duty of states to protect families and morals, and traditional values of the community:

“The family shall be the natural unit and basis of society. It shall be protected by the state which shall take care of its physical health and moral.

The state shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community.

The state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child.”

2.2.3 Human rights for natural persons and legal persons

2.2.3.1 Introduction

Generally, the human rights noted above do not focus on legal persons; all of those rights are applicable only to natural persons. It appears that those who drafted and those who signed the conventions did not think of legal persons' interests. At that time legal persons were thought to have no problems regarding matters that are covered by human rights. Above all, legal persons

are not human.²⁰ The incidence of ignoring legal persons in designing regulations was not only the case with international treaties but also with domestic documents, like constitutions.²¹

However, the ECHR embraced a different perspective on the interpretation of human rights, offering a wide range of protection to legal persons in addition to natural persons. Articles 34 and 35 of the ECHR contain the general admissibility criteria for the European Court of Human Rights (ECtHR). Article 34 provides that:

“The court may receive applications from any person, non-governmental organisation or group of individuals claiming to be victims of a violation by one of the high Contracting Parties of the rights set forth in the convention or the protocols thereto...”

The word *non-governmental organisation* used in the above quotation includes legal persons as well. On numerous occasions the European Court of Human Rights (ECtHR) has not hesitated to include legal persons in the interpretation of the word non-governmental organisations.²² The issue of admissibility of claims of legal persons with respect to human rights has also been emphasized by Elspeth Berry.²³ Quoting *Klass v. Germany*²⁴, Berry explains that the nature of a person submitting a claim is of little or no importance to the Court. The important issue is the ability of the applicants to prove that they have been actually and directly affected by an act or omission. The Court explained in *Klass* that:

²⁰ Natalie Lee, ‘The Effect of the Human Rights Act 1998 on Taxation Policy and Administration’, *eJournal of Tax Research*, Vol. 2, No. 2, 2004, available at SSRN: <https://ssrn.com/abstract=644020>, last visited 14 February 2017.

²¹ Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection*, Oxford, Oxford University Press, 2006, p.1.

²² Ibid.

²³ Elspeth Berry, ‘The zone of Interaction Between Partnerships, LLPs and Human Rights in United Kingdom Law’, *Human Rights Law Review*, Vol. 11, 2011, pp. 503-526.

²⁴ *Klass and Others v. Germany*, application No. 5029/71.

“...a person, nongovernmental organisation or group of individuals must, in order to be able to lodge a petition... claim to be victim of a violation of the rights...”²⁵

If that is the case then companies may submit their claim if their rights have been infringed.

In Europe, differences with respect to human rights between natural and legal persons seem to vanish. Rights which formally were deemed to be applicable to natural person are now applicable to legal person like companies as well.

2.2.3.2 Right to possessions

The right of possession has been clearly stated in Article 1 of Protocol 1 to the ECHR. The protocol states that:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by the law and by the general principles of international law...”

While it has been argued by scholars that, the term “everyone” and “no one” which are used in most of the articles of the ECHR do not exclude legal persons,²⁶ the discussion above has demonstrated that some of the ECHR's provisions can by their context only be applicable to natural persons. The right to possessions, and the other rights considered below are not so limited.

2.2.3.3 Right to privacy

Article 8 of the ECHR requires everyone to be respected with regard to his private and family life:

“Everyone has the right to respect for his private and family life, his home and his correspondence.”

²⁵ Ibid., paragraph 33.

²⁶ Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection*, Oxford, Oxford University Press, 2006, p. 34.

It might at first sight be thought that this provision is only meant for natural persons. However, in *Société Colas Est and Others v. France*²⁷ the ECtHR ruled that a company deserves a right of privacy of its home as well. Therefore, any interference of a business premises might infringe this right. A similar situation existed in *Wieser and Bicos Beteiligungen GMBH v. Austria*.²⁸ The first applicant Wieser was a manager and owner of the second applicant, Bicos, a limited company. The applicants complained about the search of the business premises of the first owner and seizure of some documents found in the computer of the second applicant. The ECtHR in this case ruled that after being satisfied with the case law which extends the notion of “home” to a company's business premises, the Court had no reasons to distinguish between natural and legal persons in the application of Article 8:

“Having regard to its above-cited case-law extending the notion of “home” to a company's business premises, the court sees no reason to distinguish between the first applicant who is a natural person and the second applicant who is a legal person as regards the notion correspondence.”

There is thus in principle no border between natural and legal persons on the application of right of privacy in Europe.

2.2.3.4 Right to a fair trial

The right to a fair trial is guaranteed by Article 6 of the ECHR, which provides that:

“In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by the law...”

The right to a fair trial has been frequently demanded by companies. There is no problem with respect to the application of this right to legal persons under the ECHR. The ECtHR has made several judgments in favour of legal persons against the infringement of this right.²⁹ Elspeth

²⁷ *Société Colas Est and Others v France*, No. 37971/97, ECHR 2002-III, §§ 40-42.

²⁸ *Wieser and Bicos Beteiligungen GMBH v Austria*, No. 74336/01, ECHR 2008.

²⁹ See subsection 8.4.3.

Berry believes that the right to a fair trial is among the human rights which have been greatly in demand by companies. The right to a fair trial has been applied in both criminal and civil litigations.³⁰

2.2.3.5 Right to freedom of expression

This right is ensured in Article 10 of the ECHR:

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...”

The right of freedom of expression has repeatedly been demanded by legal persons/companies.³¹

2.2.3.6 Criticisms of the application of the human rights to legal persons

The protection of human rights for companies is in a process of development: the list of rights which has been already applied to legal persons/companies is not exhaustive. Demand for rights is increasing.³² A good example of this was the decision of the ECtHR finding that the word ‘home’ included business premises. Might in the future the right to marry be associated with the merger and acquisition of companies?

There are however claims from other scholars about the application of human rights to companies. These scholars believe that the general campaign and movement of fighting against violation of human rights has been hijacked by strong and powerful legal persons. These legal persons have joined the movement only for the sake of protecting their commercial interests. Similarly, these legal persons are financially and operationally stronger than some states.³³ In

³⁰ Elspeth Berry, ‘The zone of Interaction Between Partnerships, LLPs and Human Rights in United Kingdom Law’, *Human Rights Law Review*, Vol. 11, 2011, pp. 503-526.

³¹ Leonard S. Sealy, A book review of Alan Dignam & David Allen, *Company Law and the Human Rights Act 1998*, *The Cambridge Law Journal*, Vol. 60, No. 3, 2001, pp. 628-629.

³² John Townsend, Book Review, *Human Rights Law Review*, Vol. 6, 2006, pp. 593-599.

³³ Natalie Lee, ‘The Effect of the Human Rights Act 1998 on Taxation Policy and Administration’, *eJournal of Tax Research*, Vol. 2, No. 2, 2004, available at SSRN: <https://ssrn.com/abstract=644020>, last visited 14 February 2017.

this context including legal persons in a movement that demands the promotion of human rights is seen as being misplaced. John Ruggie has investigated the inclusion of transnational corporations in the movement which fights against the violation of human rights. He explains that the inclusion of companies is likely to damage the campaign for human rights:

*“...Take the case of transnational corporations. Their legal rights have been expanded significantly over the past generation. This has encouraged investment and trade flows, but also has created instances of imbalances between firms and states that may be detrimental to human rights...”*³⁴

Ruggie has associated the financial and operational strength of the transnational firms with the possibility of the violation of human rights. He believes that some developing nations may lack the institutional capacity to enforce national laws and regulation against transnational firms doing business in these nations.

Similar questions on the application of human rights to companies have been raised by Anna Grear.³⁵ She believes that the application of human rights to companies should reflect social realities. Transnational companies may have more power and resources than some states. Therefore companies are supposed to be among the promoters of human rights instead of placing themselves as the demanding party. In fact, Grear believes that strong companies should not be beneficiaries of human rights.³⁶ She concludes that to let human rights be applied to companies is to destroy the actual meaning, nature, and objectives on the basis of which human rights emerged. Human rights meant to reduce exposure of human beings to suffering. Companies do not suffer violation of human rights like natural persons do.

³⁴ John Ruggie, 'Protect, Respect and Remedy A publication of the United Nations: in the public domain', *Innovations*, Spring 2008, available at <http://www.mitpressjournals.org/doi/pdf/10.1162/itgg.2008.3.2.189>, last visited 14 February 2017.

³⁵ Anna Grear, 'Challenging Corporate Humanity: Legal Disembodiment, Embodiment and Human Rights', *Human Rights Law Review* Vol. 7, 2007, pp. 511-543.

³⁶ *Ibid.*

2.2.3.7 Conclusion

The concerns raised by Ruggie and Gear have not been neglected in the analysis of this dissertation. To include companies in human rights' movements might result in a loss of focus on natural persons' suffering.

However, the issue raised by Ruggie and Gear seems to focus only on strong transnational companies. Less attention has been given to other companies operating in one state only. It is submitted that the state will always remain the stronger partner in its relations with its natural persons or legal persons. These persons need to be protected against states. Take for example, how frequently a company interacts with state authorities in fulfilling obligations like paying tax. Gear has ignored the fact that, some natural persons are also wealthy enough. Should their rights be neglected because of their wealth?

It might be true that some transnational companies do not respect human rights in their operations. However, the failure of these companies to respect rights of others does not justify denying those companies their human rights. There must be penalties imposed on those violate the rights of others; whether the perpetrators are legal persons or natural persons. Therefore, rights and obligations of persons (regardless of whether they are natural or legal persons) should be clearly identified and respected.

2.3 The application of human rights to taxpayers

2.3.1 Introduction

This section demonstrates the application of human rights to taxpayers. It sets out reasons why most of human rights which are available in various legislation and conventions are considered as taxpayers' rights in this dissertation. This section discusses human rights promoted by the ECHR that are directly applied to taxpayers. Similarly, taxpayers' rights which have been explained in the OECD Practice Note on Taxpayers' Rights and Obligations are described. This section gives preliminary information to the reader about taxpayer's rights that will be used in the analysis in this dissertation.

2.3.2 Taxpayers' rights and human rights

2.3.2.1 Introduction

In the previous subsection it was demonstrated that in Europe the application of human rights to legal persons/companies and natural person is well-developed. The ECtHR has ruled in several cases that companies can claim rights which have been safeguarded in the ECHR (see par.8.4.3). In this part the question to answer is whether human' rights can be considered as taxpayers' rights? For the purpose of this dissertation a taxpayer, means any person (natural or legal) who is a tax subject, a person liable to tax.

Generally, taxpayers' rights have been mostly codified in human rights' treaties and laws governing human rights. They are promoted in the ECHR, the Human Rights Act 1998 of the United Kingdom and other similar laws and treaties. Taxpayers' rights are treated as a special type of human rights.³⁷ They are the human rights which can directly be applied in tax matters. The number of human rights which have been claimed to be compatible with taxpayers has increased rapidly. This increase may be a result of the way how a modern tax administration operates. Many countries are seeking to improve the services provided to taxpayers. The improvement mainly focuses on improving the relationship between taxpayers and the revenue authorities. A good relationship is expected to enhance voluntary compliance.³⁸

Unlike human rights, not all taxpayers' rights have been written and protected in legally binding documents. Some of the taxpayers' rights are expressed in administrative guidelines such as Taxpayers' Charters. These documents are unilateral principles and largely contain promises that a tax authority intends to offer to its taxpayers. Taxpayers' Charters only offer a weak protection of taxpayers' rights. Even though they are promoted in the administrative manuals, they are not

³⁷ Anders Hultqvist, 'Taxpayers' Rights in Sweden', *Revenue Law Journal* Vol. 7, 1997 (1), art. No. 4 available at <http://epublications.bond.edu.au/rlj/vol7/iss1/4/>, last visited 13 February 2017.

³⁸ Adrian Sawyer, 'A Comparison of New Zealand Taxpayers' Rights with Selected Civil Law and Common Law Countries, Have New Zealand Taxpayers Been "Short-Changed"?', *Vanderbilt Journal of Transnational Law*, Vol. 32, 1999.

laid down in legislation.³⁹ Taxpayers may lack a legal basis to claim their rights before courts. This situation may always be true in a country where there is no strong protection of legitimate expectations.

Human rights available in the ECHR which are applicable directly to taxpayers are:

1. Article 6: the right to a fair trial. This right is applicable to all taxpayers, in all proceedings criminal or civil.
2. Article 8: the right to respect of private and family life. Clarification on the application of this right to taxpayers is similar to that provided in the previous part.
3. Article 10: the right of freedom of expression provides that:

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...”

- 4 Article 1 of the First Protocol to the Convention: the protection of property:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law...”

The OECD Practice Note⁴⁰ showed that most countries in Europe particularly promote taxpayers' rights. The taxpayers' rights that are normally promoted are discussed below.

³⁹ Duncan Bentley, 'Taxpayers' Charter: Opportunity or Token Gesture?', *ePublications@Bond*, 1995, available at http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1060&context=law_pubs, last visited 14 February 2017.

⁴⁰ These rights have been explained in several OECD documents. However most of the rights explained in this part are set out in the OECD Practice Note, available at http://www.oecd.org/tax/administration/Taxpayers'_Rights_and_Obligations-Practice_Note.pdf, last visited 3 September 2019.

2.3.2.2 Taxpayers' rights

The following taxpayers' rights can be distinguished:

- a. the right to pay no more than the correct amount of tax due,
- b. the right to be informed,
- c. the right to certainty,
- d. the right to be assisted,
- e. the right to be heard,
- f. the right to appeal,
- g. the right to a fair trial including the right to be judged by a competent and impartial court,
- h. the right to privacy, and
- i. the right to confidentiality.

The aforementioned rights will be discussed below.

a) The right to pay the correct amount of tax

The right to pay the correct amount of tax emphasises the importance of taxpayers paying the amount of tax prescribed in the tax law. The right requires taxpayers to be informed of any available deductions or relief available to them. This right does not restrict taxpayers from using legal techniques to minimize their amount of tax payable through tax planning. Concerning this right, the OECD Practice Note explains:

“Taxpayers should pay no more tax than is required by the tax legislation, taking into account their personal circumstances and income. Thus while it is acceptable to reduce tax liability by legitimate tax planning, governments make distinction between this form of tax planning and forms of tax minimisation which clearly go against the intent of the legislator. Taxpayers are also entitled to a reasonable

measure of assistance from the tax authorities so that they receive all reliefs and deductions to which they are entitled.”

b) The right to be informed

This right requires taxpayers to have access to up-to-date information about the tax system and the way their tax liability is determined. The OECD Practice Note describes this right in detail:

“Taxpayers are entitled to have up-to-date information on the operation of the tax system and the way in which their tax is assessed. They are also entitled to be informed of their rights, including their right of appeal. All taxpayers can expect that the information provided to them should reflect the complexity of the tax situation, thereby by enabling them to understand better their tax affairs...”

c) The right to certainty

The right to certainty requires taxpayers to be assured of the correctness of information that will help them determining the tax consequences of actions to be undertaken. The right to certainty is concerned with the consistent wording and application of the law. Therefore decisions of the tax administration are supposed to be in line with the wording of law. Similarly the right to certainty includes consistent interpretation of the law. The tax authority is supposed to apply the law consistently.

Practically, it is not easy for taxpayers to know in advance the tax consequence of their actions. The tax consequence may change based on the facts and circumstances of the intended action. The right to certainty is very challenging; the tax system always changes, and the business environment is complex and evolving. Therefore, to have perfect certainty is nearly impossible. A taxpayer should, though, be able to anticipate the tax consequences of his personal and business affairs.

d) The right to be assisted

The right to be assisted is the right of taxpayers that is largely experienced when there is a hardship of understanding or applying tax laws and procedures. This right moves closely with the right to be informed, because being timely and correctly informed is one of the crucial

elements of assistance. The right to be assisted however moves further to giving tax rulings to taxpayers.

e) The right to be heard

The right to be heard means that a taxpayer is entitled to be heard before a decision regarding that taxpayer is taken by the tax authorities. Often this decision involves the adjustment of an assessment or the collection of information from a taxpayer.

f) The right to appeal

The right to appeal is applicable especially on the application and the interpretation of the law and administrative rulings directly related to taxpayers. The OECD Practice Note explains this right as follows:

“The right of appeal against any decision of the tax authorities applies to all taxpayers, and to almost all decisions made by the tax authorities, whether as regards the application of the law or of administrative rulings, provided the taxpayer is directly concerned.”

g) The right to a fair trial

The right to a fair trial is concerned with procedures and practices involved in the appeal. The right to a fair trial requires the availability of competent courts to settle tax disputes. Likewise the appeal procedures and arrangements have to ensure the justice is timely and correctly obtained.

h) The right to privacy

The right to privacy prohibits unnecessary and un-reasonable searches of taxpayers' homes and requests for information which are not relevant for determining the correct amount of tax.

i) This right to confidentiality

This right to confidentiality requires that information provided to a revenue authority on the affairs of a taxpayer should be treated confidentially. The information should only be used for the purposes specified in the tax legislation and should not be shared with third parties.

2.4 Summary

As it may be observed from the above, most of the taxpayers' rights explained are directly related to human rights which are available in treaties. Therefore, for the analysis, this dissertation examines taxpayers' rights promoted in the legislation and in the administrative manuals of states (since most of the rights which are promoted in the administrative manuals originate from legislation and from human rights treaties). Moreover, for the purpose of this dissertation any human right which has been declared by the courts⁴¹ to apply to legal persons is termed as a taxpayer's right.

It may be appropriate to minimize the degree of confusion of using the terminology '*human rights*' to cover tax matters of legal persons by introducing rules in conventions or treaties that promote and protect taxpayers' rights for legal persons. The treaties or declarations should cover taxpayers; it should not matter whether they are legal or natural persons. Therefore, all taxpayers' matters should be reflected in the treaties. It is however true that, in the current system where there are no such treaties or conventions, individual taxpayers, natural persons, have no problem with the availability of their rights. Being human beings itself, enables them to shelter under the general human rights umbrella.

Having a set of separate and independent rules in the conventions or declarations, exclusively promoting taxpayers rights, will probably not only solve the problem of arguing whether human rights are applicable to legal persons, it may also help to ensure clear protection of taxpayers' rights.

⁴¹ Any court in the country under review, the Court of Justice, European Court of Human Rights, African Court of Human and Peoples Rights, East African Court of Justice.

3 CHAPTER THREE: THE POLITICAL PROFILE OF TANZANIA

3.1 Introduction

This chapter studies the political profile of the United Republic of Tanzania and assesses the relationship between the state and its citizens. Generally, the chapter examines the sources of law of Tanzania, and how the Tanzanian state is governed from 1961 to the present day. The assessment is intended to provide basic information to readers on the historical background and recent situation concerning the promotion of human rights in Tanzania.

3.2 Political profile

3.2.1 Country structure

The United Republic of Tanzania (hereafter Tanzania) is comprised of two independent countries; Tanzania mainland (former known as Tanganyika) and Zanzibar (two islands in the Indian Ocean; Unguja and Pemba). Tanzania, the name itself is an acronym of Tanganyika and Zanzibar. It was founded on 26 April 1964 when J.K. Nyerere and A. Karume (the then presidents) of the two countries signed the Article of Union.⁴² Tanzania has a joint constitution and government, and a common police force and joint citizenship. There is also a common income tax, corporate tax and customs and excise duties.

Tanzania has two legislatures and two executives. One works for Zanzibar and one for the union matters.

The President is the Head of State. He is the Head of the Government, and Commander-in- Chief of the armed forces. There is also a Prime Minister who is, theoretically, accountable to the National Assembly. This accountability is theoretical because the Prime Minister is appointed, just like other ministers, by the President. The President may, without consulting any person or

⁴² Issa G Shivji et al, *Constitutional and legal system of Tanzania*, Mkuki na Nyota, Dar es Salaam, 2007, pp. 49-50.

body, terminate the appointment of the Prime Minister.⁴³ Thus in fact the latter is in reality accountable to the President.

Tanzania is a social-democratic state,⁴⁴ as provided in the preamble to the 1977 Constitution:

“...now therefore, this constitution is enacted by the Constituent Assembly of the United republic of Tanzania...and ensuring that Tanzania is governed by a government that adheres to the principles of democracy and socialism.”

3.2.2 Constitutional law

Since it was founded, Tanzania has a written constitution, which is the main guideline for government activities. The government and its organs are obliged to act in accordance with the constitution in legislating and in their day-to-day activities. In discussing constitutional law, it is wise to review two different periods; the period before 1988, and the period from early 1990 until today. This demarcation is due to the political and economic behaviour existing in the periods concerned.

3.2.2.1 Constitutional law prior 1988

Soon after gaining Independence in 1961 from England, Tanganyika took various initiatives to abolish the then existing multiparty system inherited from the UK. In January 1963, President J.K. Nyerere announced that Tanganyika should become a one party state in order to enhance national unity and rapid development.⁴⁵ To ensure the success of his goal, several laws were enacted that were used to threaten any person or body who opposed the government or its policies. The Preventive Detention Act of 1962 was a good example. Under this law, the President was given the power to detain any person in the Republic, without trial, on the ground

⁴³ Michael Wambali, 'Historical overview of Constitutional Reforms towards limited leadership in Tanzania', *Journal of African and International Law*, Vol. 1, 2008 pp. 206-7.

⁴⁴ Despite the fact that the reference to socialism remains in the Constitution, Tanzania (from the end of the 1980s) no longer follows socialist principles: there is privatization and people are allowed to own means of production.

⁴⁵ Muhabe Nyirabu, 'The Multi Party Reform Process in Tanzania: The Dominance of Ruling Party', *African Journal of Political Science*, Vol. 7, 2002, pp. 99-112.

of security reasons. This power could not be questioned by any court of law.⁴⁶ Generally the President directed the country according to his own discretion. He was not obliged to follow advice from any person or body.⁴⁷

After the harassment of some social-political institutions including political parties, the state managed to form a one-party state in 1965. The then constitution⁴⁸ was amended to declare the one-party state: there should be one political party in mainland Tanzania and one political party in Zanzibar. To complete the objective of having one political party in each of the two countries, the main political parties during the struggle for independence (for each country), were legally recognized as the only political parties: the Tanganyika African National Union (TANU) served in mainland Tanzania and the Afro Shirazi Party (ASP) in Zanzibar.

At that time those parties and their organs gained supremacy over the National Assembly. This meant that many state matters were decided by the political party/ies or their organs. If a matter had been decided by the party, the National Assembly could either agree or not, but the issue decided would be implemented.⁴⁹

The one-party system in each of the countries of the Republic continued until 1977, when the two parties decided to unite and form one political party; Chama Cha Mapinduzi (CCM)⁵⁰ was then established, to replace TANU and ASP.

Some of the important features of the Tanzanian constitutional law from 1961 to 1988 can be summarized as follows.

⁴⁶ Michael Wambali, 'The Historical overview of Constitutional Reforms towards limited leadership in Tanzania', *Commonwealth Law Bulletin*, Vol. 34, No. 2, 2008, p. 227-229.

⁴⁷ Muhabe Nyirabu, 'The Multiparty Reform Process in Tanzania: The Dominance of Ruling Party', *African Journal of Political Science* Vol. 7, 2002, pp. 99-112.

⁴⁸ The 1962 Constitution established Tanganyika as a republic.

⁴⁹ Issa G Shivji et al, *Constitutional and legal system of Tanzania*, Mkuki na Nyota, Dar-es-Salaam, 2007, p. 53.

⁵⁰ Chama Cha Mapinduzi is Swahili for "a revolutionary party".

First, the country was not endowed with and did not apply human rights. This is because, during that period the country was governed without observing the principles of human rights.⁵¹ The constitution said nothing about human rights: it did not incorporate the Bill of Rights or any other declaration or convention of human rights. Quite often, during that period people were deported from their place of domicile to any other place within Tanzania. People were tortured and forced to agree and obey party policies. When the party intended to do anything or initiate any policy, citizens had to obey and cooperate. Otherwise often harassment, detention and deportation took place.⁵²

Detention without trial was an example of the breach of human rights during that period. The President was given the power to detain any person or body without trial. That power could not be questioned by any court of law.⁵³ A lot of innocent people suffered under this unfair detention. They were innocent in the sense that they only disagreed with the government.⁵⁴ President Nyerere detained many citizens who did not agree with him. The main victims were his former friends during the struggle for independence who afterwards disagreed with him in certain issues.⁵⁵

During that period, it was normal for any person who was *chargeable*, rather than *being charged* or convicted of an offence, to be subject to forced labour.⁵⁶ The police were authorized to detain any person who questioned the behaviour of the party or its leaders.⁵⁷

The second constitutional feature was the party supremacy. Prior to the late 1980s, the ruling political party was the supreme organ in Tanzania. Besides controlling Parliament, a decision of the party or its organ was final, so Parliament could not go against it. A Member of Parliament,

⁵¹ Helen Kijo-Bisimba and Chris Maina Peter, *Justice and Rule of Law in Tanzania*, Legal and Human Rights Centre, Dar-es-Salaam, 2005, p. 6.

⁵² Ibid.

⁵³ Chris Maina Peter, 'Incarcerating the Innocent: Preventive Detention in Tanzania', *Human Rights Quarterly* Vol. 19, No. 1, 1997, pp. 113-135.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Nancy Spalding, 'State-Society Relations in Africa', *Polity*, Vol. 29, No. 1, 1996, pp. 65-96.

⁵⁷ Ibid.

who questioned the justification of the supremacy of the party instead of the Parliament, had his case discussed by the party executive committee and was expelled from the party; hence he automatically lost his membership of the Parliament.⁵⁸ There was also an incident where the President, who was at the same time a chairman of the ruling party, announced new taxes and instructed to be collected even before the taxes were approved by the Parliament.⁵⁹ The party supremacy deemed to jeopardize the development of society based on the rule of law. People were required and forced to think, and behave, as the party wished. Any person or body who behaved contrary to the party's interest committed treason.⁶⁰

Another feature of the constitutional law during that period was the presence of an unfair and biased judiciary. During that period the Tanzanian judges, even the best of them, did not defend the rule of law. Judges argued, reasoned and pronounced their judgments to meet the interest of the rulers of the day, rather than give priority to the integrity of the law.⁶¹ Judges spent much of their efforts in interpreting and construing the law rather than granting the integrity of the law. The rules of evidence and procedure were ignored; bail, appeal and legal representation were forbidden. The police prosecutor stood to be a supreme executive.⁶² By that time, it was not easy to gauge the independency of the courts. The executives of both countries of the union had direct influence on the judiciary.⁶³

In general, by that time, the Tanzanian judges had eyes that enabled them to see, but in fact they could not take action against the inhumanity committed in the country. Thousands of people

⁵⁸ Helen Kijo-Bisimba and Chris Maina Peter, *Justice and Rule of Law in Tanzania*, Legal and Human Rights Centre, Dar-es-Salaam, 2005, p. 8.

⁵⁹ It happened during the President's 1983 New Year speech, see *Ibid.*, p. 10.

⁶⁰ Nancy Spalding, 'State-Society Relations in Africa', *Polity* Vol. 29, No. 1, 1996, pp. 65-96.

⁶¹ Helen Kijo-Bisimba and Chris Maina Peter, *Justice and Rule of Law in Tanzania*, 2005, p. viii.

⁶² Issa G Shivji, 'Developments in the Teaching and Practice of Human Rights Law in Tanzania,' *Journal of African Law* Vol. 35, No. 1, 1991, pp. 116-127.

⁶³ Rainer M Bierwagen and Chris Maina Peter, 'Administration of Justice in Tanzania and Zanzibar: A Comparison of Two Judicial Systems in One Country', *International and Comparative Law Quarterly*, Vol. 38, No. 2, 1989, pp. 395-412.

were detained⁶⁴ and many were tortured to death while they were in detention.⁶⁵ The courts could do nothing: judges were scared by executives. It happened to be very normal when a magistrate who released a person on bail while pending trial was himself detained by the police on instruction *from the top*.⁶⁶ In fact the court was not independent.⁶⁷

The last feature of the constitutional law between 1961 and 1988 was the parliamentary system, a system that existed since the formation of Tanzania in 1964. However, the Members of the Parliament were all from one political party. During that time, when discussing public matters, it was not easy for Members of the Parliament to think, to behave or to do anything which seemed to go against the party's principles.⁶⁸ Whatever was proposed by the party had to be endorsed. The Parliament was merely deemed to be an expensive rubber-stamping machinery.⁶⁹ Therefore, during that period there was no difference between the ruling party meeting and the Parliament session. The Parliament focused more on securing and safeguarding the party interest than the public interest.⁷⁰ For example, at that time the Parliament did not oppose several arbitrary bills that supported the harassment of the citizens.⁷¹ These bills threatened any person who opposed the party principles.

Therefore, generally during the period of 1964 to 1988, Tanzania did not have a good record with regard to the promotion of the rule of law and human rights.

⁶⁴ Issa G Shivji, 'Developments in the Teaching and Practice of Human Rights Law in Tanzania', *Journal of African Law* Vol. 35, 1991, pp. 116-127.

⁶⁵ Nancy Spalding, 'State-Society Relations in Africa', *Polity* Vol. 29, 1996, pp. 65-96.

⁶⁶ Chris Maina Peter, 'Incarcerating the Innocent: Preventive Detention in Tanzania', *Human Rights Quarterly* Vol. 19, 1997, pp. 113-135.

⁶⁷ Bernard Frank, 'The Tanzanian Permanent Commission of Enquiry – The Ombudsman', *Denver Journal of International Law and Policy*, Vol. 2, 1972, pp. 255-279.

⁶⁸ Muhabe Nyirabu, 'The Multiparty Reform Process in Tanzania: The Dominance of Ruling Party', *African Journal of Political Science* Vol. 7, 2002, pp. 99-112.

⁶⁹ Helen Kijo-Bisimba and Chris Maina Peter, *Justice and Rule of Law in Tanzania*, Legal and Human Rights Centre, Dar-es-Salaam, 2005, p. 9.

⁷⁰ Nancy Spalding, 'State-Society Relations in Africa' *Polity* Vol. 29, No. 1, 1996, pp. 65-96.

⁷¹ *Ibid.*

3.2.2.2 Constitutional law after 1988

The 1977 Constitution of Tanzania (the Union Constitution) has undergone a number of amendments. Until July 2004 the Constitution has been amended fourteen times, but the main amendments to be discussed shortly here are those in 1984, which introduced the Bill of Rights, in 1992 which introduced a multiparty system, and in 2000, which introduced the supremacy of the judiciary on the disposition of justice; and established the Human Rights and Good Governance Commission. The amendment in 1984 of the Constitution of Zanzibar, which incorporated international human rights,⁷² had a great impact on constitutional law in Tanzania.

The 1984 Amendments

The 1984 constitutional amendments included the Bill of Rights in the 1977 Constitution. The amendment was made as a result of pressure from internal and external communities which required Tanzania to observe the rule of law and respect of human rights. Internally, the efforts of the Tanganyika Law Society and the Faculty of Law of the University of Dar es Salaam contributed to influencing the ruling party to include the agenda of a Bill of Rights in its formal meetings.⁷³ From the first time in the history of Tanzania, the Tanganyika Law Society conducted several seminars and workshops which enhanced the demand for respect of human rights in Tanzania. The University of Dar es Salaam decided to offer free legal assistance to Tanzanians, and even included the idea of human rights in its teaching practices. Externally, the demands of the World Bank and the IMF contributed to influencing the government to establish a Bill of Rights. In the period between 1979 and 1983 the Tanzanian economy was badly damaged because of the impact of the War with Uganda, and the collapse of the East African

⁷² Issa G Shivji et al, *Constitutional and Legal System of Tanzania*, Mkuki na Nyota, Dar es Salaam, 2007, p. 59.

⁷³ Ibid.

Community.⁷⁴ Therefore, the World Bank and IMF required Tanzania to meet certain conditions, one of which was to respect human rights, for assistance in its economic recovery.⁷⁵

The ruling party agreed to incorporate the Bill of Rights in the Constitution in 1984, but it would only become applicable three years later. That was done in order to give time to the Government to prepare itself for the changes. However, it was just wasting time, and nothing was done. Laws were not changed to reflect the Bill of Rights during that three-year period.⁷⁶

The incorporation of the Bill of Rights in the Constitution was a step towards the promotion of human rights. However, from the outset the Bill of Rights did not provide strong protection of human rights. First, because the Bill of Rights was introduced by the ruling party, thus it had to maintain the interest of the government in power. Secondly the Court had weak powers towards laws that were contrary to the Bill of Rights; it could only make recommendations to the ruling party if a rule were found to be incompatible with the Bill of Rights.

The 1992 Amendment

The 1992 constitutional amendment introduced a multi-party political system in Tanzania. From that period onwards, Tanzanians were allowed to organise themselves to form political parties. However, like the 1984 amendments, the 1992 amendment was not introduced because the ruling party was willing and interested in doing so. It was only introduced because of the demands of European nations to most developing countries⁷⁷ to give *pace to democracy*. In doing so, the rich

⁷⁴ Michael K B Wambali, *Democracy and Human Rights in Tanzania Mainland The Bill of Rights in the Context of Constitutional Development and the History of Institutions of Governance*, PhD Thesis School of law, University of Warwick, UK, 1997, p 167. Accessed through http://wrap.warwick.ac.uk/4207/1/WRAP_THESIS_Wambali_1997.pdf, last visited 3 January 2017.

⁷⁵ Helen Kijo-Bisimba and Chris Maina Peter *Justice and Rule of Law in Tanzania*, Legal and Human Rights Centre, Dar-es-Salaam, 2005, p. 11.

⁷⁶ Michael K B Wambali, 'Historical Overview of Constitutional Reforms towards limited leadership in Tanzania', *Journal of African and International Law*, Vol. 1, 2008, pp. 192-193.

⁷⁷ Michael Bratton and Nicolas Van De Walle, 'Popular Protest and Political Reform in Africa', *Comparative Politics* Vol. 24, 1992, pp. 419-442.

countries required that the poor countries which sought loans or aid introduce a multiparty system.⁷⁸

When the ruling party allowed the discussion about a multiparty system, the then President of Tanzania, A.H. Mwinyi, formed the Law Reform Commission, officially known as Nyalali Commission.⁷⁹ The Commission was given the task of examining the possibility, the advantages, and the overall implications of the establishment of a multiparty political system.⁸⁰

The Commission performed its duties as assigned. It collected views from the citizens on the whether there should be a multiparty system or whether to continue with a single party system. The Commission found that 80% of the Tanzanians who gave their views to it wanted the single party system to continue. However, on mid-February 1992, the Commission submitted its report to the President and emphasized the need of establishing a multiparty political system as a way towards the expansion of democracy. As it was explained:

“... The Commission has many recommendations but the most important thereof is the necessity of ensuring the protection of human rights and to guarantee the Parliament/House of Representative and the Courts operate as independent organs. People should have the freedom to form and conduct their own societies and communities without any government interference...”⁸¹

Giving its reasons for favouring pluralism, the Commission explained that there was a need to consider the strength and wisdom of the different views expressed about change, rather than simply to make decisions based on what a majority wanted or did not want.⁸²

⁷⁸ Michael K B Wambali, 'Historical Overview of Constitutional Reforms towards limited leadership in Tanzania' *Journal of African and International Law*, Vol. 1, 2008, p. 200.

⁷⁹ The Commission bore the name of its Chairman, Chief Justice, Francis Nyalali.

⁸⁰ Michael K B Wambali, 'Historical Overview of Constitutional Reforms towards limited leadership in Tanzania', *Journal of African and International Law*, Vol. 1, 2008, p. 201.

⁸¹ Nyalali Commission Report, April 1994, Book Three, Dar es Salaam.

⁸² Juma Ngasongwa, 'Tanzania Introduces a Multiparty system', *Review of African Political Economy*, No. 54, *Surviving Democracy?* 1992, pp. 112-116.

Obviously this was a strange reasoning to justify the establishment of a multiparty system. The value of collecting the public's view on the ideal political system while the commission or the government does not respect what the citizens wanted is unclear. Does it mean that Tanzanians did not know what they wanted? Most of the reasons provided by the Commission seemed to be more political. There was no concrete evidence to support their decision other than a desire of the certain group. Surprisingly, a government which had been for several years resistant to calls to establish a multiparty system accepted easily a change from the single party system to the multiparty system, regardless of citizens' wishes. The only real explanation is that the developed countries had a great influence on the 1992 Constitutional amendments.⁸³

The 2000 amendment

The thirteenth amendment of the Constitution of Tanzania happened in 2000. These amendments brought about four major changes in the Union's Constitution. First, the Human Rights and Good Governance Commission was established. Secondly, it provided for the independency of the judiciary, by declaring that the judiciary shall have the final say on matters determining rights and duties as provided in law. The third change was the increase of female participation in the Parliament. The fourth and final change was in the procedures for electing the President. For the purpose of this dissertation the focus will be on the establishment of the Human Rights and Good Governance Commission.

a) **The Commission of Human Rights and Good Governance**

The Commission was established to replace the Permanent Commission of Enquiry (PCE).⁸⁴ It was established by Article 129(1) of the Constitution of the United Republic of Tanzania in 2000,

⁸³ Helen Kijo-Bisimba and Chris Maina Peter, *Justice and Rule of Law in Tanzania*, Legal and Human Rights Centre, Dar-es-Salaam, 2005, p. 11.

⁸⁴ The PCE was mandated to investigate misconduct of the government, parastatals, and even the ruling party. Citizens were required to complain to the Commission against misconduct by the government or a party leader. The Commission was required to report its findings to the President. However, the PCE failed to promote good governance. It was weak and powerless. It had no power to decide on anything, and the President could at any time stop any investigation without giving any reason. See Bernard Frank, 'The Tanzanian Permanent Commission of Enquiry – The Ombudsman', *Journal of International Law and Policy*, Vol. 2, 1972, pp. 255-279.

and started to operate on 1 July 2001. The Commission is vested with a dual mandate: it is a Human Rights Commission as well as an Ombudsman to oversee government activities.

The Commission was established to allow everyone to complain about any activity which infringes human rights. The Commission can receive complaints from citizens through various means, such as by letter, orally, by a petition, or sometimes even through the news from TV, radio or newspapers. Normally when the Commission receives complaints, it investigates and may call parties associated with the case to deliver the evidence either to support or defend the acts concerned. The Commission however has no power to give binding orders; it may only issue recommendations. Since it was established, most of the cases submitted to the Commission have been about women harassment and abuse of children rights. There have as yet been no complaints on tax matters.

3.2.2.3 Summary

The constitutional law and political life of Tanzania took on different features due to the existence of these constitutional amendments. A court now can review the constitutionality of a law and declare it to be void if it goes against the Constitution. Also the Parliament now discusses public matters effectively without much influence of the ruling party's principles. However, due to the domination of one political party in the Parliament, members of the Parliament from the opposition parties have little influence on passing bills. The domination of one political party emerged as a result of the 2000 and 2005 General Elections where the CCM continued to obtain more than 85 percent of the total seats in the Parliament.⁸⁵ However, as time moves on, the domination of the ruling party is being reduced, although not at high speed. For example, during the general election of October 2010 the ruling party continued to win many constituencies, but this time gained only 75 percent of all seats in the Parliament.⁸⁶ The result of the recent general

⁸⁵ In the 2005 election the ruling party CCM had 275 Members of Parliament out of 323 members.

⁸⁶ In the 2010 general election, CCM had 258 MPs: <http://www.parliament.go.tz/bunge/electeds.php?party=CCM>, last visited 5 December 2014.

election (October 2015) shows that the domination of the ruling party is steadily reducing; the ruling party now has 70 percent of all seats.⁸⁷

In general, after the introduction of the multiparty system, there is at least awareness of human rights and the rule of law. Currently Tanzanians can openly demand respect for human rights where there is an infringement of those rights. The increase of awareness was the output of among others the establishment of Non-Governmental Organisations (NGOs) which specialized in the provision of legal consultancy services. Various NGOs were established to tackle the problem of human rights, although most of these NGOs, such as the Legal and Human Right Centre, concentrate principally on the provision of legal services to women and children.

Moreover, the University of Dar es Salaam (UDSM) played a great role in raising awareness of human rights among Tanzanians by establishing legal aid services. These were provided both to those who could, and to those who could not afford the cost of paying for legal services. The participation of UDSM in the field of human rights changed the attitude of Tanzanians, who hitherto had believed that UDSM was only an academic institution which could not participate effectively in the promotion of human rights.⁸⁸

3.2.3 Sources of Tanzanian law

After independence in 1961, Tanzania did not change the frame of law used by the former colonial power, the United Kingdom. However, it modified or repealed the old laws and passed new ones. The main sources of constitutional law however remained three: *received law*, *local law* and *customary law* including *Islamic law*.⁸⁹ These types of law will be discussed hereafter.

⁸⁷ This percentage includes Members of Parliaments who are Presidential appointees, and 5 Members of Parliament from the Zanzibar House of Representatives.

⁸⁸ Issa G Shivji, 'Contradictory Developments in the Teaching and practice of Human Rights Law in Tanzania', *Journal of African Law* Vol. 35, No. 1, 1991, pp. 116-127.

⁸⁹ Issa G. Shivji et al, *Constitutional and Legal System of Tanzania*, Mkuki na Nyota, Dar es Salaam, 2007, pp. 14-15.

3.2.3.1 Received law

As the impact of the UK system continues, the received law is common law and the doctrine of equity. Common law (customs and practice of the British) and doctrine of equity (the decisions handed down by the King or the Chancery Court) are suitable according to the local environment. It means that any custom or practice of the UK is applicable in Tanzania if the matter for which the custom or practice has been made relates with one in Tanzania. For example, it is very common to rely on a definition of a matter decided by a UK court if Tanzanian law has not issued a definition of the matter concerned.

Statutes of general application are also received law. These are laws passed by the Parliament of the UK which can be applied in any country. In Tanzania, these received laws are applicable if they meet two conditions:

- There is no written local law that covers the subject; and
- They are conducive to the local environment (hence they will be subject to modification to suit local needs).⁹⁰

Section 9 of the Judicature and Application of Laws Act chapter 358 explains that

“The provisions of the Acts of the Parliament of the United Kingdom described in the First Schedule hereto, as amended prior to the twenty-second day of July, 1920, shall apply to and have effect within Tanzania subject to the exceptions, adaptations and modifications set out therein.”

The first schedule of the Judicature and Application of Laws Act chapter 358 comprises the following UK laws which are to be used in Tanzania:

• Foreign Tribunals Evidence Act, 1856	The whole Act.
• Evidence by Commission Act, 1859	The whole Act.
• British Law Ascertainment Act, 1861	The whole Act.
• Foreign Law Ascertainment Act, 1861	The whole Act.

⁹⁰ Ibid., pp. 16-17.

- Conveyancing Scotland Act, 1874 Section 51.
- Colonial Prisoners Removal Act, 1884 The whole Act.
- Evidence by Commission Act, 1885 The whole Act.

Therefore, in any matter which falls within the boundary of these laws, UK laws are to be directly applied in Tanzania.

3.2.3.2 Local law

Local laws are the laws enacted by the local legislature. This concept includes the laws passed by the former colonial legislative council. The main types of the local laws are the Constitution, principal legislation and subsidiary legislation. The Constitution is the main source of constitutional law in Tanzania. Principal legislation must be in line with the Constitutional guidelines.

In Tanzania, the Constitution has supreme power. Even the Parliament has to adopt laws and discuss issues according to the Constitution. If the enacted law is against the Constitution, the Court can declare such legislation to be 'null and void'.

Principal legislation covers the Acts enacted by the Parliament. Subsidiary legislation is introduced in the form of rules and regulations set by public bodies referred to in principal legislation. Subsidiary legislation must be compatible with the Constitution and principal legislation.

3.2.3.3 Customary law

Customary law consists of the customs and practice of the local ethnic communities which are accepted as being binding for them. A court will normally apply the customary law only in civil matters; not in criminal matters. Criminal matters will always be judged using the domestic criminal laws. Practically customary laws are only applied to a member of a community concerned, unless such member has ceased to be a member of such community.

It should be borne in mind that customary law focuses on matters concerning land, personal, and domestic matters, i.e. matters of family relations and inheritance.⁹¹ However, the application of

⁹¹ Issa. G. Shivji, op.cit. fn 90, p. 18.

these laws is subject to written law. If the customary law is against the written law, it will not be applicable.

3.2.3.4 Islamic law

Just like customary law, Islamic law is a source of law in Tanzania. It is not, however, applied in its integral fashion as required by the Islamic Law system. Islamic law is only applicable in the matters of marriage, divorce, succession, inheritance and guardianship. Customs and legislation have been added to modify the application of Islamic law. Thus the decisions of the Courts usually deviate to a certain degree from the strict Islamic rules on these subjects.⁹² In most of the cases, the Islamic laws on these matters will only be used if both parties to a case accept that Islamic law should be applied. Islamic law does not have any role in tax matters.

3.2.4 Conclusion

Generally, Tanzania is a democratic state which is governed through its written Constitution. Tanzanian law is derived from the Constitution, received law, Islamic law (for matters concerning marriage, divorce, succession, inheritance and guardianship. Tanzanian history shows that from 1964 to early 1980, Tanzania did not have a good record on the promotion of human rights. Citizens were detained without trial; the political party was superior to the Parliament. The Court was not independent. Judges were very biased; they could not defend the rule of law. The judges' interest was to protect the interest of the leaders. However, things changed in 1988 when the Bill of Rights was introduced into the Constitution, and again in 1992 when the multiparty system was launched. From then, at least, human rights could openly be discussed. Similarly, the political party's dominance over the Parliament has diminished. Currently, at least, Members of Parliament from opposition parties question the government. In 2000, the Commission of Human Rights was established to strengthen the promotion of human rights.

⁹² Ibid., p. 19.

In fact, from 1988 on the constitutional law and political life of Tanzania has displayed different features. Since then a court can review the constitutionality of an Act of Parliament and declare it to be void if it goes against the Constitution.

3.3 Human rights in Tanzania

3.3.1 Introduction

Tanzania is a dualist state. It means that any international convention or treaty will only be enforceable after being ratified by the Tanzanian Parliament.⁹³ This makes the application of human rights much dependant on domestic Tanzanian law and the few non-self-existing treaties which have been accompanied by an Act of Parliament.⁹⁴

After the long-time struggle for the application of human rights, the 1984 amendment of the Tanzanian Constitution introduced the Bill of Rights. Currently citizens' rights are provided by part III of the first chapter of the Tanzanian Constitution. This section discusses in general the human rights available in Tanzania.

3.3.2 Rights to equality⁹⁵

The constitution has classified the right of equality into two groups. The first group is the equality of human beings; the second is equality before the law. This classification of the rights might have been highly influenced by the history of human and its sufferance. Human beings passed through many difficult stages of life, including, in Africa, slavery and colonialism.⁹⁶ In these

⁹³ William Binchey & Catherine Finnegan (eds), A book chapter of Khoti Kamanga, 'International Human Rights Law as Reflected in Tanzania's Treaty and Court Practice' *Human Rights, Constitutionalism and the Judiciary*, Clarus, Dublin, 2006, pp. 54-56.

⁹⁴ Ibid., p. 69.

⁹⁵ The Constitution of the United Republic of Tanzania 1977.

⁹⁶ Walter Rodney, *How Europe Underdeveloped Africa*, Bogle-L-Ouverture Publications, London, 1972, paragraph 4.1. Access through <http://abahlali.org/files/3295358-walter-rodney.pdf>, last visited 4 January 2017.

stages torture was part of normal life. A master could torture a slave as he wished, because a slave was his possession.⁹⁷

The right of equality of human beings is explained in Article 12 of the Constitution. The Constitution explicitly states that “*all human beings are born free and are all equal.*” Article 12 goes on to proclaim that “*every person is entitled to recognition and respect for his dignity*”.

The matter of equality is more clearly explained in the Constitution of the Netherlands, Article 1 of chapter 1, which states that:

*“All persons in the Netherlands shall be treated equally **in equal circumstances.** Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted.”* [Emphasis added]

Setting the basis of equality more explicitly may reduce the number of doubts and complications on the interpretation of the Constitution. In the above article for example, equality is measured based on the circumstances. Simply, it is possible to treat citizens differently based on the prevailing circumstances even though the case involves the same or similar matter.

On the side of the right of equality before the law, the Tanzanian Constitution provides in Article 13 that:

“All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law.

*No law enacted **by any authority** in the United Republic shall make any provision that is discriminatory either of itself or in its effect.*

*The civic rights, duties and interest of every person and community shall be protected and determined by the courts of law or **other state agencies** established by or under the law.*

⁹⁷ Ibid.

No person shall be discriminated against by any person or any authority acting under any law or in the discharge of his functions or business of any state office.”

[Emphasis added]

The good thing about this article is that it at least explains the meaning of the word “discriminates”. A citizen may easily and clearly understand to what he or she is entitled.

Section 3 of the article ensures the protection and determination of the given rights. In this section, the Constitution ensures that civic rights (as they are termed) shall be protected and determined by the Courts and other state agencies established under the law. The problem of this section is, however, the lack of clarity. It is not clear what these state agencies are and what their functions are. Does the word ‘state agency’ include all government ministries and departments? How and when will these state agencies determine civic rights? The existence of these agencies and their relationship with the courts is unclear. The intended state agencies could be the government through its organs which aim to enforce the compliance with certain laws, e.g. the Tax Revenue Appeal Board (TRAB) and Tax Revenue Appeal Tribunal (TRAT). These organs are under the supervision of the Ministry of Finance. They are established (as stated on the official website of the Ministry of Finance) for the purpose of solving tax disputes, advising the Minister of Finance on tax cases, and implementing appropriate sanctions on tax offenders.⁹⁸ There is nowhere to be found explicitly that the TRAB and TRAT are obliged to protect and determine civic rights.

While these questions remain unanswered, Section 6 of Article 13 of the Constitution lays down principles for the state authority that ensure equality before the law. The state authorities are required to observe fairness on hearing during appeal. The Constitution prohibits the retrospective application of laws. However, the components of a fair trial have not been clarified.

Other citizens' rights include:

- The right to appeal;
- The right to privacy;

⁹⁸ http://www.mof.go.tz/index.php?option=com_content&task=view&id=14&Itemid=28, last visited 4 January 2017.

- The right to be assisted and heard; and
- The right to information.

A description and analysis of the above rights is set out in paragraph 4.6.

Generally, the constitution has at least shown the way towards the promotion of the rule of law through these rights. However, there are some matters which deserve to be improved. The Tanzanian Constitution does not state the components of fairness and circumstances, or benchmark to equality. Similarly, the right to remain silent is not mentioned. Therefore, any government organ can force citizens to answer questions even if the citizen to whom the questions are asked is unwilling or unable to answer them.

3.4 The assessment of human rights in Tanzania

As noted above, human rights in Tanzania before the late 1980s were a “vocabulary”; in the sense that only very few Tanzanians could pronounce the word “human rights”.⁹⁹ Those who dared to pronounce such terminology ended up facing the strong arm of the government. At that time, human rights were considered to be a bottleneck for the then governmental development policies. Nyerere, the then President, refused to incorporate the Bill of Rights in the Constitution for fear of constitutional sanctions against his policies.¹⁰⁰

After the incorporation of the Bill of Rights in the Constitution in 1984, which was enforced in 1988, human rights claims could be invoked. A good example is in the judgment of Justice Mwalusanya in *Chumchua s/o Marwa v Officer i/c of Musoma Prison and Attorney-General*.¹⁰¹ The case was filed to oppose an unlawful deportation, three weeks after the coming into operation of the Bill of Rights in 1988.¹⁰² After that case, many (provisions of) Parliamentary Acts were

⁹⁹ Chris Maina Peter, *Enforcement of Fundamental Rights and Freedoms; Matching Theory and Practice, Fundamental Rights and Freedoms in Tanzania*, Dar es Salaam: Mkuki na Nyota Publishers 1998, pp. 48-49.

¹⁰⁰ Ibid.

¹⁰¹ High Court miscellaneous criminal case no 2 of 1988, Mwanza registry (unreported) (*Chumchua Marwa*).

¹⁰² The case was about the deportation of Marwa Magori, who was a detainee at Musoma Prison pending his deportation to Lindi Region. The deportation order was already signed by the President, but when the Bill of Rights came into force, the son of detainee (*Chumchua*) filed a case against the unlawful deportation. See Chris P

declared null and void as they conflicted with human rights embodied in the Constitution. For example, Section 148 of the Criminal Procedure Act 1985, which resulted in difficulties for accused persons to be released on bail; the provision of the Election Act 1985, which required a deposit of Tanzanian Shillings 5,000,000 as a security of the cost before the case could be heard¹⁰³ were both declared to be contrary to human rights.

The incorporation of the Bill of Rights in the Constitution was one step towards the promotion of human rights. However, there is no clear mechanism to apply them. The clawback provisions in the Constitution which grant a right to the government to set aside human rights are vague and incomplete. They mostly use terms as “according to the law” or according to the “public interest” while the term public interest has not been defined.¹⁰⁴ According to Luoga,¹⁰⁵ most clawbacks are set by the executive for political reasons to deal with their opponents. Hence the problem of guaranteeing human rights remains.

Another threat with respect to human rights remains the power of the Judiciary: a Court can review the constitutionality of an Act of Parliament and declare it to be null and void if it contravenes the Constitution. The interesting thing remains that, when the Court declares the unconstitutionality of certain provisions of an Act, the provision(s) will continue to operate, including its unconstitutional feature.¹⁰⁶ Maina has rightly described this situation as absurd.¹⁰⁷ There is a lack of separation of powers. Once the Court has declared an Act null and void, this declaration should be taken as a command and not as a recommendation as it is now.

The Commission on Human Rights and Good Governance was intended to promote and protect human rights for citizens. Easy procedures for the accessibility of the Commission were set up.

Maina, Enforcement of Fundamental Rights and freedom; Matching theory and practice, *Fundamental Rights and freedoms in Tanzania*, Dar es Salaam: Mkuki na Nyota Publishers 1998, p. 52.

¹⁰³ Issa G Shivji et al, *Constitutional and Legal System of Tanzania*, Mkuki na Nyota, Dar es Salaam, 2007, p. 97.

¹⁰⁴ Ibid., p. 95.

¹⁰⁵ Florence D A M Luoga, The Tanzanian Bill of Rights, *Fundamental Rights and freedoms in Tanzania*, Dar es Salaam: Mkuki na Nyota Publishers, Dar es Salaam, 1998, p. 41.

¹⁰⁶ Issa G Shivji et al, *Constitutional and Legal System of Tanzania*, Mkuki na Nyota, Dar es Salaam, 2007, p. 96.

¹⁰⁷ Chris M. Peter, *Enforcement of Fundamental Rights and freedom; Matching theory and practice, Fundamental Rights and freedoms in Tanzania* Dar es Salaam: Mkuki na Nyota Publishers 1998, p. 55.

Any citizen whose rights might have been infringed was requested to contact the Commission, free of charge. But the main obstacle was that the Commission had no power to issue binding orders to those who breached human rights. Despite the introduction of the Commission on Human Rights and Good Governance, guaranteeing human rights in Tanzania still remains a challenge. Many instances of government organs breaching intentionally human rights have been reported, and many remain unreported to the Court because of lack of awareness and lack of material means to access the Court.¹⁰⁸

Some of the more common reported issues are that of police officers who use excessive power when dealing with criminals or suspects. Torture and killings still continue. In 1986 the police killed four people in Kilombero, sugarcane cutters who were on strike because of the low salary which was paid by their employer.¹⁰⁹ In 2001, the police killed more than 30 demonstrators from the opposition party during a demonstration organized by the Civic United Front (CUF) in Pemba.¹¹⁰ In the case of suspects, the police in 2007 killed fourteen alleged bandits from Kenya. According to the Legal and Human Rights Centre (LHRC), the killings could not be legally justified, because there were contradictions between the police report and the LHRC observation.¹¹¹

Beside killings, it has been very normal for the police to torture, beat and harass an arrested citizen who is held in custody for interrogation.¹¹² However such behaviour is often not officially reported, and those who suffered from these humiliations do not submit complaints or charges against those who humiliate them. Instead they consider the torture and beating as normal things

¹⁰⁸ Issa G Shivji et al, *Constitutional and Legal System of Tanzania*, Mkuki na Nyota, Dar es Salaam, 2007, p. 102.

¹⁰⁹ Mapunda T Benedict, *Personal Freedom and Police Power*, in Chris P. Maina *Fundamental Rights and Freedoms in Tanzania*, Dar es Salaam: Mkuki na Nyota Publishers 1998, p. 150.

¹¹⁰ Issa G Shivji et al, *Constitutional and Legal System of Tanzania*, Mkuki na Nyota, Dar es Salaam, 2007, p. 95 and Chandra L Sriram and Karin Wermester, *From Promise to Practice*, Lynne Rienner, Boulder Co, 2003, pp. 110-112.

¹¹¹ See *Human Rights Report*, Legal and Human Right Centre, Dar es Salaam, 2007.

¹¹² News from Human Rights Watch, 2013. Accessed through <https://www.hrw.org/news/2013/06/26/tanzanias-victims-torture>, last visited 4 January 2017.

that happen when someone is in custody.¹¹³ Moreover, policemen, instead of being peacekeepers, have been reported to raid citizens and beat them in revenge if they themselves were beaten. They may take their revenge on anyone, even on passers-by.¹¹⁴ In 2000 and 2005 during the campaign for the general election, I witnessed the police raiding and beating viciously innocent citizens in Zanzibar.

The police have been repeatedly reported to breach human rights. The tendency of police officers to breach human rights has been sometimes influenced by the power vested to them through the Criminal Procedure Act 1985. Under this Act, the police can search with or without a warrant. They can enter a building, a vessel, a place etc., and search it without a warrant during a state of emergency, and seize anything connected with an offence.¹¹⁵ This power has been mostly abused since there is no definition of what constitutes a state of the emergency.¹¹⁶

In May 2013, the police were accused of firing tear gas and live bullets to the supporters of the opposition party in Arusha. During the incident, some citizens lost their lives and dozens were wounded. However, when the Prime Minister was asked to explain about the incident to the Parliament, he said:

“We are tired, if they don't want to obey the law, let the police continue to beat them!”

The Prime Minister's statement supporting the police beating the law breaker raised a huge discussion in Tanzania. Several human rights activists raised a concern of human rights towards the Prime Minister's statement. The Legal and Human Right Centre went further and filed a case against the Prime Minister on account of that statement. The court found, however, that it had no power to inquire into the immunity the Prime Minister has in the Parliament

¹¹³ Issa G Shivji, *State Coercion and Freedom in Tanzania*, Institute of Southern African Studies, National University of Lesotho, 1990, p. 69.

¹¹⁴ *Ibid.*, p. 70.

¹¹⁵ Section 42(1) of the Criminal Procedure Act 1985.

¹¹⁶ Chris Maina Peter & Ibrahim Hamisi Juma, *Fundamental Rights and Freedoms in Tanzania*, Mkuki na Nyota Publishers, 1998, p. 150.

*“We hold that while this Court has powers to inquire into the exercise of parliamentary immunities in appropriate cases, this is not one of such cases, as the petitioners are not covered by the provisions of section 4 of Cap. 3.”*¹¹⁷

Almost in every yearly report on human rights in Tanzania issued by the LHRC or other organizations such as the Bureau of Democracy, Human Rights, and Labour Africa, there have been many complaints on police behaviour while dealing with suspects.¹¹⁸

3.5 Conclusion

Generally, Tanzania has legislation that guide the promotion of human' rights, even though it experienced several infringements of human rights from 1964 to the late 1980s. The Tanzanian Constitution guides the promotion and protection of human rights. There have, however, been several incidents where the government has acted against the constitution. For example, police in several cases have been repeatedly reported to violate human rights through torturing and killing of innocent citizens.

Generally, the idea of human rights is still new in Tanzania. The government itself throughout the post-colonial period does not seem to be interested in the promotion of human rights.¹¹⁹ Therefore an effort is needed to raise awareness of the citizens in recognizing their rights. As Shivji has explained, most Tanzanians do not know their rights, so sometimes when a government officer performs his duty, citizens may actually perceive it as a favour.¹²⁰

There is also great need for civil servants to know human rights and apply them in their day-to-day activities. The focus should not only be on the police but on all government organs.

¹¹⁷ Civil Cause No. 24 of 2013 *Legal and Human Rights Centre and Tanganyika Law Society v. Hon. Mizengo Pinda and Attorney General*, <https://www.scribd.com/document/312082798/Case-LHRC-TLS-vs-Mizengo-Pinda-Another-Misc-Civil-Cause-No-24-of-2013>, p. 27, last visited 27 December 2017.

¹¹⁸ For more information visit <https://www.state.gov/reports-bureau-of-democracy-human-rights-and-labor/country-reports-on-human-rights-practices/>, last visited 13 September 2019.

¹¹⁹ Chris Maina Peter & Ibrahim Hamisi Juma, *Fundamental Rights and Freedoms in Tanzania*, Mkuki na Nyota Publishers, 1998, p. 55.

¹²⁰ Issa G Shivji, *State Coercion and Freedom in Tanzania*, Institute of Southern African Studies, National University of Lesotho, 1990.

As explained in the analysis above, most human rights' reports show the breach of human rights by police officers for killings, torture, harassment and raid. This does not mean that in other government organs things are well organized. There is a need to conduct studies to show the application and availability of human rights in other sectors.

4 CHAPTER FOUR: TAXPAYERS' RIGHTS IN TANZANIA

4.1 Introduction

This chapter reviews the legal position of corporate taxpayers in Tanzania, outlining the history of the tax system of Tanzania, and discussing the present structure of corporate tax there. Matters such as taxable subject and taxable object are also examined, as are taxpayers' rights set out in the Taxpayers' Charter, and the tax appeal system in Tanzania. The discussion of the latter will reveal the structure and composition of tax appeal tribunals in Tanzania, as well as examining tax appeal procedures. The last part of the chapter analyses taxpayers' rights' in Tanzania, specifically including a discussion of the current situation on the promotion of those rights.

Using data from tax cases decided by the Tax Revenue Appeal Board and the Tax Revenue Appeal Tribunal from 2002, and using the existing tax laws, regulations and administrative manuals and documents, this chapter finds that the Constitution seems to assume that human rights that are mentioned in the part III of the Constitution of the United Republic of Tanzania 1977 apply to every person, legal and natural. However, to the contrary, it seems, the Parliament in 1984 had no intention to give rights to legal persons when it incorporated the Bill of Rights in the Constitution. The intention of the Bill of Rights is seen to promote human rights to natural persons only. It might be true that some of the rights promoted in the Constitution apply to every person, legal as well as natural, but certainly most of the human rights mentioned in the constitution are not sufficient for corporate taxpayers (legal persons). Those human rights which seem to apply to corporate taxpayers are very few indeed. Unfortunately, in Tanzania there is little case law in which human rights have been demanded by and granted to legal persons. This shortage or absence of cases might have been caused by a lack of awareness by corporate taxpayers that they could demand their rights, or, it could be because most corporate taxpayers prefer to solve their cases at the negotiating table, without taking them to court.

4.2 The Tanzanian tax system

4.2.1 Introduction

This section sets out the tax system in Tanzania. It also examines corporate tax in Tanzania, and the power to levy tax and taxable subjects and objects. Deductions and taxation of group companies are also briefly described. This review is made to assist a reader to understand the background of taxation and corporate tax in Tanzania. Similarly, the review helps to demonstrate how a corporate taxpayer is obliged to pay tax. This follows the notion that a taxpayer can claim rights, if he meets his obligations sufficiently.

4.2.2 History of the Tanzanian tax system

Long before the arrival of the Germans in Tanganyika, taxation was a matter of a family, a clan or society's contributions to their leaders. People by that time submitted their contributions in the form of harvest and cattle to their kings and other local rulers. There was no money economy.¹²¹

The Germans were the first colonial rulers to introduce modern principles of taxation in Tanganyika in 1901: modern because they collected tax in the form of money instead of cattle and harvest.¹²² The poll tax and the hut tax introduced by the Germans were the first direct taxes collected from Tanganyika. That tax system not only aimed to collect revenue from Africans but also to force Africans to participate in the money economy. The German colonial tax system also facilitated the alienation of the local citizens from their land. This alienation came about by forcing the locals to work on German plantations and to abandon their farms in order to get money to pay taxes; sometimes they worked free of charge.¹²³ The German era did not last long. The period of seventeen years (1901-1918) was not sufficient to establish a strong and effective

¹²¹ Geho, J.I XYZ of *Direct taxation in Tanzania*, Institute of Accountancy Arusha, Tanzania 1989, p. 50.

¹²² Luoga F.D.A.M, *A Source Hand Book of Income Tax Law in Tanzania*, p. 7. Access through <http://www.gepc.or.tz/wp-content/uploads/2013/04/IncomeTax-Law-in-Tanzania-Source-Book-Prof.-Luoga.pdf>, last visited 4 January 2017.

¹²³ Geho J.I XYZ of *Direct taxation in Tanzania*, Institute of Accountancy Arusha, Tanzania 1989, p. 50.

control of the territory. The German era therefore left a minor impact on the Tanzanian legal structure and on taxation.¹²⁴

In Tanzania, income tax was introduced in 1940 under British colonial rule. The structure was similar to the Kenyan income tax structure which had been introduced three years before the enactment of the Tanzanian income tax law. By that time all the three East African Countries (Kenya, Tanganyika and Uganda) were under British colonial rule. They used to have almost the same tax structure. In general, the structure was a simplified tax model of the United Kingdom tax legislation of the 1920s.¹²⁵

From 1952, the income tax of the East African countries was guided by one Act; the East African Income Tax (Management) Act 1952. This act provided the general guidelines on management and control of the tax revenue in all three countries. However, each country had its own tax authority, and the income tax authorities of each of the three countries had a mandate to fix their own tax rates and allowances in their respective countries.¹²⁶

Between the years 1952 and 1958, the tax legislation of East Africa was amended several times, until a stable tax structure was established in 1958. Despite several amendments of the tax legislation, the main feature of income tax remained almost the same. Tax was collected on any income accrued or derived within East Africa. Any income having a source outside East Africa was liable for tax upon being remitted to and received in East Africa.

In spite of obtaining its political independence in December 1961, Tanzania continued to manage and to collect income tax through the East African Income Tax (Management) Act until 1973 when Tanzania enacted its own Income Tax Act 1973 which came into effect from 1 January 1974. The 1973 tax structure had almost the same feature as the 1958 structure. Tax affairs of individuals, bodies corporate and trusts were managed under one Act. The 1973 Act continued to serve with various amendments until 2004 when it was replaced by the Income Tax Act 2004.

¹²⁴ Luoga, F.D.A.M., *The ability to pay, the basis for fair income taxation in Developing Countries*, LL.M. Queens University, Kingston, Ontario, 1988, p. 25.

¹²⁵ Ibid.

¹²⁶ Geho J.I, *XYZ of Direct taxation in Tanzania* Institute of Accountancy Arusha, Tanzania 1989.

The Income Tax Act 2004 incorporates various changes which reflect global, political and economic change. For example, the establishment of the Dar es Salaam stock exchange (DSE) brought a change in levying tax. The previous Income Tax Act 1973 did not consider the treatment of a company which was registered on the stock exchange. However, the current act provides for a different treatment, according to whether a company is registered on the DSE or not. For example, in ordinary circumstances in Tanzania, any share is considered to be an investment asset.¹²⁷ Therefore shareholders will either be subject to dividend tax on maturity or capital gains tax upon the realization of shares.¹²⁸ However, shares of a company which is registered on the Dar es Salaam stock exchange are not deemed to be an investment asset¹²⁹ if the owner of such shares owns less than 20 percent of the controlling shares. This might influence investors to buy newly-issued shares of companies, thus making it easy for a registered company to raise capital. At the same time, shareholders in companies which are registered on the DSE will not be affected by the ordinary corporate/individual tax rate when they sell these shares because, according to the Income Tax Act 2004, gains obtained from such shares do not constitute investment/business income.

4.2.3 Power to tax

In Tanzania, the Parliament is the only organ which has the power to levy tax on citizens. Any tax which has been imposed without the authorization of the Parliament is illegal. Article 138 of the Tanzania Constitution provides that

“No tax of any kind shall be imposed save in accordance with a law enacted by Parliament or pursuant to a procedure lawfully prescribed and having the force of law by virtue of a law enacted by Parliament.”

This provision makes it plain that the Parliament is empowered to levy tax to citizens. However the constitution does not state the modalities for or limit the taxes that are to be imposed by the Parliament. It might be thought from this that the Parliament possesses the sole power to tax. However, that is not always the case. The Parliament cannot act independently in tax matters. It

¹²⁷ Income Tax Act 2004, section 3.

¹²⁸ Ibid., section 9 (2).

¹²⁹ Ibid., section 3.

shares its power to impose or alter tax law with the President of Tanzania. The Parliament by itself cannot impose or alter tax law unless the President proposes the imposition or alteration of the tax law; this is stated in Article 99 of the Constitution:

“The National Assembly shall not deal with any of the matters to which this Article relates except if the President has proposed that the matter be dealt with by the National Assembly and the proposal has been submitted to the National Assembly by a Minister.

(2) The matters to which this Article relates are the following:

(a) A Bill to enact a law providing for any of the following -

(i) to levy a tax or to alter taxation otherwise than by Reduction...”

Nevertheless, the tax legal framework in Tanzania was set to permit the executive to decide on any matter concerning taxation without conformity to any principle, rules or standards. The Constitution seems to assume an automatic obligation to pay tax. Hence the government through parliament can just adopt a law governing the collection of tax without any guidance from the Constitution. In practice however, the Parliament through its plenary¹³⁰ powers has the mandate to impose tax.

There are various challenges with respect to power to tax in Tanzania. The main challenge is the absence of clear directives and principles from the Constitution that express and govern the power to tax. The absence of clear directives led to the President sometimes exercising a questionable power or taking surprising actions with respect to tax matters. A good example was in 1991/92 when the Minister of Finance raised the tax rate of stamp duty on sale instruments¹³¹ without enactment. Taxpayers were forced to pay the higher tax rate on the ground that it was imposed under the discretionary Presidential power. This power is vested within the Provisional

¹³⁰ It is a plenary power since there are no constitutional directives that might guide Parliament during the tax law-making process.

¹³¹ A sale instrument is an official sale contract which aims at transferring ownership from the current owner to a prospective owner.

Collection of Tax and Duties Act 1963. The Act empowers the President to collect a tax declared in a budget prior to the enactment while waiting for the passing of the annual Finance Bill. However, surprisingly, in this case the new rate was not even included in the Finance Bill for the respective year. During late 1999 when the taxpayers queried about the validity of the new rate, the Government immediately rushed a bill through Parliament to validate the higher rate.¹³² In 2013, there was again a controversial tax introduced by the Parliament. Through the plenary session in Parliament, it was claimed that the Parliament approved the introduction of the SIM card tax. However few days later, some Members of the Parliament claimed that a SIM card tax was not discussed by the Parliament. Six months later, this tax was scrapped by the Parliament¹³³ because it caused a huge public discussion.

The Tanzanian Parliament can delegate the taxing power to the executive. By this delegation, the executive is vested with the authority to make regulations and other guidance rules concerning tax matters. There is no constitutional provision that limits the scope of such delegation. The delegation of taxing power created a chance for some ministers to abuse their vested powers. A good example is a recent case concerning two former cabinet members, Daniel Yona and Basil P. Mramba, who were the Ministers of Finance, and of Minerals and Energy respectively. Together they were charged with misuse of powers by granting arbitrary tax relief and tax exemptions, occasioning a loss of Tanzanian Shillings 11.7 billion to the Tanzanian government.¹³⁴

4.3 Corporate Tax

According to Section 3 of the Income Tax Act 2004, a 'corporation' means any corporate or body corporate established or registered under any law in Tanzania or elsewhere including an unincorporated association, a government, a political subdivision of a government, a parastatal

¹³² Luoga F.D.A.M, 'The viability of developing democratic legal frameworks for taxation in developing countries: some lessons from Tanzanian Tax reform experiences', unpublished report.

¹³³ <http://twaweza.org/uploads/files/SzWBrief7SimCardTax-EN-130913FINAL.pdf>, last visited 1 February 2017.

¹³⁴ On 6 July 2015, they were sentenced to serve three years in prison for abuse of office and causing losses to the government.

organisation,¹³⁵ and a public international organisation and a unit trust. However, partnerships are excluded from the term 'corporation'.

4.3.1 Taxable subject

In Tanzania, corporate tax is levied and collected through the Income Tax Act 2004. The basis of levying tax of a company is the residential status of a company or the source of income. A company is deemed to be a resident company in the year of income if it is either incorporated in Tanzania or the management and control of the company affairs is exercised in Tanzania.¹³⁶

If a company qualifies to be a resident, tax is levied from income generated or accrued worldwide. However, for permanent establishments¹³⁷ and non-resident companies, tax is imposed and collected only for the income generated or accrued within the United Republic of Tanzania.¹³⁸

Non-resident multinational firms which have permanent establishments in Tanzania are obliged to calculate their annual income twice. They have to calculate the income which is generated in Tanzania and they also have to calculate the income which is generated outside Tanzania. The idea behind the separation of income generated inside and outside Tanzania is to simplify determination of taxable income and enable the correct amount of tax to be levied. In this way, taxation on income which is not supposed to be taxed in Tanzania can be avoided.

Generally, the criteria which are set to determine residential status of taxpayers and ultimately the tax payable pose some problems, one of which is for Tanzanian registered companies which decide to operate outside Tanzania (multinationals). According to Section 66 of the Income Tax Act 2004, once a company is established under Tanzanian law it is a resident company regardless of the area in which it operates. In this case, the income tax law in one way or another restricts the freedom of movement of such a company. Wherever the company decides to move,

¹³⁵ Parastatal organisations are economic organizations working along with the state and for the state. These are corporations that are either directly or indirectly controlled by the state. The company shall be deemed to be parastatal if the state owns 50% or more of the controlling shares (Income Tax Act 2004, section 3).

¹³⁶ Income Tax Act 2004, section 66 (4).

¹³⁷ A domestic permanent establishment is a place where a person carries on a business; it includes a place where a person carries on a business through an agency. See Income Tax Act 2004, section 3.

¹³⁸ Income Tax Act 2004, section 4 (b).

Tanzanian tax law applies to its income, unless there is a tax treaty between Tanzania and the country in which the company operates, in which case the terms of the treaty will apply.

Another possible problem is the possibility of a company to become resident in more than one country or to become a non resident in none of the tax jurisdictions. This is possible if a company (MNE) conducts business in Tanzania and in another tax jurisdiction; but the other tax jurisdiction has different criteria to determine the residential status of a company. Specifically, if the other tax jurisdiction determines the residential status of a company on the basis of the place of operation, while in Tanzania a company may become a resident simply because the management and control of affairs of the company is exercised in Tanzania. Thus if that situation exists, a company may have neither any commercial activities nor any employee in Tanzania while allocate most of its income in Tanzania. The residential status may result problems of determining a tax jurisdiction that has a right to levy tax on the income of the company.

4.3.2 Taxable object (general remarks)

As indicated, a resident company shall be charged with income tax upon the total income earned during the year of income. In Section 5 of the Income Tax Act 2004, the total income is defined as:

“The total income of a person shall be the sum of the person's chargeable income for the year of income from each investment and business...”

A company is also liable to income tax on any final withholding payments¹³⁹ received by the company.

¹³⁹ Final withholding payments are the payments in which tax is collected at source hence the receiver of such income receives net income. Examples of final withholding payments are dividends, rents and interest as specified in section 86 of the Income Tax Act 2004.

4.3.2.1 Income from business activities

Any company which generates income through business in Tanzania is subject to income tax. The Income Tax Act 2004 specifies activities that should be considered to be business activities. These include:

“A trade, concerns in the nature of trade, manufacture, profession vocation or isolated arrangement with a business character. Generally, any arrangement which is carried on with a view to obtain profit shall be generating taxable business income”.

Section 8 of the Income Tax Act 2004 lists several items to be included in the taxable business income when calculating the taxable income of a company:

- income from stock trading;
- service fees;
- gains from realization of business assets or liabilities;
- amounts derived as a consideration of accepting a restriction on the capacity to conduct business;
- gifts and other ex gratia payments received by the person in respect of the business;
- amounts derived from realization of depreciable assets of the business; and
- Any amounts derived that are effectively connected with the business and that would otherwise be included in calculating the person's income from investment.

In fact, any income which is derived by a company from conducting a business must be included in the taxable income.

4.3.2.2 Income from investment

Companies are subject to tax on income from investment. According to Section 3 of the Income Tax Act 2004, investment means:

“the owning of one or more assets of a similar nature or that are used in an integrated fashion, on similar terms and subject to similar conditions, including as to location and includes a past, present and prospective investment, but does not

include a business, employment and the owning of assets, other than investment assets, for personal use by the owner.”

The above definition shows that the Income Tax Act 2004 has classified the tax base for an asset based on the uses of the particular assets and based on the nature of the activities of the companies. For example, if a company is a financial institution, it is obvious that receiving and paying interest form part of its daily activities. In Tanzania, even if an interest is explicitly stated in the Act to be among the items that form investment income, that rule does not apply to financial institutions. Interest for them is treated as business income. However, whether such interest is categorized as business income or as investment income it makes no difference with respect to the tax due. The tax rate for business and investment income is similar for companies. The distinction between business and investment income is only set to simplify the administration of tax and to ease the computation of taxable income for companies. Section 9 of the Income Tax Act 2004 lists several items to be included in determining taxable income from investment. The following are included:

“Any dividend, distribution of a trust, gains of an insured from life insurance, gains from interest in an unapproved retirement fund, interest, natural resource payment, rent or royalty;

Net gains from the realization of investment assets of the investment; and

Amount derived as a consideration for accepting restriction on the capacity to conduct the investment.”

The list states that any dividend shall constitute an investment income. However, Article 86 of the Income Tax Act treats dividend as one of the items that form final withholding payments. The section provides that:

*“Any dividend paid by a resident corporation or paid by non-resident corporation to a resident individual **shall be a final withholding payment.**”* [Emphasis added]

This means that any dividend paid by a resident corporation to whoever receives it, whether a resident or a non-resident corporation, is considered to be a final withholding payment. Likewise,

a dividend paid by a non-resident corporation is treated as a final withholding payment if the receiver of such dividend is a resident, non-private investor. Normally such an individual does not have the features of being an investor, but owns the shares merely for saving purposes.

Generally, if dividend qualifies to be a final withholding payment then it is automatically excluded from investment income. Final withholding payments constitute neither business income nor investment income.¹⁴⁰

Another issue to take into account before including dividends as part of investment income is the consideration of Section 54(2) of the Income Tax Act 2004. In this section, the Act explains that:

“Any dividend distributed by a resident corporation to another resident corporation shall be taxed at 5% from the income tax where the corporation receiving the dividend holds 25 percent or more of the shares in the corporation distributing the dividend and controls, either directly or indirectly, 25 percent or more of the voting power in the corporation.”

The above section makes clear that the issue of dividend is not as simple as it appears to be from Section 9 of the Income Tax Act. The taxpayer must understand the circumstances when dividends received will be considered to be investment income and when dividends are treated as final withholding payments.

Other items which constitute investment income are interest and rent. Section 9 of the Income Tax Act treats interest and rent as being among the items to be included in taxable income when a taxpayer is calculating taxable income from investment. However, Section 86 of the Income Tax Act also included interest and rent among the items that form final withholding payments.

Section 86 (b) of the act explains that:

“For the purpose of this Act, the following shall be final withholding payments...

“interest paid by financial institution to a resident individual where the interest is paid with respect to a deposit held with the institution, other than-

¹⁴⁰ Income Tax Act 2004, section 8 (3a).

(i) interest received by the individual in conducting a business”.

From the above it follows that any interest which is paid to a company, whether a resident or non-resident, will constitute investment income. There is no circumstance that allows interest received by a company to qualify as final withholding payments.

The treatment of rental income is similar to the treatment of interest. Section 9 of the Income Tax Act mentioned rent to be among the items that form investment income. Section 86 (c) of Income Tax Act however lists rent among the final withholding payments if the rent is paid to a resident individual under a lease of land or building and associated fitting and fixture. Section 86(c) states that

For the purpose of this Act, the following shall be final withholding payments...

“rent paid to a resident individual under a lease of land or a building and associated fittings and fixtures, other than-

(i) rent received by an individual in conducting a business.”

The treatment of rent and interest has one thing in common. If rent or interest is paid to a corporation, whether resident or non-resident, the rent or interest will be either investment or business income, depending on the nature of the business of the corporation. For example, the National Housing Corporation (NHC), a public resident corporation in Tanzania, is a company which deals only with leasing houses to people and entities. Therefore, if NHC receives rent from any corporation, the rent cannot be considered to be investment income, but will be counted as business income. On the other hand, if the National Social Security Fund (NSSF) collects rent from various buildings owned by it, the rent received will constitute investment income; because the nature of the business of the NSSF is not to lease buildings.

There is a special treatment for a person who has a domestic¹⁴¹ or foreign permanent establishment. For tax purposes, a person and his domestic or foreign permanent establishment are considered as independent but associated persons: the permanent establishment is resident in

¹⁴¹ Domestic permanent establishment means all permanent establishments of a non-resident individual, partnership, trust or corporation situated in the United Republic of Tanzania.

the countries in which it is situated. Income tax liability will be calculated separately for the permanent establishment and its owner. In addition to the tax levied on the income generated in Tanzania, a foreign person with a permanent establishment in Tanzania will also be taxed in respect of repatriated income of the permanent establishment.¹⁴²

A resident company which has a foreign permanent establishment may claim the foreign tax credit for any income tax paid by its foreign subsidiaries. Section 77 of the Income Tax Act provides that:

“A resident person (other than a partnership) may claim a foreign tax credit for the year of income for any foreign income tax paid by the person to the extent to which it is paid...”

A foreign tax credit which is available to a taxpayer who has a foreign permanent establishment however shall not exceed the percentage of income tax payable for the similar business in Tanzania. For example, if the corporate income tax rate in Tanzania is 30%, the maximum tax credit available to a resident person who pays income tax in a foreign country will be 30%. A resident person who paid tax through a foreign permanent establishment may decide to relinquish a foreign tax credit available for the year of income and then claim a deduction for the amount of the foreign income tax paid. Apart from this, no deduction is available for foreign income tax paid.¹⁴³

4.3.3 Corporate tax rates

In Tanzania, the corporate tax rate is 30% of the total income of a company during the year of income. This tax rate is applicable to resident and non-resident taxpayers.

However, there is a relief for a company which is newly registered on the Dar es Salaam Stock Exchange. If such a company has at least 30% of its shares issued to the public, it will be taxed at 25% for three consecutive years from the date of listing.¹⁴⁴ This incentive is available to any

¹⁴² Income Tax Act 2004, section 72.

¹⁴³ Income Tax Act 2004, section 77 (4).

¹⁴⁴ Ibid., First Schedule, paragraph. 3.

company regardless of its residence status. This incentive is given to motivate companies to list themselves on the DSE.

Repatriated income of a domestic permanent establishment of a non-resident tax payer is taxed at 10%.¹⁴⁵ Repatriated income exists when the domestic permanent establishment transfers income to its head office. The details of repatriated income are discussed in subsection 4.3.5.

4.3.4 Taxation of associated companies

4.3.4.1 Inter-company pricing

Section 33 of the Income Tax Act 2004 and regulations 6 and 33 of the Income Tax Regulation 2004 provide general guidance on how to treat a transaction incurred between two or more associated companies particularly on transfer pricing. If there have been transactions between associated companies,¹⁴⁶ those companies are required to quantify, apportion and allocate their taxable income in the amount that would have arisen if such transactions had been conducted at arm's length.

Where the Commissioner General believes that the associated companies fail to meet the arm's length principle, he is empowered to make an adjustment, which is intended to find the correct value of the transaction. The Commissioner General may reallocate the income of associated companies, or he may apportion the expenditure incurred by one company that might benefit another company in conducting its business. In general, the Commissioner General has the power to restructure business transactions to reflect fair taxable income. In practice, fairness in this context means the amount that would be deemed to be the correct taxable income to the satisfaction of the Commissioner General. Practically, transfer pricing issues are very challenging. Due to the speed of commercial development, modalities of doing business have become more sophisticated; companies operate globally and are closely connected. The connection may often impair the correct value of transactions between associates. To address the

¹⁴⁵ Ibid.

¹⁴⁶ Associated companies are the companies in which either alone or together with another party a company controls or may benefit from 50 percent or more of the rights to income, capital or voting power of or in an entity. See Income Tax Act 2004, section 3.

problem of the transfer pricing, Tanzania introduced the Income Tax (Transfer Pricing) Regulation in 2014, which means that Tanzania uses guidelines similar to those of the OECD and the UN on transfer pricing.¹⁴⁷

4.3.4.2 Taxation of group companies

Tanzanian corporate tax law does not recognise a group of companies. Every company in a group has to pay its tax separately. There is no provision in the tax law which allows the transfer of losses or gains between companies in a group. Generally, the idea of taxation of group companies is not reflected in any way in the Income Tax Act 2004.

4.3.5 Taxation of repatriated income of a Tanzanian permanent establishment

A non-resident company which has a permanent establishment (PE) in Tanzania is treated differently from a resident company.¹⁴⁸ The PE that has an accumulated income generated in Tanzania is obliged to pay 10% of its accumulated income on top of the normal corporate tax rate of 30% of the total income generated by the PE. The addition of 10% extra imposed on repatriated income is meant to discourage the investors from transferring the revenue to their countries. Similarly, it discourages the accumulation of profit which may result in tax avoidance. Repatriated income is not the same as dividend. Repatriated income exists when there is accumulated profit in the accounts of the PE. However, there is no difference between the tax rate of dividend paid to a foreign company by a subsidiary firm and the tax rate of the repatriated income tax.

4.3.6 Taxation of a controlled foreign corporation

A controlled foreign corporation is a non-resident company in which a resident person owns equitable or legal rights whether directly or indirectly. In order to qualify as a controlled foreign company, a resident person must either alone or with other companies possess, control or may benefit for 50% or more of the rights to income or capital or voting powers. A controlled foreign corporation is taxed like other corporations, separately from its shareholders. Any arrangement

¹⁴⁷ Income Tax, Transfer Pricing Regulation 2014, regulation 9.

¹⁴⁸ Domestic permanent establishment means all permanents of a non-resident individual, partnership, trust or corporation situated in the United Republic of Tanzania.

between a controlled foreign corporation and its managers or shareholders is recognised through the arms' length principle.¹⁴⁹

A controlled foreign corporation is deemed to distribute its total income to its members during each year of income according to each member's shares. Therefore, in taxing a member of a controlled foreign corporation, in order to avoid double taxation, the member may deduct the deemed distribution when computing its taxable income, provided that the amount to be deducted has not previously been deducted; and the amount to be deducted exceeds the total income of a company.¹⁵⁰ The Income Tax Act 2004 has not prescribed any additional conditions concerning the features of a country where the daughter company resides.

4.3.7 Taxation of dividend

Generally, a dividend distributed by a resident company will be taxed in the hands of the company's shareholders by way of a final withholding tax. Normally the tax rate of dividend is 10%. However, when a dividend is distributed by a resident company (subsidiary) to another resident company, it will be taxed at a rate of 5%. This lower rate applies if a company receiving the dividend (parent) holds 25% or more of the shares of the company which distributes the dividend (subsidiary).¹⁵¹

Dividend distributed by a non-resident company to another entity taxed in the hands of the recipient at the same tax rate as investment income.

Taxation of a resident company which owns non-resident subsidiaries depends on the percentage of ownership. If the ownership is below 50% of the controlling powers, dividend is included in the total taxable income of a company which receives the dividend (parent). But if the ownership is more than 50 percent, the tax treatment is that applicable to a controlled foreign entity, discussed in subsection 4.3.6.

¹⁴⁹ Tanzania Revenue Authority, *A Handbook on the application of Income Tax Act 2004*, TRA 2007, p. 213.

¹⁵⁰ For details, see Tanzania Revenue Authority, *A Handbook on the application of Income Tax Act 2004*, TRA 2007, pp. 223-226 and Income Tax Act 2004, sections 73-76.

¹⁵¹ Income Tax Act 2004, Section 54 (2), as amended by the Finance Act 2012.

4.3.8 Assessment and payment of corporate tax

In Tanzania, unless the Commissioner General directs otherwise, companies are obliged to determine their own tax liability. Companies or their tax advisers are required to file returns of income accurately and submit them to the Commissioner General. Tax returns must be submitted together with accounts and records that support the tax determined in the returns. The process of a company filing a return is called self-assessment.¹⁵² The Commissioner General is empowered to use his best judgment to assess whether the submitted returns of income show a fair and reasonable amount of the tax payable.

Once the amount of tax payable has been established, the taxpayer is required to pay the assessed tax on due dates and in a manner specified in the assessment notice from the Commissioner General. A company may pay its tax liability in quarterly instalments during the year of income.

On paying tax in instalments, a company is required on the due date¹⁵³ of payment of a first instalment to submit a statement of estimated tax payable during the year of income. The statement of estimated tax works like a provisional assessment. Through this statement taxpayers are obliged to determine their taxable income and amount of tax payable during the year of income.

Upon receiving a statement of estimated tax payable, the Commissioner General will accept and collect the tax as shown on the statement in four instalments. However, at the end of the year of income, a taxpayer is required to submit a return of income to the Commissioner General which shows the actual income generated by the company during the year. The return must also show the actual amount of tax paid to the TRA (corresponding to the statement of estimated tax) and the actual amount of tax that is supposed to be paid (shown in the return). From the income tax return, it would be easy for the revenue officer to determine whether or not a taxpayer has

¹⁵² Mpongoliana R.G, *The Theory and Practice of Taxation*, Business Image Graphics, Dar es Salaam, Tanzania 2005, p. 92.

¹⁵³ Due dates for the instalment payer are on or before the last day of the third, six, ninth and twelve months of the financial year if the company's financial year is a twelve-month period beginning at the start of a calendar month; in any other case at the end of the third, sixth, ninth and twelve month period commencing at the beginning of the year of income.

underestimated the amount of tax estimated. If the revenue officer realises that a taxpayer estimated the tax payable below 80% of the actual amount of tax payable during the year of income, the taxpayer is not only obliged to pay the tax difference (which he would have to do whatever the underestimation) but also a penalty for underestimation. The taxpayer thus has to pay the difference between the provisional assessment and the actual tax determined, with interest. Likewise, if the revenue officer realises that a taxpayer has paid more than he was obliged to pay, the amount of overpaid tax will be refunded; The act is silent concerning payment of interest in case of a tax refund.

4.3.9 Conclusion

The power to levy tax has not been clearly explained in the Tanzanian tax structure. The absence of a detailed article in the Constitution which clearly stipulates the power to impose tax creates a possibility for the government to levy tax on anyone without observing any rule. A good example was in 1991/92 when the Minister of Finance raised the tax rate of stamp duty on sale instruments¹⁵⁴ without any statutory enactment.

The Tanzanian tax structure imposes an obligation to pay tax on any person who has total income during the year. For a company, the prevailing tax rate is 30% of corporate profit. Companies are allowed to deduct several expenses. However there is no any favour available for a group of companies. Every company must calculate its taxable income on its own. Likewise every company must claim its deductions on its own.

¹⁵⁴ A sale instrument is an official sale contract that aims at transferring ownership from the current owner to a prospective owner.

4.4 Tax Administration (Tanzania Revenue Authority)

4.4.1 Introduction

The role of levying, collecting and administering tax is entrusted to the Tanzania Revenue Authority (TRA). The TRA is also responsible for advising the government on all matters relating to fiscal policy. The TRA was established by the Act no. 11 of 1995 and started to operate in 1996. Before that time tax was levied and collected directly by the Ministry of Finance.

The TRA is headed by the Commissioner General who acts as a Chief Executive Officer and is obliged to oversee the day-to-day activities of TRA. The Commissioner General is in turn under the supervision of the Board of Directors, headed by a Chairman who is appointed by the President after consulting the Minister of Finance. The Board of directors is itself under the supervision of the Minister of Finance.¹⁵⁵

In examining the tax administration, this section discusses guidance that is commonly issued by the TRA to assist taxpayers to meet their obligation to pay tax; such guidance takes the form of practice notes and advance tax rulings. The taxpayers' rights laid down in the Taxpayers' Charter are also discussed.

4.4.2 Guidance issued by the TRA

4.4.2.1 Practice notes

Practice notes are the statements issued in writing to tax officers or to taxpayers that explain the Commissioner's interpretation of certain provisions of the tax law. They are issued for the purpose of achieving consistency in the administration of the Income Tax Act 2004. Practice notes are issued also to provide guidance to stakeholders of the Income Tax Act.¹⁵⁶ Practice notes are issued by the Commissioner General through the power vested to him under Section 9 of the Tax Administration Act 2015, which provides that the:

¹⁵⁵ Tanzania Revenue Authority Act 2005, section 4 (3).

¹⁵⁶ Practice note No. 01/2004, issued on 15 December 2004.

“Commissioner may issue practice with a view to ensure consistency in the administration of the tax law and to provide guidance to persons affected by such law.”

a) Reliance on the practice note

When the Commissioner General issues guidance on the interpretation of the tax law or on the application of provisions of the tax law, the guidance will be binding to the Commissioner until revoked. The reliability of the practice notes is thus guaranteed, and taxpayers may rely on them. A taxpayer may invoke the interpretation issued by the Commissioner in any court of law if the Commissioner behaves contrary to the practice notes.

However, the Commissioner's interpretation of the law does not limit the rights of taxpayers to interpret the tax law in their own way. Practice notes are not binding on taxpayers. If taxpayers believe that the Commissioner's interpretation was incorrect, they may apply the law based on their interpretation, and the resulting dispute will be resolved through the normal mechanism.

b) Matters which practice notes may be issued.

There are no specific matters on which a practice note is issued, but they are commonly issued on matters that involve contradictions in the interpretation and application of the tax law. The Commissioner General may issue practice notes to explain the TRA understanding on the matter, and those notes may contain simple examples that demonstrate the application of the tax law.

c) The Importance of practice notes

Practice notes are very important in the daily activities especially on tax matters. Given the benefits derived from the practice notes in the interpretation of the tax law and the application of the tax law, it is submitted that the Commissioner should continue with the existing power of issuing practice notes. Practice notes have a positive influence on the taxpayer's right of certainty. Guidance issued by tax administration influences certainty positively,¹⁵⁷ and certainty in the tax

¹⁵⁷ Jonathan Schwarz, 'Rights and Powers: Protecting the legitimate interest of taxpayers', British Tax Review, Vol. 3, 2009, pp. 306-318.

system will ultimately influence compliance with tax laws.¹⁵⁸ Several provisions of the tax law have been simplified and clarified through examples in the practice notes.

However, there should be an improvement in the process of issuing the practice notes; they are crucial for the proper and smooth administration of tax. The manner in which these notes are presently issued may raise doubts about the process being politically abused. Practice notes are not issued during an emergency situation, so there should be at least a parliamentary committee to review and accept the proposed interpretation by the Commissioner General in draft. This committee should work to ensure that the objective of the Parliament on a certain section to be interpreted is achieved.

4.4.2.2 Advance tax rulings

The Commissioner is empowered to issue an advance tax ruling to a taxpayer on a specific transaction entered into or to be entered into. An advance tax ruling is a declaration by the Commissioner on the application of the tax law in a particular arrangement proposed or entered into by a taxpayer. It is issued to an individual taxpayer based on the circumstance of the specific transaction. The advance tax ruling is individual, not general, in its effects; a ruling which is issued to a particular taxpayer on a specified arrangement or transaction shall not be applied to any other taxpayer or to any other arrangement than that has been specified in the Commissioner's written notice.¹⁵⁹ An advance tax ruling is issued to increase certainty to taxpayers¹⁶⁰ and such rulings promote transparent, clarity and consistency in the application of tax law.¹⁶¹

a) Conditions for obtaining an advance tax ruling

Section 11(4) of the Tax Administration Act 2015 stipulates the conditions for obtaining an advance tax ruling. In order to acquire an advance tax ruling a taxpayer must submit a written request. The application should explicitly describe the underlying transaction or arrangement. It

¹⁵⁸ Kirsty Unger, 'Ethic Codes and Taxpayer Charters', *ejournal of tax research* Vol. 12, 2014, pp. 483-498.

¹⁵⁹ Tax Administration Act 2015, section 11 (4).

¹⁶⁰ Winnie Chan, 'Binding Rulings', *Fiscal Studies*, Vol. 18, 1997, pp. 189-210.

¹⁶¹ IMF legal department, *Introducing An Advance Tax Ruling (ATR) Regime*, Vol. 1, 2016, accessed through <https://www.imf.org/external/pubs/ft/tltn/2016/tltn1602.pdf>, last visited 3 September 2019.

must be submitted giving full and complete disclosure of the particulars of the arrangement to be conducted. The arrangement proceeds should also be stated in the application letter. Section 11(4) provides that:

“Where prior to the issue of a ruling under subsection (1), the person

makes -

(a) a full and true disclosure to the Commissioner of all aspects of the arrangement relevant to the ruling; and

(b) the arrangement proceeds in all material respects as described in the person's application for the ruling, the ruling shall be binding on the Commissioner with respect to the application of this Act to the person with respect to the arrangement.”

Advance tax rulings are issued at the discretion of the Commissioner. The Tax Administration Act 2015 obliges a taxpayer who desires the private ruling to provide full disclosure of the particulars of the transaction entered into or to be entered into.¹⁶² However, the Act does not oblige the Commissioner General to issue an advance tax ruling. If the Commissioner decides to issue the advance tax ruling, the Act has not set a specific time limit for the Commissioner to respond to the application. Regardless of the availability of the required information, the Commissioner may take as long as he or she sees fit before issuing the ruling. This situation may result in a delay in obtaining the ruling; this may in one way or another limit the execution of a prospective transaction or arrangement. For example, assume a company intends to establish a long-term investment in electricity/power generation. The company may decide to undertake this transaction by itself or by collaborating with another company or by way of a partnership. The arrangement may involve cross-border transactions. With this in mind, the taxpayer may well request the Commissioner General to make an advance ruling to state the application of the law. The absence of clarity in certain provisions of the tax law is one of the factors that influence the exercise of the Commissioner's power to issue advance tax rulings. But in this example, even

¹⁶²Tax Administration Act 2015, section 11 (4).

though there may be uncertainty about the application of the tax law, still the Commissioner is not obliged to issue the advance tax ruling, nor is he obliged to issue the ruling in advance, as the concept of advance tax rulings requires. He may instead issue it after the transaction. The refusal of the Commissioner to issue an advance tax ruling does not give a taxpayer the right to sue the Commissioner General for his or her failure to act.

b) Reliance on the advance tax ruling

In general, an advance tax ruling issued by the Tanzania Revenue Authority is a binding statement on the application of the tax laws. It should not be forgotten that the ruling is only binding on the Commissioner General.¹⁶³ A taxpayer may decide to look for a better interpretation of the law if he thinks the Commissioner General has not provided him with a fair or correct interpretation. But if he wishes, a taxpayer may rely on the ruling issued by the Commissioner General. Likewise, the Commissioner General is empowered to revoke the ruling if he or she believes that a mistake was made in the interpretation of the law. The ruling may also be revoked if the Commissioner General believes that the ruling may result in improper levying of tax. The Tax Administration Act 2015 has not explained the consequence of the revocation of ruling, especially if the taxpayer has fully complied with the ruling previously issued by the Commissioner General. The Act simply demands that the Commissioner General inform a taxpayer that the ruling has been revoked. Section 14 of the Act provides that

“The Commissioner General may, by a notice in writing revoke a private or class ruling in whole or in part

Where the ruling is revoked under the subsection (1), the commissioner General shall-

In the case of private ruling, serve the applicant with a revocation notice...”

In any other case, if the ruling is not revoked and the Commissioner General acts contrary to the advance tax ruling, a taxpayer can invoke the ruling in any court of law, if the law upon which the ruling was made continues to remain intact. Any change of the law will take immediate effect

¹⁶³ Tax Administration Act 2015, section 11.

on the levying and collecting of tax due despite the advance tax ruling.¹⁶⁴ The Commissioner will always be bound by the ruling he made, provided that the Parliament has not changed the provision of the law upon which the ruling was made.¹⁶⁵ However, the Tax Administration Act has not explicitly set out what action should be taken in case there are amendments of the tax law, especially after the ruling has been issued. The Act has simply excluded the Commissioner from being bound by the ruling he made if there is an amendment of tax law. The Act has not considered the time at which a change of the law occurs. For example, it has not been made clear whether the amendment of the tax law will apply to the ruling even after a taxpayer has already filed the return of income for the particular fiscal year for which the ruling was made. Nor does the Act make it clear whether the taxpayer will be punished for filing what became an incorrect tax return because it was based on the ruling previously issued, before the amendment of the law. None of these matters have been addressed in the Tax Administration Act 2015.

4.4.3 Taxpayers' charter

The Tanzania taxpayers' charter is a document which explicitly sets out the taxpayers' rights and obligations. In the taxpayers' charter the revenue authority promises to provide quality services without breaching the law and the taxpayers are informed about their rights and obligations. The promises made by the tax authority are not set of binding rules. The taxpayers' charter is not a contract which gives rights to taxpayers to commence legal action if the revenue authority behaves contrary to the taxpayers' charter. However, to a great extent the taxpayers' charter provides lists of rights and obligations derived from tax laws.

4.4.3.1 Taxpayers' rights in the Taxpayers' charter

a) Right of an impartial treatment

The taxpayer is promised impartial treatment in the determination of the proper taxable amount. Section 7.1 of the taxpayers' charter states that:

¹⁶⁴ Ibid.

¹⁶⁵ Ibid., section 11 (4).

“Taxpayer has a right to an impartial application of the laws when determining his/her liability, so as to enable him/her pays the required tax amount.”

Even though the taxpayers' charter has partly explained the above right, there is no explanation of the impartiality a taxpayer should expect. The taxpayers' charter does not provide criteria to be considered when a taxpayer wants to identify whether he has been treated partially or not, nor has it provided any further information on this right. Revenue officers are humans just like taxpayers and their representatives; sometimes it is quite possible that a taxpayer may feel treated differently based on his expectation or based on his understanding and interpretation of the law; it is quite possible that taxpayers who have similar income are taxed differently. This will always be possible depending on the ability of taxpayers to arrange business transactions or arrangements to obtain tax savings. That situation, if it is known by other taxpayers who could not obtain tax savings, it may possibly be deemed to be partial treatment of him. A taxpayer is thus required to have proper understanding and awareness of partial and impartial treatment. Experience shows that if there are no clear rules to identify partial or impartial treatment in tax offices, in Tanzania, the partiality will then depend mostly on the feelings of the taxpayers. Therefore it will be hard for taxpayers to prove that they have been treated partially. Perhaps the TRA should describe in detail what an impartial treatment exactly means. As far as the present writer is aware, the TRA has not drawn a line between partial and impartial treatment. If it has, such line has not been communicated to taxpayers.

Reviewing the taxpayers' charters of Kenya and Rwanda (neighbouring countries of Tanzania) did not, it is submitted, reveal a better approach. They have not provided for any details related to the right of impartial treatment as well. For example, the Kenyan taxpayers' charter has explained this right by including the right to pay the correct amount of tax, stating that:¹⁶⁶

“You are entitled to demand impartial application of the law. It is the responsibility of KRA to collect only the correct amount of tax, duties and fees, no more no less.”

¹⁶⁶ See http://www.kra.go.ke/lto/taxpayer_charter.pdf, last visited 21 December 2016; it can also be accessed through <https://www.kra.go.ke/images/publications/Mkataba-wa-Huduma.pdf>, last visited 3 September 2019.

Similarly, there is no explanation in the Rwandan service charter concerning this right or any other taxpayers' rights. The Rwandan service charter simply states that:

"You must know, understand and up hold your rights. These are:

*To expect fair and just treatment."*¹⁶⁷

b) Right of privacy and confidentiality

All taxpayers' information submitted to the TRA is promised to be preserved confidentially, whether such information concerns business or private issues. Section 7.2 of the taxpayers' charter explains that:

"Taxpayer has a right to privacy and confidentiality for private and business information supplied to TRA unless the law derogates such privacy and or confidentiality."

In the above promise, the taxpayers' charter includes a general declaration on privacy and confidentiality. The taxpayers' charter seems to forget that taxpayers sometimes may not submit the documents or information voluntarily. Tax officers are obliged to collect the information from either taxpayers' premises or any other places. However, the taxpayers' charter does not demarcate when privacy is to be applied and when confidentiality is to be respected; in general, privacy is expected to be applied during collection of information or collection of tax debts. Among the circumstances where the privacy right is significantly breached is during the collection of unpaid tax or during the collection of documents or information from taxpayers. Sometimes the modality of accessing the information may endanger privacy rights.¹⁶⁸ This is true especially of the abrupt visit to a taxpayer's premises and the action of searching in the taxpayers' premises thereafter. In some jurisdictions, an inspection cannot be conducted unless a taxpayer is informed beforehand of the inspection.¹⁶⁹ Similarly a taxpayer can appeal to a court

¹⁶⁷ http://www.rra.gov.rw/fileadmin/user_upload/rra_service_charter_2.pdf, last visited 2 September 2019.

¹⁶⁸ Federico Aquilanti, 'Fundamental rights and tax inspections', *European Tax Studies*, Issue 2, 2014, pp. 46-49.

¹⁶⁹ Carlotta Armuzzi, 'Tax inspections: the balance between banking secrecy and the protection of privacy', *European Tax Studies*, Issue 2, 2014, pp. 40-45.

if the inspection is not justified.¹⁷⁰ The taxpayers' charter has not explained how privacy is to be observed during the collection of the information.

Furthermore, the taxpayers' charter provides no explanation about the privacy rights during collection of tax especially if a taxpayer fails to pay tax voluntarily. The taxpayers' charter seems to assume that a taxpayer will always submit the information himself and pay tax voluntarily. Therefore, the privacy right is only required in relation to retaining the taxpayers' information.

Another challenge is on the side of confidential rights. The taxpayers' charter promises that information will be kept confidentially. The taxpayers' charter was expected to define the meaning and limits of the confidentiality a taxpayer should expect to acquire from the TRA. Taxpayer should know exactly who may access his information. Similarly, the type of information that can be exchanged by the TRA should be known in advance.

Practically, in the era of transparency, the right of confidentiality is at risk of being breached. Countries impose more obligations to taxpayers to disclose tax-related information.¹⁷¹ On the other hand, countries are engaging more in the exchange of taxpayer's information. The process of exchange of information endangers the right of confidentiality.¹⁷² This will be true if a taxpayer is not involved in any way in the process.¹⁷³ The taxpayers' charter provides little information about the secrecy of the taxpayers' information. Nowhere can be found in the taxpayers' charter the principles which guide the confidentiality or how such confidentiality shall be applied. Generally, the right of confidentiality is not strongly guaranteed. The charter itself provides a room for intervention and supremacy of other laws.

The same is observed in the taxpayers' charters of Rwanda and Kenya. No details are available concerning the right of privacy. The Kenyan taxpayers' charter explains

¹⁷⁰ Ibid.

¹⁷¹ Luis Eduardo Schoueri and Mateus Calicchio Barbosa, 'Transparency: From Tax Secrecy to the Simplicity and Reliability of the Tax System', *British Tax Review*, Vol. 5, 2013, pp. 666-681.

¹⁷² Philip Baker, Privacy Rights in an Age of Transparency: A European Perspective, Tax notes International, May 2016, pp. 583-586.

¹⁷³ Reuven S Avi-Yonah and Gianluca Mazzoni, Taxation and Human Rights: A delicate balance, Public Law and Legal Theory Research Paper Series, Paper No. 520, 2016.

“You are assured that the personal and financial information which you provide to KRA shall only be used only for purposes of carrying out our lawful duties.”

The Rwandan service charter explains, a taxpayer has a right

“To respect full confidentiality within legal provision in respect to your personal right privacy.”

In general, there is a need to clarify the taxpayers' right of privacy and confidentiality taking into account the issue of disclosure of tax information and the exchange of taxpayers' information.

c) Rights of presumption of honesty

A taxpayer is promised a qualified right of presumed honesty, in the sense that the taxpayer is not always deemed to be honest. If the taxpayers' previous behaviour was considered to be deceitful such behaviour will have a negative impact on the taxpayer's future relationship with the tax authority.¹⁷⁴ The taxpayers' charter provides that:

“The taxpayer has a right to be presumed honest unless previous conduct or evidence to the contrary exists.”

A taxpayer's reputation could deteriorate due to his previous conduct. The taxpayers' charter does not provide a chance for a behavioural change. This means that a taxpayer must always comply with the tax law, rules and other directives issued by the TRA since one mistake may probably result in a loss of trust. The taxpayer will then have to work hard to regain his previous status. In the Tanzanian context, it is clear that if the tax authority does not trust a taxpayer, he or she will be subject to a continuous audit: the tax authority will continuously visit the taxpayers' premises. The visit may be to collect tax information or to examine taxable properties. However, sometimes, the continuous follow-up of the taxpayer may open room for corruption. According to the life style of Tanzanians, taxpayers are willing to offer tax officers an amount of money so

¹⁷⁴ Taxpayers' Charter, section 7.3.

as to minimize the penalty that would have been imposed due to the taxpayers' action. The study by Odd-Helge Fjeldstad¹⁷⁵ supports the beliefs that TRA officers are among the attributes of corruption in Tanzania.

d) **Right of review of tax assessment**

In the Taxpayers' charter, a taxpayer is promised a right to review the assessment made by the revenue authority. With regards to this right the taxpayers' charter observes that:

“Taxpayer has a right to object to an assessment or any other determination by TRA to the extent to which that right is circumscribed by the law.”

The Taxpayers' Charter seems to be driven to offer a taxpayer the right of review of an assessment. However, in the explanation available in the taxpayers' charter, the focus is on the right to object to an assessment. The right to review and the right to object to an assessment made by tax officers are two different rights. In Tanzania, objection is a mandatory action which is required to be made by a taxpayer intending to appeal to the Tax Revenue Appeal Board. It is not possible for a taxpayer to ask the revenue officer to review the assessment made by him. If a taxpayer wants the assessment to be reviewed, he or she must start the appeal procedures. Therefore, it is wrong to call this right the right of review of tax assessment, while actually the elements of this right are characteristic of the right to appeal. Even though the taxpayers' charter considers that there is no difference between review and objection, in Tanzania there is no right to review the assessment. There is only a right to appeal against the assessment by means of objecting to the Commissioner General.

In other jurisdictions, a review is offered by the revenue authority, or requested by a taxpayer. The UK is an example, see part 7.4.4.2. A review is an opportunity to a revenue authority to confirm its decision. Practically, it is done by a more senior tax officer than the one who made the decision being reviewed.¹⁷⁶

¹⁷⁵ Odd-Helge Fjeldstad, 'Fighting Fiscal Corruption: Lessons from the Tanzania Revenue Authority', *Public Administration and Development*, Vol. 23, 2003, pp. 165–175.

¹⁷⁶ Wayne Gumley, 'The Taxation Appeal System: An Administrative Law Perspective', *Australian Tax Forum*, Vol. 3, 1998.

4.4.3.2 Taxpayers' obligations in the Taxpayers' charter

The Tanzanian Taxpayers' Charter lays down the taxpayers' obligations; these are discussed in what follows below.

a) *Register for tax purpose*

Every taxpayer is obliged to be registered in accordance with the law. There is no further information available in the taxpayers' charter about the registration, or the question of who is an eligible person. However, the issue of eligibility has been covered in every tax law.

b) *Filing returns*

Taxpayers are obliged to file returns to show their financial status, or, for instance, the expected income to be derived in a particular tax period. The taxpayers' charter sets the obligation on any registered taxpayer of VAT, income tax or any other tax administered by the TRA to file a tax return within the due date. This obligation is set out in the following terms:

“Any person who is registered for Income Tax, VAT or any other tax administered by TRA must file a tax return within the periods prescribed and pay the assessed tax within the due dates stipulated under the law.”

c) *Timely payment of tax*

Taxpayers are obliged to pay tax timely. It is not surprising to see the taxpayers' charter reminding taxpayers of this obligation. The idea and obligation of paying tax links taxpayers and the tax authority. The issue of paying tax timely is expressed as a tool to escape penalties and interest. The way it is explained in the charter it seems that Tanzanian taxpayers will only pay tax timely if the authority sets high penalties for those who delay. With regard to this obligation the charter explains that:

“Every taxpayer has a duty to pay his/her taxes promptly as they fall due if he/she is to avoid the penalties and interest prescribed under the tax law.”

It is nice to remind taxpayers about their obligations. However, the focus should not be directed on threatening taxpayers. While a taxpayer is reminded to pay tax timely if he wishes to avoid a penalty, the charter should find another way of convincing people to pay tax on time. For

example, it could require taxpayer to pay tax timely to be rewarded by the government providing quality services.

d) Cooperation with TRA officers

Cooperation with tax officers is another obligation of Tanzanian taxpayers. The taxpayers' charter emphasizes the need of cooperation on page 21. The charter makes it plain that:

“Every taxpayer has a duty to cooperate adequately with TRA officers by disclosing or producing relevant information or documents when required to do so.”

In explaining the role of cooperating with TRA officers, the taxpayers' charter has extended this obligation in such a way that it might lead to the belief that there may be excessive power given to these TRA officers. The taxpayers' charter requires taxpayers to allow tax officers adequate freedom to perform their duties, proclaiming that

“Every person has duty to allow TRA officers adequate freedom to carry out their lawful duties without intimidating, abusing, mistreating, threatening or influencing them in any manner whatsoever.”

The above provision is very wide. The limit of adequate freedom is not set. Even the term 'freedom' by itself is not defined. The taxpayer is not required to influence a tax office, although what actions could constitute influence remains unstated. What if a taxpayer asks question, or elaborating fact to a TRA officer? Will it be termed to be an 'influence'?

4.4.3.3 The legal status of the Taxpayers' charter

In general, the taxpayers' charter issued by the TRA is a political promise of taxpayers' rights and obligations. The taxpayers' charter cannot be invoked in any court of law; it is devoid of legal effect, even if tax officers behave contrary to the promises made in the taxpayers' charter. Interestingly, the taxpayers' charter by itself does not explain the measurable consequences for tax officers who fail to apply it; it gives no indication of penalties for non-compliance. Section 12 of the taxpayers' charter states that:

“In the event that the TRA officers depart from these service standards without a reasonable cause thus causing delays to taxpayers, the Commissioner General or the Revenue Commissioners will:

Write a letter of apology to the taxpayer

Instruct a senior officer to expedite the finalization of the delayed process so as to mitigate future losses or expenses to be incurred by the taxpayer

Where the laws allow, the Commissioner will waive any interest payment that may accrue as a result of the delay.

However, any officer who departs from the service standards and from the norms of good tax administration shall be disciplined in line with the terms of employment.”

There is, however, no clear guarantee of the removal of the interest accrued as a result of the delay caused by the tax officers during the assessment of a tax liability. In fact, having rules without a remedy for their violation is useless.¹⁷⁷

It is obvious in many tax jurisdictions that taxpayers' charters have improved quality services of revenue Authorities.¹⁷⁸ Taxpayers' charters enhance mutual trust between taxpayers and the revenue authority.¹⁷⁹ Similarly it is believed that a taxpayers' charter improves compliance with tax law. This is true if the charter itself is accessible to taxpayers, and it is applied by tax officers when attending to taxpayers' matters.¹⁸⁰ However, to strengthen the protection of taxpayers'

¹⁷⁷ Leandra Lederman, 'Special Report of Taxpayers' Rights, Wrongs, and a Proposed Remedy', *Tax Notes*, 22 May 2000, pp. 1133-1142.

¹⁷⁸ Maria Teresa Soler Roch, 'Forum: Tax Administration v Taxpayers - A New Deal?' *World Tax Journal*, 2012, pp. 282-296.

¹⁷⁹ Ibid.

¹⁸⁰ John Whiting, 'Finance Act note: Section 92-HMRC Charter - Magna Carta the Second?' *British Tax Review*, 2009, pp. 616-620.

rights, a taxpayers' charter must have legal backing.¹⁸¹ The existing taxpayers' charters that lack legal backup do not ensure reliability of rights that are promoted in the taxpayers' charter.¹⁸²

In other jurisdictions, taxpayers' charters are established by legal requirements: the UK is an example; see section 7.2.4. In Tanzania there is no law that obliges the TRA to have a taxpayers' charter. It is the initiative of TRA itself. If the TRA wishes to assure the taxpayers' rights, it should go a step further and initiate the inclusion of provision for a taxpayers' charter in the Tax Administration Act 2015. This would give taxpayers confidence,¹⁸³ and genuinely promote taxpayers' rights through the charter.¹⁸⁴

¹⁸¹ Ibid.

¹⁸² Jonathan Schwarz, 'Rights and Powers: Protecting the legitimate interest of taxpayers', *British Tax Review*, Vol. 3, 2009, pp. 306-318.

¹⁸³ Judith Freedman and John Vella, 'HMRC's Management of the UK tax System: The Boundaries of legitimate discretion', *Legal Research Paper Series*, paper No. 73, University of Oxford 2012.

¹⁸⁴ OECD, *Tax Administration: Comparative information on OECD and other advanced and emerging economies*, 2015, p. 283.

4.5 Tax appeal system

4.5.1 Introduction

Tax appeal has been among the rights of taxpayers which have been explained and demanded by several scholars and taxpayers' rights activists. The availability of a strong and efficient mechanism of solving taxpayers' disputes timely and justly has been a major demand of these groups. In most of the African countries there has been a focus and attention on general human rights, especially for politicians, women and children. However, taxpayers' rights have not been paid enough attention. The revenue authorities of most African countries focus more on revenue collection than on promoting taxpayers' rights.

This section describes tax appeal procedures in Tanzania, looking at the composition of the appeal bodies, and the process of making a valid tax appeal. The tax appeal proceedings, hearings and ultimately decisions of the Tax Revenue Appeal Board (TRAB) and the Tax Revenue Appeal Tribunal (TRAT) are also discussed, as is the availability of legal aid.

4.5.2 The Tax Revenue Appeal Board

The Tax Revenue Appeal Board (TRAB) aims to solve non-criminal tax disputes that may arise between taxpayers and the Tanzania Revenue Authority (TRA). Section 7 of the Tax Revenue Appeal Act 2000 empowers the TRAB to deal with all non-criminal tax disputes between taxpayers and the TRA. The section explains that:

“The Board shall...have sole original jurisdiction in all proceedings of a civil nature in respect of disputes arising from revenue laws administered by the Tanzania Revenue authority.”

The TRAB consists of a chairman and two vice-chairmen, one from Zanzibar and one from the Tanzania Mainland, and four ordinary members from each region of the country, all appointed by the Minister of Finance. Taxpayers can access the Tax Revenue Appeal Board wherever they are within Tanzania. The ordinary members of the TRAB sit in the TRAB for the purpose of hearing and determining the appeal originating from the regions from which they are

appointed.¹⁸⁵ In this setting, the members of the TRAB of the Dar es Salaam region will not sit in a tax case appearing in for example Mwanza or any other region. As a result, it is quite possible that TRAB members from a certain region will not actually solve any case during their membership of a TRAB.

A person is qualified to be appointed as a chairman of the TRAB if he is a principal legal officer or a person who has adequate knowledge of taxation. For a member of the TRAB, a person qualifies if he has knowledge of and experience in taxation, commercial or financial matters.¹⁸⁶ No further explanation is provided in the law. No clarification on academic or professional qualifications has been given.

4.5.3 The Tax Revenue Appeal Tribunal

The Tax Revenue Appeal Tribunal (TRAT) is a higher body than the Tax Revenue Appeal Board in solving tax disputes. Just like the TRAB, the TRAT normally solves only civil tax disputes that arise between taxpayers and TRA.¹⁸⁷ However, the TRAT only deals with the tax disputes which have been already dealt with by the TRAB if one of the appeal parties was not satisfied with the decision of the TRAB.

The TRAT consists of a chairman and two vice-chairmen who are appointed by the President of the United Republic of Tanzania after consultation with the Chief Justice. One vice-chairman must be from Zanzibar and the other must be from the Tanzania Mainland. The TRAT also consists of four ordinary members appointed by the Minister of Finance.

In order to qualify as a chairman of TRAT, a person must be a Judge of the High Court. In order to qualify as a member, a person should have knowledge of and experience in taxation, commercial or financial matters. As in the case of the TRAB, the way the qualification of the members of the TRAT is explained in the Appeal Act in very general terms. The Act has not

¹⁸⁵ Tax Revenue Appeal Act 2000, section 4.

¹⁸⁶ Ibid., section 3.

¹⁸⁷ Neither TRAB nor TRAT is mandated to deal with any criminal case. Any tax case which has any criminal feature (depending how it was structured) is required to be handled by the ordinary courts. Tax cases may thus either be dealt by the TRAB (for civil cases) or ordinary courts (for criminal cases).

clarified the issue of knowledge and experience. For example, the Appeal Act has not set the degree of knowledge or duration of experience a person is expected to have in order to qualify as a member of the TRAT. As a result, for example a person having experience of commerce for a period of only six days seems to qualify as a member. On the side of the knowledge, the Act has not explicitly explained what is deemed to be knowledge.

4.5.4 Objection with the decision of the Commissioner General of TRA

When a taxpayer is aggrieved with the decisions of the Commissioner General of the Tanzania Revenue Authority, he may appeal against such decisions to the Tax Revenue Appeal Board. However, in Tanzania, a taxpayer is not allowed to appeal directly to the Tax Revenue Appeal Board, but is first required to raise an objection against a Commissioners' decision to the Commissioner General before appealing to the Tax Revenue Appeal Board. For some issues which are specifically listed in Section 14 of the Tax Revenue Appeal Act 2000 there is an exception to this rule. These issues include the refusal of the Commissioner General to register or deregister a taxpayer for VAT purposes and the calculation of the amount due for a refund or repayment of any tax by the Commissioner General. In any other cases, taxpayers are.

4.5.4.1 Conditions for objection

Generally, a taxpayer may appeal against any decision made by the TRA. Most of decisions against which taxpayers appeal involve the proper determination of tax and penalties.

A valid objection is required to meet the following conditions¹⁸⁸

- It should be filed in writing; no appeal will be accepted if it is made orally.
- It should clearly state the grounds of objection and the reasons for the appeal; no tax appeal will be accepted if grounds for appeal are not stated;
- The objection must be filed with the Commissioner General within thirty days from the date of the Commissioners' decision; and
- The payment of a tax deposit.

The 30 days rule and the obligation to pay a tax deposit are discussed below.

¹⁸⁸ Tax Revenue Appeal Act 2000, section 12.

30 days rule

The objection must be filed with the Commissioner General within thirty days from the date of the Commissioners' decision. However, the tax appeal law does not explain whether this period begins on the date the notice is issued by the Commissioner, or the date the notice is received by the taxpayer. However this was clarified by the TRAB in *Kombo Hassani c/o Multimodal freight co Ltd*.¹⁸⁹ In this case, the taxpayer appealed against the decision of the TRA to refuse to admit the objection on the ground that the notice of objection was time-barred. The taxpayer explained that the arrival of the notice of the decision of the Commissioner General was delayed. Therefore the taxpayer argued that his objection had taken place within 30 days from the date he received the notice of the decision of the Commissioner General. The TRAB ruled in favour of the taxpayer, deciding that the 30 days period begins on the date on which the notice is actually received by the taxpayer instead of the date shown on the notice.

There is an exception under the 30 days rule: if a taxpayer has a reasonable cause that prevents him from submitting an objection within the prescribed time, the Commissioner General may admit the late objection provided that the taxpayer has applied for the late submission of the objection to be accepted. In his application, the taxpayer is required to state clear grounds that resulted in the delay. The Commissioner General then will check the reasonableness of the motives given by the taxpayer on his application. The Act provides for a non-exhaustive list of reasonable causes which are accepted by the Commissioner General for the late submission of the objection; this includes sickness of a taxpayer or his representative, or being absent from Tanzania.¹⁹⁰ There are no clear and conclusive grounds that constitute reasonable excuses. However, what may constitute a reasonable excuse in the eyes of the Commissioner General may not appear reasonable to TRAB. In *Design Partnership Limited v Commissioner General* in 2003¹⁹¹ for example, the taxpayer did not submit a notice of objection to the Commissioner

¹⁸⁹ *Kombo Hassan c/o Multimodal Freight Co Ltd v Commissioner General* (2004) 1 TTLR 166.

¹⁹⁰ Tax Revenue Appeal Act 2000, section 12 (7).

¹⁹¹ *Design Partnership Ltd v Commissioner General* (2003) 1 TTLR 133.

General within 30 days from the notice of assessment, but instead appealed directly to the TRAB. When he was asked about the reason for not submitting the notice of appeal to the Commissioner General, he explained that he was not completely aware of the appeal procedures. By then the tax appeal legislation was still new, and the taxpayer had not been properly informed and guided by the tax officers about the new appeal procedures. For these reasons, the taxpayer's appeal was admitted.

It was reported in *M.R. Hotels v Commissioner General*¹⁹² that tax officers sometimes refuse to inform taxpayers about the procedures of appeal, or they refuse to give the taxpayer the address of the TRAB. This incident happened in a rural area where in most cases taxpayers failed to meet the deadline of submitting an appeal. In the case of *M.R. Hotels*, the taxpayers' late appeal was admitted because they proved that they had written the notice of appeal within the required time but had no knowledge of the then new appeal procedures and the place to submit the appeal. *M.R. Hotels* also proved that they had requested the appeal information from the TRA but the revenue officers refused to inform and assist them about the manner and place to submit his appeal. Failure to inform taxpayers about the appeal procedures has brought a number of cases to the Tax Revenue Appeal Board where most taxpayers claimed to be ignorant of procedures.

The aggrieved taxpayer is required to object within 30 days or apply for extension of the time to appeal. The Commissioner General may not always allow time extension, although he or she is required to give reasons for such refusal. While the Appeal Act does not oblige the Commissioner General to do so, in *Nas Hauliers Ltd v Commissioner General* in 2004 the TRAB ruled that reasons had to be given.¹⁹³ The taxpayer was complaining against the decision of the Commissioner General to refuse to extend the appeal time without giving a reason for his refusal. After the deliberation, the TRAB ruled that any proper and fair tax administration had to inform a taxpayer of every decision the Commissioner General takes against him or her, giving reasons for the decision concerned. The taxpayers' complaints were accepted, and time extension was granted.

¹⁹² *M.R. Hotels Ltd v Commissioner General* (2003) 2 TTLR 36.

¹⁹³ *Nas Hauliers Ltd v Commissioner General* (2003) 2 TTLR 84.

Obligation to pay a tax deposit

Payment of a tax deposit is one of the conditions for a valid objection. Any person who raises an objection pending the final determination of the objection to an assessment is required to pay the full amount of tax which is not in dispute or one third of the assessed tax whichever amount is greater.¹⁹⁴ The amount of tax not in dispute is the amount of tax that would have been charged if the assessment were amended in accordance with the notice of objection.¹⁹⁵

The general idea of requiring a person who intends to object to pay a portion of assessed tax is based on the security interests and on minimizing tax arrears. The TRA was established in order to secure public money and takes the view that if it did not require payment of a tax deposit as a condition for valid objections, there would be a risk that government revenue will not be collected. It would be a loophole for every taxpayer to appeal so that he can delay the payment of tax. In *Tanganyika Investment Oil and Transport Company Ltd v Commissioner General* the taxpayer was required to deposit to the Commissioner General the ownership deed of land property as a security for payment of unpaid tax. This ruling was made by the commercial division of the High Court. The court instructed the Commissioner General and the taxpayer to reconcile their dispute about an assessment. While discussions took place, the land title would be kept as a security. During the reconciliation, however, the taxpayer was required to follow normal procedures for solving tax disputes. Then the taxpayer began the appeal procedures by objecting to the Commissioner General about the same assessment. After receiving the objection, the Commissioner General refused to consider the objection on the ground that the taxpayer had to pay the required tax deposit. When the taxpayer appealed to the Tax Revenue Appeal Board against the decision of the Commissioner General, the TRAB held that the land deed security ordered by the High Court amounted to a security just like the tax deposit would have done, and allowed the taxpayer's appeal.¹⁹⁶

There is an exception available as to the amount of tax to be deposited. The Commissioner General may reduce or waive the amount of tax to be deposited and may admit the objection

¹⁹⁴ Tax Revenue Appeal Act 2000, section 12 (9).

¹⁹⁵ Ibid., section 12 (10) (b).

¹⁹⁶ *Tanganyika Investment Oil and Transport Company Ltd v Commissioner General*, 2006.

without or with a low tax deposit.¹⁹⁷ These powers can only be exercised if the taxpayer has applied for such relief, and if the taxpayer has a reasonable ground which convinces the Commissioner General. The Appeal Act provides that:

“The Commissioner General may, upon being satisfied that there exist good reasons warranting reduction or waiver of tax payable...direct that a lesser amount be paid or waive the required tax deposit.”

The power given to the Commissioner General to waive or reduce the tax deposit is another complicated part in the tax appeal system. Most taxpayers who intend to appeal apply to the Commissioner General for a waiver or reduction of the tax deposit as a condition for objection. In an interview by the present writer with one of the TRA officers about the trend among taxpayers who apply for the waiver of tax deposit, it was made clear that there is an increasing number of taxpayers who request a waiver or reduction of the deposit. It was explained further that, had the Commissioner General accepted every application for waiver, there would have been no amount of tax collected by the Government at all. That is why the Commissioner General refuses to grant a partial relief or waiver of the tax deposit in most cases. In this situation, one can obviously say that sometimes the Commissioner General may refuse to give relief or waiver of tax deposit only because of the number of taxpayers who request for it.

The words *failure to provide a reasonable ground* is always used by the Commissioner General to justify dissatisfaction or refusal to grant a waiver. Most of the taxpayers who applied for the waiver ended up receiving a similar answer, namely that they had failed to provide a reasonable ground. For example, in *Al-Adawi Co Ltd v Commissioner General*¹⁹⁸ the taxpayer applied to the Commissioner General for a tax deposit waiver, explaining and proving, in the application, that it was encountering big financial problems. The Commissioner General refused to grant a tax waiver on the ground that the company failed to give reasonable grounds. A similar result is also to be seen in *Tanganyika Investment Oil and Transport Company Ltd v Commissioner General*.¹⁹⁹ Here too, the taxpayer applied for a tax waiver so that its objection could be judged

¹⁹⁷ Tax Revenue Appeal Act 2000, section 12 (4).

¹⁹⁸ *Al-Adawi Co Ltd v Commissioner General*, 2007.

¹⁹⁹ *Tanganyika Investment Oil and Transport Company Ltd v Commissioner General*, 2006.

by the TRA without depositing tax. In its application, the company complained against an erroneous assessment by the Commissioner General, arguing that there was a material error regarding the tax assessment made by the tax officer. That error could without doubt result in a failure to determine the correct taxable income and tax payable. The company complained that, on top of receiving an erroneous assessment from TRA, the company was denied a hearing to demonstrate the existence of uncertainty of the law. The company intended to demonstrate to the Commissioner General the mistake which was made by the tax officer in the assessment, but was denied a chance to explain. Even worse, the company was also denied a chance to prove how it was likely to suffer hardship which might result from the assessment raised by the TRA. In the end, the TRAB found that the TRA had made a mistake in rejecting the taxpayer's offer to demonstrate the errors and to prove the financial hardship that could result from the assessment raised by TRA. The taxpayer was allowed to appeal without depositing an amount of tax. Allowing taxpayers to explain matters may strengthen the process of decision-making by TRA.²⁰⁰ Sound decision making should always be demonstrated by the right of the taxpayer to be heard.²⁰¹

Surprisingly, in the process of allowing a minimum deposit or waiver, the Commissioner General sometimes may take extra steps which are beyond his power. In *Tanzania International Container Terminal Services Ltd v Commissioner General*²⁰² the taxpayer applied for a waiver of tax deposit, claiming not to have enough money to pay the required tax deposit due to financial hardship the company was facing. The Commissioner General did not consider the evidence and particulars submitted by the taxpayer. Instead, the Commissioner General decided to interview a third party who was not involved in the application, namely a clearing and forwarding agent, about the financial ability of the taxpayer to pay the tax deposit. Based on the information thus received, the Commissioner General refused to waive tax to the taxpayer. TRAB ruled that the Commissioner General acted beyond his mandate, by unreasonably and arbitrarily concentrating on the grounds of objection instead of dealing with the application for waiver. The taxpayer

²⁰⁰ Lucinda Vandervort, 'Access to Justice and the Public Interest in the Administration of Justice', *University of New Brunswick Law Journal*, Vol. 63, 2012, pp. 125-144.

²⁰¹ Ibid.

²⁰² *Tanzania International Container Terminal Services Ltd v Commissioner General*, 2007.

unsurprisingly won the case, and the appeal was admitted without the tax deposit having to be paid.

Yet there are still some cases in which the Commissioner General refused to grant a waiver without even elaborating the reasons for refusal. This may be due to the weakness of the tax appeal law, which, as noted above, does not oblige the Commissioner to give reasons if he denies the application for waiver. The absence of a legal obligation in the law may create duplication of efforts and inefficiency to taxpayers.²⁰³ Amending the law to oblige the tax administration to provide reasons for every decision would strengthen the taxpayer's rights of information and improve transparency. The TRAB in most of its decisions requires the Commissioner General to provide reasons whenever he refuses to grant a relief of the amount of tax to be deposited.²⁰⁴

4.5.4.2 Admitting a notice of objection

Upon receiving a notice of objection, the Commissioner General may admit or refuse to admit the notice. The Commissioner General will not admit the notice of objection if the notice of the objection has any of the following deficiencies:

- The notice of objection is sent out of time;
- The grounds of the appeal are not stated; or
- The tax deposit has not been made.

However, as has been seen above, if the Commissioner General refuses to admit the notice of objection, a taxpayer may appeal against such refusal to the Tax Revenue Appeal Board. Surprisingly, the TRAB will not hear such appeal unless the taxpayer has paid the tax deposit.²⁰⁵ So it appears that the tax deposit before lodging an appeal is a crucial criterion for a valid tax appeal. On the other hand, if the notice of objection is admitted by the Commissioner General,

²⁰³ Wayne Gumley, 'The Taxation Appeal System: An Administrative Law Perspective', *Australian Tax Forum*, Vol. 3, 1998.

²⁰⁴ *Hon. Ninrode E Mkono v Commissioner General* (2003) 2 TTLR 70, *Dr Wilbert B. Kapinga v Commissioner General* (2004) TTLR 98.

²⁰⁵ Tax Revenue Appeal Act 2000, section 12 (8).

he is vested with powers to amend the assessment in accordance with the notice of objection or to amend the assessment in the light of any further evidence that has been submitted.²⁰⁶

If the Commissioner General refuses to amend the assessment, he is required to serve a notice to the taxpayer stating the reasons for his refusal to amend the assessment. If a taxpayer is not satisfied with the final decision of the Commissioner General, the taxpayer can appeal against that decision to the Tax Revenue Appeal Board.

4.5.5 Appeal to the Tax Revenue Appeal Board

Appeals to TRAB have to satisfy the following conditions and procedures:

a) **The appeal should be submitted timely**

Any person who wishes to appeal to the Tax Revenue Appeal Board must lodge the appeal within 45 days from the date of receiving the notice of assessment of tax or from the date of notice of the Commissioners' decision.²⁰⁷ Failure to appeal within the time limit will be fatal, as *AGS Worldwide mover (T) Ltd v Commissioner General*²⁰⁸ shows. The taxpayer appealed to the TRAB against the decision of the Commissioner General to adjust the assessment of the taxpayer. However, this appeal was not admitted because it was time barred.

There is however a chance for a taxpayer to request for the extension of the time for appeal if the taxpayer has reasonable grounds; a written application may be made to the Tax Revenue Appeal Board to appeal out of time. If there is an application to extend the time for launching an appeal, the TRAB will give the taxpayer the opportunity to explain the reasons that necessitated the application for the late appeal, and the opposite party in the appeal (the TRA) will also be given the opportunity to be heard before the decision to grant the time extension is delivered.²⁰⁹

²⁰⁶ Ibid., section 13 (1).

²⁰⁷ Ibid., section 16, read with Tax Revenue Appeal Board Rules 2001, rule 4.

²⁰⁸ *AGS worldwide mover T (Ltd) v Commissioner General* (2002)1 TTLR 34.

²⁰⁹ Tax Revenue Appeal Board Rules 2001, section 12 (8).

b) **A notice of intention to appeal and payment of appeal fee**

Notice of intention to appeal

Before lodging an appeal, a taxpayer is required to file a notice of intention to appeal to the TRAB. The notice of intention to appeal must state the intention to appeal against an amount of tax or against any other decision of the Commissioner General. A copy of the notice of intention to appeal must be provided to the TRA.

The failure to submit a notice of intention to appeal may invalidate an appeal, as *British Airways v Commissioner General*²¹⁰ demonstrates. In this case there was no evidence which showed that the taxpayer had issued a notice of intention to appeal; the appellant appealed directly to the TRAB. Therefore the appeal was inadmissible.

Payment of appeal fee

Any person who wants to appeal to the Tax Revenue Appeal Board is required to pay the prescribed fee. If this condition is not met, the appeal is inadmissible. In *British Airways v Commissioner General* there was no evidence of payment of the prescribed fee for lodging an appeal.

4.5.6 Appeal to the Tax Revenue Appeal Tribunal

If a taxpayer feels aggrieved by the decision of the Tax Revenue Appeal Board, he or she is entitled to appeal to the Tax Revenue Appeal Tribunal (TRAT). The conditions for lodging an appeal are set out below.

Conditions for appeal to the Tax Revenue Appeal Tribunal

a) **The appeal should be submitted timely**

Any person who feels aggrieved by the decision of the Tax Revenue Appeal Board is required to appeal to the Tax Revenue Appeal Tribunal within 30 days from the date of the TRAB's

²¹⁰ *British Airways v Commissioner General* (2004) 1 TTLR 39.

decision. Any appeal which is time-barred will not be heard by the Tax Revenue Appeal Tribunal.²¹¹

In some cases, the appellant may submit the notice of intention to appeal timely but may fail to submit the statement of the appeal within a required time; in such a case the appeal will be inadmissible. In *Commissioner General v Messrs Pamba Industries Co Ltd*²¹² the appellant (Commissioner General) submitted a notice of intention to appeal to the TRAT timely, but failed to submit the statement of appeal on time. Hence during hearing the respondent (the taxpayer) raised an objection against the Commissioner's delay. It was decided that the appeal was inadmissible and the appellant was ordered to pay all costs associated with running the case. There is a possibility to extend the time to appeal to the Tax Revenue Appeal Tribunal if the appellant shows satisfactory grounds to the TRAT.

b) Notice of intention to appeal

A person who appeals to the TRAT is required to file a notice of intention within fifteen days from the date of the TRAT's decision in respect of which the appeal is intended to be made.²¹³

A copy of the notice of intention should be sent to all parties involved in the appeal. A notice of the intention to appeal is like a whistle which allows the commencement of the appeal procedures. However, a taxpayer may decide at any time to cancel the appeal process if he or she wants to.

Sending a copy to the other party to the appeal is among the criteria mentioned in the Tax Revenue Appeal Tribunal Rules 2001. However, in some cases not sending a copy to the other party of appeal does not invalidate the appeal. An example is *Engen Petroleum (T) Ltd v Commissioner General*.²¹⁴ In this case the appellant taxpayer failed to provide a copy of the notice of intention to appeal to the respondent Commissioner General. During the hearing by the TRAT, the respondent objected to the failure to receive a copy of the notice of intention, and requested the chairman of the TRAT to nullify the appeal. However, the objection was overruled

²¹¹ Tax Revenue Appeal Act 2000, section 16 (4).

²¹² *Commissioner General v Messrs Pamba Industries Co Ltd* (2002) 1 TTLR 52.

²¹³ Tax Revenue Appeal Tribunal Rules 2001, rule 4.

²¹⁴ *Engen Petroleum (T) Ltd v Commissioner General* (2004) 1 TTLR.

on the grounds that serving a copy of appeal to the other party is not fatal to the appeal. The registrar of the TRAT is also obliged to serve the respondent with a copy of the notice. Almost the same decision was made by the TRAT in *Rupesh Enterprises Ltd v Commissioner General*.²¹⁵ In this case the TRAT ruled that the requirement to serve a copy of the notice of intention to appeal to the respondent was mandatory according to the law. However, in this case the TRAT considered such failure not to be fatal and ordered the TRAB to admit the appeal and to decide on it.

4.5.7 Legal aid and court fees

a) Legal aid

In Tanzania, in practice and in law, the government does not provide legal assistance for civil cases. Legal aid is available only in respect of criminal cases which might, upon conviction result in high punishment for an accused, like a death sentence. However, recently, the Parliament enacted the Legal Aid Act 2017. Thus currently, legal aid may be given to a citizen even in civil proceeding if a presiding judge believes that the citizen has insufficient mean to run the case and the legal aid will influence the justice. Section 27 of the legal aid Act explains

“Where in any civil proceedings it appears to the presiding judge or magistrate that

(a) in the interests of justice a person should have legal aid; and

(b) such person has in sufficient means to enable him to obtain the legal services”

Tax cases are not excluded from the enjoyment of the legal aid if the earlier mentioned criteria exist. Section 27 of the Legal Aid Act explains

*...the presiding judge, a magistrate, adjudicatory body or a chairman of the land, labour or tax tribunal and any other tribunal as the Minister may by order published in the Gazette determine, shall cause such person to obtain legal aid.”*²¹⁶

²¹⁵ *Rupesh Enterprises Ltd v Commissioner General*, 2006.

²¹⁶ Legal Aid Act 2017, section 27.

b) **Court fee**

In Tanzania, payment of a court fee is among the criteria for access the justice. Whether it is a criminal or civil case, any person who files a case is supposed to pay court fees. For tax cases, for example, the non-payment of a court fee may render the appeal inadmissible. Rule 8 of the Tax Revenue Appeal Board states that:

(3) No appeal shall be entertained by the Board if it appears to it that the appropriate fee has not been paid by the appellant.”

A similar situation exists if a taxpayer intends to appeal to the Tax Revenue Appeal Tribunal. Rule 7 of the Tax Revenue Appeal Tribunal provides that

(2) The Tribunal shall not entertain any appeal where the appropriate fees prescribed in the Second Schedule to these Rules have not been paid.”

Generally, a court fee has been and is deemed to be among factors that hinder access to justice.²¹⁷ Tanzania is among countries that are considered to have high court fees: a report filed by David Louis Finnegan (2004)²¹⁸ concerning the judicial reforms and commercial justice in Tanzania showed that court fees in Tanzania are very high, especially for commercial courts. There is no ceiling for the court fee. Similar criticism was raised by Hon. Mr. Justice Robert V. Makaramba,²¹⁹ who regards the litigation fee as one of the challenges for the access to justice. He compared the Tanzanian system unfavourably with the Kenyan system. Kenya's Constitution requires the government to ensure the justice to all Kenyans and, if any fee is required, it should be reasonable; it should not impede access to justice. In Tanzania, however, there is no such guidance from any law concerning the court fee.

²¹⁷ Colin Campbell, 'Access to Justice in Income Tax Appeals', *University of New Brunswick Law Journal*, Vol. 63, 2012, pp. 445-458.

²¹⁸ The report may be accessed through http://siteresources.worldbank.org/INTWDR2005/Resources/finnegan_judicial_reform.pdf, last visited 3 September 2019.

²¹⁹ Judge-in-Charge, Commercial Division of the High Court of Tanzania. Report may be accessed through <http://www.comcourt.go.tz/comcourt/wp-content/uploads/2013/08/The-Practical-and-Legal-Challenges-of-Justice-Delivery-in-Tanzania-Experience-from-the-Bench.pdf>, last visited 4 September 2019.

4.5.8 Appeal proceedings at the Tax Revenue Appeal Board and Tax Revenue Appeal Tribunal

Proceedings of tax cases at the TRAB and TRAT are of a judicial nature. Cases are conducted at a place and moment as directed by the chairman of TRAB or TRAT, and, unless directed otherwise by the chairperson, are always conducted in public. Decisions of the TRAB or TRAT on any tax matter are determined by a majority of votes of the members present at the proceedings. Even though the Appeal Act requires the tax appeal hearing to be in public, in practice the concept of 'public' in TRAB practice is contrary to the meaning of public as applied in ordinary courts. At the TRAB cases, all persons attending the case must be known in advance. In normal circumstances these persons are always parties to the appeal and the members of the TRAB or TRAT. If it happens that there is any party to an appeal who intends to come with or bring any other person, he is required to inform beforehand the chairman of the TRAB or the TRAT.

During the proceedings before the TRAB or the TRAT, an appellant may appear in person or may be represented by a person registered as a Tax Consultant, accountant, auditor or advocate.²²⁰

The TRAB or TRAT may summon any person who has information that will help the TRAB or TRAT to decide on the case presented before it. Therefore, when a person is served with summons to appear before the TRAB or TRAT, but fails to comply with such summons without reasonable excuses, he commits an offence. Sometimes when a person is served with summons to appear before the TRAB or the TRAT but fails to appear, the TRAB or the TRAT may issue a warrant of arrest which will specify time, date and place where such person should be brought before the TRAB or the TRAT.²²¹

Hearing

The hearing is always in public unless provided otherwise by the chairman upon a request from the party to the appeal. The secretary of the TRAB or the registrar of the TRAT sends a notice

²²⁰ Tax Revenue Appeal Board Rules 2001, rule 12.

²²¹ Ibid.

to the parties to the appeal, notifying them about the time and place of the hearing. Appeal parties are normally informed about the hearing place and time fourteen days before the event.²²²

The general mode of hearing of a tax case at the TRAB or TRAT is similar to that in other courts. However, the TRAT or TRAB is empowered to use mediation,²²³ conciliation, or arbitration²²⁴ in solving tax disputes. The TRAB or TRAT cannot use the arbitration or mediation system in solving a dispute unless both parties to the case agree with the system. If the TRAB or the TRAT decides to use the mediation system for solving disputes, the formal procedures of mediation, conciliation or arbitration as provided by the Civil Procedure Code 1966 and the Arbitration Ordinance are not applied.²²⁵ Among the arbitration rules which are not applicable in tax cases is the rule of appointment of an arbitrator. Normally, the Civil Procedure Code requires parties to the case to participate in appointing the arbitrator who will resolve the case.²²⁶ That is not the case in tax cases; neither the appellant nor the respondent is given a chance to appoint the arbitrator.

When the present writer asked the secretary of TRAB about the timing and the circumstances that induce the use of the mediation system of solving disputes, he indicated that he was proud of the system and said that the TRAB has been using the system several times. It solves tax disputes within a very short time. He explained that through mediation there is no very formal way of judging a case as in ordinary courts. Sometimes the system gives the possibility of ignoring some procedures which could otherwise invalidate the hearing in ordinary courts had these procedures not been observed. According to the secretary of the TRAB, the use of mediation, conciliation, or arbitration does not mean that the tax law will not rule; the tax laws remain the main guidance for judgement. However, the handling of the case takes place in a less formal manner than it would in the setting in which courts normally operates. Normally the

²²² Ibid., rule 10.

²²³ Attempt to reconcile disputed matters arising between states, especially by the friendly intervention of a neutral power.

²²⁴ The hearing and determination of a dispute by an impartial referee agreed to by both parties.

²²⁵ Tax Revenue Appeal Rules 2001, rule 15 (10).

²²⁶ Civil Procedure Code, 1966, Second Schedule, paragraph 2.

power to mediate is exercised if parties to the appeal apply for it, but may also be used based on the discretion of the chairperson.²²⁷

Evidence

Just like in a court, the TRAB or the TRAT may take evidence on oath. A person who appeals has to notify the TRAB or the TRAT about documents, and other information he intends to use as evidence. The appellant may not produce any evidence other than the evidence which was previously submitted to the Commissioner General in the notice of objection.²²⁸

Evidence before the TRAB or the TRAT may be given orally or through affidavit. Evidence may also be provided in any manner instructed by the TRAB or TRAT. However, in the proceedings, the TRAB or the TRAT is not bound to follow strict rules or practice of submitting or receiving evidence; any means that would be deemed ideal for the TRAB or the TRAT to be informed in relation to any matter may be used.²²⁹

Burden of proof

Burden of proof is a legal term which can be defined as an obligation on a party in dispute to provide sufficient evidence to prove or disapprove a disputed fact.²³⁰

During the hearing at the TRAB, the appellant is required to state the grounds of his appeal and to support them by any relevant evidence, since the onus of proof lies on the appellant, who is required to prove that the revenue authority has not acted according to the law. Section 18 of the Tax Appeal Act provides that:

²²⁷ Sometimes it happens that taxpayers use the appeal right as a technique to prolong time to pay the required tax; the appeal technique is used because in practice, appeals take long time from the time the file is complete to the time the case is judged. Therefore, a taxpayer may take advantage of time spent in the case; when the tax case is decided the taxpayer might already have spent the tax arrears to generate more profit. In Tanzania, currently, a taxpayer is not obliged to pay interest on the amount of outstanding tax during the time of appeal. In this situation, sometimes the Chairman may encourage mediation especially when there is huge amount of tax in dispute.

²²⁸ Tax Revenue Appeal Board, rule 15 (4).

²²⁹ Tax Revenue Appeal Act 2000, section 22.

²³⁰ <http://legal-dictionary.thefreedictionary.com/burden+of+proof>, last visited 2 September 2019.

“2) In every proceedings before the Board and before the Tribunal-

The onus of proving that the assessment or decision in respect of which an appeal is preferred is excessive or erroneous shall be on the appellant.”

Generally, the taxpayer is the appellant at the TRAB. Experience from other jurisdictions shows that the burden of proof can be split between a taxpayer and a tax administration.²³¹ This depends on who can most easily obtain information on a certain fact; or on who is making the claim that affects another party.²³² In the USA for example, if the IRS is accusing taxpayer of fraudulent activities, the IRS must prove it.²³³ In South Africa, the burden of proof depends on what the proceedings concern; if they are about the imposition of a penalty, the tax authority bears the burden of proof of the validity and of the correctness of the amount of the penalty imposed.²³⁴

It is submitted that it is a very biased policy to impose the obligation of proof on taxpayers alone. It may in one way or another create severe problems; it may encourage carelessness on the part of tax officers in assessing taxpayers. Tax officers may over-assess taxpayers knowing that the TRA will not have to prove the charge is justified. Lessons should be drawn from other countries which have best practice on this matter: the UK²³⁵ and The Netherlands²³⁶ are examples where the burden of proof may be on taxpayer or tax authority. It depends on the type of question involved.

²³¹ General report EATLP Conference 2-4 June 2011, Uppsala Sweden.

²³² Ibid.

²³³ Paul J Lee, ‘Don't Let Burden of Proof Shift to the Taxpayer’, *International Journal of Business and Social Science*, Vol. 3, 2012, pp. 237-242.

²³⁴ Beric Croome, ‘The question of burden of proof in tax disputes, Tax bites Business day’, *Business Law and Tax Review*, July 2016.

²³⁵ As to discussion about the burden of proof in the UK, see part 7.4.7.3 of this book.

²³⁶

http://www.belastingdienst.nl/wps/wcm/connect/bldcontenten/standaard_functies/individuals/contact/you_do_not_agree/burden_of_proof/burden_of_proof, last visited 2 September 2019.

4.5.9 Enforcement of the decisions of the Board or Tribunal

Any decree or order of the TRAB or the TRAT issued while exercising the duty of dispute resolution is enforceable and executed as if it were a decree or an order issued by a court of law.²³⁷ However, the nature and power of decisions of the TRAB or the TRAT are different from that of a court. A criminal court may decide to imprison an accused person who is convicted, or may set him free. The latter is certainly the case if the court is satisfied that the accused is innocent. A court also has the power to release or refuse to release an accused on bail or to keep an accused in police custody. Such powers are not available to the TRAB or the TRAT.²³⁸ The only power that seems to strengthen the TRAB or the TRAT is the power to issue a warrant of arrest.²³⁹ This power is vested in the TRAB or the TRAT if a taxpayer or any other person is summoned but without any reasonable excuse refuses to appear. The power to issue the warrant of arrest is however not sufficient compared with the responsibilities the TRAB or the TRAT has. There is no further explanation of what will happen after the arrest.

Decisions of the TRAB seem to have features of not complying with the rule of law (sham justice). An example can be seen in *Tanga Petroleum Company Ltd v Commissioner General*.²⁴⁰ The taxpayer complained about the actions of the Commissioner General who continued to collect the disputed tax although the TRAB had already ruled to the contrary. In normal situations, any party of to appeal who feels aggrieved by the decision of the TRAB is required to appeal to the TRAT. However, in this case the Commissioner General did not follow that procedure. The Commissioner General was summoned to appear for a hearing before the TRAB so that the issue could be settled, but he failed to file a reply and he was not arrested. By that time he had already appointed a private company to execute distress against the taxpayer's trading goods. The decision of the Commissioner General to act against the judgement of the TRAB was sham justice to say the least.

²³⁷ Tax Revenue Appeal Act 2000, section 24.

²³⁸ Tax cases which are of a criminal nature are required to be sent to ordinary courts; from these ordinary courts then if taxpayer is found guilty he will be sentences to prison or fined as the case may be. Neither the Board nor Tribunal has the power to settle any tax cases which have criminal aspects.

²³⁹ Tax Revenue Appeal Act 2000, section 17.

²⁴⁰ *Tanga Petroleum Company Ltd v Commissioner General*, 2008.

4.5.10 Conclusion

This part contributes to answering the question how domestic law protects taxpayers' rights. On the side of the tax appeal mechanism, since 1973, the Tanzania taxpayers have the right to appeal against any decision of the revenue authority. However, there are some weaknesses. For example the above review reveals that a taxpayer is given very limited access to justice. A taxpayer cannot appeal directly to the TRAB without objecting to the TRA beforehand. Similarly, a taxpayer cannot appeal to the TRAT without appealing to the TRAB beforehand. Taxpayers should be allowed to appeal where they believe justice will be sufficiently obtained. This should happen when the taxpayer and TRA fail to resolve matters beforehand.

Likewise, the taxpayer does not have the right or opportunity of review of assessment. Once the TRA has made its decision, the taxpayer has to agree with it or object to it. The decision to object however requires the taxpayer to pay a tax deposit.

There also seems to be a doubt as to the independence of the appeal organs. The TRAT, TRAB and TRA are closely related. They all report to the same minister (the Minister of Finance). This structure may influence the belief that tax justice may not be obtained; it symbolizes the weak protection of taxpayers' rights. The TRAB or the TRAT may practically intend to protect taxpayers' rights. However, based on the existing structure, the TRAB and TRA seem to be affiliated to the assessment against which the appeal is lodged. It may then be said that TRA, TRAB or the TRAT become judges in their own case. The prevailing relationship between TRAB or the TRAT and TRA does not guarantee impartial decisions.

The tax appeal system imposes the burden of proof on taxpayers only (at least at the TRAB). This is not a good approach in my view. The onus of proof should depend on the type of case concerned. If the case is about the amount of penalty imposed, the tax authority should be obliged to prove the correctness of the figure. On the side of the legal aid to taxpayers, the conclusion is that corporate taxpayers do not have the right to legal aid.

4.6 Analysis of taxpayers' rights

4.6.1 Introduction

This part analyses the promotion of taxpayers' rights in Tanzania. The analysis is based on the taxpayers' rights which can be invoked before the courts and those which cannot be invoked before the courts (principles), but which a taxpayer is entitled to enjoy.²⁴¹ The analysis evaluates the position of a corporate taxpayer enjoying taxpayers' rights; rights that are promoted in the Constitution of Tanzania, and that are promoted by other domestic laws are thus described and analysed. The analysis explains in practice how the Tanzania Revenue Authority (TRA) applies the taxpayers' rights to taxpayers.

4.6.2 Tax must be imposed by law

Tanzania has succeeded in imposing tax through legislation. All taxes that are imposed on and collected from the citizens are defined in Acts passed by Parliament. Hence citizens are protected from arbitrarily paying tax. Even though the Tanzanian citizens are protected from arbitrarily paying tax, the power to levy tax on citizens is however not sufficiently elaborated in the Tanzania Constitution of 1977. Prior to 1984, there was no article in the constitution which explicitly stated and clarified the power to levy tax. However, this weakness has been remedied by the 1984 amendments which empowered the Parliament to tax citizens. Article 138 of the Constitution prohibits tax from being collected from citizens unless Parliament has approved the imposition of such tax, normally by means of a law. Article 138 of the Constitution provides that:

“No tax of any kind shall be imposed save in accordance with a law enacted by Parliament or pursuant to a procedure lawfully prescribed and having the force of law by virtue of a law enacted by Parliament.”

At first sight it appears that the power to levy tax lies fully in the Parliament's hand, but that is not always the case. The Constitution restricts Parliament to imposing or amending tax.

²⁴¹ An example of a right which cannot be invoked before court is the simplicity right: this means that tax laws and procedures should be written in simple and understandable language. The simplicity right is however not easy to measure, because the degree of understanding varies among taxpayers.

Parliament cannot discuss the reduction, increase or the imposition of a tax unless the President of the United Republic of Tanzania has proposed the imposition or amendment of the tax to Parliament by presenting a bill. Article 99 of the Constitution states that:

“The National Assembly shall not deal with any of the matters to which this Article relates except if the President has proposed that the matter be dealt with by the National Assembly and the proposal has been submitted to the National Assembly by a Minister.

The matters to which this Article relates are the following:

(a) A Bill to enact a law providing for any of the following -

(i) to levy a tax or to alter taxation otherwise than by reduction...”

This may be a common system in most of African states. Governments (executives) may possess huge powers over the Parliament.²⁴² However, when Parliament lacks the authority even to discuss tax matters or abolition of certain taxes in the absence of a Bill, even if those taxes have been found to be bad to the community, this is a sign of a weak Parliament or a weak rule of law. The former might endanger the status and position of Parliament in protecting the citizens' interests.²⁴³ In Tanzania therefore, it is not easy to conclude directly that the power to levy tax lies with Parliament alone.

In practice, Parliament may sometimes delegate its power to levy tax to the executive. When doing that, the Parliament is seen to have full trust in the executive; it does not even monitor how effectively the executive has implemented the delegated power. This is frequently the case when a tax law empowers the Commissioner General of the TRA to interpret tax law by issuing practice notes.²⁴⁴ Practice notes may in practice remit an amount of tax or penalty that has earlier been imposed by the Parliament through the law, especially during the assessment of tax or

²⁴² Lia Nijzink, Shaheen Mozaffar and Elisabete Azevedo, 'Can Parliaments Enhance the Quality of Democracy on the African Continent? An analysis of Institutional capacity and Public Perception', University of Cape Town, Centre for Social Science Research, Working Paper, No. 160, 2006, p. 8.

²⁴³ Ibid.

²⁴⁴ Tax Administration Act 2015, section 9.

during an appeal (objection) made to the Commissioner General. The question that remains; what if the Commissioners' interpretation is against the intention of Parliament? While practice notes are in principle very useful instruments which may speed up the application of the law, the power to issue them may sometimes be abused by executive. It is submitted that there should be a parliamentary committee to screen the process of making practice notes. Such a committee could ensure that the intention of Parliament is respected in the practice notes issued. The Constitution has not set a limit to most of the powers vested in the executive. There are several powers given to the executive which seem to have no limit. For example, neither the Constitution nor the tax law explains the manner and circumstances under which the Commissioner General may use his or her power to issue the practice notes.

In general it is very uncertain to leave the power to levy tax under the discretion of the executive. In this context, the executive is represented by the Commissioner General or Minister of Finance. For example, in 1983, Mwalim Nyerere, the then President of the United Republic of Tanzania announced in his New Year's speech that a new tax would be levied from citizens. The new tax would be collected prior to authorisation by Parliament;²⁴⁵ and was indeed levied and collected from citizens before the authorisation by Parliament. Six months after the implementation of the President's directive, the government sent the Bill for the tax to Parliament at least to comply with the formalities of making law. Despite the illegal nature of the tax, citizens paid the tax announced by the president, without apparent complaint.

Taxpayers are entitled to clear and valid tax laws.²⁴⁶ History well demonstrates the impact of imposing tax on citizens without their consent; the imposition of tax in America by the British Government without reference to any American legislature was one of the causes of the American Revolution during the last half of the 18th century.²⁴⁷

²⁴⁵ Helen Kijo-Bisimba and Chris P Maina, *Justice and Rule of Law in Tanzania*, Dar es Salaam, Tanzania: Legal and Human Rights Centre 2005, p. 10.

²⁴⁶ Daniel Deak, 'Right to Right Tax Law', *Intertax*, Vol. 28, 2000.

²⁴⁷ Duncan Bentley, *Taxpayers' Rights: Theory, Origin and Implementation*, Kluwer Law International, Netherlands 2007, p. 216.

4.6.3 Right to pay no more than the correct amount of tax

The right to pay no more than the correct amount of tax is a taxpayers' right which focuses on the determination of the correct taxable income. This right requires that taxpayers must pay the amount of tax as stated in the law. If a taxpayer pays more than he was obliged to pay, he must be refunded the amount of overpaid tax. Likewise if a taxpayer is entitled to any tax relief or deductions, he must be given the relief or deduction.²⁴⁸

Generally, the right to pay no more than the correct amount of tax is implicitly respected by almost every tax authority through a system of tax refunds. However, in most of Constitutions, legislations and taxpayers' charters this right is not explicitly stated. It is quite possible that tax authorities and even taxpayers are exercising this right without knowing that what they are practising is one of the taxpayers' rights. The right to pay the correct amount of tax goes hand-in-hand with the certainty right. A tax law is required to be certain and clear to understand, especially on the procedures to determine the taxable income. If the tax law fails to define and to locate the tax base, then it will not be easy for a taxpayer to know and calculate the correct amount of tax. A taxpayer should be allowed to seek clarification on the application of the law in a particular transaction or arrangement if the tax law is uncertain.²⁴⁹

Tax law is expected to provide a clear description of the items which constitute taxable income. If the tax law is not clear, there will be an increasing number of cases taken to court to clarify the tax law. It is obvious that the more that cases that are taken to court to seek interpretation of a particular article of the law, the plainer the signal is that the particular article is not clear.

In Tanzania, specifically with respect to corporate tax, the provisions of the Act which deal with the tax object are reasonably clear. Sections 8 and 9 provide a list of items and transactions which qualify as business income and investment income of a company. These sections exclusively mention criteria for income that qualifies to be taxed. Any transaction or income not covered by

²⁴⁸ Jeffrey Owens, 'Taxpayers Rights and Obligations', *Intertax*, 1990, pp. 554-569.

²⁴⁹ Yehonatan Givati, 'Resolving Legal Uncertainty: The Unfulfilled Promise of Advance Tax Rulings', *Virginia Tax Review*, 2009.

the above sections is therefore not subject to tax, even though there can always be a discussion about the scope of the criteria and the exact interpretation of the law concerning taxable income.

The system of defining every aspect or item of income sometimes is problematic. The main problem will be the manner in which the tax law will accommodate economic and technological changes. The world is changing very fast. The technological and business innovation is very high. Thus, it is possible for companies to change business techniques by converting their money from real and tangible money to any other forms of assets or gain that might not be envisioned by the tax laws.²⁵⁰

Even though the Income Tax Act 2004 has to a certain degree defined and listed exclusively items to be included in the taxable income, there are some procedures introduced in the Act that may infringe the right to pay no more than the correct amount of tax. For example, Tanzania introduced the self-assessment system. In this system, taxpayers, especially companies, are required to file the return of income and assess their tax liabilities on their own. Companies may also decide to pay tax in instalments. One of the requirements of paying tax in instalments is that a taxpayer submits the statement of estimated tax, the annual amount of tax payable in a year of income. The statement of estimated tax is required to be submitted not later than the date of paying the first instalment.²⁵¹ Thereafter, a company is required to submit the return of income within six months after the end of the year of income (taxing year). A problem arises when the amount of tax estimated by the taxpayer (at the start of the taxing year) is found to be less than 80% of the actual amount of tax which is supposed to be paid (at the end of the taxing year). In this case the taxpayer will be punished for underestimation of the payable tax. The taxpayer will then be required to pay interest compounded monthly for a period of not less than fifteen months.²⁵²

²⁵⁰ Daniel Deak, 'Right to Right Tax Law', *Intertax*, Vol. 28, 2000.

²⁵¹ Practically, it is a third month from the start of the accounting period. See section 89 (1) (b) Income Tax Act 2004.

²⁵² Tax Administration Act 2015, section 75.

On the one hand payment of interest for underestimation can be considered as a technique to minimize avoidance and evasion of tax and to encourage voluntary tax compliance,²⁵³ but on the other hand the question arises about the right of the taxpayers to pay no more than the correct amount? Paying interest (the rate is set by the central bank of Tanzania) for underestimation may infringe the right of taxpayers to pay no more than a correct amount of tax especially if the tax estimate was made by the Commissioner instead of the taxpayer himself. Practically, if a taxpayer failed to file the statement of estimate, the Commissioner General may make an estimate on behalf of the taxpayer. If that amount estimated by the Commissioner General turns out to be less than 80% of the actual amount of income realized at the end of the year of income, the taxpayer will have to pay interest for underestimation, despite the fact that the underestimation was made by the Commissioner General.²⁵⁴

Another challenge that faces the right to pay no more than the actual amount of tax due is where the Commissioner General exercises his power of assessing a taxpayer by using his best judgment. This occurs mostly in the Importation Tax where the TRA may uplift the price of imported goods without reasonable grounds. A taxpayer may submit valid documents which show the actual price of an item; that price might not have been influenced by any relationship between seller and buyer, but the TRA may nevertheless uplift the value basis to the so-called market value. If such situation happens, the taxpayer will have no option but to pay what is demanded by the Commissioner. Even if such taxpayer decides to appeal to the TRAB the main condition will be to pay the tax prior to his appeal.

The issue of assessing taxpayers based on the best judgment was central to *Jumbo mills (T) Ltd v Commissioner General*.²⁵⁵ The taxpayer raised several complaints concerning the decision of the Commissioner General to count a stock of raw wheat by using a mathematical formula. The taxpayer complained that the Commissioner General did not count correctly the bags which

²⁵³ Margaret A Mc Kerchar & Chris Evans, 'Sustaining Growth in Developing Economies Through Improved Taxpayer Compliance: Challenges for Policy Makers and Revenue Authorities' (May 27, 2009). UNSW Law Research Paper No. 2009-17. Available at SSRN: <https://ssrn.com/abstract=1415164> or <http://dx.doi.org/10.2139/ssrn.1415164>, last visited 3 September 2019.

²⁵⁴ Income Tax Act 2004, section 89 (8).

²⁵⁵ *Jumbo Mills (T) Ltd v Commissioner General* (2003) 2 TTLR 12.

contained the raw wheat, using instead the length, width and height estimation method. According to the taxpayer those counting techniques led to the incorrect amount of stock being calculated, and therefore to an incorrect determination of the tax payable. It might sound awkward for scientists to hear someone complain about the use of scientific calculation or estimation during the computation of the huge amount of stock of bags of wheat. However, when it comes to the issue of determining the correct amount of stock nothing should be considered strange. A minor error in the calculation of the amount of the stock may result in an incorrect taxable income.

Moreover, the issue of a proper determination of the taxable value was questioned in *Securicor (T) Ltd v Commissioner General*.²⁵⁶ In this case, the Commissioner General picked randomly from the stock of taxable goods a few goods as a sample to determine the taxable value of the complete stock. According to the taxpayer, the sampling technique was incomprehensive, and different types of goods in the stock were left unrepresented in the value determination. Therefore the method used to assess the taxpayer resulted to the taxpayer having to pay more tax than he was obliged to pay by law.

The right to pay no more than what is required by law could be highly facilitated by the tax authorities. In appropriate circumstances, tax authorities could optimize this right by informing taxpayers about their tax relief and deductions; especially when taxpayers are not aware of them. The right to pay no more than what is stipulated in the law does not stop a taxpayer from reducing his tax liability by using legitimate tax planning techniques.²⁵⁷

4.6.4 The right to be informed, assisted and heard

Administratively, a taxpayer has a right to be informed about the operation of the tax system and the way how his tax liability is determined. Taxpayers also need information that would help them to solve their disputes where they are not satisfied with the decisions of the revenue

²⁵⁶ *Securicor (T) Ltd v Commissioner General*, 2008.

²⁵⁷ OECD, *Taxpayers' rights and Obligations* (GAP002). Accessed through http://www.oecd.org/tax/administration/Taxpayers'_Rights_and_Obligations-Practice_Note.pdf, last visited 3 September 2019.

authorities. The details of the clarification of the right to be informed, assisted and heard are discussed below.

4.6.4.1 The right to be informed

The right of information is derived from the 1977 Constitution. Article 18 of the Constitution grants every Tanzanian the right to seek information and right to be informed. The Constitution provides that:

“Every person-

b) Has out right to seek, receive and, or disseminate information

regardless of national boundaries;”

In the same article, the Constitution grants Tanzanians an automatic right to be informed without seeking the information. The constitution states that:

“Every person-

has a right to be informed at all times of various important events of life and activities of the people and also of issues of importance to the society.”

The above article grants rights to Tanzanians to be informed concerning important issues; no one can deny that tax is among those issues. Taxpayers therefore are supposed to be informed everything concerning their tax affairs. Similarly, section 26 of the Tax Administration Act 2015 provides that taxpayer shall be informed regarding his tax position. It explains:

“The authority shall provide to the taxpayer information regarding to the taxpayer's position in accordance with the provision with respective tax law.”

The right to be informed will always help reducing grievances that may arise between taxpayers and the tax authorities if it is properly honoured. At the same time if the taxpayer is assisted in his tax queries or problems his trust in the tax authority will automatically increase.²⁵⁸

²⁵⁸ <http://www.oecd.org/tax/administration/39003880.pdf>, last visited 3 September 2019.

In practice the TRA informs taxpayers in a manner it thinks fit. It informs taxpayers through public notices issued through media and also through internet, TV and radio programmes. However, TV and radio programmes are more about education than information.

There is no law currently that governs the access of information. The taxpayer cannot enforce the right of information based on the section 26 of the Tax Administration Act 2015. This is because this section is very general; it has not laid down the manner and modalities of requesting information, nor has the obligation on the TRA to inform the taxpayer been clearly imposed.

4.6.4.2 The right to be assisted

The right to be assisted is the right of taxpayers which is largely experienced when there is a hardship of understanding tax laws and procedures. This right is closely linked to the right to be informed; because being timely and correctly informed is among the crucial elements of assistance. Nevertheless, the right to be assisted can be demonstrated by the existence of the following features:

a) Availability of a timely and correct response to the taxpayer's request

When a taxpayer makes a request in any tax matter, he should be answered timely. The request may be made in writing or orally. The response to the request is expected to be in similar form and manner to that in which the request was made. For example: if the request was made by telephone, the response should be by telephone as well.

b) Availability of different tools that can accommodate various taxpayers irrespective of their physical ability

The availability of tools and equipment for the handling of taxpayers (or their representatives) with special needs is an indication of assistance to taxpayers, in particular the availability of tools and equipment for the handling of the affairs of disabled taxpayers. The existence of equipments or tools that ease visual or audio communication between taxpayers and tax officers symbolizes the assistance to taxpayers; likewise, the building structures should be convenient to all taxpayers.

4.6.4.3 The right to be heard

The right to be heard is a taxpayers' right which requires a taxpayer to be given an opportunity to explain and respond on matters raised or to be raised by the revenue authority. The right to be heard is mostly required when a taxpayer is accused of any offence, or when there is misunderstanding between a taxpayer and the tax authority. In this situation, the tax authority is expected to give a chance to the taxpayer to explain and clarify any matters which, according to tax the authority, are not clearly explained. This requires the tax authority to act closely with taxpayers. No decision, which directly affects taxpayers, should be taken without hearing the explanation and the defence of the taxpayers.

Practically, taxpayers have access to present their views before the TRA. However, this right, similar to the right of appeal, is not effectively promoted. Taxpayers are not provided with sufficient options to present cases, nor do they have the right to present their matters before the Parliamentary body of Ombudsmen (at least as official procedures). The right to be heard is largely experienced in tax appeals to the TRAB or the TRAT.

Summary

In relation to the above three rights, (the right to be informed, assisted and heard) it can be concluded that in Tanzania taxpayers are informed and assisted. This is also seen in the programmes which are conducted by the Tanzania Revenue Authority. In informing taxpayers, the TRA uses radio programs in order to educate taxpayers on various issues concerning taxation.²⁵⁹ TRA sometimes also organises live TV programmes that inform taxpayers about different matters of taxation and answer any questions that may be asked by viewers. That is a good thing, but there is no legal guarantee of the answers provided by the tax officers on TV, radio or even during phone-calls. This means that a taxpayer cannot sue the TRA by relying on the answers provided in TV, radio or telephone conversations. The principle of legal expectation is thus not always maintained.

²⁵⁹ The radio programme is called “Elimu kwa mlipa kodi” which means *Education of a Taxpayer*. The programme is normally aired on every Wednesday on Radio One, and every Sunday on National Radio (Tanzania Broadcast Corporation).

The TRA has a special task force which normally conducts seminars, workshops and conferences to educate taxpayers in various tax issues. The TRA also publishes guidance notes and leaflets which explain about various taxes which are administered by the TRA for the purpose of educating taxpayers. From the above, it is clear that the TRA has improved its culture of informing and assisting taxpayers. This cultural change was necessary because there was a huge public outcry about the behaviour of the tax officers in treating taxpayers; as *Design Partnership Ltd v Commissioner General*²⁶⁰ shows; in this case the taxpayer failed to submit an appeal on time, and at the time of submitting the appeal he also submitted it at the wrong place. The failure to submit an appeal on time and at the right place was caused by a tax officer who refused to assist the taxpayer on the formalities and procedures of appeal. Another issue was reported in *M.R. Hotel Ltd v Commissioner General*.²⁶¹ In this case it was also observed that the tax office refused to assist the taxpayer; the taxpayer asked for information on how to lodge an appeal but the tax officers refused to help the taxpayer. It was observed that the taxpayer had even asked for the address of the Tax Revenue Appeal Board so that he could lodge his appeal, but the Revenue officers refused to give him the address. Finally, the taxpayer contacted the Court located in the Iringa region where he was given information about where and how to appeal.

4.6.5 The right to privacy and confidentiality

The right to privacy requires no unnecessary interference by the tax authorities in the personal life of taxpayers. Taxpayers' premises and documents need to be respected. On this aspect, taxpayers are more concerned about business secrets, lest they be leaked to their competitors.²⁶² Therefore, practically, tax administrations should have limited access to taxpayers' information. Tax authorities should not have the power to enter and search the taxpayers' premises without prior authorisation from a Court. The authorized search should also specify the types of information to be collected: the tax administration should not be entitled to go on a fishing expedition.

²⁶⁰ *Design Partnership Ltd v Commissioner General* (2003) 1 TTLR 133.

²⁶¹ *M.R. Hotels Ltd v Commissioner General* (2003) 2 TTLR 36.

²⁶² Jeffrey Owens, 'Taxpayers Rights and Obligations', *Intertax*, 1990, pp. 554-569.

Most human rights declarations and conventions include the right to privacy. In Tanzania the right of privacy is ensured within the Constitution. Article 16 of the 1977 Constitution of the United Republic of Tanzania provides that:

“Every person is entitled to respect and protection of his person, the privacy of his own person, his family and of his matrimonial life, and respect and protection of his residence and private communications.”

The Constitution has thus largely dealt with the right to privacy for natural persons. It seems companies need no privacy. That is why the emphasis has been on the protection of the family and matrimonial life.

In Tanzania, especially for tax purposes, privacy rights may easily be interfered with. For example, taxpayers are required to provide documents that are crucial in determining their taxable income to TRA. Taxpayers have to provide all necessary information to assist proper computation of tax. However, if they fail to provide information, the Tax Management Act 2015 empowers the Commissioner General and any other tax officer to enter into a building and to have full and free access thereafter to the building, documents or other assets. If the Commissioner General or tax officer needs a copy of the document, nothing can stop him from having it. The Commissioner General or any other tax officer may use such power during daytime (between 9 am to 6 pm) and is not obliged to issue a prior notice to the taxpayer.²⁶³ The Commissioner General may also enter into a taxpayer's premises anytime (whether by day or by night) provided that he has been allowed to do so by a search warrant issued by a lower court.²⁶⁴ Whether the Commissioner has entered the taxpayer premises through the consent of the Court or otherwise, the Commissioner is also empowered to extract or to make a copy of any document found in the taxpayers' premises.²⁶⁵

If the Commissioner General is granted power to enter a person's premises without prior notice, how can the taxpayer's privacy be secured? In fact, the power to enter into and to search the

²⁶³ Tax Administration Act 2015, section 42.

²⁶⁴ Ibid.

²⁶⁵ Ibid.

taxpayers' premises is a threat to the taxpayers' privacy. The Commissioner General may use the loophole existing in the law (of not protecting the taxpayers' privacy) to interfere with that privacy.

Another issue that may endanger the right to privacy is the process of collecting information from taxpayers. As explained above, taxpayers are obliged to provide information that will help the TRA in determining the correct tax liability. However, if the taxpayer fails to submit information to the TRA, the TRA has the mandate to look for such information that will help them to determine the correct taxable amount. During the collection of information, the techniques that are normally used by the TRA have an impact on the privacy of the taxpayers. Some of the techniques which are commonly used involve collecting the information through third parties like police, bankers and taxpayers' debtors. Sometimes information can be collected through the taxpayer himself by using search and seizure powers. Bentley states that collection of information does not require the provision of unlimited information. Tax authorities should only collect information that will assist them in determining the correct tax.²⁶⁶ Other information should not be considered. However, it is difficult to demarcate this issue. How will it be possible for a revenue authority to enter into a business premises and search it without accessing other documents which are not related to a business matter? How will a revenue officer know that the particular document is related to the determination of the taxable income? Actually, the power to enter, search and collect documents from a third party is among the main obstacles to having a right to privacy.

The need and importance of valid and correct information on determining the correct taxable income is, of course, understandable. Taxpayers are bound to submit that information to the tax administration. If a taxpayer fails to provide clear and sufficient information, the tax administration may search for it. However, the process of collecting information should not affect taxpayers' rights.²⁶⁷ There must be specific procedures that ensure a respect of taxpayers'

²⁶⁶ Duncan Bentley, *Taxpayers' Rights: Theory, Origin and Implementation*, Kluwer Law International, Netherlands 2007, p. 323.

²⁶⁷ Federico Aquilanti, 'Fundamental rights and tax inspections', *European Tax Studies*, Vol. 46, 2014, pp. 46-49.

rights:²⁶⁸ the inspection must be authorised by an independent body; the procedures should include the right of taxpayers to be informed prior inspection is conducted,²⁶⁹ and taxpayers should also be given the right to appeal if the inspection is not justified.²⁷⁰

Confidentiality

The right to confidentiality is promoted through section 21 of the Tax Administration Act 2015. The Act proclaims that

“A person who is or was employed or engaged by the Authority to provide assistance to the Authority shall treat all information and document, that by reason of his employment or engagement, came into possession or knowledge in connection with any tax law, as secret and confident.”

It is submitted that the way this right is promoted in the Act, is a mere promise to a taxpayer that his information will be safe. The section itself seems to be rather an administrative guideline to tax officers than a guarantee of taxpayers' rights. The Act has not provided detailed information concerning the assurance of confidentiality. The Act does not specify the type of information to be kept secret. Procedures that limit tax officers the access of taxpayers' information are not explained. Likewise, there is no exclusive obligation on the TRA to ensure the taxpayers' confidentiality during the exchange of taxpayers' information. Possibly those matters are provided for in tax treaties, but it would be a good practice to include them in the domestic law.

Currently the world focuses on transparency in taxation. Countries are in a rush to move from the exchange of information on request to an automatic exchange of information.²⁷¹ The rush has resulted in neglecting to pay reasonable attention to the taxpayers' rights.²⁷² The Tanzanian

²⁶⁸ Ibid.

²⁶⁹ Carlotta Armuzzi, 'Tax inspections: the balance between banking secrecy and protection of privacy', *European Tax Studies*, Vol. 40, 2014, pp. 40-45.

²⁷⁰ Ibid.

²⁷¹ Philip Baker, 'Privacy Rights in the Age of Transparency: A European Perspective', *Tax Notes International*, May 2016, pp. 583-583.

²⁷² Ibid.

Taxpayer faces similar problem. The right of confidentiality is not clearly promoted in the Tax Administration Act 2015. It is obvious that the Tanzania Revenue Authority may share taxpayers' information with other tax jurisdictions. However, the TRA is not currently obliged (by domestic law) to involve the taxpayer in any manner during the exchange of information. In practice, there is a possibility of breach the taxpayers' right of confidentiality during the exchange of taxpayers' information.²⁷³ It is respectfully submitted that it is high time that Tanzania increased attention for the protection of the taxpayers' confidentiality right. This should include amending the Tax administration Act to clearly limit the access to taxpayers' information; to impose the obligation on the TRA to consider taxpayers confidentiality before exchanging taxpayers' information, and, inform the taxpayer before the information is exchanged. Involving the taxpayer during information exchange has more benefits than harm; it symbolizes the rule of law.²⁷⁴ The involvement of the taxpayer in exchange of information may also help to prevent a mistake.²⁷⁵ The taxpayer may clarify matters if the information to be exchanged is not widely clear. Similarly, a taxpayer should be given a right to appeal where the disclosure of information may infringe his business' secrecy or may impair his rights of confidentiality.

4.6.6 The right to appeal

The right to appeal is among the fundamental rights in the operation of a tax system; it grants a taxpayer a right to challenge the legality of any action or decision of the tax authority.²⁷⁶ In most countries a right to appeal is preceded by a right of a review of the tax authority's decision. The review is a means to give a chance to the tax authority to confirm or amend its decisions. The review of the decisions and appeal are among the techniques of dispute resolution. Normally the review is a means of internal dispute resolution (within the tax authority) and appeal is a means

²⁷³ Niels Diepvens and Filip Debelva, 'The Evolution of the Exchange of Information in Direct Tax Matters: Taxpayers' Rights under Pressure', *EC Tax Review* 2015, pp. 211-219.

²⁷⁴ Luis Eduardo Schoueri & Mateus Calicchio Barbosa, 'Transparency: From Tax Secrecy to the simplicity and Reliability of the Tax System', *British Tax Review*, Vol. 5, 2013, pp. 666-681.

²⁷⁵ Niels Diepvens and Filip Debelva, loc. cit., fn 274 above.

²⁷⁶ Duncan Bentley, *Taxpayers' Rights: Theory, Origin and Implementation*, Kluwer Law International BV Netherlands 2007, p. 363.

of external dispute resolution. Access to the dispute resolution mechanism, either internal or external, plays a great role in tax justice.

The internal dispute mechanism (objection in the case of Tanzanian tax appeal procedures) is expected to be a sound, effective, and reliable mechanism. Sound in the sense of being known to every taxpayer and reliable in the sense of resolving tax disputes. A sound internal dispute resolution may reduce the number of cases taken to tax appeal tribunals, as cases will be resolved through the internal process. The main issue in considering the effectiveness of the appeal machinery is the need to have tax courts or tribunals composed of competent persons.²⁷⁷ Competent persons are expected to be effective in resolving tax disputes.²⁷⁸ Nevertheless, having an effective mechanism of dispute resolution is not enough by itself. The decisions issued by these tax courts or tribunals must also be reliable. Reliability should be measured by fair rulings made by the tax courts or tribunals, and their decisions should be binding on taxpayers and the tax authorities alike. The right to appeal must lie to independent courts or tribunals which then will judge fairly. The preferred independence does not necessarily mean that the executive should not appoint members or judges of the tribunals or courts respectively but the decisions of the tax courts or tribunals should not be influenced by the revenue authorities or by the government itself.²⁷⁹

In Tanzania the right of appeal is available to every aggrieved taxpayer to the Tax Revenue Appeal Board (TRAB), to the Tax Revenue Appeal Tribunal (TRAT) and beyond that to the Court of Appeal.²⁸⁰ The Tax Revenue Appeal Board (TRAB) is an immediate solution in any tax dispute that may arise between taxpayer and Tanzania Revenue Authority (TRA). If the taxpayer

²⁷⁷ <http://www.ncsl.org/documents/standcomm/sccomfc/Independent-Tax-Appeals-Tribunals.pdf>, last visited 30 December 2016.

²⁷⁸ Philip Baker, 'Should Article 6 ECHR (civil) Apply to Tax Proceedings?' *Intertax*, Vol. 29, 2001, pp. 205-211.

²⁷⁹ Duncan Bentley, *Taxpayers' Rights: Theory, Origin and Implementation*, Kluwer Law International BV Netherlands 2007, p. 367.

²⁸⁰ The Court of Appeal is the highest court in Tanzania. The Court has territorial jurisdiction over both mainland Tanzania and Zanzibar. <https://www.nyulawglobal.org/globalex/Tanzania.html>, last visited 3 September 2019.

is not satisfied, he will then Appeal to the TRAT. The challenge that exists in the provision of tax justice lies in the nature, structure and the relationship of the TRAB, the TRAT and the TRA.

Both the TRAB and the TRAT are under the supervision of the Ministry of Finance just like the Tanzania Revenue Authority itself. The Ministry of Finance in Tanzania has two Deputy-Permanent Secretaries, one for policy and resource mobilization, and another for the treasury service. The TRA, TRAB and TRAT all fall under the supervision of the first deputy Permanent Secretary.²⁸¹ In one way or another, this structure is questionable, particularly in relation to the independence and impartiality of the TRAB and the TRAT. To put the tax collection agent (TRA) and the appeal machineries (TRAB and TRAT) under the same government department may actually encourage these organs to work jointly against taxpayers. It would be fairer if the revenue agent (TRA) on the one hand and the appeal machineries on the other hand were to be supervised by separate bodies. The TRAB and the TRAT could better be brought under same organisation as the normal court system.

More or less any rational person can expect to see the task of the TRAB and the TRAT as solely to solve disputes and provide or maintain tax justice. However, this is not what has been explained on the official website of the government: there is nothing about tax justice, and these bodies are described as being established for the purpose of advising the Minister of Finance on matters concerning tax revenue appeal cases and implementing appropriate sanctions against tax offenders.²⁸² The basic functions of the Tax Revenue Appeal Board as explained on the government website are:

“(i) to advise the Minister on matters pertaining to tax revenue Appeal cases by taxpayers; and

(ii) Effort the settlement of tax disputes. (iii) Implement appropriate sanctions on tax offenders.”

²⁸¹ http://www.mof.go.tz/index.php?option=com_content&task=view&id=14&Itemid=28, last visited 3 September 2019.

²⁸² Ibid.

Therefore, if the tax dispute resolution organs are meant to implement sanctions against tax offenders it will be hard to see these bodies having a role in dispute resolution. Likewise, taxpayers will not trust TRAB or TRAT as bodies which aim to promote justice.

Another issue is the lack of access to pure justice. Pure justice needs at least a system that might give a taxpayer a possibility to access justice easily. The current tax appeal system does not provide a simple means of accessing justice. A taxpayer is bound to follow the appeal procedures starting with the Commissioner General of TRA, appeal to the TRAB and finally to TRAT. If the taxpayer still is not satisfied then he can appeal to the Court of Appeal. Among these organs, the Court of Appeal is the only organ which is independent and which is considered to be such. It is very unfortunate that a taxpayer can only gain access to this court when the court no longer considers the facts submitted in the case; it only deal with matters of law. Section 25 of the Tax Revenue Appeal Act 2000 provides that:

“Appeal to the Court of Appeal shall lie on matters involving questions of law only ...”

Therefore, taxpayers have only one chance to access an independent organ. Unfortunately, when they get the chance to access it, the facts will not be allowed to be presented.

The structure of the Tanzanian tax appeal system used to be similar to that of the UK, where the tax dispute resolution organs and HMRC were all under the supervision of the same ministry (Ministry of Finance). However, from 2007 in the UK the tribunal system has been changed. Now there is a first-tier tribunal and an upper-tier tribunal. The tribunals are under the supervision of the Ministry of Justice.

4.6.7 Conclusion

The result of this analysis of taxpayers' rights generally reveals that in Tanzania the Constitution gives the Parliament the power to levy tax with one hand and snatch the same right on the other hand. The government seems also to possess undue power and influence on levying tax on citizens. On several occasions, the government has used this weakness to impose tax on citizens which has not been even accepted by the Parliament.

As regards the right to pay no more than the correct amount of tax, it has been seen that some administrative powers vested in the Commissioner General may endanger this right. For example, the power of assessing taxpayers based on the best judgment is among the powers that may result in taxpayers paying an incorrect amount of tax. The taxpayers' rights to privacy and confidentiality are also not strongly protected. The Commissioner General may enter into a business premises sometimes without prior notice to the taxpayer. Similarly, there is neither a vivid guarantee of confidentiality, nor a clear remedy to taxpayers whose information has been leaked by the TRA.

In relation to the rights to be informed, heard and assisted, it has been shown that they are at least promoted by the revenue authority. Taxpayers are informed about tax matters, assisted upon request and given opportunity to present their views before the Commissioner General. However, the problem that exists in the exercise of these rights is the absence of policy or law that protects them. Revenue officers may assist a taxpayer through telephone or live TV programme but there is no legal guarantee of the answer of the revenue officer issued through any means of communication other than an official notice issued by the revenue authority.

4.7 Conclusion

This part provides a summary of the findings of the whole of Chapter Four. Generally it may be concluded that protecting taxpayers' right especially in third world countries needs special attention. This is because the nature of taxpayers' rights itself requires a committed and a democratic government which lives up to the principles of good governance.

In Tanzania, there is a lot to be done in order to promote and protect taxpayers' rights. First there is a need to introduce or increase awareness of taxpayers about their rights. Currently it may sound strange in Tanzania when a person discusses about taxpayers' rights. In most Tanzanian ears, it is common to hear about children's, women's or human rights. This study has not measured empirically the degree of awareness of Tanzanians about taxpayers' rights, but practical experience shows very few cases where a taxpayer raised concerns about taxpayers' rights.

Nevertheless, the existing Bill of Rights in the Constitution has not exclusively embraced taxpayers' rights. Most of the rights which are promoted in the Constitution seem to relate more to natural persons than to legal persons. It is not really surprising to see that legal persons have been either forgotten or neglected in the Bill of Rights, as in Tanzania the focus was on the rights of natural persons: the idea was to protect humans against the state. However, it is submitted that the time is now ripe to focus on legal persons as well.

Nevertheless, the way human rights are promoted in the Constitution seems to allow the Government to infringe some principles of these rights. For example, the Constitution requires every person to be treated fairly in proceedings. However, the Constitution has not explained anything about the independence and competence of the judges as criteria for fairness.

In fact it seems there is a lack of initiatives intended to safeguard taxpayer's rights. For example, the current structure of the tax appeal mechanism seems to safeguard government revenue rather than to protect taxpayers' rights or the provision of tax justice. The problem of this structure lies in the reporting hierarchy. The Tanzania Revenue Authority, which is the sole institution responsible for the collection and accounting of revenue, and the Tax Revenue Appeal Board and Tribunal (the appellate bodies) all have to report to the same department of the Ministry of Finance. This issue can raise a question of impartiality of the appellate bodies. The independency

of the TRAB and TRAT is thus, with respect, questionable. There is no need to continue with such doubts. The viable solution is to shift the tax appellate authorities to the Ministry of Justice, just like other courts.

5 CHAPTER FIVE: THE INFLUENCE OF REGIONAL INTEGRATION ON TAXPAYERS' RIGHTS IN TANZANIA

5.1 Introduction

This chapter reviews the influence of regional integration on the promotion of taxpayers' rights in Tanzania. The chapter attempts to answer the question whether regional international law influences the promotion of taxpayer rights in Tanzania.

Following the information collected from the African Union, and the East African Community, it appears that, Tanzania has not a bad record on the promotion of human rights compared to other African states. However, the influence of regional international law is very minimal in the promotion of taxpayers' rights in Tanzania.

The chapter provides a general overview of regional integration in Africa. The establishment and functions of the African Union (AU), the African Court on Human and Peoples Rights, and the African Commission on Human and Peoples' Rights are discussed, and the influence of the African Court on Human and Peoples Right on taxpayers' rights in Tanzania is assessed.

Generally, it is observed that most of the victims of human rights' violations reported are women, children and political activists. Because there is no case which explicitly refers to taxpayers' rights, the notion of taxpayers' rights is then only implicitly discussed.

5.2 Regional Integration in Africa

5.2.1 Introduction

Human rights stories and norms are among the burning issues in the world. Several conferences have been held, and declarations and laws have been proclaimed to curb human rights' violations.²⁸³ Africa is among the places where the human rights grave is said to be found. There is a high degree of violation of human rights, and possibly the least awareness of the human

²⁸³ Stephen Hopgood, Challenges to the Global Human Rights' Regime: Are Human Rights Still and Effective Language for Social Change?' *International Journal on Human Rights*, Vol. 67, 2014, pp. 67-76.

rights concept.²⁸⁴ Innocent people are burnt to death, simply because they are accused of practicing witchcraft,²⁸⁵ and people with albinism are sometimes killed to get their organs for witchcraft purposes.²⁸⁶ Those actions exist within communities; between citizens themselves. In short, human rights' concepts and practices in Africa are not active compared to Europe and America.²⁸⁷ Most of the human rights' violations in Africa are associated with political instability, tribal wars and lack of democratic governments. Inadequate freedom of speech or of the press is reported, as are torture and some traditions and customs which seem to carry a poor image to other communities which do not belong to those customs and traditions. Human Rights Watch mentions countries like Sudan, Chad, the Democratic Republic of Congo and Guinea as being among the countries where the perpetrators of massive human rights violations have not been held accountable. The future of these countries as regards human rights issues is still undetermined.²⁸⁸

However, during the 1980s and at the early 1990s great steps were taken by many African states to introduce or to strengthen the rule of law. These steps ultimately improved the promotion of human rights. During that period, some countries introduced Bill of Rights in their constitutions, and others restructured their constitutions to meet the goal of attaining the rule of law. There were also collective measures taken by African states, such as introducing organs which aimed to, among other things, promote and protect human and peoples' rights.²⁸⁹ The African Union,

²⁸⁴ John C Mubangizi, 'Human Rights Education in South Africa: Whose responsibility is it any way?' *African Human Rights Law Journal*, Vol. 15, 2015, pp. 496-514.

²⁸⁵ Adam Ashforth, 'Witchcraft, Justice and Human Rights in Africa: Cases from Malawi', *African Studies Review*, Vol. 58, 2015, pp. 5-38.

²⁸⁶ <http://www.dailymail.co.uk/news/article-3162715/His-blade-dull-hacked-hacked-jerk-arm-tore-s-screamed-Tanzania-s-hunted-albinos-relive-horror-limbs-stolen-witchdoctors-buy-arm-1-000-head-double.html>, last visited 2 January 2017.

²⁸⁷ Adam Ashforth, 'Witchcraft, Justice and Human Rights in Africa: Cases from Malawi', *African Studies Review*, Vol. 58, 2015, pp. 5-38.

²⁸⁸ <http://www.hrw.org/en/news/2010/05/28/france-africa-summit-support-justice-end-atrocities>, last visited 4 September 2019.

²⁸⁹ Mia Swart, 'Alternative Fora For Human Rights Protection? An Evaluation of the Human Rights Mandates of the African sub-Regional Courts,' *Journal of South African Law*, 2013, pp. 437-452.

the Commission on Human and Peoples' Rights and later on the African Court of Human and Peoples' Rights are good examples of such organs.

Regional integration is a way of enforcing human rights in member states. Its contribution is seen in the protocols, declarations, guidelines, policies, and memoranda of understanding which insist on the promotion of human rights within the regions.²⁹⁰ Besides that, regional integration has also created the judicial organs which oversee the enforcement of their agreements. Therefore, even if the role of promoting and protecting human rights is primarily that of the state, because it is answerable to its citizens, the influence of regional integration should not be underestimated.²⁹¹ This last observation by Ruppel is the inspiration for looking in this Chapter at how regional integrations promote and protect taxpayers' rights in Tanzania.

5.2.2 Organisations for regional integration in Africa

The establishment of regional integration in Africa started to take off during the 1960s. By then the United Nations Economic Commission for Africa encouraged African states to form organs which might facilitate cooperation. Most of these forms of integration were established for the purpose of the fight against colonisation and the strengthening of the economy of African states. The focus was to reduce dependency on the developed countries. The promotion of human rights was not among the focus range of these kinds of integrations.²⁹² However as the days moved on, the focus of integration changed from the liberalization of Africa to economic and social development.²⁹³ This change in focus has in turn facilitated the need to promote and protect human rights. That was a viable step to obtain sustainable development.²⁹⁴ In addition to the African Union, currently Africa has eight major organisations for regional integration:

²⁹⁰ Ibid.

²⁹¹ Oliver C Ruppel, 'Regional Economic Communities and Human Rights in East and Southern Africa'. *Human rights in Africa*, Vol. 43, 2009.

²⁹² Ibid.

²⁹³ Henry J Richardson III, 'African Regional Integration and Human Rights: Potential Problems', *Proceedings of the Annual Meeting of the American Society of International Law*, Vol. 89, 1995, pp. 500-503.

²⁹⁴ Hans-Otto Sano, 'Development and human rights: the Necessary, but Partial Integration of Human Rights and Development'. *Human Rights Quarterly*, Vol. 22, 2000, pp. 734-752.

- Arab Maghreb Union (AMU);
- Community of Sahel-Saharan States (CEN-SAD);
- Common Market for Eastern and Southern Africa (COMESA);
- East African Community (EAC);
- Economic Community of Central African States (ECCAS);
- Economic Community of West African States (ECOWAS);
- Intergovernmental Authority of Development (IGAD); and
- The Southern African Development Community (SADC).

Table 1; Members of the major African Regional Integrations

AMU	CENSAD	COMESA	EAC	ECCAS	ECOWAS	IGAD	SADC
Algeria	Benin	Burundi	Burundi	Angola	Benin	Djibouti	Angola
Libya	Burkina Faso	Comoros	Kenya	Burundi	Burkina Faso	Ethiopia	Botswana
Mauritania	Central African Republic	DRC	Rwanda	Cameroon	Cape Verde	Kenya	DRC
Morocco	Chad	Djibouti	Tanzania	Central African Republic	Cote d Ivoire	Somalia	Lesotho
Tunisia	Comoros	Egypt	Uganda	Chad	Ghana	Sudan	Madagascar
	Cote d Ivoire	Eritrea	South Sudan	DRC	Guinea	Uganda	Malawi
	Djibouti	Ethiopia		Guinea	Guinea Bissau	Eritrea	Mauritius
	Egypt	Kenya		Sao Tome and Principe	Liberia	South Sudan	Mozambique
	Eritrea	Libya		Gabon	Mali		Namibia
	The Gambia	Madagascar		Rwanda	Niger		Seychelles
	Ghana	Malawi			Nigeria		South Africa
	Guinea Bissau	Mauritius			Senegal		Swaziland

	Libya	Rwanda				Sierra Leone		Tanzania
	Mali	Seychelles				Togo		Zambia
	Mauritania	Sudan				Gambia		Zimbabwe
	Morocco	Swaziland						
	Niger	Uganda						
	Nigeria	Zambia						
	Senegal	Zimbabwe						
	Sierra Leone							
	Somalia							
	Sudan							
	Togo							
	Tunisia							

This section assesses the influence of regional international laws on promotion of taxpayers' rights. The influence of the African Union (AU) and the East Africa Community (EAC) and their organs is examined. The choice for these organisations is made because of the geographical location of Tanzania in the world and in Africa (Tanzania is located at the Eastern part of Africa and borders Kenya and Uganda), and the potential functions and objectives of these organizations.

The African Union (AU) is an organisation of states which intends to promote unity and solidarity among African States. Inter alia it promotes and protects human and peoples' rights in Africa and pursues its objective of strengthening the political and economic situation in African states. Details of the AU and its organs (the African Court of Human and People Rights, and the African Commission on Human and People Rights) are discussed below. The East African Community is chosen because Tanzania is among the founding members of that Community and recently that Community has shown interest in dealing with human rights' issues.

5.2.3 The African Union (AU)

Prior the establishment of the African Union in 2002, promoting African unity was the role of the Organization of African Unity (OAU). The OAU was established in 1963 with the aim of uniting African states.²⁹⁵ By that time most of the African states had gained their political independence. The OAU mission was based on the Pan-Africanist philosophy of encouraging the unity of all peoples of African ancestry. The OAU was also inspired to fight for the independence of various African states which were still under the European colonial rule.

The main roles of OAU were

- a) promotion of solidarity among African states;
- b) to defend the sovereignty of African states;
- c) eradication of colonialism in all its forms.

²⁹⁵ See more at <https://www.au.int/en/history/oau-and-au>, last visited 3 January 2017.

The OAU operated with several shortcomings, such as the lack of armed forces for peace keeping, and the unwillingness of the OAU to intervene with the internal affairs of Member states. These weaknesses contributed to several crises in Africa, such as the genocide in Rwanda. In fact the OAU was seemed to be more a forum for rhetoric than for action.²⁹⁶

The African Union (AU) was then established to overcome these shortcomings. It was established under article 2 of the Constitutive Act of the African Union.²⁹⁷ The AU is the main organization in Africa which deals with all African economic and political issues including human rights;²⁹⁸ it was established on 9 July 2002 for the purpose of promoting cooperation among the independent African states,²⁹⁹ and has the role of promoting and protecting human rights on the African continent. The AU has two organs which are vested with the responsibility to ensure that human rights are not infringed: the African Commission on Human and Peoples Rights, and the African Court on Human and Peoples Rights.

5.2.4 The African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights was established in 1987 and is now an organ of the African Union, having been inherited from the OAU. The Commission was established after the entry into force of the African (Banjul) Charter on Human and Peoples' Rights in 1986³⁰⁰ and intends to promote and protect human and peoples' rights in Africa.³⁰¹ This role includes educating people about human rights and increasing awareness of the African Charter on Human and Peoples' Rights among Africans. The Commission also arranges a range of activities such as conferences, seminars, reviewing reports of the AU

²⁹⁶ See more at: <http://www.sahistory.org.za/topic/organisation-african-unity-oau> last visited 3 January 2017.

²⁹⁷ http://www.au.int/en/sites/default/files/ConstitutiveAct_EN.pdf, last visited 3 January 2017.

²⁹⁸ Constitutive Act of African Union, Article 3.

²⁹⁹ <https://www.au.int/en/history/oau-and-au>, last visited 2 January 2017.

³⁰⁰ African [Banjul] Charter on Human and Peoples' Rights adopted June 27, 1981 and entered into force 21 October 1986. It was established by the Organisation of African Unity (OAU).

³⁰¹ Nsongura J Udombana, 'So Far So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights', *American Journal of International Law*, 2003, pp. 1-37.

Special Rapporteur and others. The Special Rapporteur and Working Group of Experts are the AU teams that have a role in promoting human rights in Africa. The teams normally consist of well-known experts on human rights. The working group booked a particular success when it facilitated the adoption of the UN declaration on the Rights of Indigenous People by the member states of the AU. Prior to the efforts of the working group, the declaration faced strong resistance from African states,³⁰² which hesitated to adopt the declaration because they were not sure about their national and territorial integrity if they were to adopt the declaration. The African states also hesitated to sign up because the declaration had no definition of the word indigenous. However, the working group solved that issue and the declaration was then adopted.³⁰³

5.2.4.1 Filing a communication with the Commission

In its protective mandate, the Commission receives communications from states, individuals and from Non-Governmental Organizations (NGO's) alleging the violation of human rights as provided in the African Charter.³⁰⁴ The Commission also conducts fact-finding missions to investigate the allegation of massive human rights' violations within Member States. At the end of the mission, reports are published with recommendations on how to improve the human rights' situation in the country concerned.³⁰⁵ The Commission works closely together with NGOs dealing with human rights' issues in Africa. Several cases have been reported to the Commission and others remain unreported.

However, the number of cases reported to the African Commission does not balance with the complaints written in the annual human rights' reports published by local and international

³⁰² George Mukundi Wachira, African Court on Human and Peoples' Right: Ten Years on and still no Justice. London: Minority Rights Group International, report 2008, available at <http://minorityrights.org/wp-content/uploads/old-site-downloads/download-540-African-Court-on-Human-and-Peoples-Rights-Ten-years-on-and-still-no-justice.pdf> p.8, last visited 14 February 2017.

³⁰³ Ibid., p. 8.

³⁰⁴ African Charter on Human and Peoples' Rights, Articles 47-49, 55.

³⁰⁵ George Mukundi Wachira, op. cit., fn 302, p. 10.

organizations and NGOs.³⁰⁶ The local NGO normally reports many violations of human rights. There is nothing strange in this, as NGOs and other human rights' activists have direct access to the life of Tanzanians especially in the rural areas where human rights' concepts are deemed to be mere vocabulary. It means that there are few people who would know and understand the concept of human rights.³⁰⁷ It is obvious that the effective enjoyment of rights depends on the awareness of the rights themselves;³⁰⁸ and the willingness of the country to safeguard the rights.³⁰⁹

The imbalance between the political reports and NGOs' reports about the human rights position is not confined to Tanzania; it is also seen in some other African states. For example, Peter Kiplangat³¹⁰ discussed this situation in Kenya, observing that the shortage of communication results from a lack of enforcement of the recommendations of the African Commission on Human and Peoples' Rights.³¹¹ People find it difficult to communicate their problems to the Commission, knowing that even after winning the case, no action may be taken by the country which violates human rights.

Nevertheless, in its protective role, the Commission is required to review the member states' periodic reports which explain the human rights situation in the countries concerned. The report submitted to the Commission is part of the requirements of Article 62 of the African Charter which demands each country to submit the said report. The charter provides that

“Each state party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures

³⁰⁶ See *Tanzania Human Right Reports 2009*, published by LHRC, 2010.

³⁰⁷ John C Mubangizi, 'Human Rights Education in South Africa: Whose responsibility is it any way?' *African Human Rights Law Journal*, Vol. 15, 2015, pp. 496-514.

³⁰⁸ Ibid.

³⁰⁹ Mia Swart, 'Alternative Fora For Human Rights Protection? An Evaluation of the Human Rights Mandates of the African sub-Regional Courts', *Journal of South African Law*, 2013, pp. 437-452.

³¹⁰ He is a programme officer with Ogiek Welfare Development Program in Kenya.

³¹¹ George Mukundi Wachira, op. cit., fn 302, p. 11.

taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.”

However not every Member State submits the report timely as required.³¹² Some countries fail to submit reports on the implementation of the Charter at all, such as Comoro and Sao Tome and Principe.³¹³ However, there is no strong mechanism to enforce them to report.³¹⁴

Composition of the Commission

The Commission is composed of eleven Commissioners elected by secret ballots by the Assembly of Heads of State and Governments for a six-year renewable term. The Commission elects from its members its own bureau, the Chairperson and Vice-Chairperson for a two-year renewable period. The Secretary of the Commission is appointed by the Chairperson of the African Union Commission. Members serve in their personal and individual capacity. They are supposed to be independent in the discharge of their duties. The chosen Members are African personalities reputed for their high morality, integrity and impartiality.³¹⁵

However, the composition of members of the Commission has been challenged by many African scholars and even by scholars from outside Africa. They saw the composition of the Commission as an obstacle towards attaining proper and valid rights for citizens whose rights have been violated in African states. Among the issues raised was the independence of the Commissioners. For many years a large number of Commissioners have been working or have a close link with their governments. Some of these Commissioners were Ministers and others were Ambassadors of their countries. In these cases, it was almost impossible to measure and

³¹² Magnus Killander, 'Human Rights Developments in African Union during 2014', *African Human Rights Law Journal*, Vol. 15, 2015, pp. 537-558.

³¹³ <http://www.achpr.org/states/stats/>, last visited 4 September 2019.

³¹⁴ <http://www.achpr.org/states/reporting-procedure/>, last visited 4 January 2017.

³¹⁵ This information is however based on the status of the Commission rather than on its application in practice. The information is accessed through http://www.achpr.org/english/_info/members_achpr_en.html, last visited 4 January 2017.

realise the independence of these Commissioners.³¹⁶ These Commissioners were seen to protect the interest of their governments more than human and peoples' rights.

After several complaints from scholars and the community at large, the African Union on 5 April 2005 issued guidelines with respect to the nomination of members of the Commission and members of the African Court on Human and Peoples' Rights. The guidelines demanded that in order for a person to qualify as a Commissioner or a judge of the African Court on Human and Peoples' Rights, the person should not be a Minister or under-secretary of a state, diplomatic representative, director of a ministry or legal advisor to a foreign office.³¹⁷ Rule 7 of the African Commission on Human and People Rights 2010 explains that:

“The position of member of the Commission is incompatible with any activity that might interfere with the independence or impartiality of such a member or demands of the office such as a member of government, a Minister or under-secretary of State, a diplomatic representative, a director of a ministry, or one of his subordinates, or the legal adviser to a foreign office or any other political binding function or participate in any activity of the nature that will compromise the independence and impartiality.”

5.2.4.2 Effectiveness of the African Commission on Human and Peoples' Rights

Although it is the first and unique Commission in Africa which aims to resolve human rights problems in Africa, the African Commission of Human and Peoples' Rights is considered not to be an ideal solution for human rights problems. Not only does the Commission have no legal power to compel compliance on any issue: it can only recommend a solution to heads of the African states, the Commission does not have any follow-up mechanism.³¹⁸ It does not even have a policy to monitor how effective its recommendations are and to what degree the

³¹⁶ Gina Bekker, 'The African Court on Human and People's Rights: Safeguarding the Interests of African States', *Journal of African Law* Vol. 51, 2007, pp. 151-172.

³¹⁷ <http://www.achpr.org/instruments/rules-of-procedure-2010/#pp>, last visited 4 September 2019.

³¹⁸ Magnus Killander, 'Human Rights Developments in African Union during 2014', *African Human Rights Law Journal*, Vol. 15, 2015, pp. 537-558.

Member States which are found to violate human rights have obeyed or put into practice the Commission's recommendations.³¹⁹ The study conducted by Viljoen & Louw found that of the 46 communications which were declared admissible between 1994 and 2004, 44 Member States were found to violate human rights. However, only six countries complied fully and timely with the recommendations of the Commission.³²⁰ The remaining countries either did not fully comply or did not comply at all. A number of comments are appropriate on this result. First, one can never stop saying that most African states violate human rights; as many as 96 percent of the admitted cases have proved a kind of violation of human rights by Member States. Secondly, if the main goal of the Commission was to identify the violation of human rights, it has succeeded in that goal, and therefore the Commission is an ideal organ. But identification of violation of human rights was not the sole goal of the establishment of the Commission. As observed above, the Commission was established for the purposes of promoting and protecting human and peoples' rights in Africa. The conclusion is that this has not yet been adequately done. Nevertheless, the Commission also suffered from the common pitfall of most of African organisations: it had not enough funds to finance its activities. The Commission has for many years operated through the assistance of donors from European countries and other developed countries,³²¹ but it has received insufficient funds from the African Union.

The aid given to the Commission has sometimes been perceived negatively. Some scholars have termed the financial aid as a remote control of the agenda and activities of the Commission. On account of these subventions it is alleged that the Commission performed its activities in the interest of the donors.³²² Even though, from 2008 the African Union has

³¹⁹ Frans Viljoen & Lorette Louw, 'State Compliance with the Recommendations of the African Commission on Human and People Right 1994-2004', *American Journal of International Law*, Vol. 101, 2007, pp. 1-34.

³²⁰ Ibid.

³²¹ Magnus Killander, 'Human Rights Developments in African Union during 2014', *African Human Rights Law Journal*, Vol. 15, 2015, pp. 537-558.

³²² Ibid.

increased the budget of the Commission by over 400 percent in order to reduce the dependence on donors;³²³ the problems still persist.³²⁴

The Commission also was required to be a centre for receiving complaints without making an effort to solve them. There were complaints that the Commission declared more than half of the complaints inadmissible based on political grounds.³²⁵ These challenges were among the factors that led to a lot of complaints about the Commission and its ultimately being given many nick names including “*the paper tiger*” because it had no teeth to catch and punish human rights violators.³²⁶

The above discussion relates to human rights in general. There was no specific case about taxpayers' rights. No African state, individual company or NGO submitted a case concerning tax matters. The focus is more on civil and political rights.³²⁷ However, had tax matters or complaints been submitted to the Commission, it is unlikely that no change would have happened because the problem of the Commission was its own structure. The Commission was quite simply incompetent. The weakness of the Commission laid bare the need to have a strong organ that could help the Commission in promoting and protecting human and peoples' rights. For this reason, the African Human Right Court was established.

³²³ George Mukundi Wachira, op. cit., fn 302, p. 10.

³²⁴ Magnus Killander, op. cit, fn 321,

³²⁵ Anne Pieter van der Mei, ‘The New African Court of Human and Peoples' Rights: Towards an effective Human Rights Protection Mechanism for Africa’. *Leiden Journal of International Law*, Vol. 18, 2005, pp. 113-129.

³²⁶ Arthur E Anthony, ‘Beyond the paper tiger: The Challenge of a human rights court in Africa’. *Texas International Law Journal*, 1997; available at <https://www.questia.com/library/journal/1P3-26629533/beyond-the-paper-tiger-the-challenge-of-a-human-rights>, last visited 14 February 2017.

³²⁷ Vinodh Jaichand, ‘After Human Rights Standards Setting, What's Next?’ *International Journal on Human Rights*, Vol. 35, 2014, pp. 35-42.

5.2.5 The African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights was established to work together with the African Commission on Human and Peoples' Rights in order to promote and protect human rights. The Court was established by a Protocol to the African Charter on Human and Peoples' Rights in 1998, which entered into force only on 24 January 2004.

The Court started its operations in Addis Ababa, Ethiopia in November 2006, but moved to its permanent seat in Arusha, Tanzania in August 2007.³²⁸ The Court was meant to be the solution for human rights cases which existed in Africa for a long time. The establishment of the Court was not only the result of the weakness of the African Commission on Human and Peoples' Rights. External forces from Western donors also had their effects. There were several complaints sent to Western countries by NGOs and human rights' activists concerning the African countries for not having a human rights' court. As a result, in the 1990s western countries set conditions which required every country which needed financial assistance from Western countries to have a strong human rights' protection system.³²⁹

The Court is given the mandate to interpret and to oversee the application of the African Charter on Human and Peoples' Rights and any other human rights' instruments ratified by the African states.³³⁰ In this role the Court is expected to be the main human rights protector in Africa to complement the role of the African Commission in promoting and protecting human rights. The Court is also vested with the responsibility to provide legal advice to member states.³³¹ This legal advice is a non-binding advice which can be issued by the Court

³²⁸ <http://en.african-court.org/index.php/12-homepage1/1-welcome-to-the-african-court>, last visited 9 January 2018.

³²⁹ Gina Bekker, 'The African Court on Human and People's Rights: Safeguarding the Interests of African States', *Journal of African Law*, Vol. 51, 2007, pp. 151-172.

³³⁰ <http://en.african-court.org/index.php/12-homepage1/1-welcome-to-the-african-court>, last visited 3 January 2017.

³³¹ Protocol to the African Charter on Human and People's Rights on the Establishment of the African Court on Human and Peoples' Rights, Art. 4.

upon a request from a member state. The advice which can be issued by the court will mostly be on issues concerning human rights.³³²

5.2.5.1 Composition of the Court

The Court is composed of eleven judges appointed by the Member States based on their qualifications and experience. The Member States usually nominate candidates to serve as judges from among jurists of high moral character and of recognised practical, judicial or academic competence and experience in the field of human and peoples' rights. The AU assembly elects them by secret ballot.

5.2.5.2 Filing a case at the Court

Article 5 of the Protocol of the establishment of the African Court on Human Rights provides rights to several stakeholders of the human rights in Africa to file cases with the Court:

“1. The following are entitled to submit cases to the Court

- a. The Commission;*
- b. The State Party which has lodged a complaint to the Commission;*
- c. The State Party against which the complaint has been lodged at the Commission;*
- d. The State Party whose citizen is a victim of human rights violation;*
- e. African Intergovernmental Organizations.”*

However, this provision has limited the access of the court to individuals and Non-Governmental Organisation to file cases to the Court. Individuals and NGOs only have access to the Court if the Member State in which these individuals or NGOs reside, has declared this right during the ratification of the protocol. Article 5(3) provides that:

³³² <http://en.african-court.org/index.php/about-us/jurisdiction>, last visited 3 January 2017.

“The Court may entitle relevant Non-Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of this Protocol.”

Article 34(6) states that

“At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5.”

There is thus no direct access to the Court for citizens. Individuals and NGO's are restricted from submitting cases to this Court directly. The only means available in the AU for allowing individuals and NGO's to submit a case is for member states to sign the declaration allowing individuals and NGO's to have direct access to the Court. Unfortunately, until now only 29 countries, including Tanzania, out of the 54 member states of the AU have lodged the declaration to allow individuals and NGOs to have direct access.³³³ Citizens of these countries can submit cases to the court directly. This is a great challenge facing the African Court on Human and Peoples' Rights.

5.2.6 The Influence of the African Court on Human and Peoples' Rights on taxpayers' rights in Tanzania

Because the Court is very new, it is not very easy currently to identify and assess it's the material contribution in promoting and protecting taxpayers' rights in Tanzania. Although it was established in 2004, the Court and the Commission on Human Rights finalised their harmonisation by setting internal rules only on 28 April 2010.

³³³ The 25 other countries are: Algeria, Burkina Faso, Burundi, Congo, Côte d'Ivoire, Comoros, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Malawi, Mali, Mauritania, Mauritius, Mozambique, Niger, Nigeria, Uganda, Rwanda, Senegal, South Africa, Togo and Tunisia.

Nevertheless, the Court issued its first judgment on 15 December 2009 in *Michelot Yogombaye v Republic of Senegal*.³³⁴ Until 8 December 2016 the Court issued 33 judgments in total,³³⁵ 8 were related to cases involving Tanzania. Of these, Tanzania was found to have violated human rights in 5 cases; commonly on rights of a fair trial (to individuals). No case so far has related to tax matters; the cases concerned individuals who complained about torture while in police custody and the absence of fair trial during proceedings. It is however not surprising, as in Africa in general there is a narrow focus on human rights. Currently there are ninety-two pending cases,³³⁶ of which seventy-four are against Tanzania. In the circumstances, the influence of the African Court on Human and Peoples' Rights on Tanzanian taxpayers' rights is difficult to judge.

Tanzania is one of the 29 out of 54 countries which ratified the Protocol of the Establishment of the African Court on Human and Peoples' Rights.³³⁷ To sign the Protocol of the Court is to recognise the jurisdiction of the Court, and therefore a country declares itself willing to abide by the African Charter of Human and Peoples' Rights. Recognising the court's jurisdiction is a step towards acknowledging human rights and a step towards accepting being reviewed by the African Court in case there is an accusation of violation of human rights in Tanzania.

The Court, unlike the Commission on Human and Peoples' Rights, has the power to issue a binding judgement and can require a state party to comply with its decision within a given time frame. This power may make African countries, including Tanzania, work hard in promoting and protecting human rights. A condemnation for non-compliance with the African Charter can lead to punishment from the Court, and the strength of the judgment might

³³⁴ Application number 001/2008, *Michelot Yogombaye v Republic of Senegal*.

³³⁵ <http://en.african-court.org/index.php/cases/2016-10-17-16-18-21#finalised-cases>, last visited 2 January 2017.

³³⁶ <http://en.african-court.org/index.php/cases/2016-10-17-16-18-21#pending-cases>, visited 2 January 2017.

³³⁷ Other countries which have ratified the Court protocol are: Algeria, Burkina Faso, Burundi, Ivory Coast, Cameroon, Congo, Comoros, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, Sahrawi Arab Democratic Republic, South Africa, Senegal, Togo, Tunisia and Uganda, see <http://www.african-court.org/en/>, last visited 4 September 2019.

increase the protection of human rights. The judgment of the African Court is final and is not subject to appeal. However, if the party of the case submits new evidence, the judgement can be reviewed. These strong powers of the Court can play a substantial role in promoting and protecting human rights in Tanzania and Africa at large. The main challenge that exists for the Court is therefore not about the mandate the Court possesses over the Member States, but about the composition of rights. There is no declaration or protocol which explicitly mentions taxpayers' rights that the court is obliged to oversee. The human and peoples' rights set out in the African Protocol of Human and Peoples' Rights are very general.

5.2.7 The East African Community

The East African Community was re-established during the year 2000 after the collapse of the former East African Community in 1977. The community has five members (Tanzania, Rwanda, Burundi, Kenya and Uganda) of which three are founding members (Tanzania, Kenya and Uganda). The Community was established to serve economic purposes. By the time it was established, the main concern of the African states and the world at large was the restructuring of the economy, which was totally destroyed as a result of war. Leaders of the East African states focused more on having a Community that might strengthen the social and economic welfare of the Eastern Africans than on a Community that would be concerned with human rights. The Community established the East African Court of Justice as a supreme organ which safeguards the interests of the East African Community.

5.2.7.1 The East African Court of Justice

The East African Court of Justice is established under Article 9 of the Treaty for the establishment of East African Community.³³⁸ The Court is given the task of interpretation of the provisions of that treaty and it supervises the compliance with East African treaties by the member states.³³⁹ The Court was also given the mandate to settle disputes that may arise

³³⁸ East African Community Treaty 1999, Article 9.

³³⁹ Ibid., Article 23.

between Member States on treaty matters.³⁴⁰ The Court does not work alone in solving the disputes between member states or citizens in a member state on the interpretation of the treaty. National courts of the partner states are required to play a role in solving those disputes as well.³⁴¹ However, if there is a misunderstanding between the decision of the national courts and the Court of Justice, the decision of the Court of Justice will have precedence over the decision of the national courts on a similar matter.³⁴²

5.2.7.2 The Influence of the East African Court of Justice on taxpayers' rights in Tanzania

Human rights issues were not among the direct concerns of the East African Court of Justice. However, in May 2005 the Council of Ministers issued a draft protocol to extend the jurisdiction of the Court to allow it to solve human rights' cases; the protocol has not yet been approved.³⁴³ While the effect of this Court in Tanzania is difficult to predict at present, there are some indicators on the basis of *James Katabazi v Uganda*.³⁴⁴ Here the Court ruled that the action of the Ugandan government in detaining a person who had been released by the Court was against the rule of law. The Court also explained that it has the jurisdiction to hear and decide on the issues related to human rights, emphasizing that the member states are obliged to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.³⁴⁵

³⁴⁰ Ibid., Article 28.

³⁴¹ Ibid., Article 33.

³⁴² Ibid.

³⁴³ www.ijrcenter.org/regional-communities/east-african-court-of-justice/, last visited 3 January 2018

³⁴⁴ *James Katabazi and 21 others v Secretary General of the East African Community and others no. 1 of 2007*[2007] EACJ 3 (1 November 2007).

³⁴⁵ Ibid.

5.3 Conclusion

Generally, Tanzania has not got a bad record with respect to the violation of human rights compared to other African countries. It has been in the front line in accepting treaties concerning human rights. Several initiatives have been taken by Tanzania to ensure that the issue of human rights is not ignored. For example, it adopted the Protocol of Human and Peoples' Rights into its 1977 Constitution. These initiatives show a good trend and the willingness of Tanzania to abide by human rights provisions.

Tanzania hosts the three most important courts on the promotion of human rights; The African Court of Human and Peoples' Rights; the African Court of Justice, and the East African Court of Justice. The decision to host these important organs was not made by mistake; Tanzania was chosen to host these courts because of its status in the field of promoting and protecting human rights.

Several cases have so far been filed at these courts. However, taxpayers' issues have not been dealt with in any of the Courts discussed in this part of the study. Therefore the influence of regional integration on the promotion of taxpayers' rights is not easily discernible. Taxpayers' rights are still a new subject in African States. An effort is highly required to make taxpayers' rights known and openly demanded. However, it seems to be difficult to acquire sufficient support from African communities concerning taxpayers' rights, because even the human rights issue itself still is not stable in Africa. In general, the influence of regional integration on the human rights status of Tanzania is, as with other African States, minimal.

6 CHAPTER SIX: THE POLITICAL PROFILE OF THE UNITED KINGDOM

6.1 Introduction

This chapter explores the political profile of the United Kingdom and provides a general discussion of the structure of the UK and explains the sources of law in that country. The chapter provides a historic background of UK taxation and more specifically of UK corporate tax. The chapter also provides a summary of the prevailing corporate tax structure in the UK; matters such as tax subjects and taxable objects are also briefly examined.

6.2 Political profile

The United Kingdom of Great Britain and Northern Ireland (the UK) comprises the nations of England, Wales, Scotland and Northern Ireland.³⁴⁶ The UK is considered a legitimate and sovereign state by its citizens and by other states. The political formula, by which it is governed, is the product of a long historical process. The Queen is the Head of State, but all political activities are headed by the Prime Minister, who is invited by the Queen to form an administration. He or she will usually be the leader of the party with the largest number of seats in the House of Commons. The UK is a multiparty, democratic state, where two major political parties (Labour and the Conservatives) have dominated UK politics most of the time.³⁴⁷

³⁴⁶ In 1536 England merged with Wales to form a political entity and in 1707 Scotland joined the union. In 1801 Ireland was also integrated into the United Kingdom, but in 1926 the Irish counties except the six counties of Northern Ireland, decided to go further on their own. See R. Heffernan and G. Thompson, *Politics and Power in the UK* Edinburgh University Press, 2005, pp. 6-9.

³⁴⁷ Percy Allum, *State and society in Western Europe*, Polity Press UK, 1995, p. 216.

6.3 Constitutional law and human rights in the UK

6.3.1 Introduction

The UK has no written constitution, although it does have a substantial body of constitutional law, found in various sources: statute law; common law (case law); custom and practice; authoritative and scholarly works; European law, and accession treaties.³⁴⁸ Therefore the UK has no single document which provides clear rules and guidelines with respect to the way the UK Parliament and Government use their powers.

The UK Parliament has the sole power to decide on any matter concerning the way the country is ruled. This means that Parliament is not bound to discuss issues within the limits of an existing law. Moreover, the current Parliament is not restricted by the laws passed by earlier Parliaments, so Parliament can repeal earlier acts. UK courts do not have the power to discuss the validity of an Act of Parliament. They merely have to apply them faithfully (subject to the requirements of EU law).³⁴⁹ The courts however have the power to create case-law if the existing law does not come up with an answer in a particular matter.

Since there is no written Constitution that might be hard to amend, a change of the UK constitutional system can be very easy and simple. This is because the change of the UK constitutional system does not require the completion of any formal procedure. What is needed is the ability of the government of the day to influence Parliament.³⁵⁰

The protection of human rights in the UK has developed gradually alongside UK Constitutional Law. The demand for human rights was similarly experienced during the development of UK constitutional Law.

³⁴⁸ R. Heffernan and G. Thompson, *Politics and Power in the UK*, Edinburgh University Press, 2005, p. 19.

³⁴⁹ W. A. Heringa and P. Kiiver, *Constitutions Compared*, Intersentia, Oxford, 2007, p. 21.

³⁵⁰ <http://www.publications.parliament.uk/pa/ld201012/ldselect/ldconst/177/17705.htm>, last visited 4 September 2019.

6.3.2 The development of UK Constitutional law

As explained above, the sources of UK Constitutional law are diverse. UK Constitutional law has developed from medieval to modern times. Some of the major developments and sources are:

The Magna Carta

The Magna Carta is a formal settlement between the Crown and England's citizens concluded in 1215. There was a political crisis between the Crown and the Barons. The latter opposed the unlimited powers of the King;³⁵¹ they required King John to abolish all the evil customs by which the kingdom of England had been unjustly oppressed. King John however refused to do what the Barons wanted, and as a result the Barons rebelled against King John's leadership. In early 1215, the City of London fell in the hands of the Barons; King John had no option other than to negotiate with them.³⁵² During the negotiations, it was decided that, everybody in England, including the King was subject to the law; no one was above the law.³⁵³ The Magna Carta has in general a symbolic value as an early document that limits the powers of the Crown and as a guideline to the provision of citizens' rights.

Petition of Rights

The Petition of Rights was another step in the development of UK Constitutional law. The Petition of Rights was enacted in 1628 as a result of *Darnel's Case*.³⁵⁴ In this case, which sometimes is referred to as the Five Knight's case, Darnel and other knights were imprisoned for refusing to lend money to King Charles I,³⁵⁵ who used various means to raise money

³⁵¹ Hilaire Barnett, *Constitutional and Administrative Law* 4th Ed, Cavendish Publishing Limited, London 2002, p. 19.

³⁵² <http://www.bl.uk/magna-carta/articles/magna-carta-an-introduction>, last visited 13 September 2016.

³⁵³ Lesley Dingle and Bradley Miller, 'A summary of Recent Constitutional Reform in the United Kingdom' *International Journal of Legal information*, Vol. 33, Issue 1/7, 2005.

³⁵⁴ Hilaire Barnett, op. cit. (fn 351), p. 19.

³⁵⁵ Ibid.

including forced loans.³⁵⁶ These citizens were imprisoned without trial;³⁵⁷ they sought relief in the Kings' Bench, however the Attorney General explained that they were detained by special command of his Majesty. The court ruled in favour of King Charles I, because by that time the court was not independent; it could not rule against the King. The Petition of Rights came about as a result of the complaints by Parliament against the arbitrary powers of the King. Among the decisions that influenced the petition of rights were; the decision of King Charles I to levy tax without parliamentary consent; arbitrary imprisonment, and the use of martial law during peacetime. The King however did not accept the petition. Sometime later, he dissolved Parliament, and did not call another one for 11 years. He then continued to rule and levy tax without Parliament.³⁵⁸

Generally, the Petition of rights strengthened the rule of law in the UK. It encouraged the concept of the separation of powers between the King and Parliament. The petition was regarded having a similar status as an Act of parliament; thus it was deemed to be among the strong instruments that guarantee human rights.³⁵⁹

The Bill of Rights

The Bill of Rights 1689 was enacted during high tension between England and the Roman Catholic Church.³⁶⁰ In England, from 1534, the King was the head of the Church of England. Papal authority was officially abolished. However, it was feared that Popery would still remain. Therefore in 1689 William of Orange and Mary, the then King and Queen of England, presented the Bill of Rights before Parliament. The Bill of Rights intended to solve the

³⁵⁶ <http://www.oxfordreference.com/view/10.1093/oi/authority.20110803095821668>, last visited 4 September 2019.

³⁵⁷ <http://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/civilwar/overview/petition-of-right/>, last visited 10 January 2017.

³⁵⁸ Ibid.

³⁵⁹ <https://www.bl.uk/collection-items/the-petition-of-right>, last visited 14 May 2018.

³⁶⁰ Lesley Dingle and Bradley Miller, op. cit. (fn 353).

existing tension between the State and the Catholic Church. The Bill of Rights declared that no future monarch could be a Catholic- or be married to a Catholic.³⁶¹ Nevertheless, the Bill of Rights balanced power between the Crown and Parliament. From then the Crown could not execute any law without the consent of Parliament. Excessive bails and fines, and unusual punishment were also rejected.³⁶² Generally, the Bill of Rights laid the foundation for the UK constitutional system.³⁶³

The Act of Settlement

The Act of Settlement was passed in 1700. The Act dealt with the succession of the Crown. It also ensured security of tenure for the judiciary, so that judges could not be removed from the office simply because of the pleasure of the King.³⁶⁴

The Treaty of the Union (1707)

The Treaty of the Union united England and Scotland. The treaty continues to form part of UK constitutional law. The union between these countries led to the formation of the United Kingdom of Great Britain.³⁶⁵

Crown Proceedings Act (1947)

The Crown Proceedings Act was enacted in 1947. From then civil actions could be brought against the Crown, which meant that wrongful ministerial acts could give rise to civil liability.

The European Communities Act (1972)

³⁶¹ <http://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/religion/key-dates1/1604-to-1689/>, last visited 10 January 2017.

³⁶² Hilaire Barnett, op. cit. (fn 351) p. 21.

³⁶³ Lesley Dingle and Bradley Miller, op. cit. (fn 353).

³⁶⁴ Ibid.

³⁶⁵ <http://www.historyofparliamentonline.org/england-scotland-and-treaty-union-1706-08>, last visited 4 September 2019.

The European Communities Act 1972, as amended, and the European Union Treaties form part of the sources of UK constitutional law. The UK has accepted that European Union law prevails over domestic law in case of inconsistency between the two.

Judicial decisions (case law)

Judicial decisions are also among the source of constitutional law in the UK. These are decisions made by the higher courts. Judicial decisions have been an important source of law in defining the relationship between the state and its citizens, as well as the relationship between Crown, Parliament and the judiciary.³⁶⁶

6.3.3 Human rights in the UK, a general overview

Historically, the UK government declared that it would follow the rule of law with respect to human rights. The rule of law is a concept that is hard to define clearly. By its prescriptive or semantic meaning, the rule of law means the conduct required by law.³⁶⁷ The rule of law may be referred to as the empire of law, not of men.³⁶⁸ The concept of the rule of law generally promotes stable justice. Leaders are prohibited from acting as they please. There should instead be a public interest in the rulers' actions or decisions.³⁶⁹ The rule of law is different from “rule by law”, “*Rechtsstaat*”. The latter means that law is the structure of the state. Nothing can be done which is not within the law. Rule by law is concerned strictly with the legality of action; regardless how good those actions are, the actions must be written in the law.³⁷⁰ It is not the intention of this book to dwell on the details of the definition of the rule

³⁶⁶ Hilaire Barnett, op. cit. (fn 351), p. 24.

³⁶⁷ Ibid., p. 73.

³⁶⁸ Mortimer N.S. Sellers, ‘What is the Rule of Law and Why Is It So Important’ in J.R. Silkenat et al. (eds.), *The Legal Doctrines of the Rule of Law and Legal State (Rechtsstaat)*, Ius Gentium: Comparatives on Law and Justice 38, Springer International Publishing, Switzerland, 2014, p. 4.

³⁶⁹ Hilaire Barnett, op. cit. (fn 351) p. 81.

³⁷⁰ Gianluigi Palombella & Leonardo Morlino, *Rule of Law and Democracy*, Brill, Leiden, 2010, p. 11.

of law. For present purposes it suffices to adopt the definition provided by Sellers, according to which the rule of law means:

*“The empire of laws and not of men, the subordination of arbitrary power and the will of public officials as much as possible to the guidance of laws made and enforced to serve their proper purpose, which is public good (“res publica”) of the community as a whole.”*³⁷¹

The rule of law is concerned with the extent to which individual rights are recognised and protected by the law.³⁷² Similarly, the rule of law is portrayed by the existence of a stable justice system³⁷³ which protects people against the use of the law to oppress them.³⁷⁴ In the UK, even before the enactment of the Human Rights Act 1998, it was accepted that a citizen may go wherever he or she wishes, and do whatever pleases him or her, provided that the movements or actions are within the law. These movements or actions should not hinder the rights of other citizens available in the laws of the UK.³⁷⁵ These rights however could not be found in a single written domestic law; Most of them were deemed to be implicitly promoted in the customs of the UK. Therefore, any person who was tempted to discuss human rights issues was supposed to be conversant with various domestic laws, customs, and international conventions that the UK had ratified.

The Human Rights Act 1998, at least laid down human rights in a single document. As a result, the UK citizens have all the human rights that are provided for in Articles 2-12 and 14 of the European Convention on Human Rights.³⁷⁶ Sections 1 and 2 of the Human Rights Act 1998 provide that:

³⁷¹ Sellers, loc. cit. (fn 368) p. 4.

³⁷² Hilaire Barnett, op. cit. (fn 351), p. 73.

³⁷³ Sellers, loc. cit. (fn 368) p. 4.

³⁷⁴ Palombella & Morlino, op. cit. (fn 370), p. 4.

³⁷⁵ Eric Barendt, An Introduction To Constitutional Law, Oxford University Press, 1998, p. 48.

³⁷⁶ To access these rights, visit <http://www.hri.org/docs/ECHR50.html>, last visited 4 September 2019.

1. "In this Act "the Convention rights" means the rights and fundamental freedoms set out in

(a) Articles 2 to 12 and 14 of the Convention,

(b) Articles 1 to 3 of the First Protocol, and

(c) Article 1 of the Thirteenth Protocol,

as read with Articles 16 to 18 of the Convention.

(2) Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation (as to which see sections 14 and 15)."

Therefore, based on the above sections, UK citizens enjoy the following rights:

- a) The Right to life
- b) The Prohibition of torture
- c) The Right to liberty and security
- d) The Right to worship
- e) The Right to marry
- f) The Right to a fair trial
- g) The Right to respect private and family life
- h) The Right to freedom of expression

All persons in the UK are also entitled to rights set out in Articles 1-3 of the 1st protocol of the European Convention on Human Rights:

- i) The Right to the peaceful enjoyment of his possessions
- j) The Right to education
- k) The Right to free elections.

6.3.4 Conclusion

The UK has an uncodified constitution. However, the country follows the rule of law. Prior to the year 1998, there was no formal guarantee of human rights.³⁷⁷

The uncodified constitution, that gives citizens the right to do as they please, provides a similar right to Parliament. Hence there is no guarantee of the absence of a collision between citizen's rights and Parliament's interest. Parliament is allowed, as stated above, to decide at any time to impose, to amend or to repeal any legislation it thinks fit, without reference to the Constitution. This (so called) flexibility of the Constitution may, sometimes, be an obstacle to respect human rights. A good example is the Prevention of Terrorism Act 1984 in which the police were given the power to arrest a suspect of terrorism without warrant and to detain such a person up to 48 hours without charge.

Therefore prior to the inclusion of the European Human Rights Convention in UK domestic law under the Human Rights Act 1998, the UK did not have an impressive formal record in providing and maintaining basic human rights. The UK was found by the European Court of Human Rights to have violated human rights 37 times between 1975 and 1995.³⁷⁸

6.4 The United Kingdom Tax System

6.4.1 The power to tax

In the UK the power to tax lies in Parliament's authority. There is no constitutional limit to Parliament's actions on taxation; thus Parliament may decide to tax anything it wishes, in any way it wishes and under any name it wishes.³⁷⁹ However, Parliament has to consider the supremacy of the EU law when passing tax Bills. That applies to all matters concerning EU

³⁷⁷ E.C.S.Wade and A.W. Bradley, *Constitutional Law*, Longman, London, 1970, p. 479.

³⁷⁸ Paul Elliott Rock, *Constructing Victims' Rights: The Home Office, New Labour and Victims*, Oxford University Press, 2004, p. 220.

³⁷⁹ Geoffrey Morse and David Williams, *Davies: Principles of Tax Law*, Sweet and Maxwell, London 2008, p. 37.

law.³⁸⁰ Parliament also has to ensure that a bill is compatible with the European Convention on Human Rights. Currently any bill submitted to Parliament should bear a statement that explains the compatibility of the bill with the European Convention on Human Rights.

6.4.2 History of taxation in the UK

In the UK, taxation started during the middle ages.³⁸¹ Stamp Duty was introduced by William of Orange in 1694.³⁸² Apart from that, tax was based on the possession of land, wealth and other properties. In 1798, Pitt introduced income tax,³⁸³ charged at 0.83 percent on income that exceeded £ 60 a year. A year later however, the rate was increased to 10 percent for income in excess of £ 200.³⁸⁴ This income tax operated until 1802, when Addington introduced a new tax structure. Under this structure, tax was charged on particular income, departing from Pitt's structure of imposing tax on a person's total income. The new Addington structure classified income into schedules. Each schedule contained different treatment for tax purposes.³⁸⁵ Addington also introduced the system of deducting tax at source and war

³⁸⁰ http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/114547_en.htm, last visited 15 July 2018.

³⁸¹ Geoffrey Morse and David Williams, *Davies: Principles of Tax Law*, Sweet and Maxwell, London 2008, p. 21.

³⁸² *Ibid.*

³⁸³ Edwin R. A. Seligman, *The Income Tax: A Study of the History, Theory, and Practice of Income taxation of Home and Abroad*, The Law book Exchange Ltd, New York, 1914, pp. 77-78. Access through https://books.google.co.tz/books?id=vJGHR1Is7kC&pg=PA82&lpg=PA82&dq=Income+Tax+Act+1799&source=bl&ots=qYrL7L3ZN1&sig=XXKZVISbzEJTU_YBdHzPZv8il5BY&hl=en&sa=X&ved=2ahUKEwjL4eTkhNzYAhWFbXQKHcgCAUoQ6AEwDnoECAwQAQ#v=onepage&q=Income%20Tax%20Act%201799&f=false, last visited 16 January 2018.

³⁸⁴ Christian Seidl, Kirill Pogorelskiy, Stefan Traub, *Tax Progression in OECD Countries: An Integrative Analysis of Tax Schedules and Income Distributions*, Springer-Verlag, Berlin, Heidelberg, 2013.

³⁸⁵ Schedule A contained income tax on the owner of land, including houses. Schedule B contained income tax on farmers in respect of land and houses attached to farms; Schedule C tax on dividend and annuity from public revenue; Schedule D a tax on residents with income derived from property or business abroad, or business, profession or employment exercised in Great Britain. See Stephen Dowel, *History of Taxation and Taxes in England: From the earliest time to the present day*, Routledge, London 2013.

duties (a special tax imposed on wine and on the consumption of goods or services). The 1802 tax structure operated until 1815, when peace with France arrived. In general, the whole idea of income tax was just a temporary measure used to finance special spending by the government. Therefore, every year Parliament had to decide whether there would be an income tax or not.³⁸⁶

For a period of 27 years, 1815-1842, the UK citizens had no duty to pay income tax. However, they continued to pay land taxes and trade taxes. Nevertheless, it became clear that the tax collected from land and trade was insufficient, due to the industrialisation of the economy. The government had to build infrastructure to accommodate industrialization. This also awakened the demand for more machines and other sophisticated tools. The British government however did not have sufficient funds to produce those machines; and to increase the required infrastructure. The British government had also, by then, increased expenditure on the army and navy, and ships and weapons were very much in demand. This demand led to the re-introduction of income tax in 1842.³⁸⁷

The 1842's income tax system, which bore almost the same features as the 1802 structure, operated without great structural changes for a number of years. In 1914, the progressive tax system was introduced, and the tax base was extended to income derived from shares and rent from property situated abroad. Progressive income tax however was not levied on companies' profits.

³⁸⁶ Hugh J. Ault and Brian J Arnold, *Comparative Income Taxation: Structural Analysis*, Aspen Publishers, New York 2004, p. 115.

³⁸⁷ Geoffrey Morse and David Williams, *Davies: Principles of Tax Law*, Sweet and Maxwell London 2008, p. 22.

An important structural change happened in 1937. A company profit tax was introduced on distributed and retained profits at different tax rates. A profit was defined as including capital gains.³⁸⁸ Paragraph 7 of the Fourth Schedule to the Finance Act 1937 provided that³⁸⁹

“Income received from investments or other property shall be included in the profits in the cases and to the extent provided in this paragraph, and not otherwise-

(a) in the case of the business of a building society, or a banking business, assurance business or business consisting wholly or mainly in the dealing in or holding of investments or other property, the profits shall include (...) income received from investments or other property except:-

(i) income received directly or indirectly by way of dividend or distribution of profits from a body corporate carrying on a trade or business to which the section of this Act charging the national defence contribution applies; and

(ii) income to which the persons carrying on the trade or business are not beneficially entitled;”

There was preferential treatment for companies that retained profits; a higher tax rate was imposed on a company that distributed profits to shareholders. The idea was to influence companies to retain profits and to reinvest thereafter. The 1937 company profit tax continued to operate until 1965 when corporation tax was introduced to tax companies based on their profits. Profits covered both income and capital gains.³⁹⁰ The main difference between the

³⁸⁸ <http://hansard.millbanksystems.com/commons/1937/apr/20/national-defence-contribution>, last visited 10 January 2017.

³⁸⁹ Accessed through <http://www.legislation.gov.uk/ukpga/Edw8and1Geo6/1/54/schedule/FOURTH/enacted>, last visited 20 January 2017.

³⁹⁰ Finance Act 1965, Section 46(5)(b), accessed through http://www.legislation.gov.uk/ukpga/1965/25/pdfs/ukpga_19650025_en.pdf, last visited 14 February 2017.

1965 corporation tax and the 1937 company profit tax was that under the latter, companies' profits were subject to income tax (just like individuals) and special taxes on profit as well. Special taxes on profit included the National defence contributions which were levied on retained and distributed profit.³⁹¹ The 1965 corporation tax was levied only on corporate profits of incorporated companies or unincorporated associations other than partnerships.

Although it has endured numerous major and minor changes, the present UK income tax structure does not have a core structure which deviates much from that of the 1802 structure. Recently, there were initiatives taken by the UK government to rewrite the UK tax laws. The Tax Law Rewrite Project ran from 1995 to 2010, in which all political parties agreed to change the UK tax structure.³⁹² The motive behind the rewrite was to write tax laws in clear language and to make them easier to use. As a result, several tax laws were introduced. For example for corporate taxation: the Corporation Tax Act 2009; the Corporation Tax Act 2010; The Taxation (International and Other Provisions) Act 2010, and the Capital Allowances Act 2001. For income tax, the Income Tax (Earnings and Pensions) Act 2003, the Income Tax (Trading and Other Income) Act 2005, and the Income Tax Act 2007 were introduced.³⁹³

6.5 Corporate Tax

6.5.1 History of corporate tax

As observed above, the present UK Corporation Tax was established by the Finance Act 1965.³⁹⁴ Its main feature was that it could be credited against income tax that was due by shareholders of the company paying corporate tax. This was because shareholders were allowed to offset part of the corporate tax paid by the company against their income tax liability when paying income tax on dividends distributed by the company. This would allow

³⁹¹ Hugh J Ault and Brian J Arnold, *Comparative Income Taxation*, Kluwer Law International, The Netherlands, 2010, p. 147.

³⁹² John Tiley *Revenue Law*, 6th ed., Hart Oxford 2008, p. 51.

³⁹³ Peter Harris, *Corporate Tax Law: Structure, Policy and Practice*, Cambridge University Press, 2013, p. 11.

³⁹⁴ Hugh J Ault and Brian J Arnold, *Comparative Income Taxation A Structural Analysis*, Aspen Publishers 2007, p. 116.

shareholders to claim a tax credit, although a company paying dividend might not have paid corporate tax (for example because of loss relief or tax incentives). Therefore, the UK government, in order to ensure that the company's shareholders would claim the actual amount of corporation tax paid by their companies, established Advance Corporation Tax (ACT). Under ACT, a company paying a qualified distribution was obliged to pay corporation tax in advance to the Inland Revenue. A qualified distribution was any distribution made by a company except for the issuing of bonus redeemable shares³⁹⁵ or securities. The ACT was later on credited against the mainstream Corporation Tax (actual corporation tax payable) when it was due by the company. Thus ACT was not a withholding tax on the distribution, but a prepayment of corporation tax.³⁹⁶

For example: Uk Co a UK resident company generated a profit after tax of £ 20,000. It distributed 75% of the profit (£ 15,000) to its shareholders and retained the remaining portion of the profit for future investments (£ 5,000). Leeds Co is a UK resident company and is a shareholder in Uk Co, owning 60% of the ordinary shares of Uk Co. Leeds Co is entitled to receive a dividend amounting to £ 9,000 (£ 15,000 x 60%), but Uk Co is obliged to deduct an amount of ACT from the dividend. Assuming the ACT rate is 20% £ 1,800 will be paid as ACT by Uk Co. The net dividend received by Leeds Co will be £ 7,200. However, at the time of filing the corporate tax return, Leeds Co will reduce its tax obligation by £ 1,800 by way of a tax credit in respect of the ACT already paid by Uk Co.

During 1997, Gordon Brown, the then Chancellor of the Exchequer initiated two major reforms of the corporation tax system in his first budget. The first was to restrict the credit available to shareholders: tax credit available to non-tax-paying institutions was limited. Tax credit on distributions made to UK pensioners, authorised unit trusts and pension funds was abolished. The reform did not affect other tax-exempt shareholders such as charities, non-tax-

³⁹⁵ A redeemable share is a share in which an investor is promised to be paid back the money paid for the shares during purchases of such shares. The redeemable shares are normally redeemed on the agreed date and price.

³⁹⁶ https://research.ibfd.org/#/doc?url=/collections/cta/html/cta_uk_s_001.html, last visited 4 September 2019.

paying individuals, and holders of tax-advantaged personal equity plans. Similarly, during the same year, tax credit on a distribution to non-resident companies was also prohibited if the country of residence had no tax treaty with the UK. This reform was made to increase government revenue. The UK government abolished tax credit on dividends totally from 6 April 2016.³⁹⁷ The second reform initiated by Gordon Brown was the abolition of ACT,³⁹⁸ which led to the establishment of quarterly instalment payments of corporate tax for large companies.

Prior to the abolition of the credit system and ACT, the UK corporation tax structure was in favour of shareholders who preferred to receive a dividend rather than retain profit in their companies. The reform resulted in a devaluation of the shares of these companies by 20%.³⁹⁹ It was not surprising to see such a dramatic fall of the share value of these firms. A study by the Institute of Fiscal Studies explained that there was a dramatic rise in the percentage of profits paid out as dividend from 1984 to 1994; the UK had the highest dividend pay-out ratio, compared with other European countries like Germany and France. A high dividend pay-out ratio usually has adverse effect on business. Investors usually opt for short-term investments instead of long-term investments. In his budget speech, Chancellor Brown explained that:

*“The present system of tax credits encourages companies to pay out dividends rather than reinvest their profits... this cannot be the best way to encourage investment for long term as was acknowledged by the last Government.”*⁴⁰⁰

³⁹⁷ <https://www.gov.uk/government/publications/summer-budget-2015-hm-revenue-and-customs-overview/summer-budget-2015-hm-revenue-and-customs-overview>, last visited 4 September 2019.

³⁹⁸ John Tiley, *Revenue Law*, 6th ed., Hart, Oxford 2008, p. 830 and 878.

³⁹⁹ Leone Bell & Tim Jenkinson, ‘New Evidence of the Impact of Dividend Taxation and on the Identity of the Marginal Investor’, *Journal of Finance*, 2002, pp. 1321-1345.

⁴⁰⁰ For the full budget speech; http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/speech_chex_271097.htm, last visited 4 September 2019.

Therefore, as a major step towards stabilizing the UK economy, Gordon Brown decided to reduce the corporation tax rate and abolish the credit available to investors so to make them indifferent between dividend and retention.⁴⁰¹

6.5.2 Taxable subject

In the UK, corporation tax is charged on profit made by a resident company or by a non-resident company carrying on business in the UK through a permanent establishment.⁴⁰² A resident company is liable to pay corporation tax on profits accrued worldwide. A non-resident company will be liable to corporation tax on the income which is generated within the UK.⁴⁰³

For corporation tax purposes, a company means any corporate or unincorporated association, but does not include a partnership, a local authority or a local authority association. According to section 519 of ICTA 1988, 'local authority association' means

“any incorporated or unincorporated association of which the constituent members are local authorities, a group of local authorities or local authority associations; and which has for its object or primary object the protection and furtherance of interests in general of local authorities...”

A company is deemed to be resident if it is incorporated in the UK or if its business is centrally managed and controlled in the UK.

6.5.3 Taxable object

Taxable profits for Corporation tax include: profits from taxable income such as trading profits and investment profits. Capital gains⁴⁰⁴ are part of the taxable object as well.

⁴⁰¹ Steven Bank, *The Dividend Divide in Anglo-American Corporate Taxation*, (2004) *Bepress Legal Series*.

⁴⁰² Corporation Tax Act 2009, section 5.

⁴⁰³ Ibid.

⁴⁰⁴ Capital gains are gains derived when company sells an asset for a higher price than the company paid for it.

6.5.3.1 Tax base

A taxable profit means all chargeable gains and profits derived from any trade; and from any profession or vocation during the taxing year.⁴⁰⁵ In fact, determining the taxable profit of a company requires full application of the Income and Corporation Tax Act 1988, the Corporation Tax Act 2009, the Corporation Tax Act 2010, the Capital Allowances Act 2001 and some sections of the Taxation of Chargeable Gains Act 1992.⁴⁰⁶

Generally, UK companies do not enjoy tax rate relief for capital gains. There are no tax rate differences on income and capital gains acquired by companies. Any capital gain received will bear the same tax burden as ordinary profit. The ordinary profit is a profit acquired from conducting trade or business, while capital gains are gains derived from selling assets. For a resident company, there is a corporate tax on a profit of a company derived during the year of income; section 2 of the Corporation Tax Act 2009 states that:

“(1)Corporation tax is charged on profits of companies for any financial year for which an Act so provides.

(2)In this Part “profits” means income and chargeable gains, except in so far as the context otherwise requires.”

Corporation tax on capital gains is imposed on every gain on disposal or part-disposal of the chargeable assets wherever the asset is situated. There is however an indexation allowance available on the acquisition or base costs of assets. It is deducted when computing taxable gains. The indexation allowance is a system of calculating the real value of the assets, taking into consideration the interest rate and the inflation at the time of acquisition. It is to ensure that the value of taxable gains has been adjusted for the rate of inflation.⁴⁰⁷

⁴⁰⁵ Corporation Tax Act 2010, section 4 (2), (3).

⁴⁰⁶ Income and Corporation Taxes Act 1988, section 6 (3).

⁴⁰⁷ Taxation of Chargeable Gains Act 1992, section 53.

6.5.3.2 Taxation of a foreign permanent establishment

As stated before in UK tax law, a resident company will be subject to corporate tax on profit generated in any country. Section 5(1) of the Corporation Tax Act 2009 explains that

*“A UK resident company is chargeable to corporation tax on all its profits wherever arising.”*⁴⁰⁸

This means that any profit which is generated by a permanent establishment of a UK resident company (a foreign branch) will be subject to corporate tax in the UK. However, for the purpose of minimizing double taxation, the UK tax system provides a foreign tax credit relief against UK corporate tax payable on the profit made by a foreign branch. The tax credit relief is given whether or not the UK has a double taxation agreement with the foreign country in which the foreign branch is situated.⁴⁰⁹

The amount of tax credit given is not supposed to exceed the amount of corporation tax payable in the UK on the taxable profit. Apart from that, if a permanent establishment of a resident company pays a corporate tax in a foreign country that is less than the prevailing corporation tax rate in the UK; the company must pay the difference between the tax in the UK and that of the foreign country.⁴¹⁰

From 2011, the UK introduced a new system of taxing foreign permanent establishments of a resident company. From then on, any profit that is generated by a permanent establishment of a company resident in the UK is excluded from the corporate tax base. Likewise, losses which are attributable to a permanent establishment of a UK resident company are not allowed to be offset against profit generated within the UK (exemption regime). This system is optional. Once the company has opted to use the exemption regime, its decision will be irrevocable; the system must be used in every tax year.⁴¹¹ The taxable amount that qualifies for exemption

⁴⁰⁸ Corporation Tax Act 2009, section 5 (1).

⁴⁰⁹ Taxation (International and Other Provisions) Act 2010, section 18.

⁴¹⁰ Ibid., section 42.

⁴¹¹ Corporation Tax Act 2009, sections 18A, 18F.

will be similar to that that would have qualified for a tax credit, i.e. the amount that is effectively connected with the permanent establishment.

6.5.3.3 Taxation of Dividends

In the UK dividends received by a resident company from another resident company are exempted from tax. Likewise, a dividend paid by a subsidiary (residing outside the UK) to a UK parent company is also exempted from tax provided that the following criteria are met;⁴¹²

- i. The distribution is made by a company (subsidiary) that is controlled by the UK recipient company (parent);
- ii. the distribution is made in respect of ordinary share shares (non-redeemable shares);
- iii. the distribution derived from transactions is not designed to reduce tax; and
- iv. there is no deduction available to the payer (subsidiary) concerning the distribution made in the country of residence of the subsidiary (payer).

A distribution made to a parent company in respect of a portfolio holding will be exempted provided that the recipient company holds less than 10% of the issued share capital of the payer.⁴¹³ Any artificial distribution made by a UK company for the purpose of diverting profit outside the UK will be taxed at 25% of the diverted profit.⁴¹⁴ An artificial distribution is one made in order to divert taxable income overseas to avoid UK tax.⁴¹⁵ Mostly, the transaction

⁴¹² Corporation Tax Act 2009, section 931D.

⁴¹³ Ibid., section 931G.

⁴¹⁴ HMRC, Diverted Profits Tax: Interim Guidance March 2015. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/422184/Diverted_Profits_Tax.pdf, last visited 14 February 2017.

⁴¹⁵ Deloitte, *International Tax; United Kingdom Highlights* 2016. Accessed through <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-unitedkingdomhighlights-2016.pdf>, last visited 20 January 2017.

or arrangement will be deemed to be artificially made, if it lacks economic substance or if it involves entities that lack economic substance.⁴¹⁶

6.5.3.4 Deductions

The taxable profit for the purpose of the corporate tax is calculated by deducting from profit all expenses (including capital allowances) incurred in a year of income for the purpose of a trade. The general rule for allowing expenses to be deducted is that the expenses must be wholly and exclusively spent for the purpose of a trade.⁴¹⁷

Capital allowances

A company cannot generally deduct spending on capital assets immediately; instead it is allowed to claim the cost over time, reflecting the asset's depreciation (or decline in value).⁴¹⁸ This is referred to as capital allowances in respect of capital expenditure incurred. Capital allowances are available for assets such as plant and machineries, mineral extractions, know-how and research and development. In the UK, there is no statutory definition of the word plant or machinery; however, there is some case-law which is used as guidance towards identifying plant and machinery. Normally any asset which is used as an apparatus to carry on activities of the business is deemed to be plant.⁴¹⁹ However there are some tests to be met for an asset to qualify as plant. For example, the asset must have an expected life of at least two years and must be kept for permanent employment in the business.⁴²⁰ Similarly the guidance from HMRC shows that machinery includes machines and the working parts of

⁴¹⁶

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/385741/Diverted_Profits_Tax.pdf, last visited 10 January 2017.

⁴¹⁷ Income and Corporation Taxes Act 1988, section 931D.

⁴¹⁸ <https://www.ato.gov.au/Business/Depreciation-and-capital-expenses-and-allowances/>, last visited 19 January 2017.

⁴¹⁹ <http://www.hmrc.gov.uk/manuals/camanual/ca21110.htm>, last visited 14 February 2017.

⁴²⁰ Ibid.

machines. A machine usually has moving parts. Assets like motor vehicles and lathes are machines as are computers and similar electronic devices.⁴²¹

If a company carries on a trade like an ordinary property trade, a furnished holiday letting business, an overseas property business, a profession or vocation and other qualifying activities as listed in section 15 of the Capital Allowances Act 2001 (CAA 2001) it is allowed to claim capital allowance. Normally qualifying expenditure has to be pooled in order to determine the plant or machinery allowances.

6.5.4 Corporation tax rate

From 1 April 2017 except for ring-fence companies, the corporation tax rate is 19% of taxable profit irrespective of the size of profit or the size of the company. For ring-fence companies the tax rate is 30% for a company with taxable profit in excess of £ 300,000.⁴²² Ring-fence profit is profit acquired by a company extracting oil or gas in the UK or from under the UK continental shelf.⁴²³

6.5.5 Treatment of group companies

6.5.5.1 General aspects

With respect to the payment of corporation tax, a group of companies may decide to enter into an arrangement with HMRC to nominate one company of the group to pay tax on behalf of the other companies in the group. It is an option, and the companies in a group must sign an

⁴²¹ <https://www.gov.uk/hmrc-internal-manuals/capital-allowances-manual/ca21010>, last visited 4 September 2019.

⁴²² <https://www.gov.uk/government/publications/rates-and-allowances-corporation-tax/rates-and-allowances-corporation-tax>, last visited 4 September 2019.

⁴²³

<http://webarchive.nationalarchives.gov.uk/20140109143644/http://www.hmrc.gov.uk/budget2007/bn04.htm>, last visited 14 February 2017.

agreement with HMRC to nominate one company to pay tax on behalf of other companies in the group.⁴²⁴

For corporate tax purposes, a group is formed by a parent company and its 51% subsidiaries (any company of which it is the beneficial owner of more than 50% of the ordinary share capital), its 75% subsidiaries; or its 90% subsidiaries. The ownership of the ordinary shares is relevant in this respect; and it may be direct or indirect. For example, if ABC Ltd owns 85% of ordinary shares of XYZ Ltd, and XYZ Ltd owns 70% of ordinary shares of VVV Ltd. ABC Ltd is taken to own 59.5% of VVV Ltd ordinary shares. Therefore VVV Ltd has 51% subsidiary status for ABC Ltd. If ABC Ltd owns 65% of ordinary shares of XYZ Ltd, and 25% of ordinary shares of VVV Ltd; at the same time, VVV Ltd is owned by XYZ by 40% of its ordinary shares; in this case, the ABC Ltd will be considered to own VVV Ltd at 51%. That is, 25% direct ownership and 26% indirect ownership through XYZ Ltd.

Generally, two companies may be deemed to be in a group if one of the companies is directly or indirectly owned by the other company for the earlier mentioned percentage of ordinary

⁴²⁴ <https://www.gov.uk/guidance/corporation-tax-group-payment-arrangements>, last visited 14 February 2017.

shares. The group may also be formed if both of the two companies are owned by another company.⁴²⁵

6.5.5.2 Group relief

The UK tax system allows a company in a group to surrender into a group the following losses, and expenses:

- current trading losses,
- capital allowances,
- non-trading deficits on loan relationships,
- excess management expenses of investment companies, and
- excess charges on income to another company in a group.

The amount of loss surrendered gives the right to the other party, the claimant, to offset it against its own profit provided that:

“the surrendering company and the claimant company are both members of the same group

the surrendering company is resident in the UK or is not a resident but carries on a trade there through a permanent establishment

the claimant company is resident in the UK or is not a resident but carries on a trade there through a permanent establishment”⁴²⁶

Additionally in cross border situations, losses which are eligible for corporate tax group relief may be surrendered and claimed in a group if the following conditions are fulfilled:

- the surrendering company is a 75% subsidiary of a claimant company and the claimant company is resident in the UK, or

⁴²⁵ Income and Corporation Taxes Act 1988, section 838.

⁴²⁶ Ibid., section 402.

- both the surrendering company and the claimant company are 75% subsidiaries of a third company that is a resident in the UK.

The above conditions will be satisfied if the surrendering company is subject to corporate tax under the law of any country in the European Economic Area⁴²⁷ (EEA) territory. A company will be deemed to be under the law of any country in the EEA territory if:

“It is a non-resident company which is a resident in any EEA territory

*It is a non-resident company which is not resident in any EEA territory but which carries on a trade in any EEA territory through a permanent establishment.”*⁴²⁸

6.5.5.3 General restrictions for surrendering losses within a group

Section 407 of the Income and Corporation Taxes Act 1988, provides criteria upon which a loss may be surrendered. According to this section, a surrendering company is not allowed to surrender an amount of loss exceeding the amount of the claimant company's total profits actually arising in the accounting period after relief in relation to previous year's losses of the claimant company.

For example

ABC Company is a UK resident company. ABC is a subsidiary within the ABC group of companies which deals with manufacturing stationeries and office furniture. ABC Company

⁴²⁷ The European Economic Area (EEA) was established on 1 January 1994 following an agreement between the member states (other than Switzerland) of the European Free Trade Association (EFTA) and the European Community. Specifically, it allows Iceland, Liechtenstein and Norway to participate in the EU's Internal Market without conventional EU membership. In exchange, they are obliged to adopt all EU legislation related to the single market, except laws on agriculture and fisheries. See <http://www.efta.int/eea/eea-agreement.aspx>, last visited 20 January 2017.

⁴²⁸ Income and Corporation Taxes Act 1988, Section 402 (2B).

is a claimant company for group relief purposes. It intends to claim group relief from its parent company for the year ending 31 July 2014. The accounts of ABC Company for the year ending 31 July 2014 show the following.

Trading loss	(£ 90,000)
Gain from intangibles	£ 140,000
Chargeable gains	£ 115,000
Chargeable losses brought forward	(£ 60,000)
Other Charges paid	(£ 4,000)

Assume the company decides not to claim relief for the trading loss. At this point, (as it may claim the loss in the next taxing year); based on the above data, the profits for 2014 are £ 191,000, as follows.

Trading income	Nil
Gain of intangibles	£ 140,000
Chargeable gains	<u>£ 115,000</u>
	£ 255,000
Losses brought forward	<u>(£ 60,000)</u>
	£ 195,000
Charges paid	<u>(£ 4,000)</u>
Profit	<u>£ 191,000</u>

However, the group relief which ABC Company claims for the year ending 31 July 2014 cannot exceed £ 101,000. This is because its maximum group relief claim is reduced by the trading loss of £ 90,000.

Nevertheless, if the surrendering company is a UK resident, the company may not surrender the loss, as far as such loss is attributable to overseas permanent establishment. But there is an exception to this rule. If the loss is deemed to be a final loss, it can be surrendered in a group. A final loss is the loss incurred by a foreign subsidiary or PE, when two conditions are met:

- i. The loss has been incurred within a particular accounting period (it is not a carry forward loss); and
- ii. the loss cannot be offset within the domestic law of the country of residence of the subsidiary or PE.

The exception was first experienced in the ruling in *Marks & Spencer*. The UK refused to grant group tax relief in respect of loss incurred by Mark & Spencer subsidiaries in Belgium, Germany and France. The UK argued that since the subsidiaries had no PE in the UK, they should offset the loss where they operated. The UK could only allow group tax relief for losses recorded in the UK. However, the European Court of Justice (Grand Chamber) ruled that rejection of the relief was against one of the Community objectives, because it hindered the freedom of establishment of the parent company. Paragraph 55 of the statement of judgment states that

“In that regard, the Court considers that the restrictive measure at issue in the main proceedings goes beyond what is necessary to attain the essential part of the objectives pursued where:

- the non-resident subsidiary has exhausted the possibilities available in its State of residence of having the losses taken into account for the accounting period concerned by the claim for relief and also for previous accounting periods, if

necessary by transferring those losses to a third party or by offsetting the losses against the profits made by the subsidiary in previous periods, and

- there is no possibility for the foreign subsidiary's losses to be taken into account in its State of residence for future periods either by the subsidiary itself or by a third party, in particular where the subsidiary has been sold to that third party."⁴²⁹

6.5.5.4 Surrendering a tax refund

A company (a group member) may also surrender a tax refund in a group. The tax refund can be surrendered in the group if the following conditions are fulfilled:⁴³⁰

- i. The surrendering company and the recipient company, must each write a notice to HMRC to notify their intention;
- ii. The notice must specify the amount of tax refund to be surrendered; and
- iii. Both companies must be in the same group and must have a similar accounting period.

Once the tax refunded has been surrendered in the group, the recipient company may then reduce the amount of tax payable in respect to that particular taxing year equal to the amount of tax refund surrendered.

6.5.6 Assessment and Payment of Tax

Since 1998, companies are required to compute and determine tax payable themselves. The system is known as self-assessment. A company is required to fill and submit a tax return

⁴²⁹ Case C-446/03 Marks & Spencer PLC v Halsey (HM Inspector of Taxes) [2005] ECR I-10837, paragraph 55, ECLI:EU:C:2005:763.

⁴³⁰ Corporation Tax Act 2010, Section 963.

to HMRC within a period of 12 months from the end of the accounting period or within 3 months from the date of receiving a notice to file the tax return.⁴³¹

Large companies may pay their tax liability in four instalments.⁴³² Payment of tax by instalments requires a company to estimate the amount of tax payable in a tax year. The estimation normally is made at the beginning of the accounting period. The company then has to pay the tax in instalments based on that estimate during the tax year for which the estimate was made. At the end of the tax year, the estimated tax will be compared with the actual tax which is required to be paid based on the accurate accounts and documents submitted. Underpayment or overpayment of an estimated tax attracts interest. Therefore, when a company estimates a low amount of tax payable, interest will be imposed on the difference between the actual amount of realized tax payable and the estimated amount of tax paid. The same procedure will apply if a company estimates and pays more than what it is supposed to pay (a company may claim back the amount of tax overpaid, alternatively, the company may leave the amount of the overpaid tax to HMRC to offset it against subsequent instalments).⁴³³ A company is allowed to revise and adjust the provisional profit figures or the provisional estimated tax if it believes that it made a mistake in estimating the tax payable.⁴³⁴

6.6 Conclusion

Generally, the historical background has great influence on the existing political situation and constitutional law in the UK. The influence of national rules and international treaties from mediaval to modern times cannot be ignored in explaining the development of the UK-tax structure as well as on the constitutional law of the UK. The influence of Magna Carta, Petition of Rights, Bill of Rights, Act of Settlement and the European Communities (to

⁴³¹ http://ip-online2.ibfd.org/kbase/#topic=doc&url=/highlight/collections/cta/html/cta_uk_s_001.html&q=ACT+acts&WT.z_nav=Navigation&colid=4916, last visited 6 December 2016.

⁴³² A company is considered to be large if its taxable profit exceeds the upper limit of small company profit. If a company's profit is above £ 1.5 million it is considered to be a big company, John Tiley, *Revenue Law*, 6th. ed., Hart, Oxford 2008, p. 852.

⁴³³ <https://webarchive.nationalarchives.gov.uk/20090606122609/http://www.hmrc.gov.uk/guidance/instalment-payments/working-out.htm>, last visited 4 September 2019.

⁴³⁴ *Ibid.*

mention but few) have to a great extent helped in the development of constitutional law and the rule of law in the UK.

On the side of human rights, the inclusion of the European Convention on Human Rights in UK domestic law has contributed to enhance the protection of human rights in the UK.

Nevertheless, the UK tax structure does not have a core structure which deviates much from that of the 1802 structure, besides enduring numerous major and minor changes. The power to levy tax is vested solely in the Parliament. There is no constitutional limit to Parliament's actions on taxation; thus Parliament may decide to tax anything it wishes. However for matters concerning EU law, Parliament has to consider the supremacy of EU law when passing tax bills.

Corporation tax is charged on profit made by a resident company or by a non-resident company carrying on business in the UK through a permanent establishment. Companies are required to pay corporate tax on profit generated from taxable income such as trading profits and investment profits; capital gains form part of the taxable object as well. The taxable profit for the purpose of the corporate tax is calculated by deducting from profit all expenses (including capital allowances) incurred in a year of income for the purpose of a trade.

There is group relief available to a group of companies. A group of companies may decide to enter into an arrangement with HMRC to nominate one company of the group to pay tax on behalf of the other companies in the group. Upon complying with several terms and conditions, a company in a group may surrender into a group the trade losses. Likewise the UK tax system allows a company in a group to surrender tax refunds into a group.

Generally companies are required to compute and determine tax payable themselves (self assessment). Companies may pay their tax liability in four instalments. Payment of tax by instalments requires a company to estimate the amount of tax payable in a tax year at the beginning of the year (provisional assessment); thereafter, after the end of the tax year, the estimated tax will be compared with the actual tax which is required to be paid based on the accurate accounts and documents submitted.

7 CHAPTER SEVEN: TAXPAYERS' RIGHTS FOR CORPORATE TAXPAYERS

7.1 Introduction

This chapter reviews the legal position of corporate taxpayers in the UK. It reviews the rights to which corporate taxpayers are (legally) entitled and the rights which are actually available to them. Taxpayers' rights that are promoted in the UK Taxpayers' Charter are explored, and compared with the experience with the Australian Taxpayers' Charter. This comparator is chosen because Australia had and has an influence on developing the UK Taxpayers' Charter. John Bevacqua explains that “*the UK has also based their charter broadly on the Australian model. The United Kingdom Tax Institute, in recommending the use of the Australian Charter as a model for a United Kingdom Charter, described the Australian model as 'impressive.'*”⁴³⁵ Australia is also one of the countries that have developed best practices on Taxpayers' Charters.⁴³⁶

This chapter also explains about advance tax rulings, looking at the procedures and criteria for applying them. Furthermore, this chapter demonstrates the possibility of uncertainty that may exist in advance tax rulings especially when they are deemed to constitute state aid.

The analysis of taxpayers' rights is made through tax cases decided by the First-tier Tribunal and the Upper Tribunal. The existing tax laws, administrative manuals and other documents relating to taxpayers' rights are also examined.

⁴³⁵ John Bevacqua, ‘Redressing the imbalance - challenging the effectiveness of the Australian taxpayers' charter’, *Australian Tax Forum*, Vol. 28, 2013, pp. 377-400.

⁴³⁶ *The practical protection of taxpayers' fundamental rights*, International Fiscal Association, Cahier 2015, p. 71.

7.2 The Taxpayers' Charter

7.2.1 Introduction

In the UK, the collection and levying of tax is entrusted to Her Majesty's Revenue and Customs (HMRC). HMRC levies and collects among others, Income Tax, Corporate Tax, Value Added Tax, Capital Gains Tax and Customs duties.

Tax administration involves interaction between taxpayers and tax officers. There may be conflicts between them. To ensure the proper administration of tax laws and the promotion of tax justice, HMRC has published taxpayers' rights in the Taxpayers' Charter. This is expected to guide taxpayers and tax officers; it is a document that explains taxpayers' rights and obligations. UK taxpayers are also entitled to rights that are provided in the European Convention on Human Rights, through the Human Rights Act 1998.⁴³⁷

This section therefore discusses taxpayers' rights that are promoted in the UK Taxpayers' Charter. The legal status of the Taxpayers' Charter is also analysed. The last part of this section examines advance tax rulings.

7.2.2 Taxpayers' rights in the UK Taxpayers' Charter

The taxpayers' rights that are available in the UK Taxpayers' Charter are discussed below.

a) **Right to be respected**

The wordings of the Taxpayers' Charter with respect to this right are as follows

*"We'll treat you even-handedly, with courtesy and respect. We'll listen to your concerns and answer your questions clearly. We'll presume that you're telling us the truth, unless we have good reason to think otherwise."*⁴³⁸

⁴³⁷ Jonathan D Peacock and Francis Fitzpatrick, 'The impact of Human Rights Act 1998 in the tax field', *British Tax Review*, Vol. 4, 2000, pp. 202-210.

⁴³⁸ UK Taxpayers' Charter, paragraph 1.

HMRC promises to respect a taxpayer whenever it deals with him, and promises to treat a taxpayer with courtesy and consideration. Moreover, HMRC promises to listen to the taxpayer's concerns and to answer the taxpayer's questions in a simple and understandable way. The way the right of being respected is presented in the Taxpayers' Charter reveals that in the UK respect (based on HMRC criteria) is demonstrated by giving a taxpayer an opportunity to be heard as well as by considering the taxpayer to be honest. In Australia the concept of respect in the Australian Taxpayers' Charter is part of fair treatment of taxpayers. The Australian taxpayers' charter sets this out as follows:

- *We will:*
 - *treat you with courtesy, consideration and respect*
 - *behave with integrity and honesty*
 - *act impartially*
 - *respect and be sensitive to the diversity of the Australian community*
 - *make fair and equitable decisions in accordance with the law*
 - *resolve your concerns, problems or complaints fairly and as quickly as possible*⁴³⁹

When the two Taxpayers' Charters are compared, it appears that the Australian perspective considers respect to be an element of fairness rather than a standalone taxpayers' right. It is promoted within the explanation of the right of fair treatment. Practically it is not easy to rule out which approach, the British or the Australia is better. Respect by itself is a heavily loaded term.⁴⁴⁰ A dictionary meaning of the word respect is “*a feeling of deep admiration for*

⁴³⁹ https://www.ato.gov.au/About-ATO/About-us/In-detail/Taxpayers-charter/Taxpayers--charter---what-you-need-to-know/?page=3#Offering_you_professional_service_and_as, last visited 7 December 2016.

⁴⁴⁰ Bernd Simon, 'Respect equality, and power: A social psychological perspective', *Gruppendynamik*, Vol. 38, 2007, p. 309.

someone or something elicited by abilities, qualities or achievements."⁴⁴¹ The concept of respect is related with a person's feeling; therefore it is impractical to have a conclusive list of items that may constitute respect. Bernd Simon⁴⁴² argues that *"respect as a scientific concept must not be defined simply by listing under the heading of 'respect' all the meanings that a lay person means to convey when they use the 'r-word' to describe their experience. Instead, respect for respect as scientific concept requires us to identify the underlying theoretical principle that provides the concept and its associated meanings ..."* This argument can be accepted, because people may perceive respect differently depending on their experience. Tom Tyler and Steven Blader explain that *"If an authority listens to people's arguments we might hypothesize that people think that the authority is conferring interpersonal respect on that person."*⁴⁴³ Possibly HMRC describes the rights of being respected based on this principle. However sometimes people may feel respected to the extent to which they are treated in a way that is (seen as) unbiased, trustworthy and dignified.⁴⁴⁴ That seems to be the Australian perspective in explaining respect to Australian taxpayers. It matters little which approach to describing respect is better; respect depends on agreed norms of the community concerned.

b) **Right to being assisted**

With the right to be assisted, HMRC promises taxpayers that it will help them by giving all the necessary information that will assist them to understand their obligations on paying the correct amount of tax. The Taxpayers' Charter states that:

⁴⁴¹ Oxford Online Dictionary. Accessed through <https://en.oxforddictionaries.com/definition/respect>, last visited 10 January 2017.

⁴⁴² Bernd Simon, op. cit. (fn 440), at 310.

⁴⁴³ Tom R Tyler and Steven L Blader, 'The Group Engagement Model: Procedural Justice, Social Identity, and Cooperative Behaviour', *Personality and Social Psychology Review*, Vol. 7, 2003, pp. 349-361.

⁴⁴⁴ Bernd Simon, 'op. cit (fn 440) at 312.

*“We'll help you understand what you have to do and when you have to do it. We'll deal with the information you give us quickly, efficiently, and keep any costs to you at a minimum. We'll put any mistakes right as soon as we can.”*⁴⁴⁵

HMRC also promises taxpayers quick and efficient services on any information taxpayers presented to HMRC, which may be expected to minimize tax compliance costs. HMRC promises taxpayers that, if HMRC makes a mistake, it will immediately correct it once it is discovered. It is not, however, certain whether, and, if so, how a taxpayer will be compensated because of a mistake by HMRC.

The experience from the Australian Taxpayers' Charter shows that, the right to be assisted focuses more on the provision of clear information to taxpayers, and on giving a remedy in case the information given has mislead a taxpayer. The Australian Taxpayers' Charter expresses this thus:

“We aim to provide accurate, consistent and clear information to help you understand your rights and entitlements and meet your obligations.

Our information ranges from published information about how the law applies generally to advice to you personally about how the law applies to your circumstances...

If our information is incorrect or misleading.

*If you follow our information and it turns out to be incorrect, or it is misleading and you make a mistake as a result, we will take that into account when determining what action, if any, we or you should take.”*⁴⁴⁶

There is no material difference between the two Taxpayers' Charters in explaining this right.

⁴⁴⁵ UK Taxpayers' Charter, paragraph 1.2.

⁴⁴⁶ https://www.ato.gov.au/About-ATO/About-us/In-detail/Taxpayers-charter/Taxpayers--charter---what-you-need-to-know/?page=3#Your_rights, last visited 14 February 2017.

c) **Presumption of being honest**

The UK Taxpayers' Charter states that

“We'll presume that you're telling us the truth, unless we have good reason to think otherwise.”

A taxpayer is thus given a qualified promise by HMRC that he will be presumed to be honest. This promise is a qualified promise because if HMRC has good reason to believe the contrary, there will be a further review and an investigation concerning the correctness and completeness of the information submitted by a taxpayer. A taxpayer is in fact required to submit valid information that can be used to determine his taxable income.

Similar words are found in the Australian Taxpayers' Charter. Taxpayers whose actions seem to be deceitful will not be considered honest. The Australian Taxpayers' Charter clarifies further the presumption of being honest:

“We presume you tell us the truth and that the information you give us is complete and accurate unless we have reason to think otherwise.

Generally, you prepare the information you need to claim your entitlements and meet your obligations, then you give this information to us. Based on this information, you either make or receive a payment.

We recognise that people sometimes make mistakes. We differentiate between mistakes and deliberate actions. If you make a mistake, we give you the opportunity to explain. We listen to you and take your explanation into account.”

d) **The Right to privacy and confidentiality**

The right to privacy is also promised in the UK Taxpayers' Charter, which explains that

“We'll protect information we obtain, receive or hold about you and only share information about you when the law lets us. We'll explain why we need any additional information.”⁴⁴⁷

The privacy that is promised is the privacy of taxpayers' information and taxpayers' documents presented to HMRC. HMRC will not share taxpayers' information except when the law requires them to share it.

The experience from the Australian Taxpayers' Charter shows similar characteristics to that of the UK. Taxpayers are promised confidentiality unless the law requires the particular information to be shared. However, the Australian Taxpayers' Charter sets out steps to be taken by a taxpayer who believes his privacy or confidentiality rights have been breached:

“In administering the laws, we collect information about you. We may get this information from you or from other parties. We must respect your privacy and keep your information confidential.

In some circumstances, the law allows us to disclose your information to others for specific purposes.

If you think that your privacy or the confidentiality of your tax information has been breached because of our actions, your first step should be to try to resolve it with the tax officer you have been dealing with (or phone the number you have been given).”

Generally, the rights to privacy and confidentiality are exposed to great risks. Tax administrations are more and more concerned with obtaining taxpayers' information. The information may sometimes be exchanged within a country between state agencies, or it may be exchanged cross borders between revenues authorities. This is not surprising; a taxpayer has a legal obligation to file information that may be used to calculate the correct amount of tax to the tax administration. However, the taxpayer's information may contain business

⁴⁴⁷ UK Taxpayers' Charter, paragraph 1.4.

secrets. A taxpayer on his side may well be more concerned with the confidentiality of his information. As explained by Mathew Gilleard,⁴⁴⁸ *“the chief (...) risk is that sensitive data is exposed to the threat of leaking”*. He went on to observe that *“leaking can carry a very real threat not least of which is the threat to company's bottom line”*. That is, a leakage of trade secrets may impair net profit of a company. He very clearly has a point; leakage of taxpayers' information is a threat to taxpayers' confidentiality. It is very unfortunate that it is not easy to ensure that there will be no leakage of taxpayers' information during the exchange of information. Leakage of information sometimes happens as a deliberate action by a tax officer or it may happen because of technological fault.⁴⁴⁹

Leakage of taxpayers' information has several disadvantages, including that, the leaked information may sometimes be sold to a taxpayer's business competitors. This will be done if the leaked information contains information related to the value of intellectual properties, research and development, or transfer pricing.⁴⁵⁰ Mathew Gilleard raised concerns that sometimes information can be leaked to criminal organisations:

*“People in less stable parts of the world generally worry about their information being leaked to criminal organisations or being used politically.”*⁴⁵¹

It is not obvious that the exchange of information between countries breaches the confidentiality of taxpayers.⁴⁵² However this may still occur. Countries encourage the exchange of information to enhance transparency and proper determination of taxable

⁴⁴⁸ Mathew Gilleard, 'The dark side of transparency', *International Tax Review*, Vol. 25, 2014, pp. 12-15.

⁴⁴⁹ <https://www.globalbankingandfinance.com/taxpayer-data-leakage-and-fraud-on-the-rise/>, last visited 11 January 2017.

⁴⁵⁰ Enrico Mercuri, 'Instantaneous Exchange of Information: Technology addressing Laws that facilitate tax evasion in other jurisdictions', *Revenue Law Journal*, Vol. 23, 2013.

⁴⁵¹ Mathew Gilleard, op. cit (fn 448).

⁴⁵² See also Niels Diepvens and Filip Debelva, 'The Evolution of Exchange of Information in Direct Tax Matters: The taxpayers' Rights under Pressure', *EC Tax Review* 2015, p. 216.

income.⁴⁵³ There is a need to increase attention concerning the taxpayers' confidentiality rights to minimize the possibility of leakage of information. Philip Baker, on the issue of exchange of information and taxpayers' rights, explains that “*in the headlong rush towards automatic exchange of information, very little attention appears to have been paid to instituting the necessary safeguard for taxpayers' rights to confidentiality, privacy and data protection*”.⁴⁵⁴ His view is similar to that of Niels Diepven and Filip Deleva who argue that there is a need to have a fair balance between the rights of tax authorities and the rights of taxpayers; so far this has not been the case for exchange of information. They further observe that “*the possibilities and instruments for tax authorities to exchange information have been steadily increasing, but a corresponding increase of taxpayer's protection has been absent.*”⁴⁵⁵

In practice it is not easy to reduce the possibility of a breach of taxpayer's right of confidentiality, because tax administrations have different legal and economic capacity to maintain taxpayer's confidentiality. There should be effort to ensure that countries do not exchange taxpayers' information unless the sending country is sure that the recipient country is sufficiently capable of ensure the confidentiality. It is also wise practice to notify a taxpayer when tax administration intends to exchange taxpayers' information.⁴⁵⁶ The notification by itself will not solve the issue of leakage of taxpayer's information, but it may allow a taxpayer to raise a concern if he believes there is a possibility of leakage of his trade secrets due to weakness of tax rules or technology in the recipient country.

⁴⁵³ Arthur J. Cockfield, 'Protecting Taxpayer Privacy Rights Under Enhanced Cross-Border Tax Information Exchange: Toward a Multilateral Taxpayer Bill of Rights', *University of British Columbia Law Review* Vol. 42, 2010, pp. 420-471. Available at SSRN: <https://ssrn.com/abstract=1705551>, last visited 14 February 2017.

⁴⁵⁴ Philip Baker, 'Privacy rights in the Age of Transparency: A European Perspective', *Tax Notes International*, May 2016, pp. 583-586.

⁴⁵⁵ Niels Diepvens and Filip Debelva, op. cit (fn 452), pp. 210-219.

⁴⁵⁶ Jose M. Calderon, 'Taxpayer protection within the exchange of information procedure between state tax administrations', *Intertax* Vol. 28, 2000, pp. 462-475.

e) **Right to fair treatment**

The idea of fairness is very broad; it includes the personal perception of a person of conduct or acts of another person. Jonathan Farrar has defined fairness as “*a judgment arising from actual or imagined comparisons involving oneself or oneself and others.*”⁴⁵⁷ The dictionary meaning of the term fair is

*“Treating someone in a way that is right or reasonable, or treating a group of people equally and not allowing personal opinions to influence your judgement.”*⁴⁵⁸

The UK Taxpayers' Charter has explained the right to fair treatment by explaining that

“We'll deal with your complaints or appeals as quickly as we can. You can also ask someone else to look into an issue on your behalf. If we can't resolve matters between us, you can ask us to work with someone who's not been involved in your dispute.”

But this does not really openly present the main idea of fairness. The Taxpayers' Charter has not explicitly described *how fairly* a taxpayer will be treated. Instead it focuses more on explaining how taxpayers' complaints can be resolved.

The Australian Taxpayers' Charter elaborates the right of fair treatment more broadly than is the case in the UK Taxpayers' Charter. The Australian charter states that:

- *We will:*
 - *act impartially*
 - *respect and be sensitive to the diversity of the Australian community*

⁴⁵⁷ Jonathan Farrar, ‘An empirical analysis of taxpayers' fairness preferences from Canada's Taxpayer Bill of rights,’ *Journal of Accounting and Taxation*, Vol. 7 2015, pp. 71-79.

⁴⁵⁸ <http://dictionary.cambridge.org/dictionary/english/fair>, last visited 4 September 2019.

- *make fair and equitable decisions in accordance with the law*
- *resolve your concerns, problems or complaints fairly and as quickly as possible.*

Making fair and equitable decisions

We apply the law consistently when we make a decision about your affairs. However, we listen to you and will take your circumstances into account if they are relevant to the decision and the law allows us to.

The idea of fairness is indeed very broad. To treat taxpayers fairly would include honouring the taxpayers' belief that whatever guidance is issued by the tax administration is reliable. The belief that tax guidance is applicable to every taxpayer who falls within the subject matter of the guidance. The taxpayer may then rely on the guidance when he fulfils his tax obligation. This notion was discussed in *The Queen on the Application of Ralph Hely-Hutchinson v The Commissioners for Her Majesty's Revenue and Customs*,⁴⁵⁹ where the judge ruled that in certain circumstances HMRC can apply a wrong tax treatment to ensure fair treatment to taxpayers. In this case the taxpayer suffered a capital loss by relying on the guidance published by HMRC. HMRC had published the guidance on how to calculate capital gains and losses, and later on it withdrew the guidance on the ground that there was a change of the law. However, at the time when the guidance was withdrawn the taxpayer had already relied on it, and as a result he suffered capital loss. HMRC refused to allow the deduction of that particular loss. Mrs Justice Whipple held that:

In determining what amounts to unfairness so marked that it constitutes an abuse of power, it is important to remember that "the categories of unfairness are not closed" (per Bingham MR in Unilever at p 690 f) and therefore the circumstances in which the Commissioners may be required to forgo tax can travel beyond cases of detrimental reliance (although the fact that a taxpayer has relied to his or her

⁴⁵⁹ *The Queen on the Application of Ralph Hely-Hutchinson v The Commissioners for Her Majesty's Revenue and Customs* [2015] EWHC 3261.

*detriment on the Commissioners' promise is in many cases the source of the complaint of unfairness). Specifically, the Commissioners are incorrect to submit, as they do in their skeleton, that "A public authority cannot be required to continue to apply the wrong tax treatment just in order to ensure consistency of treatment" (para 23); the Commissioners can be required in an appropriate case to continue to apply the wrong tax treatment to ensure consistency of treatment, where the alternative would be conspicuously unfair, and an abuse of power.*⁴⁶⁰

7.2.3 Taxpayers' obligations in the Taxpayers' Charter

The Taxpayers' Charter has provided some obligations which are expected to be lived up to by taxpayers. They are expected to be honest. They are expected to be truthful, open and are expected to act within the boundaries of the law. Taxpayers are also expected to provide accurate information to HMRC and if a taxpayer makes a mistake, he is expected to contact HMRC immediately after realizing his mistake. On this obligation, the Taxpayers' Charter states that

"We need you to be honest with us. If someone else acts for you we expect them to be honest too. We expect you to: be truthful, open and act within the law; give us accurate information; give us all relevant facts; tell us as soon as you can if you think you have made a mistake."

Another obligation of taxpayers which is explained in the Taxpayers' Charter is to take care to make things right. A taxpayer is expected to take reasonable care when performing his obligations; for example in filing a tax return. Also a taxpayer is expected to pay his tax timely, keep adequate records and maintain the records for the period which is required by law. A taxpayer is also obliged to inform HMRC once there is anything that stops him from meeting his obligations. These obligations are explained as follows

⁴⁶⁰ Ibid., paragraph 43.

“We need you to take responsibility of getting things right, even if you have authorised someone to act on your behalf. We expect you to: take reasonable care when you complete tax returns and fill out forms; make payments on time... tell us if you have any particular needs so we can take them into account...keep adequate records that support what you tell us and hold them for as long as the law says you need to.”

7.2.4 Legal status of the Taxpayers' Charter

The Taxpayers' Charter is a very important document that is used to express in simple language taxpayers' rights and sometimes taxpayers obligations in relation to their tax affairs.⁴⁶¹ It promises the quality service a taxpayer should expect to receive from the tax administration.⁴⁶² Similarly, the Taxpayers' Charter is expected to balance the powers possessed by the revenue authorities and the rights of taxpayers.⁴⁶³ Therefore, the Taxpayers' Charter may create a uniform guidance on the modality of treatment of taxpayers. Tax officers may use the Taxpayers' Charter to provide taxpayer's rights when dealing with taxpayers.⁴⁶⁴ In practice, the Charter is expected to be an instrument that protects a taxpayer against the possible abuse of powers of the tax administration.⁴⁶⁵

⁴⁶¹ Jonathan Farrar, 'An empirical analysis of taxpayers' fairness preferences from Canada's Taxpayer Bill of rights', *Journal of Accounting and Taxation*, Vol. 7, 2015, pp. 71-79.

⁴⁶² John Bevacqua, 'Redressing the imbalance challenging the effectiveness of the Australian Taxpayers' Charter', *Australian Tax Forum*, 2013, pp. 377-400.

⁴⁶³ Ian Hayes, 'A Model Taxpayers' Charter- Why?' *European Taxation*, 2013, pp. 522-524.

⁴⁶⁴ Simon James, Kristina Murphy & Monica Reihart, 'Taxpayers' Charter: a case study in tax administration', *Journal of Australian Taxation*, Vol. 7, 2004, pp. 336-356.

⁴⁶⁵ Kirsty Unger, 'Ethic codes and taxpayer charters', *ejournal of tax research* Vol. 12, 2014, pp. 483-498 available at https://www.business.unsw.edu.au/research-site/publications-site/ejournaloftaxresearch-site/Documents/09_Unger_EthicsCodesTaxpayerCharters.pdf, last visited 14 February 2017.

While many Taxpayers' Charters have succeeded in ensuring the quality of service to taxpayers,⁴⁶⁶ this is not the case for the protection of taxpayers' rights. Most Taxpayers' Charters do not have a sufficient legal basis.⁴⁶⁷ They are not laws, thus they do not create any additional legal rights for taxpayers.⁴⁶⁸ The UK Taxpayers' Charter is no exception to this, and its legal status in the UK is still a questionable matter. The UK Taxpayers' Charter is not a legal document, just a document which explains promises the revenue authority makes to taxpayers. It provides only a weak protection of taxpayers' rights.⁴⁶⁹ The existence of this document within the tax administration may exaggerate the actual situation concerning taxpayers' rights in the country. As The Chartered Institute of Taxation (CIOT) observed during drafting the Scotland charter of standards and values,⁴⁷⁰ a meaningful charter must be capable of being enforced. The CIOT explained that:

“In order for the Charter to be meaningful, not only must it be obeyed, but it must be capable of being enforced. There must also be provision for effective remedy. We welcome the inclusion of the statement that the Charter can be referred to in all tax dealings, including correspondence, review, appeal, tribunal and court proceedings. It is important that this is stated clearly, to ensure that all users of the Charter are aware of this.”⁴⁷¹

Having a Taxpayers' Charter is not enough on its own. A Taxpayers' Charter must have a sufficient legal basis to be enforced by the court. Ian Young has argued that in order to have

⁴⁶⁶ John Bevacqua, 'Redressing the imbalance challenging the effectiveness of the Australian Taxpayers' Charter', *Australian Tax Forum*, 2013, pp. 377-400.

⁴⁶⁷ Ibid.

⁴⁶⁸ Ibid.

⁴⁶⁹ Judith Freedman and John Vella, 'HMRC's Management of the UK Tax System: The Boundaries of legitimate discretion', *Legal Research Paper Series*, paper No. 73, University of Oxford 2012, p. 87.

⁴⁷⁰ This is similar with the Taxpayers' Charter. It is issued by the revenue authority of Scotland. It is accessible through <https://www.revenue.scot/about-us/charter-standards-and-values>, last visited 23 February 2017.

⁴⁷¹ *Revenue Scotland Charter of Standards and Values – A Consultation Paper Response by the Chartered Institute of Taxation*, March 2015.

an effective and efficient tax system the taxpayer must have the ability to hold the tax administration to account: “*My personal view is that HMRC needs to recognise that tax systems can only work efficiently, and effectively, when the taxpayer and the tax agent are provided with the wherewithal to hold the tax administration to account.*”⁴⁷² It appears, therefore, that currently in the UK a taxpayer cannot hold HMRC to account for failure to provide what is written in the Taxpayers' Charter.

The Chartered Institute of Taxation⁴⁷³ has proposed since 2008 that the UK Taxpayers' Charter should be made part of the UK's principal tax legislation (i.e. be included in the tax law). The Institute argued that to give the Taxpayers' Charter legislative force will increase protection of taxpayers' rights. It is a way to give clear and reliable guidance to taxpayers and the tax administration.⁴⁷⁴ It may also strengthen in a truthful way the taxpayer rights, thus taxpayers' rights will be better respected in practice. But their recommendation was ignored. The UK Taxpayers' Charter remains just a charter which depends on the favour and concerns of HMRC. The arguments in favour for legislating the taxpayers' charter are, however, still valid.⁴⁷⁵ Having an un-legislated Taxpayers' Charter does not afford sufficient protection for taxpayers' rights.⁴⁷⁶ Currently when HMRC breaches what is written in the Taxpayers' Charter, neither the Tribunals nor the Courts can make HMRC accountable for not observing

⁴⁷² Ian Young, ‘Why your charter is a positive feature of the UK tax system’, *Tax Journal* (14 June 2016) published through <https://www.taxjournal.com/articles/why-your-charter-positive-feature-uk-tax-system-14062016>, last visited 12 January 2017.

⁴⁷³ The CIOT is the leading professional body in the UK for advisers dealing with all aspects of taxation. As a not-for-profit organization, their primary purpose is to promote education in taxation with a key aim of achieving a more efficient and less complex tax system for all. For more information visit <http://www.tax.org.uk/members>, last visited 12 December 2016.

⁴⁷⁴ Jonathan Schwarz, ‘Rights and Powers: Protecting the legitimate interest of taxpayers’, *British Tax Review*, Vol. 3, 2009, pp. 306-318.

⁴⁷⁵ OECD *Tax administration: Comparative information on OECD and other advanced and emerging economies*, 2015, p. 283.

⁴⁷⁶ Judith Freedman & John Vella, op. cit. (fn 469), p. 118.

its promises. Therefore it a taxpayer can in principle not rely on the guidance given by HMRC.⁴⁷⁷

Although the UK Taxpayers' Charter is not law itself, there is a legal requirement that HMRC establish a Taxpayers' Charter; this is set out in section 92 of the Finance Act 2009; the Act provides that:

“The Commissioners must prepare a Charter

The Charter must include standards of behaviour and values to which Her Majesty's Revenue and Customs will aspire when dealing with people in the exercise of their functions.”

By requiring HMRC to establish the Taxpayers' Charter, the Act imposes an obligation, and the Charter not optional for HMRC; but it still remains the case that the Taxpayers' Charter itself does not have legal force.

In the UK there is however monitoring of the implementation of the Taxpayers' Charter. Section 92 of the Finance Act 2009 requires the Commissioners to review the charter and publish a report for the general public in order to demonstrate the extent to which the HMRC has promoted taxpayers' rights:

The commissioners must, at least once every year, make a report reviewing the extent to which Her Majesty's Revenue and Customs have demonstrated the established standards of behaviour and values included in the charter.

Therefore in order to ensure that the taxpayers rights promised in the Taxpayers' Charter are efficiently promoted as intended, administratively, HMRC has appointed a tax officer (Charter Champion) to ensure that the HMRC staff is given guidance and support to comply

⁴⁷⁷ Ibid.

with the Taxpayers' Charter.⁴⁷⁸ This initiative may increase the quality of service within HMRC, but it cannot have additional effect on the protection of taxpayers' rights; the legal status of the Taxpayers' Charter remains the same. The UK government has also established the Charter Advisory Committee, composed of several members from external stakeholders. The committee is obliged to review how HMRC has implemented the rights promoted in the Taxpayers' Charter and to make recommendations to the management of HMRC concerning the conformity of HMRC with the Taxpayers' Charter.

Nevertheless, these measures are still internal mechanisms to ensure the quality of services of HMRC. The protection of taxpayers' rights has not been sufficiently safeguarded. The committee report to the board of the HMRC seems like a one-man-show: HMRC prepares the charter, interprets the charter, and evaluates the implementation of the charter!

A positive aspect of the UK Taxpayers' Charter is judicial backup based on legitimate expectation.⁴⁷⁹ Even though the UK Taxpayers' Charter is not law, the judges may require HMRC to stick with the guidance it gave to the general public. This is true if taxpayers prove to have been affected by the guidance made by HMRC. In *R v Board of Inland Revenue, ex parte MFK U/W Agencies Ltd* it was held that

*“...the Inland Revenue could give advice and guidance to taxpayers, but a taxpayer could only have legitimate expectation that he could hold the Revenue to a ruling or statement in respect of his fiscal affairs if in his part he approached the revenue with a clear and concise proposal about the future conduct of his fiscal affair...”*⁴⁸⁰

⁴⁷⁸

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236902/3752_Your_Charter_Annual_Report_2013-14_v6_accessible.pdf, last visited 9 September 2017.

⁴⁷⁹ John Bevacqua, 'Redressing the imbalance challenging the effectiveness of the Australian Taxpayers' Charter', *Australian Tax Forum*, 2013, pp. 377-400.

⁴⁸⁰ *R v Board of Inland Revenue, ex parte MFK U/W Agencies Ltd* [1990] 1 All ER 91.

While the issue of legitimate expectation may be considered to be a relief to taxpayers' rights,⁴⁸¹ it does not seem to provide sufficient and reliable comfort to taxpayers.⁴⁸² The statutory protection of taxpayers' rights is a stronger way of protection and reliance on taxpayers' rights.⁴⁸³

7.3 Advance tax rulings

7.3.1 Introduction

Carlo Romano defines an advance tax ruling as

*“A legal instrument consisting of any advice, information or a statement provided by the tax authorities to a specific taxpayer, upon his request, concerning his tax situation in respect of future transactions and on which that taxpayer is, to a certain extent, entitled to rely.”*⁴⁸⁴

The OECD has defined an advance tax ruling in the glossary of tax terms as

*“A letter ruling, which is a written statement, issued to a taxpayer by tax authorities that interprets and applies the tax law to a specific set of facts.”*⁴⁸⁵

Advance tax rulings are normally issued to facilitate certainty with respect to the application of the tax law prior to a taxpayer engaging into a transaction or arrangement.⁴⁸⁶ The taxpayer may ascertain the tax implications on a transaction to be undertaken in the future.⁴⁸⁷

⁴⁸¹ John Bevacqua, op. cit. (fn 479).

⁴⁸² Judith Freedman and John Vella, op. cit. (fn 469), p. 118.

⁴⁸³ Ibid.

⁴⁸⁴ Carlo Romano, *Advance Tax Rulings and Principles of Law: Towards a European Tax Rulings System?* IBFD, Doctoral Series 4, 2002, p. vii.

⁴⁸⁵ <http://www.oecd.org/ctp/glossaryoftaxterms.htm>, last visited 4 September 2019.

⁴⁸⁶ Winnie Chan, 'Binding Rulings', *Fiscal Studies* (1997), Vol. 18, pp. 189-210.

⁴⁸⁷ Ibid.

Sometimes an advance tax ruling may be requested with respect to a transaction which has already occurred but prior to filing the tax return.⁴⁸⁸

Any taxpayer may apply for an advance tax ruling.⁴⁸⁹ However, in practice, MNE are commonly the beneficiary of advance tax rulings. They need certainty on the application of the law especially on cross-border transactions and on transfer pricing arrangements.⁴⁹⁰ Advance tax rulings usually must be applied for in writing by the person who is about to undertake the transaction, or any third party who will directly be affected by the transaction to be undertaken. For example, company (A) may apply for an advance tax ruling if there is another company (B) which intends to takeover a third company (C). If company A is associated with either company B or C, the takeover between company B and C may have a tax impact on company A.

Generally advance tax rulings are binding statements made by the revenue authority to a particular taxpayer on the application of the tax law. The taxpayer will be protected from penalties, interest or additional tax when he relies on the ruling issued.⁴⁹¹ Much of the above is based on the UK tax system.

⁴⁸⁸ ECON Committee (European Parliament), Tax Rulings in the EU Member States, 2015(IP/A/ECON/2015-08), p. 28, accessed through <http://www.europarl.europa.eu/studies>, last visited 4 January 2018.

⁴⁸⁹ European Parliament Committee on Economic and Monetary Affairs (ECON), *Tax rulings in the EU Member States, European Union*, November 2015, p. 28, accessed through [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/563447/IPOL_IDA\(2015\)563447_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/563447/IPOL_IDA(2015)563447_EN.pdf), last visited 4 September 2019.

⁴⁹⁰ Ibid.

⁴⁹¹ IMF Legal Department, *Introducing an Advance Tax Ruling (ATR) Regime*, Vol.1, 2016. Accessed through <https://www.imf.org/external/pubs/ft/tltn/2016/tltn1602.pdf>, last visited 4 September 2019.

7.3.2 Advance tax rulings in the UK

In the UK in most cases a ruling will be given within 28 days from the date of application. However, for transactions which are deemed to be complicated, HMRC is authorised to extend the time to issue a ruling.⁴⁹²

When requesting an advance tax ruling, a taxpayer is required to submit all relevant information regarding the transaction to be undertaken.⁴⁹³ A taxpayer, before submitting any information concerning the advance ruling he is asking for, may request a meeting with the revenue officer. During the meeting, the taxpayer may clarify the required information about the transaction he is about to undertake. Thereafter the taxpayer may decide whether or not to continue to request the advance tax ruling by submitting official documents.

7.3.2.1 Circumstances upon which an advance tax ruling can be made

In the UK, the general rule for requesting an advance tax ruling is that the ruling will only be available:

- if there is uncertainty as to how the law will apply to a specific transaction.⁴⁹⁴ This will apply if the ruling is requested on matters introduced in the last four Finance Acts and the newly-introduced law or amendments have brought about changes in determining the tax liability of a taxpayer. Similarly, MNE may request an advance tax ruling to seek the clarification on the application of a double taxation agreement in a particular transaction or arrangement.⁴⁹⁵

⁴⁹² <https://www.gov.uk/hmrc-internal-manuals/business-income-manual/bim00520>, last visited 4 September 2019.

⁴⁹³ <https://www.gov.uk/guidance/when-you-can-rely-on-information-or-advice-provided-by-hm-revenue-and-customs>, last visited 4 September 2019.

⁴⁹⁴ Maclay Murray and Spens, *Tax Rulings England*, Lex Mundi Publication, 2011, pp. 1-3.

⁴⁹⁵ *Ibid.*

- On legislation older than the last four Finance Acts, if there is uncertainty as to the tax outcome concerning a real issue of commercial significance to the business of the taxpayer.⁴⁹⁶ The commercial significance to the business is determined by reference to the scale of the business and the impact of the issue to be undertaken.

It is very unfortunate that HMRC has not explained what may constitute commercial significance. However, as noted above, in practice MNE commonly request advance tax rulings to acquire certainty on the application of tax law especially concerning transfer pricing arrangements.⁴⁹⁷

7.3.2.2 HMRC may reject to issue a ruling

There is no guarantee that any corporate taxpayer who requests an advance tax ruling will obtain it. A corporate taxpayer cannot claim to have a legal right to acquire an advance tax ruling.⁴⁹⁸ In the UK there are circumstances that may influence HMRC to reject the issuance of an advance tax ruling, such as:⁴⁹⁹

- a) The application for an advance tax ruling will always be rejected if the matter for which the ruling is applied for has already been clarified in the published guidance on tax law issued by HMRC;
- b) Where a taxpayer asks HMRC to comment on a tax planning arrangement. This is a circumstance when a taxpayer proposes to undertake a transaction or arrangement and approaches HMRC to comment on the possible tax savings that might be derived as a

⁴⁹⁶ <https://www.gov.uk/hmrc-internal-manuals/business-income-manual/bim00520>, last visited 4 September 2019.

⁴⁹⁷ Birgit Huesecken and Michael Overesch, *Tax Avoidance through Advance tax rulings, Evidence from the Lux Leaks Firms*, University of Cologne, 2016.

⁴⁹⁸ Maclay Murray and Spens, op. cit. (fn 494).

⁴⁹⁹ The list is available at <https://www.gov.uk/guidance/non-statutory-clearance-service-guidance#when-hmrc-will-provide-advice-under-this-service>, last visited 13 January 2017.

result of the proposed arrangement or transaction. This involves a request to HMRC to give tax planning advice, or to 'approve' tax planning products or arrangements;

- c) Where a taxpayer sends an application that seems to be a minor variation of a previous ruling for the same client on the same type of transaction. Normally only one advance tax ruling will be made on a transaction. Therefore, if the ruling is issued on a particular transaction or arrangement, no other ruling issued for the same transaction or arrangement will be issued which involves the same parties within the same period or a different period if there was no change of the tax law.
- d) Where HMRC believes that the arrangement to be undertaken is primarily to gain tax advantages rather than being primarily commercially motivated. This situation is different from the situation in (b) above: in (b) the taxpayer requests HMRC solely to comment or suggest possible tax savings on a transaction to be undertaken. However if tax advantages are the main purpose, then the evaluation made by the revenue officer becomes the driving element, so the refusal to issue a ruling is understandable.
- e) Where HMRC has already opened an audit or enquiry into the transaction that is subject of the application.

If the request for the advance tax ruling has been rejected, based on any of the reasons mentioned above, or any other reason, HMRC will respond to the taxpayer stating clearly the reason for the rejection. Similarly, if the application is rejected because HMRC believes that the matter has already been covered in other guidance that it has issued, HMRC will refer the taxpayer to the relevant guidance.

A corporate taxpayer has no right to appeal against the decision of HMRC to refuse to make an advance tax ruling. However the corporate taxpayer may apply to the Court for a judicial review.⁵⁰⁰ Before applying for the judicial review, a taxpayer must submit his complaints to

⁵⁰⁰ Judicial review may be requested for any HMRC decision where there is no right of appeal against the particular decision. Commonly, judicial review is available to review the discretionary powers of HMRC.

the complaints handler (adjudicator), who reviews whether administrative procedures have been fully complied with in the process.

7.3.2.3 Information to be provided on the application for the advance tax ruling

A taxpayer is supposed to provide to HMRC full facts and the context of the transaction to be undertaken while applying for an advance tax ruling. The taxpayer is also supposed to show clearly the uncertainty of the law in question. The taxpayer is required to include in his application, information about:⁵⁰¹

- i. The applicant for the ruling; this information includes the name of the applying person, the business he carries on, his taxpayer's identification number, and contact details;
- ii. The transaction; a taxpayer is required to submit full details about the transaction to be undertaken, including:
 - a. details of to which taxes the application refers: whether the application concerns corporate tax, capital gains tax or any other type of tax;
 - b. information about all parties to be involved in the transaction; this includes contact details of the parties of the transaction;
 - c. the reason why the business is undertaking the transaction;
 - d. other relevant facts about the transaction; for example, what the transaction involves regarding price, contract terms, or a draft of the contract, proposed date of transaction and any other relevant information about the transaction;
 - e. the commercial background: a taxpayer is expected to explain the significance of the tax result if the transaction is to be undertaken, and must show the amount of tax that is expected to be collected from the transaction (based on his view and understanding). A taxpayer also has to explain why he chooses

⁵⁰¹ <https://www.gov.uk/guidance/non-statutory-clearance-service-guidance#what-information-you-need-to-provide>, last visited 12 January 2017.

the particular transaction over another that could lead to the same commercial result. Simply, a taxpayer is required to explain whether he has considered alternative transactions;

- f. the legal point: a taxpayer is required to explain the specific legislation at issue to be applied, and explain in detail why he believes that the application of the legislation may result in different interpretations, he must present a summary of those different interpretations; in his presentation, the taxpayer may present references to published guidance of the law or case-law to prove the differences in interpretation of the tax law; moreover the taxpayer is required to give details of any legal advice he has already received on the transaction.

An advance tax ruling is not a short cut for a taxpayer to ease the computation of tax. A taxpayer must prove that he has made sufficient efforts to determining the tax impact on the transaction or arrangement to be undertaken before applying for the ruling. Interestingly, HMRC requires a taxpayer to disclose the possible tax advantage that exists for the transaction to be undertaken. The reason to require such disclosure of a tax advantage is to prohibit the application of an advance tax ruling that is highly tax driven.

It appears that HMRC has ignored the fact that it is hard to distinguish between tax advantages and business advantages. This is because taxation is one of the factors influencing business advantages. Several studies have been carried out which show how taxation may influence investment and financing decisions of a company. Most of these studies have concluded that tax is among the factors that influence investments and financing decisions of companies.⁵⁰² For a company to request an advance tax ruling is a tax risk management strategy.⁵⁰³ In practice MNE's in particular are involved in series of arrangements or transactions that involve uncertainty concerning the tax impact of those arrangements or transactions. Tax rulings play

⁵⁰² Austan Goolsbee, 'The impact of the corporate income tax: Evidence from state organisational data', *Journal of Public Economics* Vol. 88, 2004, pp. 2283-2299.

⁵⁰³ Yehonatan Givati, 'Resolving Legal Uncertainty: The Unfulfilled Promise of Advance Tax Rulings', *Virginia Tax Review* 2009, pp 137-175.

a great role in tax planning. This view is supported by Diller, Markus *etal.*⁵⁰⁴ who state that *without a ruling such international tax planning activities and the underlying investments are characterized by a high degree of tax uncertainty*. Therefore, it is submitted, to require a taxpayer to disclose the tax advantages of a particular transaction are inappropriate. The tax administration ought to identify itself the possible tax savings; and a taxpayer should not be punished if the tax savings fall within the existing tax law.

7.3.2.4 Reliance on the ruling

In the UK, the legal status of the advance tax ruling is not always clear. An advance tax ruling may be or may not be binding on HMRC. A number of factors determine the circumstances under which the advance tax ruling becomes binding on HMRC. Generally, HMRC will only be bound by the ruling if a taxpayer submitted the facts clearly and has provided to HMRC all required details of the particular transaction at the time of applying for the tax ruling.⁵⁰⁵

However, HMRC will not be bound by the advance tax ruling if any of the following situations exists:

- i. if the nature of the transaction has changed in a way that has a material impact⁵⁰⁶ on the transaction as a whole. This situation may exist if the change has occurred prior to the date of the transaction. Changes which might have a material impact on the transaction may be any change of the price involved in the transaction, a change of the

⁵⁰⁴ Markus Diller, Pia Kortebusch, Georg Schneider & Caren Sureth, 'Boon or bane of advance tax rulings as a measure to mitigate tax uncertainty and foster investment', *Arqus-Diskussionsbeiträge zur quantitativen Steuerlehre*, No. 187 2015, p. 2. Access through <https://www.econstor.eu/bitstream/10419/109954/1/823366405.pdf>, last visited 12 January 2017.

⁵⁰⁵ John, *Tiley Revenue Law*, 6th. ed., Hart Publishing Oxford 2008, p. 62.

⁵⁰⁶ When considering whether something is "material" a Court analyses the contractual term in which it is used to assess whether something significant or substantial has happened in the commercial context of the relevant parties arrangements, see <http://www.lexology.com/library/detail.aspx?g=a36d6d40-e8b2-45b7-8512-29a881166e14>, last visited 4 September 2019.

parties of the transaction, a change of the products that are part of the transaction, and any other change that may have material impact on the transaction;

- ii. if it appears during the application of the ruling, that a taxpayer has provided incorrect or incomplete information;
- iii. if the Court or Tribunal changes the prevailing interpretation of the tax law on which the advance tax ruling was based and the taxpayer's liability to tax for that year has not been finalized;
- iv. if there is a change of the statutory law relevant to the transaction on which the advance tax ruling was issued.

If any of the above situations exist, HMRC will ignore the ruling, and the existing law will prevail. However, the principles of administrative law always apply.⁵⁰⁷ The courts will still have the power to determine that HMRC is bound by the ruling it made if HMRC claims not to be bound by the ruling.⁵⁰⁸

Generally, the issue of relying on a tax ruling in the UK is not always straight forward. For example, there are some circumstances under which HMRC will be bound by a ruling even if HMRC made an incorrect interpretation of the tax law.⁵⁰⁹ This case may apply if a company explicitly proves that:

- it relied upon the ruling;
- it made full disclosure of the relevant facts;

⁵⁰⁷ Availability of review for decisions of governments or government's ministries, departments and organs.

⁵⁰⁸ <https://webarchive.nationalarchives.gov.uk/20131006071245/http://www.hmrc.gov.uk//cap/links-dec07.htm>, last visited 4 September 2019.

⁵⁰⁹ The incorrect interpretation may exist if HMRC has previously issued a ruling to a particular taxpayer, and later realises that it made a mistake on interpreting the tax law, or when the Tribunal or Court interprets the tax law differently from how it was interpreted by HMRC.

- the application of the law would result in financial damage for the company.

In these circumstances, HMRC will not apply the prevailing tax law; it will be bound by the ruling even if it contradicts the law.⁵¹⁰ However if the HMRC issued an erroneous advance tax ruling (a ruling which is incompatible with tax law) and subsequently notified the company that the ruling was incorrect before the transaction to be undertaken is finalized, HMRC will not be bound by the ruling. The company is then required to determine its tax liability taking into account the notification from HMRC.⁵¹¹ This situation existed in *F&I Service Limited v Commissioners for Customs and Excise*.⁵¹² In this case the taxpayer (a company which dealt with project promotion and budget services) applied for an advance tax ruling on the application of VAT on the sale of vouchers to be used by retail outlets such as restaurants, cinemas and suppliers of consumable goods. HMRC, after considering the complete facts of the application, issued a ruling which accepted the interpretation put forward by F&I and permitted F&I not to pay VAT on the sale of the vouchers. However, after a certain time trade competitors of F&I raised questions about this approach. After a tax avoidance specialist had reviewed the matter it was established that the advance tax ruling previously issued was incorrect and F&I was required to start paying tax.

Another challenging matter in relying on an advance tax ruling emerges in relation to the possibility of the existence of state aid. The European Union believes that if Member States fail to perform an adequate evaluation during issuing an advance tax ruling, the ruling may constitute illegal State aid. This is true especially if a ruling is made on transfer pricing.⁵¹³ Article 107(1) of the Treaty on the Functioning of the European Union (TFEU)⁵¹⁴ prohibits

⁵¹⁰ <https://webarchive.nationalarchives.gov.uk/20131006071245/http://www.hmrc.gov.uk//cap/links-dec07.htm>, last visited 4 September 2019.

⁵¹¹ *F&I Service Ltd v Commissioners for Customs and Excise* [2001] STC 939.

⁵¹² *Ibid.*

⁵¹³ Shearman and Sterling, *EU Investigates tax Rulings for Breach of State Aid Rules*. Accessed through <http://www.shearman.com/~media/Files/NewsInsights/Publications/2015/02/EU-Investigates-Tax-Rulings-for-Breach-of-State-Aid-Rules-Antitrust-020415.pdf>, last visited 4 September 2019.

⁵¹⁴ As to the latest consolidated version of the TFEU, see O.J. 2016, C 202/47.

Member States from providing companies state aid that may distort competition in the internal market. The article provides that:

“Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.”

Generally, the features that may constitute the illegal state aid are:

- i. The existence of an advantage; the advantage is the economic benefit which a firm could not have obtained under the normal market conditions.⁵¹⁵ This advantage can be obtained directly or indirectly through the state resources.⁵¹⁶ The advantages may include the subsidies given to public companies and transfers within a public group. The transfer of State resources may take many forms, such as direct grants, loans, guarantees, direct investment in the capital of companies and benefits in kind;⁵¹⁷
- ii. the advantage must be to a specific or selective undertaking;⁵¹⁸ the state aid shall be deemed to exist if the advantage is given to a specific undertaking or the production of certain goods. The selectivity of the advantage exists also in a situation where in general the advantage applies to all undertakings but is limited to the discretionary powers of public administration;⁵¹⁹ and
- iii. the advantage must distort the competition within the Common Market.

⁵¹⁵ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, O.J. 2016 C 262/1 paragraph 66.

⁵¹⁶ Ibid., paragraph 47.

⁵¹⁷ Ibid., paragraph 51.

⁵¹⁸ Ibid., paragraph 117.

⁵¹⁹ Ibid., paragraph 123.

Therefore in general European Commission has not prohibited the issuance of advance tax rulings; however when ruling is issued it is required to respect the state aid rules. Para 170 of the Commission notice stated that:

*“The grant of a tax ruling must, however, respect the State aid rules. Where a tax ruling endorses a result that does not reflect in a reliable manner what would result from a normal application of the ordinary tax system, that ruling may confer a selective advantage upon the addressee, in so far as that selective treatment results in a lowering of that addressee's tax liability in the Member State as compared to companies in a similar factual and legal situation.”*⁵²⁰

Normally a tax ruling shall be deemed to provide selective advantage if:

- i) *“the ruling misapplies national tax law and this results in a lower amount of tax;*
- ii) *the ruling is not available to undertakings in a similar legal and factual situation;*
- iii) *the administration applies a more ‘favourable’ tax treatment compared with other taxpayers in a similar factual and legal situation.”*⁵²¹

However, tax rules can never be precise on every aspect of business. That is a reason why tax rulings are made. Therefore, for an advance tax ruling, it is sometimes difficult to determine precisely whether or not the ruling has departed from the general tax rule.⁵²² In practice a

⁵²⁰ Ibid., paragraph 170.

⁵²¹ Ibid., paragraph 174.

⁵²² Reuven Avi-Yohan and Gianluca Mazzoni, ‘Apple State Aid Ruling: A Wrong Way to Enforce the Benefit Principle?’ *Michigan University Law and Economics Research Paper Series*, Paper No.16-024, 2016.

taxpayer requests a tax ruling when the application of the tax law on that particular matter is not certain.⁵²³

The first consequence of the advance tax ruling that is found to provide state aid is that the ruling will be declared void and unenforceable. Secondly the Member State will be obliged to recover the aid from the beneficiary (MNE).⁵²⁴ Article 16 of Council Regulation (EU) 2015/1589 explains:⁵²⁵

“1. Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary ('recovery decision'). The Commission shall not require recovery of the aid if this would be contrary to a general principle of Union law.

2. The aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the Commission. Interest shall be payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery.”

This second consequence is a seriously unsympathetic decision for an MNE that is affected by the ruling.⁵²⁶ The MNE will be required to pay back the amount of money that is deemed to be state aid together with interest. That scenario raises a level of uncertainty about the tax ruling. Taxpayers (who already have rulings) may not be sure when it is going to be their turn. As Anna Gunn explains it *“the EC's preliminary investigations have only raised the level of uncertainty for taxpayers, who are left wondering whether their tax rulings and APAs can*

⁵²³ Anna Gunn and Joris Luts, 'Tax Rulings, APAs and State Aid: Legal Issues,' *EC Tax Review* 2015, pp. 119-125.

⁵²⁴ Council Regulation 2015/1589 for the application of Article 108 TFEU, 2015 O.J.L. 248/9.

⁵²⁵ Ibid.

⁵²⁶ Shearman and Sterling, EU Investigates tax Rulings for Breach of State Aid Rules. Accessed through <http://www.shearman.com/~media/Files/NewsInsights/Publications/2015/02/EU-Investigates-Tax-Rulings-for-Breach-of-State-Aid-Rules-Antitrust-020415.pdf>, last visited 4 September 2016.

stand the State aid test."⁵²⁷ In the recent European Commission decision on *Apple*, for example, Ireland is accused of allowing impermissible state aid to the Apple company worth up to € 13 billion. In its press release of 30 August 2016,⁵²⁸ the Commission explained that Apple enjoyed selective tax treatment from the Irish tax authority. The treatment gave it a significant advantage over other companies that are subject to Irish tax rules. Therefore, Ireland was required to recover from Apple unpaid tax of around € 13 billion plus interest. The Commission however explained that the amount of unpaid tax to be recovered could be reduced if other countries require the Apple Company to pay more taxes on profit generated within their jurisdictions. Part of the statement explains "*If other countries were to require Apple to pay more tax on profits of the two companies over the same period under their national taxation rules, this would reduce the amount to be recovered by Ireland*". Ireland rejected the allegation that it had given state aid to Apple. The Irish Minister of Finance issued a press release on 30 August 2016 to respond on the Commission's statement. He explained that Ireland does not do deals with taxpayers.⁵²⁹ He added that the proposition that the amount of unpaid tax to be recovered would be reduced shows contradictions in the Commission's decision, while requiring Ireland to recover money from Apple; the Commission was acknowledging that those sums might be taxable in other jurisdictions. Ireland has appealed against the Commission decision.⁵³⁰

⁵²⁷ Anna Gunn and Joris Luts, 'Tax Rulings, APAs and State Aid: Legal Issues', *EC Tax Review*, 2015, pp. 119-125.

⁵²⁸ http://europa.eu/rapid/press-release_IP-16-2923_en.htm, last visited 4 September 2019. As to the Decision, see 2017 O.J.L. 187/1.

⁵²⁹ <http://www.finance.gov.ie/news-centre/press-releases/minister-noonan-disagrees-profoundly-commission-apple>, last visited 4 September 2016.

⁵³⁰ Case T-892/16 *Apple Sales International and Apple Operations Europe v Commission* (pending). A summary of the grounds of appeal can be found at <https://www.taxjournal.com/articles/apple-ireland-state-aid-appeal-pleas-22022017>, last visited 19 August 2017.

There is a nuance to all this. A ruling will be deemed state aid because of its contents. The instrument as such will not be state aid as long as it is available to all tax subjects.

7.4 UK Tax Appeals

7.4.1 Introduction

Any taxpayer who is not satisfied with decisions made by the HMRC may – after having appealed with HMRC - appeal against such decisions to appeal tribunals. The appeal can be made to The First-tier Tribunal and then to the Upper Tribunal. These tribunals were established under section 3 of the Tribunals, Courts and Enforcement Act 2007.

This section examines the tax appeal procedures in the UK. The background of the tax appeal system and general procedures to appeal before the First-Tier Tribunal and the Upper Tribunal is also discussed.

7.4.2 Background of the tax appeal system in the UK

A report of the study by Sir Andrew Leggatt has revealed that before the establishment of the current tax appeal system, the previous UK tax appeal system was not effective. The previous tax appeal system was established to meet the needs and convenience of the Government only. The taxpayers' needs were ignored or forgotten.⁵³¹ Leggatt explained that most taxpayers were not sure whether their tax cases were handled by an independent body. The UK taxpayers believed that there was a direct link between HMRC and the General or Special Commissioners. The General Commissioners were lay persons who were assisted by a qualified clerk, and were a tax appeal organ which was meant to be the immediate solution to any dispute that arose between a taxpayer and HMRC. The General Commissioners were only empowered to deal with simple cases; if they found the case to be complex, they were obliged to transfer that case to the Special Commissioners. These were a body of qualified persons, experienced in tax law, who were employed full-time to solve tax disputes.

In his report Leggatt made it plain that the relationship between the tax appeal boards and the government endangered the independence of these appeal boards and created an inferiority

⁵³¹ <http://webarchive.nationalarchives.gov.uk/+http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm>, last visited 9 January 2018.

complex which was even felt by the commissioners themselves; they believed that regardless of the competence they possessed, it was hard for UK taxpayers to identify and value their independence.⁵³²

Leggett also reported on the poor relationship between the appellant and the commissioners. The issues that were raised included the poor records system and frequent delays in handling cases. Taxpayers complained to Leggett that in some cases taxpayers attended the hearing by the commissioners and realized that they had not been given a similar bundle of documents to that of HMRC. According to the taxpayers these issues were among the factors that led them to believe that the prevailing tax appeal system failed to promote tax justice.⁵³³

The report of Leggett on the review of the tax appeal system brought a major change of the tax appeal system in the UK. In 2007 a new appeal system was enacted in which the First-tier Tribunal and the Upper Tribunal were introduced.

7.4.3 Overview of the appeal procedures (since 2009)

From 1 April 2009, the UK has started to operate its new appeal system. In this dispute resolution system, a corporate taxpayer has various levels for settling tax disputes. If a corporate taxpayer is not satisfied with the assessment made by HMRC he should resolve the issue by appealing first within HMRC. This process is called a review. If the issue remains unsolved by the review, the corporate taxpayer may resolve the problem through appealing to the First-tier Tribunal. If the corporate taxpayer is not satisfied with the ruling made by the First-tier Tribunal appeal against that decision lies to the Upper Tribunal. If the corporate taxpayer still is not satisfied with the decision of the Upper Tribunal appeal against that decision lies to the Court of Appeal. A Detailed description of the appeal procedures is set out below.

⁵³² <http://webarchive.nationalarchives.gov.uk/20090608183755/http://www.council-on-tribunals.gov.uk/consultation/374.htm>, last visited 4 September 2019.

⁵³³ <http://webarchive.nationalarchives.gov.uk/20090608183755/http://www.council-on-tribunals.gov.uk/consultation/374.htm>, last visited 4 September 2019.

7.4.4 Appeal within HMRC

7.4.4.1 Introduction

Any corporate taxpayer who is not satisfied with a decision of HMRC may appeal against that decision. The right to appeal is conferred by section 31 of the Tax management Act of 1970,⁵³⁴ which provides that:

“An appeal may be brought against an assessment to tax by a notice of appeal in writing given within thirty days after the date of the notice of assessment.

(2)The notice of appeal shall be given to the inspector or other officer of the Board by whom the notice of assessment was given.”

Commonly a taxpayer may appeal against HMRC's decisions on:

- a decision of HMRC to amend the tax return submitted by a taxpayer
- the imposition of penalties for late filling for a corporate tax return,
- the imposition of penalties for filing an incorrect return,
- a penalty for not keeping proper business records,
- a penalty for failure to provide information requested by HMRC,
- any other decision made by the HMRC with respect to the determination of taxable amount and collection of tax.⁵³⁵

A corporate taxpayer that is not satisfied with any of these HMRC decisions may send or deliver a written appeal notice to HMRC.⁵³⁶ Normally after receiving the appeal notice, HMRC will initiate a discussion to compromise with a taxpayer concerning the correctness of the notice. In practice most appeals are resolved at this stage. If the corporate taxpayer and HMRC agree at this stage, HMRC will write a confirmation notice to the taxpayer based on

⁵³⁴ Accessed through <http://www.legislation.gov.uk/ukpga/1970/9/section/31/enacted>, last visited 13 January 2017.

⁵³⁵ Appeals and Reviews: Transitional Guidance available in <http://www.hmrc.gov.uk/ct/change/problems/appeals.htm>, last visited 4 September 2019.

⁵³⁶ Tax Management Act 1970, Section 31.

the agreement reached. When the corporate taxpayer receives the confirmation notice from HMRC it has 30 days to decide if whether to accept the agreement or change its mind.⁵³⁷ If a taxpayer fails to agree with HMRC the taxpayer can apply for a review by HMRC. In practice, this is a second review within HMRC.

7.4.4.2 Review of decisions made by HMRC

A review is a procedure by HMRC to crosscheck its decision previously made regarding a taxpayer. The review can be done once a taxpayer has filed the appeal to HMRC, but before the appeal is launched with the First-tier Tribunal. The review is applicable to all HMRC notices of any decision where there is a right to appeal. Once a corporate taxpayer files a notice of appeal, a review can either be offered by HMRC or requested by the taxpayer. If a taxpayer requests a review, HMRC has no option but to agree.⁵³⁸

7.4.4.3 Reviewing process

A review of the decision of HMRC is normally conducted by the Review Officer who was previously not involved in making the decision to be reviewed. Once the review starts, the tax appeal cannot be presented before the First-tier Tribunal until the review process is finished.⁵³⁹

The review must be done and finished within 45 days from the date a taxpayer accepts the review offer issued by HMRC or from the date the request by the taxpayer has been accepted by HMRC. However, sometimes a review may exceed 45 days, in which case HMRC will write a letter to the taxpayer to inform him about the time extension for the review. The taxpayer may either accept the time extension or may require his appeal to be heard by the First-tier Tribunal. The review normally is started by seeking fresh view points. The taxpayer

⁵³⁷ Appeals and Complaints for Direct Tax, accessed through <http://www.hmrc.gov.uk/complaints-appeals/how-to-appeal/direct-tax.htm>, last visited 28 January 2017.

⁵³⁸ The Appeal manual is available at www.hmrc.gov.uk/manuals/artgmanual/index.htm, last visited 14 February 2017.

⁵³⁹ <http://www.hmrc.gov.uk/complaints-appeals/how-to-appeal/direct-tax.htm#3>, last visited 28 January 2017.

will be given the opportunity to submit further evidence that would assist the Review Officer to come to a fair conclusion.⁵⁴⁰ Once the review is finished, the Review Officer is required to send the review conclusion to the taxpayer and his representative. A taxpayer who is not satisfied with the review conclusion has 30 days from the date of receiving the letter stating the conclusion of the review in which to appeal to the First-tier Tribunal.⁵⁴¹ If no appeal is lodged within that period, the matter is deemed to be settled by the review conclusion.

7.4.5 Appeal to the First-tier Tribunal

7.4.5.1 Structure of the First-tier Tribunal

The First-tier Tribunal is a newly introduced system of tribunals where all tribunals (from various areas of specializations) in the UK are governed by similar rules. The First-tier Tribunal is comprised of six different chambers:

- The General Regulatory Chamber
- The Health, Education and Social Care Chamber
- The Immigration and Asylum Chamber
- The Social Security Entitlement Chamber
- The Tax Chamber; and
- The War Pensions and Armed Forces Compensation Chamber.

For the purpose of this study the focus is on the Tax Chamber, and all subsequent references to the First-tier Tribunal refer to the Tax Chamber of the First-tier Tribunal.

The First-tier Tribunal receives and handles tax appeals against the decisions of HMRC; it has jurisdiction to hear tax appeals which were previously handled by the General or Special Commissioners.

⁵⁴⁰ The Appeal manual available via <https://www.gov.uk/hmrc-internal-manuals/appeals-reviews-and-tribunals-guidance/artg2010>, last visited 4 September 2016.

⁵⁴¹ <http://www.hmrc.gov.uk/complaints-appeals/how-to-appeal/direct-tax.htm#3>, last visited 28 January 2017.

7.4.5.2 Case categorization

In the UK, as from 1 April 2009 tax cases are categorized into four different categories.

Rule 23(1) of the First-tier Tribunal empowers the First-tier Tribunal to categorize an appeal case:

“(1) When the Tribunal receives a notice of appeal, application notice or notice of reference, the Tribunal must give a direction-

(a) in an MP expenses case [a financial restrictions civil penalty case or a CAA case,] allocating the case to one of the categories set out in paragraph (2)(c) or (d);

*(b) in any other case, allocating the case to one of the categories set out in paragraph (2).]”*⁵⁴²

Therefore when the First-tier Tribunal receives a notice of appeal, it may categorise the appeal in any of the following categories.

a) Default paper category

This is a group where cases are determined through written documentation usually without hearing. However, if an appeal party requests a hearing, the First-tier Tribunal must hold one. If the hearing is not requested, normally HMRC is required to provide a statement of the case to the First-tier Tribunal and a copy must also be submitted to the taxpayer within 42 days of the date the First-tier Tribunal sent to the HMRC a copy of the taxpayer's notice of appeal. A statement of the case is a written statement of HMRC's position in the case. Normally the statement of the case contains information about the legislation under which the disputed decision was made.⁵⁴³ When a copy of the statement of the case is sent to the taxpayer, the taxpayer is required to send a reply (statement of the response) to the First-tier Tribunal within

⁵⁴² The Tribunal procedures (First-tier Tribunal) (Tax Chamber) Rules 2009, rule 23(1), S.I. 2009/273, as substituted by S.I.2010/2653.

⁵⁴³ Ibid., rule 25 (2), see also *Making an appeal*, Explanatory booklet issued by Tribunal service August 2010.

a period of 30 days from the date the First-tier Tribunal sent a copy of the statement of the case to the taxpayer.⁵⁴⁴ In the statement of the response, the taxpayer may provide any relevant information and documents that support or reject the statement of the case issued by HMRC.⁵⁴⁵ In the statement of the response, the taxpayer may request the First-tier Tribunal to prepare a hearing session.⁵⁴⁶

Once the statement of the case is sent to the taxpayer, and the taxpayer has responded, there is no other exchange of information. The First-tier Tribunal will then decide the appeal without a hearing, unless the hearing has been requested.⁵⁴⁷

This category mostly deals with cases of penalties for:⁵⁴⁸

- Self-assessment and corporate tax fixed filing penalties
- Employer end of year late return penalties
- Income tax percentage surcharges
- Construction industry late returns penalties

b) Basic category

Unlike in the default paper category, in this category HMRC is not obliged to provide a statement of the case.⁵⁴⁹ Once the First-tier Tribunal received the appeal it will make arrangements for the hearing; in this category the hearing is informal, with a limited exchange of papers. Rule 23(2)(b) refers to:

⁵⁴⁴ The Tribunal Procedures (First-tier Tribunal) (Tax Chamber) Rules 2009, rule 26 (2), S.I. 2009/273.

⁵⁴⁵ Ibid., rule 26 (3), see also <http://www.hmrc.gov.uk/manuals/artgmanual/artg8370.htm>, last visited 4 September 2019.

⁵⁴⁶ Ibid., rule 26 (7).

⁵⁴⁷ Ibid., rule 26 (6).

⁵⁴⁸ <https://www.gov.uk/hmrc-internal-manuals/appeals-reviews-and-tribunals-guidance/artg8350>, last visited 4 September 2019.

⁵⁴⁹ The Tribunal Procedures (First-tier Tribunal) (Tax Chamber) Rules 2009, rule 24(2), S.I. 2009/273.

*“Basic cases, which will usually be disposed of after a hearing, with minimal exchange of documents before the hearing.”*⁵⁵⁰

This category includes appeals against:

- late filing and late payment penalties,
- appeals against incorrect returns,
- appeals against an information notice (a notice that requires a taxpayer to submit any information to HMRC),
- the application for permission to make late appeals, and
- the application for postponements of tax.

*c) **Standard category***

This category covers a great number of cases which are either not in the default paper or the basic category. In this category a longer hearing is required to consider facts and arguments. Rule 23(2)(c) of the First-tier Tribunal rules refers to

*“Standard cases, which will usually be subject to more detailed case management and be disposed of after a hearing.”*⁵⁵¹

In the standard category, HMRC is required to provide a statement of the case within 60 days from the date the First-tier Tribunal sent a copy of the taxpayers' appeal to HMRC.⁵⁵² Once the statement of the case has been sent to the First-tier Tribunal and a copy to the taxpayer, both the taxpayer and HMRC will have 42 days from the date the statement of the case is sent to the First-tier Tribunal, to list the documents they intend to produce or to rely on during the hearing.⁵⁵³ The First-tier Tribunal will then decide how the case should be conducted.

*d) **Complex category***

⁵⁵⁰ Ibid., rule 23 (2)(b); see further, rule 24.

⁵⁵¹ Ibid., rule 23 (2)(c).

⁵⁵² Ibid., rule 25 (1)(c).

⁵⁵³ Ibid., rule 27(2).

This category includes appeals where cases will require lengthy or complex evidence or lengthy hearing. Complex cases involve cases that have a complex issue or an important principle, or cases which include a large financial sum. Rule 23(4) of the First-tier Tribunal rules states that:

“The Tribunal may allocate a case as a Complex case under paragraph (1) or (3) only if the Tribunal considers that the case-
(a) will require lengthy or complex evidence or a lengthy hearing;
(b) involves a complex or important principle or issue; or
(c) involves a large financial sum.”⁵⁵⁴

Just like in the standard category, the First-tier Tribunal will require HMRC to provide a statement of the case. A taxpayer and HMRC will have 42 days to file a list of documents that they intend to use at the hearing.

The categorization is normally done by the First-tier Tribunal service. However, any party to an appeal may request a change of category if it has a reason to believe that the case is not properly categorized.⁵⁵⁵ Rule 23(3) of the First-tier Tribunal procedure rules states that

“The Tribunal may give a further direction re-allocating a case to a different category at any time, either on the application of a party or on its own initiative.”

7.4.5.3 Appeal transferred to the Upper Tribunal

The First-tier Tribunal is empowered to transfer some cases or issues to the Upper Tribunal. This may happen commonly to complex cases or issues. The First-tier Tribunal may not transfer the case to the Upper Tribunal without the consent of the appeal parties. Rule 28(1) of the First-tier-Tribunal provides that:

⁵⁵⁴ Ibid., rule 23(4).

⁵⁵⁵ Ibid., rule 23(3).

*“If a case [for a preliminary issue] has been allocated as a Complex case the Tribunal may, with the consent of the parties, refer a case to the President of the Tax Chamber [of the First-tier Tribunal] with a request that the case [or issue] be considered for transfer to the Upper Tribunal.”*⁵⁵⁶

7.4.5.4 Composition and qualifications of members of the First-tier Tribunal

The First-tier Tribunal is composed of a Judge and other members (experts in the area of taxation). During the case, normally only one judge sits the case. For some more complicated cases a judge may decide to sit with one or two additional members.⁵⁵⁷ A person is qualified for the appointment of a position of Judge of the First-tier Tribunal if he or she satisfies the judicial appointment condition on a five years basis,⁵⁵⁸ i.e. one must have a relevant legal qualification. The person holding such qualification should also have gained legal experience.⁵⁵⁹ Moreover by virtue of section 4 of the Tribunal, Courts and Enforcement Act 2007, a judge of the Upper Tribunal automatically becomes a judge in the First-tier Tribunal. However, a person shall also qualify for an appointment as a member of the First-tier Tribunal if such person possesses academic qualifications and working experience in taxation.⁵⁶⁰

7.4.5.5 Conditions for appeal to the First-tier Tribunal

Appeal to the First-tier Tribunal normally happens when a taxpayer fails to compromise with HMRC earlier. The First-tier Tribunal receives appeals which have earlier been dealt by HMRC. Appeal to the First-tier Tribunal must be made in writing, and it should state clearly the grounds for the appeal. Failure to state precisely the reasons for appeal may result into the

⁵⁵⁶ Ibid., rule 28(1), as amended by S.I.2010/2653.

⁵⁵⁷ <https://www.gov.uk/hmrc-internal-manuals/appeals-reviews-and-tribunals-guidance/artg8030>, last visited 4 January 2018.

⁵⁵⁸ Tribunals, Courts and Enforcement Act 2007, Section 4 (1) and Schedule 2, section 1 (2) (a). Under Schedule 2, section 1(2)(a), (b) advocates or solicitors in Scotland, and barristers or solicitors in Northern Ireland of at least five years' standing may also be appointed judges of the First-tier Tribunal.

⁵⁵⁹ <http://www.judicialappointments.gov.uk/about-jac/144.htm>, last visited 5 July 2015.

⁵⁶⁰ Tribunals, Courts and Enforcement Act 2007, section 4 (3), and schedule 2, section 1 (2) (d).

rejection of the appeal. In *B W Jacques v Commissioners for HMRC*,⁵⁶¹ it was decided that the failure to state the grounds of an appeal makes an appeal inadmissible. In this case, the appellant did not mention the reasons for the appeal in his appeal notice but simply explained that he appealed because of the behaviour of HMRC. Finally, the appellant submitted the reasons for the appeal just four days before the hearing; perhaps unsurprisingly, the appeal was rejected.

The conditions for an admissible appeal are:⁵⁶²

- the appeal must be in writing and must be signed,⁵⁶³
- the taxpayer must have first sent the appeal to HMRC,
- the appeal must be sent within the time limit,
- the ground for the appeal must clearly be explained and
- the taxpayer must pay the tax due (unless the taxpayer has applied for postponement of payment).

Part of these conditions will be discussed below.

a) **Time limit**

The general appeal rule is that a taxpayer is given 30 days from the date of the notice of decision of HMRC to appeal against such decision to the First-tier Tribunal. However, the time limit for submitting an appeal to the First-tier Tribunal varies depending on the availability of other options before appeal; the scenarios are as follows:

- a) HMRC has made its decision, it did not offer a taxpayer an opportunity for the review, nor did the taxpayer request review. The taxpayer must lodge the appeal to the First-

⁵⁶¹ *B W Jacques v Commissioners of HMRC* [2005] STC 513.

⁵⁶² The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, rule 20, S.I. 2009/273, as amended by SI 2010/2653, read with <http://www.hmrc.gov.uk/manuals/artgmanual/ARTG8210.htm>, last visited 4 September 2016.

⁵⁶³ <http://www.hmrc.gov.uk/manuals/sammanual/SAM10020.htm>, last visited 4 September 2016.

tier Tribunal within 30 days from the date of the notice containing the HMRC decision that the taxpayer intends to appeal;

- b) the taxpayer has been offered a review by HMRC but rejected the offer. In this situation, the taxpayer must lodge the appeal to the First-tier Tribunal, within 30 days from the date of the letter offering a review;⁵⁶⁴
- c) the taxpayer accepted the review, and the review is done and finished, but the taxpayer is still not satisfied with the conclusion of the Review Officer. The taxpayer must lodge the appeal to the First-tier Tribunal within 30 days from the date of the notice of the review conclusion.⁵⁶⁵

Any appeal submitted out of the time limit is invalid and the First-tier Tribunal will not entertain it.⁵⁶⁶ Conversely, there is an exception to the general rule of the time to appeal. A taxpayer may submit a late appeal to HMRC and to the First-tier Tribunal after sending an application to extend the time to appeal to the First-tier Tribunal.⁵⁶⁷ The taxpayer is required to have solid grounds for explaining a delay (a reasonable excuse). The taxpayer is also required to convince the First-tier Tribunal that the current appeal has been sent as early as possible. A good example of the application of these rules is *Marijus Leliunga v the Commissioners of Her Majesty's Revenue and Customs*,⁵⁶⁸ where the appellant submitted a late appeal to the First-tier Tribunal but failed to provide reasonable grounds for the delay, so the appeal was rejected. In this case the appellant's grounds for the delay were among others, the lack of information from a previous tax adviser.

Statute law is silent on meaning of a reasonable excuse for appealing out of time. A reasonable excuse is determined on its own merits. When there is an event which is beyond a taxpayer's

⁵⁶⁴ <https://www.gov.uk/tax-appeals#7>, last visited 4 September 2019.

⁵⁶⁵ Appeals and Reviews: Transitional Guidance available in <https://www.gov.uk/tax-appeals>, last visited 4 September 2019.

⁵⁶⁶ The Tribunal procedures (First-tier Tribunal) (Tax Chamber) Rules 2009, rule 20(4)(b).

⁵⁶⁷ *Ibid.*, rule 20 (4) (a), (b).

⁵⁶⁸ *Marijus Leliunga v Commissioners for Her Majesty's Revenue and Customs*, UKFTT 229 (TC) 2010.

control which prevents him from submitting an appeal on time, the event can be deemed to be a reasonable excuse. Some of the common excuses that tend to be a reasonable excuse, if they are proved to be true, are serious illness of the company representative, and bereavement on the day of submission of the appeal.⁵⁶⁹ However these excuses are not the only acceptable ones; in *B Fairall Ltd v Commissioners of HMRC*⁵⁷⁰ the company failed to appeal on time because it was misled by its tax adviser. It was proved that the taxpayer had instructed its adviser to appeal against the notice of HMRC, but the adviser however did not appeal. The adviser also did not inform his client that he had failed to file the appeal. The taxpayer was taken by surprise to receive a notice from HMRC which confirmed the previous assessment. After this notice, the management of the company found out what had happened; it was then realized that the problem was the company adviser. The management of the company decided to change the adviser and submitted the late appeal. On these facts, it was agreed that the taxpayer had a reasonable excuse for submitting a late appeal. But a matter in one case can be a reasonable excuse but the same matter might not be a reasonable excuse in another case. In *MRS Moira Mc Crae v Commissioners of HMRC*⁵⁷¹ the tax adviser of the company submitted a late appeal. HMRC wrote back to the tax adviser to seek clarification of a matter, but there was no response from the adviser, who later claimed that he did not receive the letter because he was suffering from a heart attack, and one of his brothers had unfortunately died suddenly. Apart from this argument, the judge did not see any rational explanation for the lateness of the appeal; he could not identify any reasonable excuse in this case.

b) Tax payment during appeal

Another necessary factor before a taxpayer submits his appeal to the First-tier Tribunal is the payment of the tax due. If a company appeals against an assessment, the general rule requires the company to pay the amount of tax due as if there is no appeal lodged.⁵⁷² However a

⁵⁶⁹ <http://www.hmrc.gov.uk/manuals/sammanual/SAM10090.htm>, last visited 4 September 2019.

⁵⁷⁰ *B Fairall Ltd v Commissioners for HMRC* UKFTT 305 (TC) 2010.

⁵⁷¹ *McCrae v Revenue & Customs* [2009] UKFTT 55 (TC) 22 April 2009.

⁵⁷² Robert W Maas, *Guide to Taxpayers' Rights and HMRC Powers*, West Sussex: Tottel, 2009, p. 181.

taxpayer is given an opportunity to request HMRC to postpone payment of all or some of the tax due.⁵⁷³ This will typically happen if the taxpayer believes that the amount of tax due is over-assessed. In its application to waive payment of tax, the company representative is required to submit the application to the tax officer who assessed the company earlier (as shown on the notice of the decision). The company representative must explain why he believes that the amount of tax shown on the notice of assessment is over- assessed. He must also explain, based on his knowledge (supported with evidence), what the correct amount of tax should be.⁵⁷⁴

HMRC will inform the applicant whether his application has been accepted or not. If the application has been rejected, in most cases HMRC will propose an alternative amount to be paid while waiting for the outcome of the appeal and HMRC will require the company to agree in writing to this amount. Sometimes the company may put forward an alternative counter-proposal; if the counter proposal is accepted by HMRC, the agreement is finalised.

However, sometimes the company and HMRC may disagree on the amount of tax to be postponed. If this happens, HMRC will write a notice to the company informing it about paying the tax which is shown on the notice. If the company is not satisfied with the decision by HMRC, it may apply to the First-tier Tribunal within 30 days from the date of the HMRC notice to ask the First-tier Tribunal to decide on the amount of tax to be postponed. This is not an appeal, but a hardship application.⁵⁷⁵ There is no right of appeal against the decision of HMRC on the amount of tax to be postponed.⁵⁷⁶ The First-tier Tribunal will not entertain the

⁵⁷³ The Appeal Manual via <http://www.hmrc.gov.uk/manuals/artgmanual/index.htm>, last visited 4 September 2019.

⁵⁷⁴ The Appeal Manual via <http://www.hmrc.gov.uk/manuals/artgmanual/index.htm>, last visited 4 September 2019.

⁵⁷⁵ It is called a hardship application where a taxpayer requests the First-tier Tribunal to accept the tax appeal without payment of tax or by paying less than the amount of tax due until the appeal is ruled. See <https://www.gov.uk/hmrc-internal-manuals/appeals-reviews-and-tribunals-guidance/artg7570>, last visited 17 January 2017.

⁵⁷⁶ Ibid.

hardship application to postpone the payment of tax unless the same application has been submitted to HMRC.⁵⁷⁷ The application must clearly state the amount which is being overcharged, otherwise the permission to postpone will not be granted by the First-tier Tribunal. This happened in *Mervyn Cox and others v the Commissioners of HMRC*,⁵⁷⁸ where the First-tier Tribunal agreed that according to the facts presented, there was an amount of tax over assessed by HMRC. However, because the taxpayer failed to mention the amount of overstated tax, the First-tier Tribunal could not allow the appellant to postpone the payment of the tax, so the application was rejected.

Another issue which has an impact on the taxpayers' application to postpone the payment of tax during appeal is the taxpayer's compliance behaviour. If the taxpayer has a record of non-compliance with tax law, it is likely that the First-tier Tribunal will reject the application. A good example is seen in *David Gradel v Commissioners of HMRC*,⁵⁷⁹ in which the appellant requested the First-tier Tribunal to allow him to postpone payment of tax after HMRC had rejected his application. On reviewing the case, during the submissions it was revealed that the taxpayer did not have a good compliance record. Perhaps unsurprisingly, on this ground, the First-tier Tribunal rejected the application.

7.4.5.6 Repayment of tax due

Once the appeal has been decided, the amount of tax that has previously been postponed for payment will have to be paid if the taxpayer's appeal was unsuccessful. Interest is due over the amount of tax that remained unpaid during the period of appeal. Interest is calculated until the date of the notification of the First-tier Tribunal's decision. The amount of tax due, together with the interest accrued, has to be paid within a period of 30 days after the First-tier Tribunals' notice of decision is sent to the company.⁵⁸⁰

⁵⁷⁷ The Tribunal procedures (First-tier Tribunal) (Tax Chamber) Rules 2009, rule 22 (2), (3).

⁵⁷⁸ *Mervyn Cox, Michael Cox, Colin Cox & John Londal v Commissioners for HMRC* [2010] UKFTT 51 (TC).

⁵⁷⁹ *David Gradel v Commissioners for HMRC*, UKFTT 325 (TC), 2010.

⁵⁸⁰ <http://www.hmrc.gov.uk/manuals/artgmanual/ARTG8930.htm>, last visited 4 September 2019.

Payment of interest may benefit a company which is due a refund of overpaid tax; this will normally occur if at the time of lodging the appeal the company paid the whole amount of the disputed tax assessed by HMRC. In this case, interest will be payable to the company after the end of the case, on the over-assessed amount determined by the First-tier Tribunal. The interest will run from the date the company paid the amount of overpaid tax to the date of the notice of the Tribunal's decision. Practically this may create the opportunity for the tax administration to remain with the taxpayers' money; it would have been fair had the interest run until the date HMRC repays the overpaid tax.

The payment or repayment of tax due does not depend on whether or not the company is satisfied with the decision of the First-tier Tribunal. Once that Tribunal has decided the case, any amount of tax previously postponed is required to be paid. However, if a company faces financial extremity, it may request HMRC to agree a delay in payment of the outstanding amount of tax until the decision on a further appeal has been made. In this situation the taxpayer will need to prove that it has no or insufficient funds to pay the tax.⁵⁸¹ If HMRC does agree to grant a delay, it may require adequate security from the taxpayer to secure the unpaid amount of tax.⁵⁸² This is likely to be the approach taken if paying the amount of tax required by the First-tier Tribunal will result in the company being forced into insolvency or liquidation.⁵⁸³

7.4.5.7 Review of the First-tier Tribunal decision

Generally, the First-tier Tribunal has the mandate to review its own decisions.⁵⁸⁴ In practice a review is undertaken when a party to the appeal (taxpayer or HMRC) applies to the First-tier Tribunal for permission to appeal to the Upper Tribunal. This will happen if the party is not satisfied with the deliberation made by the First-tier Tribunal on that particular case. Before giving permission to appeal to the Upper Tribunal, the First-tier Tribunal may decide

⁵⁸¹ Tax Management Act 1970, section 55(3).

⁵⁸² <http://www.hmrc.gov.uk/manuals/artgmanual/ARTG8930.htm>, last visited 14 February 2017.

⁵⁸³ Ibid.

⁵⁸⁴ Tribunals, Courts and Enforcement Act 2007, section 9.

to review its decision.⁵⁸⁵ The review examines whether there is an error in the application of the law on the decision.⁵⁸⁶ The First-tier Tribunal may also open the review on its own initiative.⁵⁸⁷

7.4.5.8 Setting aside a decision

The First-tier Tribunal has also the power to set aside a decision previously taken and remake the decision.⁵⁸⁸ That will be done if the Tribunal believes that exercising this power is in the interests of justice, and if one or more of the following conditions are satisfied:

- “(a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;*
- (b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;*
- (c) there has been some other procedural irregularity in the proceedings; or*
- (d) a party, or a party's representative, was not present at a hearing related to the proceedings.”⁵⁸⁹*

A party who seeks the setting aside of a decision or part of a decision must send his application in writing so that it is received within 28 days after the date on which the First-tier Tribunal sent a decision notice to the party.⁵⁹⁰

⁵⁸⁵ The Tribunal Procedure (First –tier Tribunal) (Tax Chamber) Rules 2009, rule 40.

⁵⁸⁶ Tribunals, Courts and Enforcement Act 2007, section 9, read with the Tribunal Procedure (First –tier Tribunal) (Tax Chamber) Rules 2009, rule 41. See Heather Gething et al, ‘Transformation of the tax tribunal’, *British Tax Review* 2009, pp. 250-262.

⁵⁸⁷ Tribunals, Courts and Enforcement Act 2007, section 9.

⁵⁸⁸ The Tribunal Procedure (First–tier Tribunal) (Tax Chamber) Rules 2009, rule 38.

⁵⁸⁹ *Ibid.*, rule 38 (1), (2).

⁵⁹⁰ *Ibid.*, rule 38 (3).

7.4.6 Appeal to the Upper Tribunal

7.4.6.1 Introduction

The Upper Tribunal is the tribunal which receives and considers appeals from the First-tier Tribunal. Any party to the appeal who is not satisfied with the deliberation of the First-tier Tribunal concerning any point of law may appeal to the Upper Tribunal.⁵⁹¹ Any corporate taxpayer who intends to appeal may not appeal directly to the Upper Tribunal. Permission to appeal to the Upper Tribunal must be issued by the First-tier Tribunal. However, if the First-tier Tribunal for any reason refuses to permit a taxpayer to appeal to the Upper Tribunal, the application can be submitted directly to the Upper Tribunal.

The Upper Tribunal is a Superior Court of Record:⁵⁹² all the Upper Tribunal's proceedings are recorded and published; they are available to the public. The Upper Tribunal has similar jurisdiction to the High Court.⁵⁹³

This section examines the general procedures of appeal in the Upper Tribunal: the composition of the Upper Tribunal is discussed, as are the conditions for appeal. This section also looks at the functions and powers of the Upper Tribunal in the tax appeal process.

⁵⁹¹ There is however an exception to this general rule. There are some matters that can be brought before the Upper Tribunal even if they are not about a point of law. These matters include:

- (a) an appeal against the First-tier Tribunal's decision to review or not review its decision,
- (b) an appeal against the First-tier Tribunal's decision to refer or not to refer a matter to the Upper Tribunal,
- (c) an appeal against the decision of the First-tier Tribunal to set aside the previous decision; and
- (d) any other decisions as mentioned in Section 11 of the Tribunals, Courts and Enforcement Act 2007.

⁵⁹² Tribunals, Courts and Enforcement Act 2007, Section 3(5).

⁵⁹³ Heather Gething et al, 'Transformation of the tax tribunal', *British Tax Review* 2009, pp. 250-262.

7.4.6.2 Composition and qualifications of members

The decision makers of the Upper Tribunal are judges, deputy judges, or expert members (non-legal members).⁵⁹⁴ The Upper Tribunals often sit as a panel comprising a judge and non-legal members. However in some jurisdictions cases may be heard by a judge or non-legal member sitting alone.⁵⁹⁵ Deputy Judges of the Upper Tribunal take the role of a judge in case the judge is not available because of sickness or for any other reason.

Judges of the Upper Tribunal are appointed by Her Majesty on the recommendation of the Lord Chancellor. A person is eligible for appointment as a judge if he satisfies the judicial appointment criteria. The person must have the experience of being a judge for at least 7 years.⁵⁹⁶ Just like in the First-tier Tribunal, the qualified candidate for the appointment as a judge in the Upper Tribunal must possess a legal qualification and sufficient experience in the field of taxation.

Judges in the Upper Tribunal are assisted by deputy judges. Deputy Judges are appointed by the Lord Chancellor. The qualification for appointment to this post is almost the same as that of a judge. A person must be a lawyer and must possess sufficient knowledge and experience in tax law.

Expert members are specialist non-legal members of the panel; it includes ex-service personnel or accountants. Expert members possess skills and expertise that are commonly required in the Upper Tribunal.⁵⁹⁷ They are layman (in legal language), however when they

⁵⁹⁴ Ibid.

⁵⁹⁵ <http://www.justice.gov.uk/about/hmcts/tribunals>, last visited 14 February 2017.

⁵⁹⁶ Tribunals, Courts and Enforcement Act 2007, schedule 3.

⁵⁹⁷ Mark Hinchliffe, 'Don't just sit there, play a full part', *principles in practice*. Accessed through https://www.judiciary.gov.uk/wp-content/uploads/2016/01/hinchliffe_non-legal-members-spring2009.pdf, last visited 20 August 2017.

are trained on the art of fact finding and evaluation of evidence, their expertise will enhance the judicial process.⁵⁹⁸

7.4.6.3 Conditions for appeal to the Upper Tribunal

Any person who is aggrieved by a decision of the First-tier Tribunal may apply to the same tribunal for permission to appeal to the Upper Tribunal against that decision. The application to appeal must be made within 56 days from the notice of the decision of the First-tier Tribunal.⁵⁹⁹ If the First-tier Tribunal refuses to grant the permission to appeal, a taxpayer who wishes to appeal may – as mentioned earlier – send his application directly to the Upper Tribunal.⁶⁰⁰ However, this application must be made within one month after the denial of the permission to appeal by the First-tier Tribunal.⁶⁰¹ It should also state clearly that the permission to appeal has been previously refused by the First-tier Tribunal.⁶⁰²

Just like in the First-tier Tribunal, an appellant may also submit a late appeal to the Upper Tribunal, but it will only be accepted if the appellant has provided acceptable grounds for the delay to appeal on time. If a judge in the Upper Tribunal considers that admittance of the late appeal will be in the interests of justice, he may admit the appeal, although in practice this appears to occur rarely, if at all.⁶⁰³ If the application for an appeal to the Upper Tribunal or the application to submit a late appeal to the Upper Tribunal has been rejected by the Upper Tribunal, the appellant has no right to appeal against such refusal.⁶⁰⁴

⁵⁹⁸ Ibid., see also *Pete Burgess, Susan Corby, Paul Latreille*, 'Non-legal members in UK Tribunals', ESRC Study, accessed through http://www.gre.ac.uk/__data/assets/pdf_file/0003/625944/UK-Tribunals-updated.pdf, last visited 20 August 2017.

⁵⁹⁹ The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, rule 39.

⁶⁰⁰ Tribunal, Courts and Enforcement Act 2007, section 13 (1) & The Tribunal Procedure (Upper Tribunal) (Tax Chamber) Rules 2008, rule 21.

⁶⁰¹ The Tribunal Procedure (Upper Tribunal) Rules 2008, rule 21 (3) (b).

⁶⁰² Ibid., rule 21 (5) (c).

⁶⁰³ The database of tribunal decisions gives little hope for optimism for late appeals, see http://taxandchancery_ut.decisions.tribunals.gov.uk/, last visited 4 September 2019.

⁶⁰⁴ Tribunal, Courts and Enforcement Act 2007, section 13 (1), (8) (c).

7.4.6.4 Review of the Upper Tribunal decision

A review of the decision of the Upper Tribunal can be made when an appellant intends to appeal to the Court of Appeal. Prior to allowing a person to appeal to the Court of Appeal, the Upper Tribunal may decide to review its decision. The review of the decision is normally done to ensure the clarity of the decision, and to confirm whether the decision is within the line of justice. A review outcome may alter or confirm a previous decision. The appellant is informed on the outcome of the review once the review is completed. Sometimes, during the review the Upper Tribunal may decide to collect extra information relating to the appeal from any person. The Upper Tribunal may demand submission of further documents from a taxpayer or HMRC. If a party of the appeal is not informed about the review, or during the review there was no representation, any appeal party may request that the earlier reviewed decision be reviewed again.⁶⁰⁵

If the Upper Tribunal does not review, or during review confirms its earlier decision, the Upper Tribunal must immediately decide to allow or not to allow a person to appeal to the Court of Appeal. The Upper Tribunal may refuse permission to appeal if it believes that there is no contradiction with the application of the law regarding its deliberation. The aggrieved party would then have to apply to the Court of Appeal directly for permission to appeal if the Upper Tribunal refused to grant permission.

7.4.7 Tax appeal proceedings for the First-tier Tribunal and the Upper Tribunal

7.4.7.1 Introduction

Normally the proceedings in the First-tier Tribunal are conducted in various cities of the UK. This depends on the address of the taxpayer who appealed. However, the proceedings in the Upper Tribunal are conducted at the head office of the Upper Tribunal. Normally there will

⁶⁰⁵ See *Appealing to the Finance and Tax Chamber of the Upper Tribunal*,

<http://www.justice.gov.uk/tribunals/tax-and-chancery-upper-tribunal>, last visited 15 July 2018.

be a pre-trial meeting where the management of the case will be decided.⁶⁰⁶ This includes the decision concerning whether the hearing is to be conducted in public or in chambers; a decision on the types of evidence to be presented at the proceeding, and a decision on any other matters concerning the proceeding of that particular case.⁶⁰⁷

Normally the proceedings at the First-tier Tribunal or at the Upper Tribunal are conducted in public.⁶⁰⁸ There are few cases where the First-tier Tribunal or the Upper Tribunal may restrict access to the hearing. A case shall be heard in private if the First-tier Tribunal or the Upper Tribunal so decides.⁶⁰⁹ Rule 32(2) of the First tier Tribunal explains;

“The Tribunal may give a direction that a hearing, or part of it, is to be held in private if the Tribunal considers that restricting access to the hearing is justified -
(a) in the interest of public order or national security;
(b) in order to protect a person's right to respect for their private and family life;
(c) in order to maintain the confidentiality of sensitive information;
(d) in order to avoid serious harm to the public interest; or
(e) because not to do so would prejudice the interests of justice.”

If the First-tier Tribunal or the Upper Tribunal decides to hold the case in private, it may decide to select persons who may attend the hearing.⁶¹⁰ During the selection of the persons to attend the hearing, the First-tier Tribunal or the Upper Tribunal will consider the smoothness of the proceedings and the interest of justice. For those cases that are being heard in public, if the First-tier Tribunal or the Upper Tribunal believes that the presence of certain people during

⁶⁰⁶ <https://www.gov.uk/guidance/take-a-business-dispute-to-the-commercial-court>, last visited 13 January 2017.

⁶⁰⁷ Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, rule 5.

⁶⁰⁸ Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, rule 32; The Tribunal Procedure (Upper Tribunal) Rules 2008, rule 37.

⁶⁰⁹ Ibid., rules 32 (2) and 37 (2) respectively.

⁶¹⁰ Ibid., rules 32 (3) and 37 (3) respectively.

the hearing might prevent justice, they will normally restrict such persons from attending the whole or part of the proceedings.⁶¹¹

7.4.7.2 Hearing

During the hearing all appeal parties are entitled to attend the hearing.⁶¹² A taxpayer is required to receive a notice of the hearing at least 14 days before the date of the hearing; the notice will state the date, time and venue of the hearing.⁶¹³ At the hearing, a taxpayer may appear in person or may be represented by his representatives. If a person decides to be represented, he may also attend the hearing if he wishes to (the right of the taxpayer to attend the hearing remains intact); if a taxpayer fails to attend the hearing but his representative is present, the proceedings will continue without the presence of the taxpayer. If a taxpayer does not have a representative and there is a great possibility of not attending the hearing, he is required to write to the First-tier Tribunal or Upper Tribunal informing about his excuses (it depends on where the case has been allocated). However, if there is a very short time left before the hearing, and a taxpayer expects not to attend the hearing, the taxpayer or his representative is required to call the Tribunal that handles the case to report about the matter.⁶¹⁴ Otherwise the Tribunal may decide to hear one party only. That will be true if the Tribunal that handles the case believes that continuing the hearing is in the interest of justice.⁶¹⁵

7.4.7.1 Filing evidence

Normally, the facts of a case are supported by evidence. A taxpayer is required prior to the beginning of the proceedings to mention the documents that are expected to support the facts as evidence. The First-tier Tribunal or the Upper Tribunal may issue a direction about the

⁶¹¹ Ibid., rules 32 (4) and 37 (3) respectively.

⁶¹² Ibid., rules 30 and 35 respectively.

⁶¹³ Ibid., rules 31 and 36, respectively.

⁶¹⁴ This is practice, rather than a requirement of the rules.

⁶¹⁵ Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, rule 33; The Tribunal Procedure (Upper Tribunal) Rules 2008, rule 38.

matter which must be supported by evidence, the nature of the evidence it requires, and whether parties are allowed or may provide an expert advice as evidence.⁶¹⁶

The evidence must be submitted to the Tribunals and to the other party of the appeal at a reasonable time. Every party of the appeal has a chance to review the evidence. Some evidence which might be submitted after the pre-trial meeting may not be accepted, unless the evidence itself is very relevant, and there is sufficient time before the hearing date. In *Xentric Ltd v The Commissioners for HMRC*,⁶¹⁷ the appellant applied for submission of further evidence a few days before hearing. The Tribunal held that, though the applicant had relevant evidence which he needed to present, the time was not sufficient to allow any other evidence to be admitted. Hence the application to submit further evidence was rejected.

The First-tier Tribunal or the Upper Tribunal may receive evidence which is either admissible in a civil trial or not. The Upper Tribunal is not bound to receive the same evidence as has been submitted to HMRC or the First-tier Tribunal. The Upper Tribunal has power to admit any evidence regardless of its availability in a previous decision.⁶¹⁸

There are some cases in which the First-tier or Upper Tribunal may restrict the access to some documents. The First-tier or Upper Tribunal may restrict the access to information which is considered to be very sensitive (for instance relating to intelligence). If any of the appeal parties requires the Tribunal (the First-tier or the Upper Tribunal) to use this kind of information as evidence, the Tribunal must adjourn the hearing and contact the Tax Administration Advice (Appeal) for advice.⁶¹⁹ Sometimes the issue of the sensitivity of

⁶¹⁶ Ibid., rule 15 in both sets of rules.

⁶¹⁷ *Xentric Ltd v The Commissioners for HMRC*, UKFTT 249 (TC) 2010.

⁶¹⁸ The Tribunal Procedure (Upper Tribunal) Rules 2008, rule 15(2); The Appeal Manual, <https://www.gov.uk/hmrc-internal-manuals/appeals-reviews-and-tribunals-guidance>, last visited 14 February 2017.

⁶¹⁹ This is a team of experts which has the responsibility of advising the Tribunal concerning matters of human rights, penalties, confidentiality of information and other issues which the Tribunal thinks fit to seek advice. See <http://www.hmrc.gov.uk/manuals/cogmanual/cog904770.htm>, last visited 4 September 2019.

information can be used as a tool to restrict a fair trial. In the case of *Chemist v the Commissioner for HMRC*,⁶²⁰ a bank was ordered to disclose information which at an earlier stage of the case was claimed to be very sensitive. In this case the appellant complained that, there was anonymous evidence that was used to assess him. The taxpayer further complained that he was frustrated by the witness statement that held anonymous allegations against him. Therefore, he requested the Tribunal to require the disclosure of the documents which were used as evidence by HMRC. The Tribunal then in order to facilitate a fair trial ordered the witness (the bank) to disclose the documents.

7.4.7.2 Presenting a witness

A taxpayer may arrange a witness to support his argument. If a taxpayer wishes to use the witness, but the person who is expected to deliver a statement hesitates to appear before the First-tier Tribunal or the Upper Tribunal, the tribunals may use their power to require the presence of the witness through a witness summons.⁶²¹ A witness summons must normally give the recipient a minimum of 14 days' notice of the date on which he is required to deliver his testimony.⁶²² If the person summoned has any reason that prevents him from delivering the testimony, he may request the tribunal to set aside the witness summons. If the person summoned makes such an application, he has the right to be heard before the tribunal before the tribunal decides on his application.

Generally, a witness statement can also be written. If there is a written witness statement then, the witness will have to read a prepared statement. The advantage of using a witness statement on hearing is to increase consistency in the proceedings. It is also believed that the written statement of a witness brings competency with the witness. There is no need for the witness to memorise what he/she was planning to explain during the hearing. However, the statement

⁶²⁰ *Chemist v The Commissioners for HMRC* UKFTT 66 (TC) 2009.

⁶²¹ Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, rule 16; The Tribunal Procedure (Upper Tribunal) Rules 2008, rule 16.

⁶²² *Ibid.*, in both sets of rules; see Robert W. Maas, *Guide to Taxpayers' Rights and HMRC Powers*, West Sussex: Tottel, 2009, p. 164.

of the witness, if it is prepared, is required to be submitted to the other party of the appeal and to the Tribunal before it is delivered during a hearing. Thus, if it is submitted to HMRC prior delivery, it gives HMRC enough time to prepare questions and counter evidence against the statement.⁶²³

7.4.7.3 Burden of Proof

The burden of proof lies either on the taxpayer or HMRC. It depends on the balance of probabilities.⁶²⁴ That is, the decision on who should bear the onus of proof depends on the types of charges raised. For example if there is an appeal raised by a taxpayer against an excessive penalty imposed by HMRC, the onus of proof is with HMRC.⁶²⁵

A good example of where HMRC was obliged to prove the imposition of an excess penalty can be seen in *HMD Response International v HMRC*.⁶²⁶ In this case the taxpayer (HMD Response International) was charged a penalty of £ 100 for each month of failure to file a tax return. However, it was informed that HMRC did not send the reminder notice to remind the taxpayer of its obligation to file the return. Instead HMRC waited until four months had passed before it sent a notice to the taxpayer requiring the taxpayer to pay a penalty of £ 500. However in this case the taxpayer informed the Tribunal that the return had been filed timely through an online connection even though the taxpayer was not sure whether the return had been received by HMRC or not. HMRC was blamed for not reminding the taxpayer of its obligation to file the return the onus of proving that the taxpayer did not file the return was with HMRC. Judge Geraint Jones explained that:

⁶²³ Maas, *ibid.*, p. 174.

⁶²⁴ <https://www.gov.uk/hmrc-internal-manuals/vat-civil-evasion-penalty/vatcep2060>, last visited 14 February 2017.

⁶²⁵ Taxes Management Act 1970, section 100B (2). See also <https://www.gov.uk/hmrc-internal-manuals/compliance-handbook/ch81180>, last visited 4 September 2019.

⁶²⁶ *HMD Response International v Revenue & Customs* [2011] UKFTT 472 (TC), 15 July 2011.

*“HMRC bears the onus of proving that the annual return was not filed. If it is to discharge that onus it must adduce some evidence upon which we can act. It is no good HMRC simply relying upon computer-generated documents without there being any evidence relating to their provenance, content, relevance or meaning. It is not for us to define what they mean, or might demonstrate, absent evidence from somebody conversant with the system.”*⁶²⁷

In a case that involves a dispute about the amount of tax assessed, both a taxpayer and HMRC are responsible to prove the correctness of the amount of tax payable. The Tax Management Act 1970, grants the Tribunal the ability to evaluate the balance of probability on who is required to prove the correctness of the assessment. The Tribunal has been given power to reduce the assessment if it appears that the taxpayer is over-assessed, otherwise the assessment is to remain intact. Section 50 (6) of tax Management Act provides that:⁶²⁸

“If, on an appeal notified to the tribunal, the tribunal decides-

(a) that, the appellant is overcharged by a self-assessment;

(b) that, any amounts contained in a partnership statement are excessive; or

(c) that the appellant is overcharged by an assessment other than a self-assessment,

the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.”

In *Burgess and Brimheath Developments Ltd v HMRC*,⁶²⁹ for example, the company (Brimheath) was alleged to have under-declared its profit for the tax years 1999-2008. The assessment detecting the under-declaration was made in 2011. When the case brought before the First-tier-Tribunal the taxpayer was required to prove the incorrectness of the assessment

⁶²⁷ Ibid., paragraph 24 of the judgment.

⁶²⁸ Taxes Management Act 1970, section 50 (6).

⁶²⁹ *Burgess and Brimheath Developments Ltd v HMRC*, [2015] UKUT 578 (TCC).

made by HMRC as well as to prove that there was no fraudulent act. The First-tier Tribunal ruled in favour of HMRC (confirming there was under-declaration of income). The taxpayer appealed to the Upper Tribunal on the ground that the First-tier Tribunal made an error of law throughout the case by letting the taxpayer alone carries the burden of proof. Another error of law alleged was that the First-tier Tribunal confirmed the assessment made by HMRC without considering the time limit within which the HMRC was supposed to complete the assessment. The Upper Tribunal therefore allowed the appeal and distributed the burden of proof to both the taxpayer and HMRC: the taxpayer was required to prove that the assessment was incorrect, and HMRC was required to prove that the assessment was made in time. The Upper Tribunal explained;

*“In this case, therefore, HMRC had the duty of establishing their case on both the competence and time limit issues. The burden of proof lay on them in each of those respects. There was no obligation on the part of Mr Burgess or Brimheath to raise those issues. As Henderson J said in Household Estate Agents, in the absence of relevant evidence there is nothing to displace the general rule that discovery assessments (and we would add assessments outside the normal four-year time limit) may not be made. The provisions of s50(6) TMA that have the effect that an assessment stands good unless the tribunal decides that an appellant has been overcharged by it, which leads to the burden being on an appellant to displace an assessment that has been validly made, do not affect this general rule as to the validity of the assessment.”*⁶³⁰

For cases that involve charges of tax evasion, a taxpayer is required to prove that charges against him are not correct. Failure by the taxpayer to prove his innocence empowers HMRC to assess taxable income based on HMRC's best judgement. In *Aouerradi v the Commissioner for HMRC*⁶³¹ the appellant was the owner of a shop. HMRC was informed that the appellant had dissolved his business, but there were no documents submitted to HMRC to prove the

⁶³⁰ Ibid., paragraph 43.

⁶³¹ *A Ouerradi v The Commissioners for HMRC* TC 11629/2009.

validity of the profit derived from the sale of the business. HMRC decided to amend the assessment based on its best judgment. The Tribunal ruled that since there were no documents to prove that HMRC had over-assessed the appellant, HMRC acted reasonably.

7.4.7.4 Decision

At the end of the proceeding the First-tier or Upper Tribunal is required to deliver its decision. The decision can be delivered orally during the hearing or it may be issued in writing later. If the decision is not announced at the end of the hearing, it is then deemed to be reached on the date the First-tier Tribunal or the Upper Tribunal sends the notice of the decision to the parties. Whether the decision is issued orally or in writing, the Tribunal is required to send a notice of the decision to all appeal parties within 28 days of a decision date or as soon as practicable thereafter.⁶³² The decision notice must include information about further appeal rights (if any) for the party who is not satisfied with the current decision. The information about the appeal rights is expected to inform the appeal party about the time limit to appeal, how to appeal and where to appeal.

7.4.8 Enforcement of the decision of the First-tier Tribunal or the Upper Tribunal

Any decision issued by the First-tier Tribunal or the Upper Tribunal shall be enforceable itself just like a decision of the High Court. In this context, a decision includes any directive issued by the First-tier Tribunal or The Upper Tribunal to taxpayers or to HMRC. Failure by a taxpayer or HMRC to comply with a decision of the Tribunal shall amount to a penalty. In *RJ Morris and MJ Morris v The Commissioners for HMRC*,⁶³³ the Tribunal imposed £ 500 as an additional penalty on the taxpayer for failure to comply with the directions of the Tribunal. If the Tribunal has ruled that a certain amount of money should be paid, as costs, penalty or tax

⁶³² Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, rule 35; The Tribunal Procedure (Upper Tribunal) Rules 2008, rule 40.

⁶³³ *RJ Morris and MJ Morris v The Commissioners for HMRC*, SC 3102-3, 2003.

but the amount remains unpaid, such amount will be a tax debt. Therefore it will be recovered as if it were payable under the notice of an order of the High Court.⁶³⁴

7.4.9 Right to order for costs

The First-tier Tribunal and the Upper Tribunal have a power to award costs to any of the appeal parties.⁶³⁵ This is done for complex cases. The First-tier Tribunal or the Upper Tribunal awards costs associated with running the case smoothly such as transportation costs, charges of a legal representative or any other costs that may be claimed if they are related with a particular case. A taxpayer may however request to exclude the proceeding from cost liability. This request is required to be made within 28 days from the date of case categorization.⁶³⁶ Therefore if a taxpayer opts to be excluded from cost liability he cannot claim his costs if he wins the case. This right to be excluded from cost liability is set in order to allow a taxpayer to exercise his appeal rights without considering the risk of the costs that the taxpayer might be required to pay once he loses a case.⁶³⁷

Normally a decision of the First-tier Tribunal or the Upper Tribunal to award costs is at the sole discretion of the respective Tribunal.⁶³⁸ For the award of costs, the applicant is required to send a written application to the Tribunal, and to the person against whom the costs are proposed to be made, and to deliver a schedule of the costs claimed in sufficient detail.⁶³⁹

⁶³⁴ Tribunal, Courts and Enforcement Act 2007, schedule 12.

⁶³⁵ The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, rule 10; The Tribunal Procedure (Upper Tribunal) Rules 2008, rule 10.

⁶³⁶ The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, rule 10 (1) (c).

⁶³⁷ Robert W. Maas, *op. cit.*, (fn. 622), p. 76.

⁶³⁸ Tribunal Courts and Enforcement Act 2007, section 29 (1) and (2).

⁶³⁹ The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, rule 10(3); The Tribunal Procedure (Upper Tribunal) Rules 2008, rule 10 (5).

Once the application to award costs has been received by the Tribunal, the Tribunal may not decide to award costs unless it gives an opportunity to the other party to make representations.⁶⁴⁰

7.4.10 Legal aid

Legal aid service has been introduced for the purpose of helping people who cannot afford to pay legal costs. The idea behind legal aid is to facilitate a fair trial. In the UK, legal aid is not available to corporate taxpayers; they are also excluded from the legal help scheme of the Community Legal Service (CLS).⁶⁴¹

7.4.11 Judicial review

Judicial review is a review of the lawfulness of the decisions or actions of HMRC. It is a form of court proceedings which challenges the way in which a decision has been made.⁶⁴² Judicial review is not undertaken to measure whether or not the decisions were 'right', as long as the law has been correctly applied and the right procedures have been followed.⁶⁴³

There is a right to judicial review for all decisions of HMRC which are non-appealable. In most cases, decisions which are related to discretionary matters are not subject to appeal. Discretionary matters include a HMRC decision refusing to issue an advance tax ruling, or refusal of the Revenue Officer to apply any guidance issued by HMRC while making a decision.

Judicial review is also available when a taxpayer claims to have been misdirected by HMRC, and he is now suffering the disadvantages which might not have occurred if he was not misled.

⁶⁴⁰ Ibid., rule 10(5)(a) & rule 10 (7) (a).

⁶⁴¹ This is a network of the Legal Services Commission funded organisations and advice provides that fund, provide and promote civil legal aid services; as to the CLS visit <https://www.gov.uk/government/organisations/legal-aid-agency>, last visited 4 September 2019.

⁶⁴² <https://publiclawproject.org.uk/wp-content/uploads/data/resources/208/Judicial-Review-and-Mediation.pdf>, last visited 4 September 2019.

⁶⁴³ Ibid.

This situation normally exists when the taxpayer failed to comply with the tax law due to misleading information from HMRC.

The High Court or the Upper Tribunal can undertake judicial review.⁶⁴⁴ The First-tier Tribunal has no power to conduct a judicial review. However, if there is an application for a judicial review addressed to the First-tier Tribunal, the First-tier Tribunal must send that application to the High Court. The High Court may then decide to review by itself or transfer the matter to the Upper Tribunal. The Upper Tribunal must conduct the judicial review in a manner the High Court would conduct it.

Normally when the application of the judicial review is successful, the High Court or the Upper Tribunal (after being permitted by the High Court) will issue its decision. The decision will be in one of the following forms:

- a mandatory order,⁶⁴⁵
- a prohibiting order,⁶⁴⁶
- a quashing order,⁶⁴⁷
- a declaration or an injunction, damages,
- a restitution or recovery of a sum due.⁶⁴⁸

⁶⁴⁴ As to the relevant powers of the Upper Tribunal, see the Tribunals, Courts and Enforcement Act 2007, sections 15, 18 & 19 (the latter inserts a new section 31A into the Supreme Court Act 1981) & The Tribunal Procedure (Upper Tribunal) Rules 2008, rules 27-33A.

⁶⁴⁵ This is an order that requires HMRC to perform a specific duty; it may be an order which requires HMRC to perform a particular action in order to attain fair discretionary decision. It is an order which address failure of HMRC to act. <http://www.emplaw.co.uk/lawguide?startpage=data/026042.htm>, last visited 14 February 2017.

⁶⁴⁶ This is an order issued to prohibit (in our case) HMRC taking an unlawful action or decision.

⁶⁴⁷ This is the order that overturns the invalid action that has already been taken. If this order is issued, HMRC will be ordered to re-decide the matter applying a proper legal test or observing a fair procedure.

⁶⁴⁸ Robert W. Maas, *op. cit.*, (fn. 622), p. 183 read with <https://publiclawproject.org.uk/wp-content/uploads/data/resources/208/Judicial-Review-and-Mediation.pdf>, last visited 4 September 2019.

7.4.12 Ombudsman and Adjudicator

7.4.12.1 Introduction

Generally, besides a taxpayer to be given an opportunity to appeal before the First-tier or Upper Tribunals on tax matters, the taxpayer may also complain against the quality of the service of HMRC. If a taxpayer believes that HMRC acted beyond its power or in an indecent way, he may complain to the Ombudsmen or the Adjudicator. The details for each aforementioned organ follow below.

7.4.12.2 Ombudsman

The office of Parliamentary Commissioner for Administration was established in 1967. The office holders (Parliamentary Ombudsmen) were authorised to deal with, *inter alia*, taxpayers' complaints against the tax authority concerning an improper manner of tax administration. The Ombudsman was intended to assist Parliament in its duties of safeguarding citizens' rights and supervising the executive.⁶⁴⁹ The main role of the Parliamentary Ombudsman is that of handling complaints of aggrieved taxpayers, and making judgments depending on the evidence and the reasonableness of particular circumstances of a case.⁶⁵⁰

When a taxpayer has any complaints against malpractice by HMRC he is required to submit the complaints to the MP of his constituency. The MP will then submit the complaints to the Ombudsman. A taxpayer may not complain to the Ombudsman directly. Upon receiving the written complaints from a MP, the Ombudsman may investigate the actions or decisions taken by the HMRC which resulted into the complaints.⁶⁵¹

Besides performing the task of dispute resolution, the remedy reached by the Ombudsman is not legally binding.⁶⁵² On addressing the complaints sent to him, the Ombudsman can only

⁶⁴⁹ Ann Abraham, 'The Ombudsman as Part of the UK Constitution: A Contested Role?' *Parliamentary Affairs*, 2008 61(1), pp. 206-215, 207.

⁶⁵⁰ *Ibid.* p. 208.

⁶⁵¹ *Simon Direct Tax Services*-2, issue 137, 2006, p. 2105.

⁶⁵² Ann Abraham, *op. cit.*, (fn. 649) p. 208.

recommend a suitable redress.⁶⁵³ Ann Abraham, questions the position of the Ombudsman constitutionally, questioning where the Ombudsman stands between the executive, the judiciary and Parliament. She finally charges the Ombudsman with usurpation; that is, hijacking the position of the court while he is not a court.⁶⁵⁴ According to her, the Ombudsman takes the power of dispute resolution that is supposed to be taken by the judiciary.

7.4.12.3 Adjudicator

The Adjudicator just like the Ombudsman performs a duty of a referee. The Adjudicator investigates and solves complaints from taxpayers who were not satisfied with the way their affairs have been dealt with. The Adjudicator works on complaints against operational matters like unreasonable delays on the treatment of certain tax matters, poor or misleading advice given by the tax authority, inappropriate staff behaviour and other issues in which taxpayers have no right to appeal to courts or tribunals.⁶⁵⁵

The Adjudicator may only accept complaints that have earlier been sent to the local tax authority office or the director of the appropriate unit, if such complaints were not handled to the satisfaction of the taxpayer.

On dealing with a taxpayer's complaint, the Adjudicator cannot work on a complaint that has been sent to the Ombudsman.⁶⁵⁶ The Adjudicator works under the agreement between him and HMRC. This contract is called the service level agreement for the provision of complaints adjudication services for HM Revenue & Customs by the Adjudicator's office. On performing his duty, the Adjudicator is required to review the decision of HMRC by comparing the action of HMRC and the published standards and code of practice of HMRC. Section 2.2 of the service agreement explains that

⁶⁵³ <https://www.financial-ombudsman.org.uk/businesses/resolving-complaint/understanding-compensation>, last visited 4 September 2019.

⁶⁵⁴ Ann Abraham, op. cit., (fn. 649) p. 213.

⁶⁵⁵ <https://www.gov.uk/government/organisations/the-adjudicator-s-office>, last visited 4 September 2019.

⁶⁵⁶ *Simon Direct Tax Services-2*, issue 137, 2006, p. 2107.

“When the Adjudicator accepts a case from a customer for investigation, she will look to compare what HMRC has done in respect of following a fair and consistent application of their published standards and codes of practice.”

7.4.13 The Tax Appeal Flow Chart

A taxpayer who is aggrieved with a decision of the HMRC may use the following procedures.

7.5 The analysis of taxpayers' rights in the UK

7.5.1 Introduction

This section analyses the promotion of the taxpayers' rights in the UK. For the purpose of this analysis, taxpayers' rights have the meaning described in paragraph 2.2.3 of this work (human rights which are applicable to legal persons and taxpayers' rights as described in the OECD survey). The analysis is performed exclusively by reviewing taxpayers' rights which are promoted by current UK domestic law. The role of UK courts is also discussed. Hence, UK tax case-law is the main source of data in this analysis; there is no discussion of international law or treaties, or any decision taken by international courts.

7.5.2 Tax must be imposed by law

In the UK, the power to impose tax is left to Parliament. It is customary that no tax shall be levied unless it is approved by Parliament. This statement, though it has not been written down in a constitution, has been followed and adhered to in the UK since 1688/89 when the British had their first Bill of Rights.⁶⁵⁷ Chapter 2 of the Bill of Rights 1688 explains

*“That levying Money for or to the Use of the Crowne by pretence of Prerogative without Grant of Parlyament for longer time or in other manner then the same is or shall be granted is Illegall.”*⁶⁵⁸

The absence of clear constitutional guidance increases the difficulties to determine precisely what matters or topics are required to be addressed by the UK's unwritten constitution.⁶⁵⁹ For

⁶⁵⁷ Geoffrey Morse, David Williams, *Davies: Principles of Tax Law*, London Sweet and Maxwell 2008, see also <http://www.independent.co.uk/news/uk/politics/the-independent-guide-to-the-uk-constitution-the-supremacy-of-parliament-10308704.html>, last visited 23 January 2018.

⁶⁵⁸ <http://www.legislation.gov.uk/aep/WillandMarSess2/1/2>, last visited 5 January 2017.

⁶⁵⁹ James Melton, Christine Stuart and Daniel Helen, To codify or not to codify? Lessons from Consolidating the United Kingdom's Constitutional Statutes, The Constitution Unit, School of Public Policy, University College London, 2015, p.10. Accessed through <https://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/162.pdf>, last visited 5 January 2017.

example, with respect to taxation, the absence of the constitutional guidance grants a right to Parliament to levy tax without any constitutional guidance, thus it leaves a possibility of Parliament to abuse the power to levy tax. The possibility of the Parliament to abuse the power to levy tax can be said to be the lack of guarantee of the protection of citizen rights.⁶⁶⁰ In an article in *The Guardian* of 2 February 2015, a committee of MPs was reported claiming that there was a need to have clearer constitutional guidance in the UK, so the Parliament and citizen would be precise and certain how the decision of the government and parliament will be made.⁶⁶¹

Nevertheless, even though the UK has no written constitution, it is generally accepted that tax in the UK is levied and collected by observing the boundaries of the law. That is, there is legislation which guides the levying and ultimately the collecting of tax from citizens. No tax will be collected unless it is based on legislation.

7.5.3 Right to certainty

Tax law must be clear in order to guarantee certainty. Certainty in tax law involves knowledge, reliability and calculability of the law.⁶⁶² An unpredictable tax law affects taxpayers' rights.⁶⁶³ Therefore there must be clear rules governing levying tax; rules must be

⁶⁶⁰ <http://www.independent.co.uk/independentbooks/the-independent-guide-to-the-uk-constitution-10311584.html>, last visited 5 January 2017.

⁶⁶¹ <https://www.theguardian.com/politics/2015/feb/02/clearer-constitutional-guide-needed-to-deal-with-a-hung-parliament-say-mps>, last visited 5 January 2017.

⁶⁶² Humberto Avila, *Certainty in Law*, Springer International Publishing, Switzerland, 2016, p. 195. Accessed through http://download.springer.com/static/pdf/772/bok%253A978-3-319-33407-3.pdf?originUrl=http%3A%2F%2Flink.springer.com%2Fbook%2F10.1007%2F978-3-319-33407-3&token2=exp=1483617065~acl=%2Fstatic%2Fpdf%2F772%2Fbok%25253A978-3-319-33407-3.pdf%3ForiginUrl%3Dhttp%253A%252F%252Flink.springer.com%252Fbook%252F10.1007%252F978-3-319-33407-3*~hmac=1036de89407ffdab082f56fa5388e38434507f7f6c9095389522fba330dc1226, last visited 5 January 2017.

⁶⁶³ Philip E. Heckerling, 'The Quest for Tax Certainty: A Court of Tax Appeals', *TAXES-The Tax Magazine*, Vol. 40, 1962, pp. 37-46.

communicated to and understood by taxpayers.⁶⁶⁴ A taxpayer should understand in advance the tax consequence of his action. In this aspect, a taxpayer should be able to equip himself with all necessary information that will assist him to determine his tax obligation. A taxpayer should also be informed about due dates to file a return and to actually paying tax. Moreover a taxpayer should be informed about tax rates and existing deductions. In general, a right to certainty requires a taxpayer to be informed about the necessary information concerning the determination of the taxable income and ultimately payment of the correct amount of tax. Therefore, information about tax relief, tax rates and manner of tax payment are very crucial. In most cases the right of certainty moves together with the simplicity rule in canons (principles) of a good tax system.⁶⁶⁵ If the tax law and procedures are simple, obviously there is a great possibility that a particular tax system is certain.⁶⁶⁶

In the UK, the right of certainty is seen to be reasonably promoted and protected. Tax is levied through law, and the tax administration communicates with taxpayers concerning the application of tax law. For example, the website of HMRC is equipped with information concerning assessment of tax and other tax related information. In case the information available on the website is not sufficient, a taxpayer is given an opportunity to ask for more information or clarification through telephone or through a physical visit to a nearby HMRC office.⁶⁶⁷ One can ask how can the information be certain and a taxpayer still needs to seek clarification from HMRC. There is no perfect answer to this question. However practically, one of the aspects of certainty is to understand in advance the consequence of the law towards

⁶⁶⁴ Hans Gribnau, 'Equality, Legal certainty and Tax Legislation in The Netherlands, Fundamental Legal Principles as check on Legislative Powers: A Case Study', *Utrecht Law Review*, Vol. 9, 2013, pp. 52-74.

⁶⁶⁵ Duncan Bentley, *Taxpayers rights: Theory, Origin, and Implementation*, Kluwer Law International, The Netherlands 2006, p. 67.

⁶⁶⁶ *Ibid.*

⁶⁶⁷ To find out how to communicate with HMRC visit <https://www.gov.uk/government/organisations/hm-revenue-customs>, last visited 9 January 2017.

taxpayers' behaviour.⁶⁶⁸ We live in an extremely sophisticated business environment.⁶⁶⁹ Therefore, it is not easy to have a law that rules clearly on every complex situation.⁶⁷⁰ Information given by HMRC therefore can rescue the situation. Similarly as we know, tax law changes frequently, thus a change of the tax law always results into change of administrative guidelines. These guidelines or changes may on first instant appear to be difficult to understand once they are published. Thus when a taxpayer is given an opportunity to ask for clarification in case he did not understand the guideline issued by HMRC it is meant to facilitate certainty.

Generally, there is certainty and consistency with respect to the information available to taxpayers. However, some decisions of HMRC jeopardize the consistency status. For instance there is no consistency on the issue of payment of interest on repayment of overpaid tax. In paragraph 7.4.5.6 above, it was explained that if a taxpayer pays more than what he was supposed to pay, he must be refunded the amount of tax overpaid and that the amount of tax to be refunded should be paid with interest. In paying interest, HMRC normally calculates interest using the simple method. There are however some instances in which HMRC calculates interest using the compound formula. The criteria for using compound or simple interest are not clearly known. This creates uncertainty. The issue of calculating interest using different formula was considered in *Sempra Metals Ltd v Inland Revenue & HM Attorney General*,⁶⁷¹ in which judge Park decided the interest to be compensated to the taxpayer and such interest to be calculated using a compound formula. In his judgment the learned judge explained that the compound interest calculation would, in principle, result in full

⁶⁶⁸ Hans Gribnau, 'Equality, Legal certainty and Tax Legislation in The Netherlands, Fundamental Legal Principles as check on Legislative Powers: A Case Study', *Utrecht Law Review*, Vol. 9, 2013, pp. 52-74.

⁶⁶⁹ John Avery Jones, 'Tax Law: Rules or Principles?', *Fiscal Studies*, 1996, Vol. 17, no. 3, access through <https://core.ac.uk/download/pdf/7107900.pdf>, pp. 63-89.

⁶⁷⁰ Walter C. Frank, 'From the Thoughtful Tax Man', *Taxes The Tax Magazine*, Vol. 40, 1962, pp. 607-608.

⁶⁷¹ *Sempra Metals Ltd v Inland Revenue & Anor* (2004) EWHC 2387.

compensation while the simple interest calculation would amount to only a partial compensation.

A case which contradicts the above ruling is *Grattan plc v HMRC*.⁶⁷² Here, HMRC had refused to compensate the taxpayer by using the compound interest method. The point of interest regarding the above two cases is the apparent lack of consistency which exists in the repayment system. The *Sepra* case occurred in 2004 while the *Grattan* case occurred 2009. Therefore, it was expected that HMRC would in 2009 compensate the taxpayer using the compound formula. The issue was finally fought out to the bitter end in the *Littlewoods* litigation, which was decided in favour of HMRC by the Supreme Court.⁶⁷³

The tribunals have ruled in several cases that a taxpayer is entitled to certainty. Certainty must be assured if taxpayer relies on the information obtained through official HMRC communication channels. See the case of *B&J Shop fitting v the Commissioner for HMRC*.⁶⁷⁴ In this case the judge explained:

“Where it is HMRC who has misstated the law, it seems to me that this is quite a different matter. HMRC has responsibility for gathering the correct amount of tax and it must be reasonable for a taxpayer to rely on HMRC's guidance as a correct statement of the law...HMRC must therefore ensure that they do not mislead taxpayers into mistaken actions...”

7.5.4 Right to pay no more than the correct amount of tax

Tax is among the compulsory payments paid by citizens to their governments.⁶⁷⁵ Once the tax is imposed by Parliament, the taxpayer has to pay no less and no more than the tax due. A

⁶⁷² *Grattan plc v HMRC* (2009) UKFTT 184 (TC).

⁶⁷³ *Littlewoods Ltd et al. v. Commissioners for HMRC* [2017] UKSC 70.

⁶⁷⁴ *B&J Shopfitting Services v The Commissioners for HMRC*, UKFTT 78 (TC) (First-tier Tribunal 2010).

⁶⁷⁵ *Chicago Legal News*, Vol. 18, June 1886, pp. 319-326. Access through http://heinonline.org/HOL/Page?handle=hein.journals/chiclene18&div=43&start_page=319&collection=journals&set_as_cursor=2&men_tab=srchresults, last visited 5 January 2017.

number of mechanisms have been set up to ensure that citizens pay their tax correctly. These mechanisms include the setting of clear tax laws as discussed before; assisting taxpayers in case the application of the tax law is uncertain; issuing tax rulings to enhance certainty;⁶⁷⁶ allowing taxpayers to file amended tax returns (to correct errors),⁶⁷⁷ and introducing strong penalties for default taxpayers. On the other hand, the right to pay no more than the correct amount of tax requires the existence of a mechanism that ensures taxpayer rights in case of disagreement between a taxpayer and the tax administration on what constitutes the correct amount of tax.⁶⁷⁸

HMRC is empowered to administer the imposition and the collection of tax in the UK and is vested with the responsibility of ensuring that tax is correctly levied and timely collected. Through tax collection, in principle, HMRC is required to collect from the taxpayer not more than the amount stated in the tax law. Although in the UK tax laws are said to be reasonable certain and clear, there is always a possibility of conflicts between taxpayers and HMRC. This possibility may exist because of the expansion of the business focus for many companies.⁶⁷⁹ Nowadays companies are convinced to expand the scope of their operations.⁶⁸⁰ Most companies have now shifted from operating within the UK to having branches outside the UK. The expansion of the business-focus might in one way or another create challenges concerning the levying of the correct amount of tax and about tax administration. Nevertheless, the expansion of the business-focus might also occur parallel to the change of a manner of doing business. For example, companies may be attuned to transact online rather

⁶⁷⁶ Winnie Chan, 'Binding Rulings', *Fiscal Studies*, Vol. 18, 1997, pp. 189-210.

⁶⁷⁷ Paul Lee, 'Tax Preparer Penalties for Relying on Incorrect Client Information', *Taxes The Tax Magazine* Vol. 91, 2013, pp. 78-78.

⁶⁷⁸ Machiel Lambooi, 'Multilateral cooperative compliance: The next step?', *International Tax Review*, Vol. 24, 2013, pp. 46-47.

⁶⁷⁹ James R. Hines, Jr. & Eric M. Rice, *Fiscal Paradise: Foreign Tax Havens and American Business*, NBER Working Paper No. 3477 (Also Reprint No. r1868), April 1994 NBER Program(s).

⁶⁸⁰ *International Tax Review*, Vol. 25, Issue 2 March 2014, pp. 8-34.

than to work from physical premises.⁶⁸¹ If this be the case then the tax administration is also supposed to be compatible with these changes.

Payment of a tax refund for the amount of tax overpaid influences the correct payment of tax. When a taxpayer under any circumstance pays more tax than he is supposed to pay, he is entitled, under sections 32 and 33 of the Taxes Management Act 1970 to a refund of the amount of tax overpaid. Section 32 provides:

“...If on a claim made to the Board it appears that to their satisfaction that a person has been assessed to tax more than once for the same cause and for the same chargeable period, they shall direct the whole or such part of any assessment as appear to be an overcharge to be vacated and thereupon the same shall be vacated accordingly...”

Moreover, the UK appeal system provides an option for HMRC to review its decision previously taken. The review is always conducted by staff who did not take part in the decision to be reviewed. The idea of reviewing is to make sure that taxpayers pay the correct amount of tax.⁶⁸² Many decisions which are reviewed end up with a change of the amount of tax compared to the earlier assessment issued.⁶⁸³

7.5.5 Right to be informed and assisted

7.5.5.1 Right to be informed

Taxation is a two-way traffic: it includes a party who is obliged to pay it, and a party who is responsible to levy and collect the tax. These parties must communicate effectively. Lack of

⁶⁸¹ Arthur J Cockfield, 'Rise of the OECD as Informal World Tax Organization through National Responses to E-Commerce Tax Challenges', Yale J.L. & Tech. 136 (2005-2006).

⁶⁸² Paul Frankel, Craig Fields and Amy Nogid, 'A lawmakers' Guide to the State Tax Appeals Process: Suggestions for Improvement', *Journal of State Taxation*, 2006, pp. 17-24.

⁶⁸³ Richard Doran, 'UK Considers ADR to Resolve Tax Disputes', *International Tax Review*, Vol. 21, 2010, pp. 41-43.

proper and sufficient communication between these parties may automatically result in grievances between them. In short, a right to be informed is among the rights that gears the smooth administration of tax law. The right to be informed requires a taxpayer to be informed of every aspect that directly relates to his rights and tax related obligations.⁶⁸⁴ It includes the right to be informed during tax auditing, inspections, and even obtaining documents during tax proceedings.⁶⁸⁵

In the UK the right to be informed is explained in the Taxpayers' Charter. HMRC is aware of the existence of the right to information and promises taxpayers that it will inform them and make them aware of their rights, including giving them information about the right to appeal against decisions of HMRC.⁶⁸⁶ On appeal issues, HMRC promises to inform a taxpayer not only about his right to appeal, but also on how to raise an appeal against a decision by HMRC.

HMRC promises taxpayers to inform them beforehand in case it needs information. HMRC will inform them of the types of information it needs, and the time to submit the information. If HMRC needs to clarify the information submitted or needs to question a taxpayer, the taxpayer will be informed about the reasons for such inquiries.⁶⁸⁷

The Taxpayers' Charter explains the right of being informed as follows;

“We want to give you as much certainty as we can... we will provide information that helps you to understand what you have to do and when you have to do it...”

⁶⁸⁴ Fernando Serrano, 'The Taxpayer's Rights and the Role of the Tax Ombudsman: an Analysis from a Spanish and Comparative Law Perspective', *Intertax*, Vol. 35, Issue 5, 2007, pp. 331–340.

⁶⁸⁵ Mario Teresa Soler, New Spanish Regulation on Taxpayers' Protection, *Intertax*, Vol. 26., Issue 11, 1998, pp. 364–369.

⁶⁸⁶ Taxpayers' Charter, accessed through <https://www.gov.uk/government/publications/your-charter/your-charter#A4>, last visited 9 January 2017.

⁶⁸⁷ Taxpayers Charter, accessed through <https://www.gov.uk/government/publications/your-charter/your-charter#A4>, last visited 9 January 2017.

It appears that the right to be informed is reasonably promoted in the UK. Apart from being stated in the Taxpayers' Charter, the official website of HMRC is also well equipped with practical information that might be useful in determining tax obligations. This right is also laid down in the Human Rights Act 1998.⁶⁸⁸

In addition to being promoted by UK laws, the right to be informed in the UK also has reasonable protection through other means. For example, HMRC may provide information to taxpayers through its official website or by telephone. A taxpayer is always guaranteed that he or she may rely on the information obtained through official channels of HMRC. This guarantee is assured even if the information provided in these sources might to a certain extent contradict the existing tax law, provided that the information is given by HMRC. In *B&J Shopfitting Services v The Commissioners for HMRC*⁶⁸⁹ the taxpayer failed to submit a return on time. The failure was caused while relying on information available on the HMRC website and on assistance from the HMRC helpline. In its submissions, HMRC claimed that failure of the taxpayer to meet his obligation should not be shielded by the information obtained through the website, as there is a law which governs tax collection. HMRC further submitted that the taxpayer had no reasonable excuse for his failure: being ignorant of the law is not by itself an excuse. The Tribunal judge ruled that HMRC is the government's tax collector; and it is reasonable to presume that their published guidance is a correct statement of the law. Therefore, the taxpayer was right to rely on the information obtained through the website, and the misleading advice given through the help line.

7.5.5.2 Right to be assisted

The right to be assisted is the right of taxpayers that is largely experienced when there is a hardship of understanding or applying tax laws and procedures. This right moves closely with the right to be informed, because being timely and correctly informed is one of the crucial elements of assistance.⁶⁹⁰ The right to be assisted however moves further to giving tax rulings

⁶⁸⁸ Human Rights Act 1998, Article 1.

⁶⁸⁹ *B&J Shopfitting Services v The Commissioners for HMRC*, UKFTT 78 (TC) (First-tier Tribunal 2010).

⁶⁹⁰ See the explanation of this right in paragraph 2.3.2.2, above.

to taxpayers. Rulings are among the crucial forms of assistance a corporate taxpayer would expect to acquire from HMRC. In the UK, HMRC is committed to assist taxpayers. A taxpayer who is confronted with difficulties in applying the tax law may always request assistance. In promoting the right to assistance for a taxpayer, HMRC issues several forms of administrative guidance that intend to clarify the application of tax law on certain matters.⁶⁹¹ This assistance is deemed to be a crucial factor with respect to certainty.⁶⁹² This is always true for matters that are not easy to determine, such as determination of deductible interest through the arm's length principle in thin capitalization,⁶⁹³ and in transfer pricing matters.

Recently HMRC launched a framework for cooperative compliance. The framework intends to enhance cooperation with taxpayers (MNEs).⁶⁹⁴ HMRC is committed to work closely and openly with taxpayers. The motive behind this is to minimize uncertainty and commercial tax risk.⁶⁹⁵ If the framework succeeds in providing assistance to a taxpayer, the taxpayer will be more relieved from uncertainty to an extent.

7.5.6 Right to be heard

A taxpayer is entitled to be heard before a decision is taken. Mostly in any decision which involves adjustment of the assessment or the decision regarding the collection of information

⁶⁹¹ See <https://www.gov.uk/government/organisations/hm-revenue-customs/services-information> for a list of manuals and guidance, last visited 6 January 2017.

⁶⁹² Claus-Peter Knöller, 'The Efficacy of Thin Capitalization Rules and Their Barriers: An Analysis from the UK and German Perspective', *Intertax*, Vol. 39, 2011.

⁶⁹³ Ibid.

⁶⁹⁴ Lisette van der Hel–van Dijk & Maarten Siglé, 'Cooperative Compliance: Tax Risk Management and Monitoring', *Intertax*, Vol. 44, 2016, pp. 642-650.

⁶⁹⁵ *Global Tax Alert*, 2015, assessed through [http://www.ey.com/Publication/vwLUAssets/UK_Tax_Authorities_issue_new_measures_on_large_business_tax_compliance_applicable_from_April_or_July_2016/\\$FILE/2015G_CM6071_UK%20TAs%20issue%20new%20measures%20on%20large%20business%20tax%20compliance%20applicable%20from%20April%20or%20July%202016.pdf](http://www.ey.com/Publication/vwLUAssets/UK_Tax_Authorities_issue_new_measures_on_large_business_tax_compliance_applicable_from_April_or_July_2016/$FILE/2015G_CM6071_UK%20TAs%20issue%20new%20measures%20on%20large%20business%20tax%20compliance%20applicable%20from%20April%20or%20July%202016.pdf), last visited 6 January 2017.

from taxpayers or third parties.⁶⁹⁶ HMRC will not determine the taxable amount prior requesting for clarification. This is true if there is unclear information. The right to be heard is largely exercised during tax appeals. No decision will be taken without a hearing (except in default paper cases, but even in these cases, if a taxpayer requests a hearing, the tribunal will always provide it).⁶⁹⁷

7.5.7 Right to privacy and confidentiality

7.5.7.1 Right to privacy

According to the Oxford Advanced Learner's Dictionary, privacy means

*“A state of being alone and not watched or disturbed by other people, or a state of being free from the attention of the public.”*⁶⁹⁸

From the above definition, a link might be drawn to define privacy in the legal or business context to include a state of confidentiality of business information and documents.⁶⁹⁹ Documents that, according to the business owner, contain information the release of which to the public may confer an advantage to his business competitors.⁷⁰⁰ In other words, the release may disturb the owner's business setting.⁷⁰¹

In the UK the right of privacy is given reasonable attention. Most of HMRC's actions which in one way or another have an impact on the personal affairs of a taxpayer must first acquire authorisation from a taxpayer himself or from an independent organ before being executed.

⁶⁹⁶ <https://www.gov.uk/guidance/appeals-and-tribunals-an-overview-for-agents-and-advisers>, last visited 6 January 2017.

⁶⁹⁷ The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, rules 23 (2) (a), 25 (2) (a), 26 and 29.

⁶⁹⁸ *Oxford Advanced Learner's Dictionary of Current English*, 6th Edition, Oxford University Press, 2000.

⁶⁹⁹ Robert W. Maas *Guide to Taxpayers' Rights and HMRC Powers*. West Sussex: Tottel, 2009, p. 63.

⁷⁰⁰ *Ibid.*

⁷⁰¹ T. Keith Fogg, 'Transparency in Private Collection of Federal Taxes,' *Florida Tax Review*, Vol. 2011, pp. 763-831.

Even if HMRC needs information from a third party that is useful in determining the correct amount of taxable profit, HMRC cannot issue a notice to third party to require the submission of another taxpayers' information without prior approval from the First-tier Tribunal.⁷⁰² The Finance Act 2008 provides that

(1) An officer of Revenue and Customs may not give a third party notice without -

(a) the agreement of the taxpayer, or

(b) the approval of the First-tier Tribunal.⁷⁰³

A tax officer is not allowed to access the taxpayer's information unless the Tribunal satisfies itself that the officer who is making an application to access the taxpayers' information is justified,⁷⁰⁴ i.e. that he is an officer who is authorized to perform the act he intends to perform. The Tribunal must also be satisfied and that, there are reasons that influenced that particular officer to perform the actions he intended to undertake.⁷⁰⁵ Mostly before making a decision to allow the tax officer to access the taxpayers' information, the Tribunal will consider whether it is true that a taxpayer has not complied with a provision of the tax law. The Tribunal will also examine whether such non-compliance is likely to have led to serious prejudice to the proper assessment of the tax.⁷⁰⁶ For example in *Dr. Kathleen Long MBChB, MPH v The Commissioners for HMRC*⁷⁰⁷ HMRC conducted the assessment of taxable income of the appellant. In order to determine the correct amount of taxable income, HMRC intended to use her business diary where HMRC believed that, it could read the number of meetings held during the year. HMRC applied to the First-tier Tribunal to use the taxpayer's business appointment diary for this purpose. However, the First-tier Tribunal rejected the application

⁷⁰² Finance Act 2008, schedule 36.

⁷⁰³ Ibid.

⁷⁰⁴ Maas, loc. cit. (fn 699).

⁷⁰⁵ Finance Act 2008, schedule 36, paragraph 3.

⁷⁰⁶ Taxes Management Act 1970, section 20 (7Aa).

⁷⁰⁷ *Dr. Kathleen Long MBChB, MPH v The Commissioners for HMRC* (2014) UKFTT 199 (TC) TC/2013/06146.

on the ground that the use of such document might impair the confidentiality of the taxpayer. The taxpayer was professionally bound to keep information of her clients confidential as well.

Normally if HMRC wants to visit and inspect business premises, it must first issue a notice to the owner or occupier of the building. The notice must specify possible consequences of obstructing an officer exercising this power. The notice must also state whether the inspection has been approved by the First-tier Tribunal.⁷⁰⁸ During the inspection HMRC has no right to interrogate any person found in the premises, save those who voluntarily agree to be interrogated.

On the protection side, the right of privacy is protected in the Human Rights Act 1998. Schedule 1 of which sets out numerous rights. The Act requires every person to be respected in his private and family life and there should be no interference of public authority on the enjoyment of that right unless it is allowed by the law.

No case which involved the breach of the privacy right in the UK in tax matters appears to have come to court. However Robert Maas⁷⁰⁹ has raised a concern about the (according to him) excessive powers of the HMRC. He observed that the HMRC's powers to acquire taxpayers' information might endanger the privacy right of taxpayers. Maas cited (as evidence for his argument) a situation where HMRC applies for an approval to issue an information notice by the Tribunal. In his explanation, he was questioning the term *authorised officer*, which he believed has so far not been defined. Maas argued that allowing every person to be an authorised officer might infringe the privacy of the taxpayer. For Maas this is excessive power in the hands of the Commissioners of HMRC. Maas further complained about the limited right of appeal available when an information notice is issued to demand a person's

⁷⁰⁸ Robert W. Maas op. cit. (fn 699), p. 77.

⁷⁰⁹ Ibid. pp. 60-64.

statutory records.⁷¹⁰ He explained that it is quite unfair for a taxpayer not to be given appeal rights when the statutory records are required by HMRC.

With respect, another view can be taken of this matter. The absence of the right to appeal against the notice of information to require the statutory records indeed places excessive power in the hands of HMRC which weakens the taxpayers' rights. Therefore, HMRC should not be left alone to do whatever it pleases. There should be always a balance between HMRC's powers and taxpayers' rights. The view presented by Maas, specifically on the issue of a limited appeal right to appeal against a notice, is inaccurate. In the UK, there is always a remedy available to a taxpayer who believes HMRC has not operated fairly, moreover, there are three remedies. The first remedy is available within HMRC through the adjudicator; the second remedy is available through the Ombudsman, and the third remedy is through judicial review against any decision against which a taxpayer has no right of appeal.⁷¹¹ A taxpayer is thus not left alone without any relief of the powers vested to HMRC. Likewise, when the information notice is sent to a third party to demand submission of the taxpayer's information, that third party may always appeal to the First-tier Tribunal if he believes he can not comply with the requirement of the information notice.⁷¹² Therefore there is always relief available to taxpayers against the information powers available to HMRC.

7.5.7.2 Right to confidentiality

HMRC through the Taxpayers' Charter promises to protect taxpayers' information. It seems to me HMRC intends to protect information from being accessed by outsiders and other government offices. The taxpayers' information is only to be used in respect of levying and

⁷¹⁰ A statutory record is a document or information which a person is required to keep and preserve by the Taxes Acts or by any legislation relating to taxes. In the UK, normally there is no right of appeal against a requirement to produce statutory record, see <https://www.gov.uk/hmrc-internal-manuals/compliance-handbook/ch24320>, last visited 4 September 2019.

⁷¹¹ These are commonly decisions made using discretionary powers of HMRC. For example a decision on whether or not to issue an advance tax ruling.

⁷¹² http://webarchive.nationalarchives.gov.uk/20140109143644/http://www.hmrc.gov.uk/finance_bill2009/Inf-powers-contact-det.pdf, last visited 14 February 2017.

collecting tax. However, it is submitted that it is very hard to measure compliance with this promise. Taxpayers are not always safe based on HMRC promises which are provided in the Charter. For example, the confidentiality right in the charter is stated in the following terms

“We recognise we have privileged access to your information...we will: protect information we obtain, receive or hold about you...only share or release information about you when the law lets us and we need to...”

Based on the above explanation of the confidentiality right, taxpayers cannot be absolutely sure that information acquired by HMRC will not be shared with other government agencies. Sometimes, HMRC may stick to the above promise, as, for example, in 2011, when the Parliamentary Committee (Public Accounts Committee) wrote a letter to the Commissioner of the HMRC requiring the disclosure of certain taxpayer information to the Committee. HMRC refused to disclose the information because it was bound by confidentiality; in his reply the Commissioner of HMRC relied on sections 18 and 19 of the Commissioners for Revenue and Customs Act 2005.⁷¹³ The Parliamentary Committee was not happy about this refusal to disclose information, and went further by accusing HMRC of having made a deal with big companies; the accusation was however not proved.⁷¹⁴

While in the above example HMRC used section 18 of the Act of the establishment of HMRC as a shield to protect taxpayer's confidentiality, the same section may sometimes be used to breach the confidentiality of the taxpayer. In *R (on the application of Ingenious Media Holdings plc and another) v Commissioner for HMRC*⁷¹⁵ a tax officer during an interview with the media concerning tax avoidance disclosed taxpayers' information to a journalist. The information disclosed was then published in the newspaper, containing quotations of

⁷¹³ The text of the reply letter can be access through <https://www.taxation.co.uk/files/pac-letter.pdf>, last visited 9 January 2017.

⁷¹⁴ Kristen A Parillo, 'News analysis: The UK dilemma of Balancing Transparency, Taxpayer Confidentiality', *Worldwide Tax Daily*, 2013, pp. 131-132.

⁷¹⁵ *R (on the application of Ingenious Media Holdings plc and another) v Commissioners for Her Majesty's Revenue and Customs* (2016) UKSC 54.

statements made by the tax officer. The taxpayer requested judicial review against the decision of the tax officer to disclose the information to the journalist. The UK lower courts considered the disclosure was rational and was made for a legitimate purpose. However, the Supreme Court ruled that HMRC had breached the confidentiality of the taxpayer. The Court observed that

*“The information supplied by Mr Hartnett to the journalists about Mr Mc Kenna and Ingenious Media was information of a confidential nature, in respect of which HMRC owed a duty of confidentiality to them under section 18(1)....”*⁷¹⁶

Nevertheless, in order to win the taxpayers' faith in their right of confidentiality, the HMRC requires every tax officer to take oath declaring that he or she will observe confidentiality as soon as he is employed. This declaration (in the oath) is a requirement of the 1989 Finance Act, s 182 which stipulates that, it is a criminal offence for any person to disclose any information which he holds or has held in the exercise of levying tax; and for a breach of confidentiality a person shall be liable on conviction to a fine up to £ 5,000 or imprisonment for up to two years, or both.⁷¹⁷

The right to confidentiality is among the rights that face huge challenges. HMRC requires taxpayer's information; this is a crucial aspect for proper determination of taxable income. However, information is not intended to be used by HMRC only. In the era of transparency, tax administrations are bound to exchange taxpayers' information.⁷¹⁸ The UK is by law required to exchange information with other tax authorities. The exchange of taxpayers' information may take place on request or automatically. Whatever the modality of exchange is used, the taxpayer's confidentiality is at risk,⁷¹⁹ mainly the risk of leakage of sensitive

⁷¹⁶ Ibid., paragraph 32.

⁷¹⁷ <http://www.legislation.gov.uk/ukpga/1989/26/contents>, last visited 14 February 2017.

⁷¹⁸ Carlos Otavio Ferreira de Almeida, 'International Tax Cooperation, Taxpayers Rights and Bank secrecy: Brazilian Difficulties to Fit Global Standards,' *Law and Business Review of the Americas*, Vol. 21, 2015, pp. 217-239.

⁷¹⁹ Mathew Gilleard, 'The Dark side of Transparency', *International Tax Review*, Vol. 25, 2014, pp. 12-15.

information.⁷²⁰ This is true if the tax authority which the information is sent to does not have a strong mechanism to maintain confidentiality. In practice, countries do not have similar ethical and legal capacities to ensure the confidentiality of exchanged information.⁷²¹ For this reason it is difficult to guarantee the taxpayers' confidentiality if the information is exchanged between tax administrations.

7.5.8 Right to Appeal

In any civilized community one organ cannot be a sole decision-maker. There must be other organs which have power to review the decisions previously taken. It may be that one of the persons involved in a decision, either a taxpayer or the tax authority (HMRC) is dissatisfied. Therefore the right to appeal involves granting a taxpayer a right to challenge the legality of any action or decision of the tax authority.⁷²²

The basis of the right of appeal is to have an appeal structure which is easily accessible to every taxpayer. The appeal system should be accessible without obstacles such as complicated procedures, formalities and cost. Any tax appeal system which involves complicated procedures to appeal is seen as an attribute of injustice. The argument is raised since the presence of a complicated tax appeal system may limit the number of taxpayers who wish to appeal. Furthermore, the tax appeal machineries need to employ competent and independent staff; they may solve tax disputes effectively and efficiently, and hence taxpayers may trust them.

In the UK the right to appeal is also ensured; it is provided in detail in the Tax Management Act⁷²³ In 2009 the UK underwent major changes in its appeal system. From 1 April 2009, there is the First-tier Tribunal and the Upper Tribunal. These two tribunals are considered to be more independent compared with the former tax appeal system organs (the former General

⁷²⁰ Ibid.

⁷²¹ Ibid.

⁷²² Duncan Bentley, *Taxpayers Rights: Theory, Origin, and Implementation*, Kluwer Law International, The Netherlands 2006, p. 219.

⁷²³ Tax Management Act 1970, sections 31, 44-56.

and Special Commissioners); the current tax appeal system falls under the Ministry of Justice, and the two present tribunals do not depend on HMRC. The previous appeal system was under the supervision of the Treasury, and part of its budget was financed directly by HMRC. It was therefore difficult to establish a clear line of independence in the earlier tax appeal system.

The change of the tax appeal structure in the UK was necessitated by the need to have competent and independent tax appeal machineries. Now, all members of both the First-tier and the Upper Tribunal are said to be competent, because the tax appeal law obliges the Ministry of Justice to appoint judges or members of the First-tier Tribunal or the Upper Tribunal who are academically and professionally qualified. Because of this legal obligation, it is expected that the Ministry of Justice will always appoint qualified judges and members of the First-tier Tribunal or the Upper Tribunal. That will promote and maintain tax justice.

As noted earlier, the right to appeal is also embraced and protected in the Human Rights Act 1998. This right is ensured by the European Convention on Human Rights. The right to appeal read together with the right of a fair trial. Article 6 of the convention provides that:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

There is no doubt that the UK taxpayers currently have access to a right of appeal which is exercised before competent and impartial tribunals.

7.6 Conclusion

Generally, the UK does not have a bad record in the promotion of taxpayers' rights. There are very few cases where HMRC was accused by taxpayers of breaching some of their rights. In those cases that there are, taxpayers mostly complained about a breach of the right to a fair

trial, but were unable to convince the Tribunal that HMRC had breached taxpayer rights. HMRC in most cases emerged the winner.⁷²⁴

There remains, though, the issue of balancing the powers of HMRC and taxpayers' rights. It is feared that the current status of HMRC powers may hinder taxpayers' rights. Some scholars (mostly tax experts) are very impressed with powers of HMRC, especially the information powers, arguing that HMRC has too many powers. They claim that the current HMRC powers to access taxpayers' information are greater than HMRC need. Yet this view may be exaggerated, as most of these powers vested in HMRC are subject to authorisation by the First-tier Tribunal. HMRC cannot unilaterally decide to exercise most of its powers without permission from the First-tier Tribunal.

Another challenge is the confidentiality right. The issue of confidentiality of taxpayer's information is at risk. The UK, like other European countries is in the process of extending the exchange of taxpayer's information. Although the sharing of taxpayer's information that determines the correct tax is unobjectionable in itself, there must be extra care concerning taxpayer's confidentiality. For this reason, tax authorities should inform a taxpayer about the exchange of information. In case there is a doubt of possible leakage of taxpayers' business secrets, the doubt must be cleared prior to proceeding with the exchange of the information. Otherwise the exchange of such particular information should be stopped. This is true if the recipient tax administration does not have the legal or technological capacity to ensure taxpayers' confidentiality.

Nevertheless, the protection of the taxpayers' rights is reasonably ensured. But the UK can do more: there is still no legal document which has compiled the taxpayers' rights. While the taxpayers' rights are promoted through the Taxpayers' Charter, that is not legislation. It is simply an administrative document which makes promises to taxpayers about their rights.

⁷²⁴ E.g. *Harvard Martin Sharkey v HM Inspector of Taxes*, SPC00459, 2004; *Auntie's Café Limited v Commissioners for HMRC*, SPC 00588, 2006 and *Bysermaw Properties Limited v Commissioners for HMRC*, SPC00644, 2007.

Although there are few cases where the Tribunal or a taxpayer refers to taxpayers' rights which are promoted in the Taxpayers' Charter as a reference on the proceedings, that situation does not make the Taxpayers' Charter a legally binding document. The Taxpayers' Charter still remains a number of administrative promises made by HMRC.

That is not to decry the UK system of promoting taxpayers rights through the Taxpayers' Charter; because the Taxpayers' Charter is an important guidance as to taxpayers' rights to HMRC and to taxpayers alike. However the current status and structure of the UK Taxpayers' Charter is inadequate. The legal status of the UK Taxpayers' Charter appears to indicate that the UK does not intend to give enough protection to taxpayer's rights. Had the Taxpayers' Charter either been passed by Parliament as law or been incorporated into the Tax Management Act as part of its provisions or as a schedule, there would have been a perfect safeguard and protection of taxpayers' rights.

The counter-argument is that the taxpayers' charter is a document which combines taxpayers' rights which are promoted by various laws into a single document. But if this be the case why then not incorporate those rights in the Tax Management Act; or as an independent statute? The process would be similar to that by which the ECHR was incorporated through the Human Right Act 1998. However, the efforts which have so far been taken towards assuring legitimate expectations should be recognised: HMRC was required by law to introduce the Taxpayers' Charter, and Tribunals have ruled in favour of taxpayers, if the taxpayer follows the information given by HMRC.

Promotion of taxpayers' rights is not a static matter. It is a growing movement which needs to be reviewed frequently. For example, the decision of the UK to renew its tribunal structure in order to speedup solving tax disputes and enhance tax justice should be praised. The restructuring of the tax appeal system was a sign of improvement of the UK position in the promotion and the protection of taxpayers' rights. It is an improvement because the former appeal machineries, especially the General Commissioners, were not always competent, as

Philip John Wright v Commissioners for HMRC well demonstrates.⁷²⁵ Here the Tribunal decided to set aside the decision of the General Commissioners on the ground that the General Commissioners failed to apply correctly the legal test to determine the residential status of the taxpayer.

⁷²⁵ *Philip John Wright v The Commissioners for HMRC*, UKFTT 277 TC, 2009.

8 CHAPTER EIGHT: THE INFLUENCE OF REGIONAL INTEGRATION ON TAXPAYERS' RIGHTS IN THE UK

8.1 Introduction

This chapter reviews the influence of regional integration on the promotion of taxpayers' rights in the UK. This review refers to the jurisprudence of the European Court of Justice (as an organ of the European Union (EU) and the jurisprudence of the European Court of Human Rights (as an organ of the Council of Europe). The review of the influence of regional integration evaluates the contribution of these organisations towards taxpayer's rights. This review demonstrates that generally, the UK does not have a bad record on the promotion of taxpayers' rights; it also shows that regional integration has a direct influence on promoting and protecting taxpayers' rights in the UK.

8.2 The emergence of regional integration in Europe

The emergence of the human rights movement in Europe is said to have begun after the end of the Second World War.⁷²⁶ During that time Europe, like most other regions required a strong mechanism for safeguarding human rights and the reconstruction of its economy which had been badly damaged by the war.⁷²⁷ As measures to restore the situation, the Council of Europe was established in 1949, and shortly afterwards in 1952 the European Coal and Steel Community (ECSC) came into being. The main purpose of these developments, taken as a whole, was to secure human rights, to unify the region and to contribute to the economic reconstruction of Europe.⁷²⁸

⁷²⁶ Penny Andrews, 'Sixty Years On: The International Human Rights Movement Today', *Maryland Journal of International Law*, Vol. 24, 2009, pp. 47-55.

⁷²⁷ Robert Whitlow, 'The European Economic Community: Some Aspects of Juridical Personality, Sovereignty and International Obligation', *The Business Lawyer*, 1958, pp. 813-830.

⁷²⁸ Dan Vataman, 'History of the European Union,' *Lex ET Scientia International Journal*, Vol. 17, 2010, pp. 107-137.

More than 60 years now since their establishment, the European Union's and the Council of Europe's focus on the regional integration has been gradually changing to reflect the pace of development in the region and the rest of the world.⁷²⁹ For example, the focus of the Council of Europe at the time of its establishment was to promote rights for only natural persons. However, there has been an expansion of the coverage of human rights due to growing economic and social needs. By now the term human rights does not only mean rights which are meant to serve natural persons, they also serve legal persons. The Council of Europe was obliged to accommodate these changes to meet its objectives.

On the other hand, what became the European Union (EU) was established merely for the purpose of strengthening the economy of Europe which was badly damaged by the war. However, the world economic changes and social demands have influenced the European Union to extend its objectives. The EU is currently still focusing on strengthening its economy but also on maintaining the rule of law. Promoting and protecting human rights is done by its own Charter of Fundamental Rights which became binding in 2009 (as a result of the Treaty of Lisbon). Moreover, the Fundamental Rights Agency was established in 2007; it collects and analyses data about the fundamental rights mentioned in the Charter of Fundamental Rights.

8.3 The European Union

8.3.1 Introduction

Historically, the European Union (EU) evolved from a number of previous organisations. The first was the European Coal and Steel Community (ECSC) which entered into force on 23 July 1952 for the main purpose of solving economic problems brought about by the Second World War.⁷³⁰ Initially, the ECSC had six Member States: Belgium, France, Germany, Italy, Luxembourg and The Netherlands. In 1957 the six founding members established two more

⁷²⁹ Cenap Cakmak, 'Shortcomings in ECHR and Other Council of Europe Legal Documents on Human Rights', *Review of International Law and Politics*, Vol. 2, 2006, pp. 117-132.

⁷³⁰ https://europa.eu/european-union/about-eu/history_en, last visited 23 January 2017.

international organisations, the European Economic Community (EEC) to bring about economic integration, including a common market, and the European Atomic Energy Community (EURATOM) to create a market for nuclear power in Europe, and develop nuclear energy for its Member States while selling the surplus of energy to non-member states. The three organisations were collectively referred to as the European Communities,⁷³¹ and their partially shared institutional structure was finally fully unified through the Merger Treaty of 8 April 1965, which entered into force on 29 July 1967.

The EU and its initial structure (often, if inaccurately, likened to a Greek temple as an architrave resting on the three pillars of the European Communities) was formally developed on 7 February 1992 by the Maastricht Treaty, which also re-baptised the EEC as the European Community (EC). These developments reflected the fact that the activities of the Communities had developed way beyond the original vision of their founding fathers. In the EU, specifically, socio-economic policies with regard to job creation, ensuring freedom, security and justice; regional development, environmental issues and reacting to the effects of globalization, were then given greater prominence in the EU dimension.⁷³² Finally, with the entry into force of the Treaty of Lisbon on 1 December 2009, the EU lost its pillar structure, the EC ceased to exist as a separate entity, and the EU was left with only one Community running parallel to the EU, namely the Euratom Community. The ECSC Treaty, having been concluded for 50 years, had expired at midnight on 22 July 2002.

Members of the EU

Over the years, the number of Member States of the EU has increased from the six founding members to (at present) 28 Member States. The additional members in order of accession are: Denmark, Ireland and the United Kingdom; Greece; Spain and Portugal; Austria, Finland, and Sweden; Croatia, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia; Bulgaria and Romania.

⁷³¹ <http://www.euintheus.org/timeline-milestone/?post=13271>, last visited 23 January 2017.

⁷³² <http://www.hrea.org>, last visited 4 September 2019.

Article 49 of the Treaty on European Union (TEU) makes it clear that a country cannot become a member of the EU just on the basis of its geographical position (though it must be a 'European State'); it must respect the values referred to in Article 2 TEU and be committed to promoting them. These values are 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'. Article 2 TEU goes on to state that such values 'are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women prevail'. In practice it is also necessary for a country to have a strong market economy and to follow the EU policies which deal with economic, social, political and monetary issues.⁷³³ This last point relates to the need to accept the '*acquis de l'Union*' (previously known as the *acquis communautaire*); on accession negotiations are about adaptations and transitional periods, not about renegotiating the EU Treaties and the body of law and case-law as such.

8.3.2 Incorporation of human rights in the EU legal order

Before 1967, the task of promoting and protecting human rights in Europe was solely vested in the Council of Europe. Within the EEC framework, issues of human rights protection largely emerged following the decisive judgment in *Stauder*⁷³⁴ by the European Court of Justice (ECJ), in 1969. Erich Stauder filed a case complaining about the decision of the City of Ulm Sozialamt (Social Welfare Office) requiring that in order to buy butter at a reduced price a beneficiary had to present to the retailer a coupon that mentioned the beneficiary's name. Stauder claimed that presenting a coupon that bore the name of the beneficiary breached the prohibition of discrimination in Community law. The ECJ ruled in favour of Stauder, stating moreover that fundamental rights were part of the general principles of Community law and, therefore, protected by the Court itself. This decision was however perceived negatively by the Bundesverfassungsgericht (German Federal Constitutional

⁷³³ https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership_en, last visited 23 January 2017.

⁷³⁴ Case 29/69 *Stauder v City of Ulm* [1969] ECR 419; ECLI:EU:C:1969:57.

Court), which hesitated to accept the supremacy of the ECJ on matters pertaining to human rights, believing that the ECJ was unable to promote and protect fundamental right at the same level as was done by German domestic law. In *Solange I*,⁷³⁵ paragraph 4 of the Constitutional Court's decision stated that

“Provisionally, therefore, in the hypothetical case of a conflict between Community law and a part of national constitutional law or, more precisely, of the guarantees of fundamental rights in the Basic Law, there arises the question of which system of law takes precedence, that is, ousts the other. In this conflict of norms, the guarantee of fundamental rights in the Basic Law prevails as long as the competent organs of the Community have not removed the conflict of norms in accordance with the Treaty mechanism.”

A similar approach was taken by the Italian Corte Costituzionale in *Frontini*⁷³⁶ in 1973, when it ruled that Italy had transferred some of its executive rights to the EEC provided that the ECJ would protect human rights.

These two cases challenged the role and status of the ECJ in the region concerning the protection of human rights. Nevertheless, the ECJ continued to rule in several cases that the fundamental rights were part of the general principles of Community law. These rights were also derived from the constitutional traditions common to the Member States. Therefore they had to be protected at Community level as part of the Community legal order. In *Internationale Handelsgesellschaft*,⁷³⁷ the plaintiff disputed the validity of the system of making a deposit as criterion for the issue of an import-export licence. The plaintiff submitted

⁷³⁵ Case 2 BvL 52/71 BVerfGE 37, 271, accessed through

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2000/06/ls20000607_2bv1000197en.html. Or visit <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=588>. Both last visited 23 January 2017.

⁷³⁶ Case no. 183/73, *Frontini v. Ministero delle Finanze* [1974] 3 CMLR 540.

⁷³⁷ Case 11/70 *Internationale Handelsgesellschaft v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125; ECLI:EU:C:1970:114.

that the system of deposit was against the principles of freedom of action and of disposition, and of economic liberty, which were protected under German law. He sought similar protection under Community Law. In its judgment the ECJ ruled that respect for fundamental rights is part of general principle of law. Paragraph 4 of the judgement observed that:

“... In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community...”

The ECJ continued to build its case law concerning the promotion of the fundamental rights, referring not only the rights promoted through domestic laws of its Member States, but also international treaties which the Member States have ratified. In *Nold*⁷³⁸ the ECJ stated in paragraph 13 of its judgment that

“As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures.

In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States.

Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.”

⁷³⁸ Case 4/73 *J.Nold, Kohlen- und Baustoffgroßhandlung v Commission* [1974] ECR 491; ECLI:EU:C:1974:51.

Following this recognition of the international treaties in the promotion of human rights, the ECJ in *Rutili*⁷³⁹ explicitly mentioned the European Convention on Human Rights, noting that certain limitations on the powers of Member States concerning the control of aliens were a specific manifestation of the more general principle, enshrined in Articles 8-11 of the Convention.

The process of absorbing the protection of human rights into the principles of what is now EU law began with the development and implementation of several key concepts in EU law, such as the principle of direct effect and the doctrine of supremacy (primacy) of EU law in the event of a conflict with national law.⁷⁴⁰ While the doctrine of supremacy is a creature of case-law, as it is still not expressly mentioned in any of the various Treaties, including the TEU. Declaration 17 on primacy annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon on 13 December 2007⁷⁴¹ emphasised the primacy of EU law over the laws of the Member States, stating that:

“The conference recalls that, in accordance with well settled case law of the EU Court of Justice, the Treaties and law adopted by the Union on the basis of the Treaties have primacy over the law of Member states.”

⁷³⁹ Case 36/75 *Roland Rutili v Minister for Interior* [1975] ECR 1219; ECLI:EU:C:1975:137, paragraph. 32.

⁷⁴⁰ That certain provisions of EU law had direct effect was first made clear by the Court of Justice in Case 26/62 *Van Gend en Loos v Netherlands Inland Revenue Administration* [1963] ECR 1; ECLI:EU:C:1963:1. The Court stated that Community law not only created obligations for Member States, the Community institutions, and individuals, but also conferred rights on individuals that they could invoke before their national courts, and which the latter had to protect. The doctrine of supremacy dates from Case 6/64 *Costa v ENEL* [1964] ECR 585; ECLI:EU:C:1964:66.

⁷⁴¹ See OJ 2016 C202/344.

The ECJ since the 1970's has routinely referred to the ECHR in its many rulings on human rights related cases, despite the fact that the EU is not a member of the Council of Europe.⁷⁴² Such is the status accorded to the protection of fundamental rights, as guaranteed by the European Convention, and as they result from the constitutional traditions common to the Member States, that Article 6(3) TEU recognises them as constituting general principles of the Union's law. This is Treaty-level approval of the development of protection found originally in the case-law.

The EU's focus on human rights attracted particularly wide attention during the late 1990s and in early 2000, following the drafting of the Charter of Fundamental Rights of the European Union in June 1999, its proclamation on 7 December 2000, and the increased status conferred upon it, as adapted on 12 December 2007, by Article 6(1) TEU. Basically, the Charter was intended to consolidate the human rights protected by the ECHR for EU citizens by making them more visible and relevant.⁷⁴³ The fifth recital to the preamble to the Charter makes its sources clear:

“This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.”

⁷⁴² Francis, G. Jacobs, 'Human Rights in the European Union: The Role of the Court of Justice' *European Law Review*, Vol. 26 (4), 2001 pp. 331-341.

⁷⁴³ <http://www.hrea.org>. As to the text of the Charter of Fundamental Rights of the European Union, adopted on 7 December 2000, see OJ 2000 C 364/1; as to the present text of the Charter, see OJ 2016 C202/389.

As the charter is part of the EU's human rights instruments, it is expected to contribute extensively to the promotion of human rights in the EU.

The decision of the EU to have its own mechanism for the promotion of human rights also became much more significant following an agreement by the representatives of the EU Member States on 12 and 13 December 2003 to establish the Fundamental Rights Agency to monitor human rights in the region.⁷⁴⁴

8.3.3 Fundamental Rights Agency of the EU

The Fundamental Rights Agency (FRA) was established by Regulation 168/2007, and started to operate on 1 March 2007; it provides assistance and expertise in the field of human rights to bodies of the European Community and to the Member States,⁷⁴⁵ and it raises awareness among European citizens about their fundamental rights. Furthermore, the FRA is not a court, therefore it can neither make binding decisions nor assess the infringement of human rights by the Member States.⁷⁴⁶

The main role of the FRA is to be the centre for assessing and disseminating reliable information on the promotion of human rights in European countries. This is designed to reduce transaction costs in the accessibility of reliable data for all actors in the field of human rights in Europe. Furthermore, the FRA is meant to act as a political advisor of EU organs and its Member States on democracy and the rule of law.⁷⁴⁷ The FRA provides advice and expertise concerning fundamental rights which are stipulated in the European Charter of Fundamental Rights.

⁷⁴⁴ For more information about the agreement, see parliamentary resolution 1427 (2005). Accessed through <http://assembly.coe.int/main.asp?link=/documents/adoptedtext/ta05/eres1427.htm>, last visited 5 June 2014. See also: Council Regulation (EC) 168/2007, O.J. 2007 L 53/1.

⁷⁴⁵ <http://fra.europa.eu/en/about-fra/what-we-do>, last visited 23 January 2017.

⁷⁴⁶ Gabriel N. Toggenburg, 'The Role of the new EU Fundamental Rights Agency: debating the "sex of angels" or improving Europe's human rights performance'? *European Law Review*, Vol. 33 (3), 2008, pp. 385-398.

⁷⁴⁷ <http://fra.europa.eu/en/about-fra/what-we-do>, last visited 23 January 2017.

In order to fulfil its role, the FRA collects and analyses valid information and data of high scientific value concerning fundamental rights.⁷⁴⁸ Thus, the FRA is meant to be a switchboard where all potential information on human rights applicable in the Member States, is stored and can be retrieved at minimal transaction costs.⁷⁴⁹ On collecting the data, the FRA may require Member States of the EU to submit reports on the implementation of the fundamental rights; a country to which a request for a report is sent is obliged to comply with a request within the time frame set in the request.

8.3.4 The Influence of the EU on the taxpayers' rights in the UK

This section specifically analyses, by evaluating the mandate and decisions of the responsible EU organs, the influence of the EU on the promotion of taxpayers' rights in the UK.

The involvement of the EU in the promotion of human rights is strengthened by Article 2 TEU, which provides that:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.”

As noted above, Article 6(1) TEU recognizes rights, freedoms and principles set out in the Charter of Fundamental Rights, and Article 6(3) recognizes fundamental rights guaranteed by the European Convention on Human Rights and as resulting from the constitutional traditions common to the Member States of the EU. The EU has, in Article 7 TEU, a specific prevention and sanction mechanism to ensure that human rights are sufficiently promoted and protected within Europe. Therefore, based on the legal setting on the promotion of human rights in EU law, the UK as one among the Member State of the EU, is expected to fully comply with EU

⁷⁴⁸ Armin van Bogdandy & Jochen van Bernstorff, ‘The EU Fundamental Rights Agency within the European and international human rights architecture: The legal framework and some unsettled issues in a new field of administrative law’ *Common Market Law Review*, Vol. 46 (4), 2009, pp. 1035-1068, at 10.

⁷⁴⁹ See Toggenburg (fn 746) at p. 392.

law governing fundamental rights. If the United Kingdom were to be seriously and persistently in breach of the values referred to in Article 2 TEU, then it could, like any other Member State have some of its rights deriving from the TEU and the TFEU suspended in accordance with Article 7(2) and (3) TEU.

8.3.5 The Court of Justice of the European Union (CJEU)

The Court of Justice of the European Union (CJEU) includes the Court of Justice (still referred to by its old acronym, the ECJ) the General Court, and specialised courts (of which there are at present none). The ECJ was established in 1958 (replacing the old Court of Justice of the ECSC) and is based in Luxembourg. The role of the CJEU, by virtue of Article 19(1) TEU is to:

“... ensure that in the interpretation and application of the Treaties the law is observed.”

The ECJ has 28 Judges, one from each EU Member State, as provided by Article 19(2) of TEU. IT has many roles, but for present purposes, two are important: it decides on infringement proceedings brought by the Commission against the Member States, and it gives preliminary rulings on requests from the courts of the Member States. It and the General Court form the centralised Union judiciary, and the national courts act as decentralised judges of Union law. In the United Kingdom, apart from the obligation imposed by EU law itself on national courts to apply and interpret EU law faithfully (an obligation flowing from what is now Article 4(3) TEU), in the United Kingdom, sections 3(1) and (2) of the European Communities Act 1972 oblige the national courts to determine cases consistently with the case-law of and principles laid down by the Court of Justice.

This has resulted in changes being necessary to many United Kingdom tax provisions that have been found to contradict EU law, as a result of rulings by the ECJ. Simply put, local courts are bound to take into consideration the application of Union law in every decision they

have to make.⁷⁵⁰ In sum, the EU has and is still playing an important role on the promotion of taxpayers' rights in the UK and all its other Member States. The position of the EU on taxation matters, especially on matters which directly reflect the TFEU in the United Kingdom legal hierarchy is clearly visible. The EU has strong and direct impact on the United Kingdom in matters that restrict free movement of capital and labour, and matters on the right of establishment relating to direct taxation.

8.4 The Council of Europe

The Council of Europe was established in 1949, soon after the end of the Second World War. Originally, 10 Member States: The Netherlands; Belgium; France; Luxemburg; the United Kingdom; Ireland; Italy; Denmark; Norway and Sweden,⁷⁵¹ signed the statute of the establishment of the Council. The Council of Europe was in essence established as the result of The Hague Congress in May 1948. The objective of that Congress was to strengthen the case for human rights and democracy in European states. While unity among the Member States was the key to economic success, the concept of the rule of law was equally significant.⁷⁵² In fact, it also can be said that the Council of Europe was established as the result of the war panic.⁷⁵³ That is why the Council of Europe focuses on protecting the region from the possible emergence of other Hitler figures or communism.⁷⁵⁴ Following the

⁷⁵⁰ Damian Chalmers, 'The Application of Community Law in the United Kingdom, 1994-1998' *Common Market Law Review*, Vol. 37 (1), 2000, pp. 83-128, p. 85-6.

⁷⁵¹ Currently the Council of Europe has 47 Members; in addition to the founding members the other members are: Albania; Andorra; Armenia; Austria; Azerbaijan; Bosnia and Herzegovina; Bulgaria; Croatia; Cyprus; Czech Republic; Estonia; Finland; Georgia; Germany; Greece; Hungary; Iceland; Latvia; Liechtenstein; Lithuania; Malta; Moldova; Monaco; Montenegro; Poland; Portugal; Romania; Russian Federation; San Marino; Serbia; Slovak Republic; Slovenia; Spain; Switzerland; Macedonia; Turkey and Ukraine.

⁷⁵² Statute of the Council of Europe, Article 3.

⁷⁵³ A. Mowbray, *Cases and Materials on The European Convention on Human Rights* (2nd ed.), Oxford: Oxford University Press, 2007, p. 4.

⁷⁵⁴ *Ibid.*

establishment of the Council of Europe in November 1949, the Committee of Ministers of the Council of Europe formed a team of experts to draft the human rights convention.

8.4.1 The European Convention on Human Rights (ECHR)

The European Convention on Human Rights (ECHR) was formally signed on 4 November 1950 in Rome. The ECHR was the result of a proposal written by Pierre-Henri Teitgen and Sir David Maxwell-Fyfe⁷⁵⁵ in late 1949, and was based on various discussions among Council of Europe Member States. The discussions focused on organising and structuring the convention and the legal contents (the human rights) to be included therein. History shows that the ECHR during the early stages strongly feared communism and dictatorship as important elements to fight against. Hence it failed to promote and protect individuals' rights adequately. Thus, the ECHR was seen to protect more the relationship among the Member States than that between states and citizens.⁷⁵⁶ Steven Greer has explained that the convention was much more concerned with the protection of the democratic identity of its Member States through the medium of human rights and the promotion of international cooperation among them; there was less focus on the provision and protection against human rights violations by the state governments.⁷⁵⁷

The ECHR for one is an international instrument which is traditionally reserved for constitutional law.⁷⁵⁸ It is legally accepted and ratified as the sole guardian for the promotion of human rights in Europe. The Member States observed in the preamble to the ECHR:

⁷⁵⁵ These were the experts from France and the UK respectively who were the leading figures towards the establishment of the international Convention and the Court for the protection of basic human rights in the member states of the Council of Europe.

⁷⁵⁶ Ralph Beppard, *Human Rights and Europe* (3rd ed) Cambridge: Cambridge University Press, 1993, p.28.

⁷⁵⁷ Stephen Greer 'What's Wrong with the European Convention on Human Rights?' *Human Rights Quarterly*, Vol. 30 (30), 2008, pp. 680-702.

⁷⁵⁸ Costas Paraskeva, 'Returning the Protection of Human Rights to Where They Belong, At Home', *The International Journal of Human Rights*, Vol. 12 (3), 2008, pp. 415-448 (at p. 416).

“Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms”;

In this way, the ECHR has secured the protection of individual rights against any Member State. This is evidenced in Article 1 of the ECHR which imposes an obligation on countries to secure all rights promoted in the ECHR:

“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”

On this basis, the promotion of the human right by Member States is not an option. It is a commitment which all Member States have accepted.

One of the main influences of the ECHR on the promotion of human rights in the European region has been to shape domestic law of Member States so it can be compatible with the ECHR. The ECHR requires Member States to mould their legal systems and to shape their governments to conform to the standards of protection of human rights as prescribed by the Convention. Though it requires no identical legal rules on human rights from Member States, it specifies the level of protection they must provide.⁷⁵⁹ Article 56(1) of the Convention states as follows;

“[....]

The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements...”

It is important to note that the ECHR does not ask its Member States to incorporate the ECHR into their domestic law. It requires them to promote human rights in the same way the Convention does. It means that Member States, even if they do not incorporate the ECHR into

⁷⁵⁹ Ibid., p. 417.

their domestic laws, are required to have domestic law which generally ensures human rights are maintained by having at least:

- Competent and independent courts or tribunals
- Domestic law which promotes and respects democracy and human rights, such as the right of speech and the right of associations

Generally, Member States of the Council of Europe are therefore required to observe the obligation set by Article 1 of the Convention which states that;

“The high contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this Convention.”

The ECHR established two organs with a mandate of protecting the rights offered by the Convention. The former European Commission for Human Rights, and the European Court on Human Rights both served to protect human rights. The 11th Protocol has abolished the European Commission on Human Rights in October 1999. This discussion will therefore focus on assessing the influence of the European Court of Human Rights on the promotion of taxpayers' rights in the United Kingdom.

8.4.2 The European Court on Human Rights (ECtHR)

The European Court on Human Rights (ECtHR) was established in January 1959. It used to have a number of judges equal to the number of Member States of the Council of Europe. This setting allowed the Court to have judges even from Member States that did not ratify the Convention. However, as from 11 May 1994 when Protocol 11 to the ECHR⁷⁶⁰ was signed, judges are elected by the Parliamentary Assembly from Member States that have ratified the Convention. Judges are appointed based on their qualifications, and experience in the area of human rights. Although they are appointed based on their nationality, they sit in an individual

⁷⁶⁰ ECHR, Protocol 11 brought a complete overhaul of the convention control mechanism. The protocol introduced the single Court of Human Rights to replace the previous system of using the Commission and the Court.

capacity. That is, judges are not required to represent the interests of their countries; they are to exercise independent judgement when deciding cases.⁷⁶¹

Unlike the European Court of Justice (ECJ), the ECtHR is not a supreme court over the Member States. Once the ECtHR has delivered a judgment, and if (during the proceedings) it finds that there is a violation of human rights, the ECtHR can award “just satisfaction.”⁷⁶² The Committee of Ministers retains the responsibility to oversee the execution of the Court's judgments.⁷⁶³ However, the absence of direct effect does not necessarily mean that the ECtHR cannot protect human rights.

There has been a great influence of the ECtHR on domestic law and policies of the Member States. National authorities have often been obliged to undertake measures in response to the Court's judgments.⁷⁶⁴ The judgement of the Court is final and binding only on the parties involved in the case.⁷⁶⁵ One of the principal roles of the Court is to interpret the ECHR in a

⁷⁶¹ A. Mowbray, *Cases and Materials on The European Convention on Human Rights* (2nd ed.), Oxford University Press, 2007, p 22. see also <http://www.echr.coe.int/Pages/home.aspx?p=court/judges&c>, last visited 23 January 2018.

⁷⁶² This is an award offered by the ECtHR based on the damage if a country is found to violate human rights. The award however is not an automatic consequence of a finding by the ECtHR that there has been a violation of human rights. It is only applied if domestic law does not allow a complete reparation to be made, see <http://www.echr.coe.int/NR/rdonlyres/8227A775-CD37-4F51-A4AA-1797004BE394/0/PracticeDirectionsJustSatisfactionClaims2007.pdf>, last visited 25 October 2017.

⁷⁶³ The ECtHR's jurisdiction is limited to declaring whether or not the Convention has been breached; it does not have powers to annul legislation nor to prescribe to states precisely what needs to be done in order to correct the violation. See Steven Greer, *op. cit.* (fn 757).

⁷⁶⁴ Dia Anagnostou, ‘Does European Human Rights law matter? Implementation and domestic impact of Strasbourg Court judgments on minority-related policies’ *The International Journal of Human Rights*, Vol. 14 (5), 2010, pp. 721-743.

⁷⁶⁵ ECHR, Art. 46.

progressive and expansive strategy. Therefore, several States will routinely fall below the ECHR standards, creating pressure for national adaptation.⁷⁶⁶

8.4.3 The influence of the ECHR/ECtHR on the taxpayers' rights in the UK

The UK is among the founding members of the Council of Europe. It ratified the ECHR in 1953. However, it was among the last countries to integrate the Convention into its domestic legal order.⁷⁶⁷ Nevertheless, the UK did not sign the optional protocol of allowing individuals to submit cases directly to the ECtHR until 1966. Signing of this protocol was an important step towards the promotion of human rights in the country. However, this decision alone was not a sufficient and strong enough way of promoting human rights. It was still very costly for an individual to have a full direct access to the ECtHR. It was said that United Kingdom citizens just like citizens of other Member States of the Council of Europe (who have not provided the ECHR in their national legal order) had to suffer expensive and time-consuming procedures to obtain rights guaranteed by the Convention.⁷⁶⁸ Therefore the emphasis on the effective protection of human rights promoted under ECHR was on the domestic level; the rights had to be secured by domestic courts and tribunals.⁷⁶⁹

As the cost associated with the submission of cases to the ECtHR was one of the obstacles in the application of the rights in the Convention for United Kingdom citizens (before the introduction of the Human Right Act 1998), until then the impact of the ECHR on domestic United Kingdom law was very limited. In the process, UK lawyers would for example, quote the ECtHR's case-law in their submissions, and then the judges would apply principles of the ECtHR's judgments, however they usually only stated or questioned the conformity of British

⁷⁶⁶ Helen Keller & Alec Stone Sweet (eds.), *A Europe of Rights, The Impact of the ECHR on National Legal Systems*, Oxford University Press, 2008.

⁷⁶⁷ Paraskeva, op. cit. (fn 758), at p. 419.

⁷⁶⁸ Ibid., p. 420.

⁷⁶⁹ Ibid., p. 422.

law with the Convention (they could not (and cannot) annul them).⁷⁷⁰ This changed when the UK incorporated the ECHR into the Human Rights Act 1998. From then the UK citizens could effectively access the rights because they form part of domestic law.

According to a study by Richard Clayton, which evaluated the position of the UK six years after the incorporation of the ECHR into its domestic law, there was an increase in references to the ECHR when UK judges handed down judgments; this could be taken as a signal that, from then on, the ECHR has established a dialogue between the UK judges and the ECtHR.⁷⁷¹ Clayton further argued that the strong reliance on the ECtHR by the UK courts has prevented them from developing indigenous human rights jurisprudence on their own.⁷⁷² This clearly demonstrates that rulings made by the ECtHR have an influence on the UK case law. The performance of the Ombudsmen can also be used to emphasise the argument further. When solving disputes between UK citizens and HMRC, the Ombudsmen referred to the rights available under the ECHR. Prior to the incorporation of the ECHR in domestic law, this either did not happen or if it did, it was hardly visible.⁷⁷³

There is a substantial evidence to support the general protective role of the ECtHR in United Kingdom's domestic law on human rights. Most of the cases in which the United Kingdom was taken to the ECtHR have concerned gender equality, pension payments, interference with communications, and the use of court martial tribunals. For example, in *Morris v United*

⁷⁷⁰ Helen Keller. Op. cit. (fn 766) at p 685.

⁷⁷¹ Richard Clayton, 'The Human Rights Act six years on: where are we now?' *European Human Rights Law Review*, 2007, pp. 11-26 at p. 12. See also *Review of the Implementation of the Human Rights Act*, Department of Constitutional Affairs July 2006 p. 11, accessed through http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdf, last visited 24 January 2017.

⁷⁷² Richard Clayton, 'The Human Rights Act six years on: where are we now?' *European Human Rights Law Review*, 2007 pp. 11-26, at p. 19.

⁷⁷³ http://www.ombudsman.org.uk/make-a-complaint/case-summary-article?runnum_keyword=622, last visited 24 January 2017.

Kingdom,⁷⁷⁴ the UK was found to have violated human rights for failing to provide a fair trial for Morris; he was a soldier in the British army who filed complaints about the structure of the court-martial system, arguing that justice could never be maintained by this system because members of the court were not independent as prescribed by article 6(1) of the ECHR. On the facts, the ECtHR ruled in favour of Morris. The composition of the court-martial was not independent; hence it caused an infringement of human rights.

On the issue of the violation of the right to privacy, the case of *Liberty and Others v United Kingdom*⁷⁷⁵ is a good example. The UK was found to have violated the right to privacy of citizens by intruding on their privacy through communication surveillance. Under UK domestic law, the state was allowed to intrude by surveying individuals' private communications, as long as there were justifiable grounds for doing so and the process observed the necessary regulations imposed by the law. However in the case of *Liberty*, the ECtHR found the UK law had failed to provide an adequate amount of protection from abuse of power. The law conferred on the state very wide discretion to intercept and examine communication between citizens. In *Liberty*, the complainants had made allegations that their private telephone communications, facsimile, email and data communications, including legally confidential information, had been intercepted by the British Ministry of Defence. After the national courts had ruled in favour of the Ministry of Defence, the case was taken to the ECtHR, which found that the UK had indeed infringed their privacy in breach of Article 8 of the ECHR.

There have been some cases where taxpayers were convicted of a criminal offence without being given a fair trial, as in *Cuscani v United Kingdom*.⁷⁷⁶ Mr. Cuscani, a UK resident of Italian origin, was a manager of a restaurant and also a director of the company operating the restaurant. He was accused of fraud which, resulted into a tax loss amounting to £ 800,000. In order to recover the debt, Cuscani was declared bankrupt. He was then arrested and

⁷⁷⁴ *Morris v United Kingdom*, Application No. 38784/97.

⁷⁷⁵ *Liberty and Others v United Kingdom*, application No. 58243/00.

⁷⁷⁶ *Cuscani v United Kingdom*, application No. 32771/96.

imprisoned for a period of four years for fraudulently evading VAT. When the case was submitted to the ECtHR, it was however understood that he could not have followed the court proceedings effectively in the UK because of his insufficient knowledge of the English language. It was further explained that during the trial (in the UK) he made a request for an interpreter. His application was not adequately fulfilled. He was given an interpreter who was also not fluent in the English language. The ECtHR found the UK had violated Cuscani's human rights for failing to provide the accused with a competent interpreter; the interpreter. ECtHR hence ordered the plaintiff to be released from prison.

Another case that shows the influence of ECtHR on UK taxpayers' rights is *King v United Kingdom*.⁷⁷⁷ The proceedings in the case took years to be completed. The question arose whether the principles of a fair trial were violated, since a trial is only supposed to be fair when the proceedings are conducted within a reasonable time without unnecessary delays. Article 6(1) of the Convention provides that

“In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by the law...”

Mr. King was charged with wilful or neglect default which resulted in a tax loss amounting to more than £ 600,000. He submitted his appeal to the ECtHR claiming that the proceedings in his case had taken more than 13 years. In the judgment, the ECtHR ruled that, although the domestic courts blamed the applicant for deliberately wasting time, the domestic courts contributed to the delays without reasonable justification. The ECtHR therefore found there had been a violation of Article 6(1) of the Convention. The ECtHR was a saviour for King's rights which had been infringed by the domestic courts.

There are United Kingdom cases in which it was claimed that tax law is biased. For example, in *P.M. United Kingdom*,⁷⁷⁸ the taxpayer complained that there was different treatment for a

⁷⁷⁷ *King v United Kingdom*, application No. 13881/02.

⁷⁷⁸ *P.M. v United Kingdom*, application No. 6638/03.

married and an unmarried father when requesting for a tax relief. P.M. had been living in a stable unmarried relationship with Miss D who had a daughter. P.M. was registered as the father on the birth certificate of the daughter, but he and D separated later. As part of the separation agreement, P.M. agreed to pay £ 25 per week maintenance for his daughter. At first, he was granted a tax relief for the maintenance payments. Later on the revenue officials argued that it was an error, because P.M. was an unmarried father when his child was born. P.M. complained that it was unfair to treat unmarried fathers the same as married fathers for the purpose of imposing financial obligations, but then treat them differently by denying them tax relief. The ECtHR ruled that there was a violation of Article 14 of the ECHR in conjunction with Article 1 of Protocol no. 1. It was unfair to impose a financial obligation on P.M. to maintain his daughter, while denying the tax deductibility of those payments. Article 14 prohibits any discrimination based on gender, sex, language religion, birth or other status. Protocol 1 moreover, emphasises the need for every individual to be entitled to a peaceful enjoyment of his or her possessions.

There have been many similar cases to that of P.M. on the different treatment of taxpayers based on marital status or gender in the United Kingdom. Some of the cases were about gender inequality treatment, such as a request for the Widow's Bereavement Allowance (WBA). Several cases have been submitted to the ECtHR by men who claimed a similar allowance to that available to women. In most of the cases the applicants would win because the ECtHR ruled that there was discriminatory treatment on granting tax relief for the individuals based on gender.⁷⁷⁹

⁷⁷⁹ See, *inter alia*, *Crilly v United Kingdom*, application No. 12895/02; *Sinclair v United Kingdom*, application No. 68621/01; *Cross v United Kingdom*, application No. 62776/00; *Anderson v United Kingdom*, application No. 73652/01 etc.; *Bond v United Kingdom*, application 63479/00, and *Szulc v United Kingdom*, application No. 63679/00.

8.4.4 Current situation in the United Kingdom

The increasing influence of the ECHR and ECtHR in the UK domestic law has not been welcomed in all circles, and the Conservative Party's manifesto in October 2014⁷⁸⁰ actually proposed the repeal of the Human Rights Act 1998. Some voices even called for a total withdrawal by the United Kingdom from the ECHR itself. This attitude certainly found no favour with the Scottish Government, which resolutely opposed the Conservative Party's strategy, arguing that this would not be optimal for the protection of citizens' rights.⁷⁸¹ However, it appears that the danger to the Human Rights Act 1998 has receded in the meantime.

In June 2016, the UK voted to leave the EU (Brexit) and the British Government started the formal procedure in 2017, invoking Article 50 TEU.⁷⁸² Brexit is expected to have quite an impact on the UK tax system.⁷⁸³ EU tax legislation and various judgments of the ECJ have required numerous provisions of the UK's tax law to be modified in order to be compatible with the requirements of EU law, in particular concerning restrictions on the freedom of establishment; anti-avoidance directives; illegal state aid, and other matters related to VAT. While the exact impact on taxpayers' rights is expected to be significant, much will depend on the result of the negotiations between the UK and the EU on how the UK will interact with the EU. It appears that the UK Government intends that ECJ judgments handed down prior to Brexit will be followed, but it remains to see what Parliament finally decides.

⁷⁸⁰ <https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf> p.60, last visited 24 January 2017.

⁷⁸¹ http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB_14-

[80_The_European_Convention_on_Human_Rights_in_the_United_Kingdom.docx.pdf](#), last visited 7 July 2018.

⁷⁸² Article 50 TEU sets out the procedure whereby a Member State of the European Union may withdraw from the Union.

⁷⁸³ Laura Ambagtsheer-Pakarinen, Ricardo Garcia Anton, Laura Mattes et al. "'God save the Brexit': Tax Implications of the Leave Vote", *European Taxation* (IBFD), November 2016, pp. 474-496.

8.5 Conclusion

Unlike some other countries, the United Kingdom has a good record on promoting and protecting human rights in the European region.⁷⁸⁴ The success of the UK in promoting and protecting human rights is not a matter of chance or a result of its strength alone. The findings of this chapter reveal that the influence of the EU, the ECHR, the ECtHR and the Council of Europe has had an important effect in promoting and protecting human rights of British citizens. The following summarises the study's findings on how the Council of Europe and the EU have influenced the promotion of taxpayers' rights in the UK.

Right to a fair trial:

This right is enshrined in the Article 6(1) of the European Convention on Human Rights. As noted above, the Council of Europe, through the ECtHR, has managed to support UK taxpayers' claims. *Morris v United Kingdom* on courts martial supports the view that the ECtHR influences the promotion of human rights in the UK. Again, *King v United Kingdom* shows how the ECtHR helped taxpayers to obtain relief from unfair treatment because the national courts took long to reach a verdict on his case. More proof of the influence of the ECHR on the right to a fair trial can be seen in *Cuscani v United Kingdom*, on the right to an interpreter as an integral part of the right to a fair trial if the defendant cannot understand or speak the language used in court.

Right to privacy

Every taxpayer has the right to privacy with respect to his or her life and family. This right is laid down in Article 8 ECHR. The influence of this article in the United Kingdom is well-illustrated by *Liberty and others v United Kingdom*. It can thus be said that without the ECtHR

⁷⁸⁴ This result is obtained from the statistics provided by the Council of Europe from 1959 to 2009 through its report *50 years of activity*, published in April 2010. Accessed through http://www.echr.coe.int/Documents/Facts_Figures_1959_2009_ENG.pdf, last visited 16 July 2017.

the United Kingdom would probably continue to intrude on the privacy of its citizens by intervening the communications without justifiable grounds.

It has been unfortunate that due to resource limitations, it has not been possible to extend the research into studying the impact of the Council of Europe on other taxpayers' rights. Such matters include the right to pay the correct amount of tax and the right to be informed about tax matters. Nevertheless, it is clear enough that the influence of the ECHR on the UK law is remarkable. The awareness of persons in the UK about human rights has been raised substantially, especially since the ECHR was incorporated into EU law in the Human Rights Act 1998. This has led to an increase in demands for more democratic governance and better protection of human rights in the UK. This was evidenced by the increase in the number of judgments referring to the convention by UK courts and Tribunals. It has also resulted in an increase of cases submitted to the ECtHR by UK citizens.

Moreover, even though the ECHR has not enforced obligations on Member States to abide by its rulings (the decisions are only be binding to the parties of the proceedings under Article 46), it has nonetheless managed to effect several changes in UK domestic law, and several provisions of UK tax and non-tax laws have been amended as a result of the ECtHR rulings. For example, Section 262 of the Income and Corporation Taxes Act 1988 was repealed as being incompatible with Article 14 ECHR.⁷⁸⁵ The excessive powers of HMRC vested by the Customs and Excise Management Act 1979 on seizure and restoration of vehicles used for smuggling were found to be incompatible with the ECHR in *Lindsay v Customs and Excise Commissioners*;⁷⁸⁶ since which the decision of seizure and restoration is subject to review and appeal by a tribunal.⁷⁸⁷ As was observed in section 6.4.1, United Kingdom ministers are now required to submit bills to Parliament that conform to the ECHR.

⁷⁸⁵ For a detailed list of laws which were deemed incompatible with ECHR and amended see <http://www.lse.ac.uk/humanRights/documents/2013/incompatibilityHRA.pdf>, last visited 14 February 2018.

⁷⁸⁶ *Lindsay v Customs and Excise Commissioners* [2002] WLR 1766.

⁷⁸⁷ Review of the Implementation of the Human Rights Act, Department of Constitutional Affairs July 2006 p. 23 Accessed through <http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/peoples->

The influence of the ECHR in the UK is also evidenced in the reform of the appeal machineries introduced in 2009. The Leggett Report explained that the then new appeal structure was necessary to help to accommodate to the ECHR standards, and specifically those regarding the right to a fair and impartial tribunal to solve disputes between taxpayers and governments.

With regard to the influence of the ECJ on the promotion of UK taxpayers' rights, it is hard to find any direct influence on taxpayer's rights. The ECJ is mandated to ensure the EU Treaty is observed by all Member States, and although the legal structures of Member States (monist or dualist) vary, the Court has positioned itself as a monist in a matter pertaining EU law.⁷⁸⁸ The UK national courts have used the decisions of the ECJ as a sword to force the government to change those laws which are found to be contrary to EU law.

On taxation matters, the EU is more focused on issues that have a direct influence on the attainment of the EU objective for creating a common market. Accordingly, in the UK the right of free movement of persons and capital, and the right to fair trade competition (which can be linked with the right to pay the correct amount of tax) are more promoted and protected by the ECJ.

Finally, this study has found that the influence of the ECHR and ECtHR on the promotion of UK taxpayers' rights has been very significant for important taxpayers' rights, such as the right to a fair trial, and right of privacy and confidentiality. On the other hand, the influence of the ECJ on the promotion of UK taxpayers' rights has been very limited. The influence of the ECJ is seen more in the field of the Treaty freedoms laid down in the TFEU.

rights/human-

rights/pdf/full_review.pdf&https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389272/responding-to-human-rights-judgments-2013-2014.pdf, last visited 10 July 2018.

⁷⁸⁸ Carl Baudenbacher, 'The Implementation of Decisions of the ECJ and of the EFTA Court in Member States' Domestic Legal Orders', *Texas International Law Journal*, Vol. 40 (3), 2005, p. 383.

9 CHAPTER NINE: THE ASSESSMENT OF TAXPAYERS' RIGHTS WITH REGARD TO EU AND OECD INITIATIVES TAKEN TO SOLVE BASE EROSION AND PROFIT SHIFTING

9.1 Introduction

This chapter assesses the status of taxpayers' rights with regard to initiatives that have so far been taken to minimize base erosion and profit shifting (BEPS). Within this scope the basic concept of BEPS is explained, and common techniques used by MNEs to erode their tax base and shift taxable profit from a high tax jurisdiction to a low tax jurisdiction are discussed. Attention is paid to techniques such as transfer pricing arrangements and the use of hybrid transactions or entities (hybrid mismatches). Furthermore, efforts or initiatives which have so far been taken by the EU and OECD towards solving BEPS are set out. The OECD action plans and the decisions already issued to counter BEPS are analysed from the perspective of taxpayers' rights.

9.2 Base erosion and Profit Shifting (BEPS)

9.2.1 Introduction

Countries around the world are confronted with the problems of tax evasion and tax avoidance. Tax evasion has been linked with illegal activities of taxpayers to minimize their tax obligations through tax fraud or any other illegal technique. Tax avoidance is linked with tax planning activities without contravening tax laws.⁷⁸⁹ Tax planning activities and techniques have become increasingly popular and sophisticated;⁷⁹⁰ they have been developed across various tax jurisdictions and they result in base erosion and profit-shifting (BEPS).⁷⁹¹

⁷⁸⁹ Kay Blaufus, Matthias Braune, Jochen Hundsdorfer, Martin Jacob, 'Does legality matter? The case of tax avoidance and evasion', *Arqus-Diskussionsbeiträge zur quantitativen Steuerlehre*, No. 193, 2015. Accessed through <https://www.econstor.eu/bitstream/10419/121168/1/837148987.pdf>, last visited 31 January 2017.

⁷⁹⁰ Commission Recommendation 2012/772 (O.J. 2012 C 228/41) on Aggressive Tax Planning, Preamble, paragraph 1.

⁷⁹¹ Ibid.

Tax planning, which ultimately causes BEPS, normally takes advantage of unevenness of information between tax authorities, mismatches between tax systems, and other loopholes in tax systems. The reason for using these mismatches or loopholes is, unsurprisingly, to minimize tax obligations.⁷⁹²

Generally, BEPS are said to have caused a huge loss of tax revenue in several countries. While the OECD had noted that there is no comprehensive data on the collective tax revenue loss caused by, for instance, hybrid mismatch arrangements,⁷⁹³ the European Parliament was informed that tens of billions of euro remain offshore; this money often remains unreported and untaxed, hence, reducing government revenue.⁷⁹⁴ Apart from being a serious risk to tax revenue, BEPS have a negative impact on investments, services and competition between taxpayers.⁷⁹⁵ The impact on fairness cannot be ignored either. BEPS usually require a substantial amount of money and can normally only be practised by multinationals that have sufficient capital.⁷⁹⁶ Therefore, it is not easy for small and medium-sized companies to engage in BEPS. BEPS work within the four principles that underlie the taxation of profit from cross-border transactions: the principle of the jurisdiction to tax, the principle of transfer pricing, the principle of leverage, and the principle of anti-avoidance legislation.⁷⁹⁷ These principles are clarified in the following paragraphs.

⁷⁹² Ibid., paragraph 2.

⁷⁹³ OECD, *Hybrid Mismatch Arrangement; Tax Policy and Compliance Issues*, OECD publishing, 2012, paragraph 5.

⁷⁹⁴ Communication from the Commission to the European Parliament and the Council on concrete ways to reinforce the fight against tax fraud and tax evasion including in relation to third countries COM (2012)351 final, p.3.

⁷⁹⁵ See OECD, *Addressing Base Erosion and Profit Shifting*, OECD publishing 2013, <http://dx.doi.org/10.1787/9789264192744-en>, p. 50, last visited 19 July 2016.

⁷⁹⁶ OECD, Op.cit. (fn 793), paragraph 27.

⁷⁹⁷ Meeting of the OECD Council at Ministerial Level, Paris 2930 May 2013; Document; Update: Base Erosion and Profit Shifting. p. 26, accessed through [https://www.oecd.org/mcm/C-MIN\(2013\)7-ENG.pdf](https://www.oecd.org/mcm/C-MIN(2013)7-ENG.pdf). OECD, *Addressing Base Erosion and Profit Shifting*, OECD Publishing 2013, p. 33, <http://dx.doi.org/10.1787/9789264192744-en>, last visited 5 December 2017.

9.2.2 Jurisdiction to tax

In principle, the right to tax a company in any country may be exercised on a worldwide and a territorial basis. The worldwide base of taxation applies normally for resident companies (the place of residence principle) while the territorial base is applied to non-resident companies that earn taxable income accrued in a foreign tax jurisdiction (the source principle).⁷⁹⁸ Apart from this, the right to tax is exercised on an entity-by-entity basis; not on a group-wide basis.⁷⁹⁹ That is, even if a company is part of a group, each company in such a group is considered to be a separate entity.

When a company operates in more than one country, it may result in two or more tax jurisdictions having the right to tax income generated by that company (based on either place of residence of that company or source). This may lead to an overlap of the national tax systems. The overlap may cause income to be taxed either more than once (double taxation) or not be taxed at all (double non-taxation).⁸⁰⁰ The following example serves to illustrate this fact of double taxation and double non-taxation:

ABC is a Tanzanian-registered company dealing in the hotel business and tour operations. The company has branches in Kenya and South Africa. Assume for the year 2012 that ABC had a sum of TZS 12,000,000 as a profit from Tanzania, Ksh 7,500 as a profit from its Kenyan branch and ZAR 3,000 as a profit from its South African branch. Based on Tanzanian tax law, ABC is required to pay tax on income accrued worldwide, while the tax laws of Kenya and South Africa may claim the right to tax income generated in their countries. If that is the case, there is a possibility that a profit which is accrued in Kenya and South Africa is taxed twice.

⁷⁹⁸ Laura Abramovsky, Alexander Klemm and David Phillips, 'Corporate Tax in Developing Countries: Current Trends and Design Issues', *Fiscal Studies*, Vol. 35, 2014, pp. 559–588.

⁷⁹⁹ OECD, Op.cit. (fn 795), p. 33.

⁸⁰⁰ Ibid., p. 34.

Double non-taxation (double deductions) may, for example, exist in case of a hybrid financial instrument or a hybrid entity.⁸⁰¹ Assume that the tax law of Kenya allows the interest on a loan between a Tanzanian parent company and a Kenyan subsidiary to be deducted as operating expenses, while at the same time the tax law of Tanzania does not tax this interest because it considers this interest to be a dividend on capital (the Tanzanian tax system does not impose tax on dividend between related parties). This hybrid financial instrument will result in escaping Tanzanian tax and enjoying Kenyan relief. The effect of a hybrid entity may be illustrated by the following example.

Tan Co is a Tanzanian registered company manufacturing household products. The company indirectly holds a Textile Company in Kenya, Ken Co through a hybrid entity, Hy Co. Tan Co holds all the equity of Hy Co, which in turn holds all the equity in Ken Co. Assume that Hy Co is regarded as transparent for tax purposes in Tanzania, while it is regarded as non-transparent in Kenya. Suppose that Hy Co borrows from a South African bank and uses the money to inject capital into Ken Co. Thereafter Hy Co and Ken Co require group treatment for tax purposes in Kenya, which implies that Hy Co can offset the interest paid on the loan to the South African Bank from the profit of Ken Co in Kenya. As, in Tanzania, Hy Co is deemed to be transparent, its interest expenses are allocated to Tan Co where the interest expenses can be deducted and offset against income otherwise generated by Tan Co. In this case the interest expenditure deduction may be claimed in Tanzania and in Kenya for the same contractual obligation.

The overlaps and mismatches of the jurisdiction to impose tax between countries cannot be solved unilaterally; there must be collective efforts by countries where multinationals operate. Currently, the focus is on tax treaties between countries. These tax treaties may describe what

⁸⁰¹ A hybrid entity is an entity which may have several features differentiating itself from one type of entity to another: based on the tax law of a country an entity may be deemed to be a company (non-transparent), while in other legislation the same or similar entity is deemed to be a partnership (transparent).

A hybrid instrument is an investment product that combines the attributes of an equity security with a debt security; examples include convertible bonds and preferred stocks.

type of income should be taxed where, and what type of expenditure should be deducted where. In most tax treaties, the countries agree to levy tax largely based on the principle that income is taxed in the country in which it has its origin.⁸⁰²

This principle (origin of the wealth) brought along the concept of permanent establishment. A permanent establishment (PE) means a physical place of (or an agent) conducting business in a foreign country. A permanent establishment is different from a subsidiary: unlike a subsidiary, it is not incorporated in the country from which it operates. However, the development of the modalities of doing business nowadays creates several critical challenges for determining the actual source of income for tax purposes. Currently, it is not unusual for a company to be established in one country and to operate in another country without having a physical presence – a PE – in that country, particularly if business transactions take place through the internet. In some cases, an enterprise may conduct business through a commissionaire arrangement. In this arrangement, a person sells products in his name but on behalf of the foreign enterprise. The person is paid commission on every sale made, therefore technically the foreign enterprise is conducting business without having a PE in the country where sales occur. Hence it escapes corporate tax in a state where income was generated.⁸⁰³ This development raises the question whether the existing rules ensure a fair allocation of taxing rights, it opens a chance for companies to erode their tax base. Assume a company located in The Netherlands that sells computer software online, and the company has several customers in Tanzania. If this company generates a profit of € 10,000,000 by selling its products in Tanzania, some portion of this profit has originated in Tanzania. However due to the advancement of technology this profit might end up being taxed only in The Netherlands. This will probably be the case if The Netherlands has a more favourable tax rate. If Tanzania has a lower tax rate compared with The Netherlands, the company would probably open a PE in Tanzania so that it could be taxed there.

⁸⁰² OECD, Op.cit. (fn 795), p. 35.

⁸⁰³ OECD/G20 *Base Erosion and Profit Shifting Project: Preventing the Artificial Avoidance of Permanent Establishment Status*: Action 7, Final Report 2015, p. 9.

Another scenario is when a hybrid mismatch is established. This may be possible if there is a mismatch of tax laws between two tax jurisdictions. The hybrid mismatch may cause either double deductions of expenses between the two countries or for a deduction of expenses in one country without including the corresponding income in the other country. Yet another scenario exists if the place of residence of a company is determined in different ways. For example, in *Apple*; Ireland and the United States used different test to determine the residential status of Apple subsidiaries. Ireland used a central management and control test while the United States (US) used the place of incorporation test. Therefore, for American tax purposes, the Apple subsidiaries were located in Ireland (not taxable in the US) because they were incorporated in Ireland. For Irish tax purposes, they were treated as American companies because their central management and control was exercised in the US. As a result, these companies had no state of residence for tax purposes. It was therefore possible for the Apple subsidiaries to receive a huge amount of income which remained untaxed in the US and in Ireland except for a small portion of income that according to a ruling with the Irish revenue authorities was attributed to a PE of the subsidiaries in Ireland.⁸⁰⁴

9.2.3 Transfer pricing

Transfer pricing rules are used to compute the profit that can be allocated to a specific tax jurisdiction in which a company or a permanent establishment performs some of its activities. Transfer prices are charges made between controlled or related legal entities (i.e. within the same group). Legal entities are considered to be under the control of a single corporation if the majority of their shares are owned ultimately by another corporation. Certain jurisdictions consider entities to be under common control if they share family members in their boards of directors.⁸⁰⁵

⁸⁰⁴ http://europa.eu/rapid/press-release_IP-16-2923_en.htm, last visited 2 February 2017.

⁸⁰⁵ OECD, *Improving Corporate Governance in India: Related Party Transactions and Minority Shareholder Protection, Corporate Governance*, OECD Publishing, 2014, p. 42.

Transfer pricing issues arise when goods are transferred or services rendered to foreign subsidiaries or to permanent establishments.⁸⁰⁶ Transfer pricing arrangements between a parent and a subsidiary company or a PE may lead to reallocation of taxable income from one tax jurisdiction to another.⁸⁰⁷ In order to find out how profit has to be allocated, there must be a proper analysis of the tasks performed by each company or PE (to measure the involvement of each company or PE to generate part of the profit) and the degree of assumed risk borne by each member or PE of the group.⁸⁰⁸

Transfer pricing therefore occurs in any arrangement made between associated companies or parts of companies concerning the charges for goods, services, including the use of (intangible) property. These charges for goods or services may be over-claimed and be claimed in a country that has a favourable policy concerning deductions. For example, assume Ned Co is a parent company registered in the Netherlands manufacturing TVs and other electronic equipment. Ned Co has a subsidiary in Tanzania that is named Ned Co (T) Ltd. Ned Co bears all production costs for manufacturing TV's while Ned Co (T) Ltd is used mostly as a marketing and selling agent, and no production takes place in Tanzania. Assume the manufacturing costs for each TV are € 500, marketing costs are € 200, and the selling price is € 900. If profit has to be calculated based on the above data, the profit will be € 200 per TV. But the companies may decide to allocate the profit between the companies using transfer pricing arrangements as follows:

⁸⁰⁶ http://www.un.org/esa/ffd/tax/2011_TP/TP_Chapter1_Introduction.pdf, last visited 20 July 2016.

⁸⁰⁷ OECD, *Report on the transfer pricing aspects of business restructurings; Chapter IX of the transfer pricing guidelines*, 2010, p. 13.

⁸⁰⁸ Ibid.

Table: 2: Transfer pricing arrangement 1

Transaction	Ned Co	Ned co (T) ltd
Manufacturing TV	€ 500	Nil
Sale	Sales revenue € 500	Cost of sale € 500
Selling costs(marketing)	Nil	€ 200
Selling price (to customers)	Nil	€ 900
Net profit	0	€ 200

The above technique may be applied if Tanzania has a favourable tax rate; if not, Ned Co may allocate its business transactions so that the whole profit of € 200 has to be taxed in the Netherlands, especially by increasing the selling price of the products. Table 3 below demonstrates this.

Table 3; Transfer pricing arrangement 2

Transaction	Ned co ltd	Ned co (T) ltd
Manufacturing TV	Production cost € 500	Nil
Sales	Sales revenue € 700	Costs of Sale € 700
Selling expenditure (marketing)	Nil	€ 200
Selling to customers	Nil	€ 900
Net Profit	€ 200	0

Generally, the internationally accepted principle with regard to transfer pricing is the arm's length principle.⁸⁰⁹ This principle requires related parties to allocate the income as it would have been allocated between independent entities in the same or similar circumstances.⁸¹⁰

To determine whether or not circumstances between related and unrelated parties are similar is very challenging. Several factors have to be considered in evaluating the similarity of circumstances; there must be at least an analysis of the following factors:⁸¹¹

- i. business strategies;
- ii. economic circumstances;
- iii. contractual terms, and
- iv. functions of the parties involved (this relates the task performed by each company in a transaction).

Generally, the above factors are expected to assist in determining the economic significance of the functions performed by related and unrelated parties. Hence those factors help to determine the price of a transaction. Due to the challenges existing in determining a transfer price through the arms-length principle, it is possible for multinational companies to transfer profit from a country which has a high tax rate to a country with a low tax rate. This is done through shifting functions, risk and ownership of tangible and intangible assets.⁸¹² Related companies may allocate hard-to-value intangibles and risks to a tax jurisdiction which provides favourable treatment on the return related to the assets.⁸¹³

The above example of Ned Co ltd may now be used to demonstrate how these two companies may allocate the intangibles as a modality of shifting profit between them. Assume that there is a great demand in Tanzania for the TV's produced by Ned Co. As a result, Ned Co (T) ltd

⁸⁰⁹ OECD *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, 2010, p. 20.

⁸¹⁰ OECD, Op.cit. (fn 795), p. 36.

⁸¹¹ OECD, Op.cit. (fn 809), paragraphs 1.36-1.63.

⁸¹² OECD, Op.cit. (fn 795), p. 42.

⁸¹³ OECD, *Comments Received on Public Discussion Draft: BEPS Action 8: Hard-to-value Intangibles*, 2015.

has to open several branches within Tanzania to capture the local market. Ned Co (T) Ltd employs several sales and marketing experts; and has its own administrative management to promote the selling of TVs. Due to technological advancement, Ned Co provides special software to Ned Co (T) Ltd to ease the distribution of TV's and to capture the customers' needs. In this example, the action of Ned Co (T) buying TV's from Ned Co constitutes an agreement to transfer tangible assets. The use of software to distribute goods and to capture customers' needs may be associated with a licence. In that case Ned Co (T) Ltd will be required to pay a royalty on the use of the software (intellectual property (IP)). To determine the correct amount of royalty is one of the biggest challenges for the tax administrations.

Another challenge concerning the valuation and taxation of intangibles commonly exists if the owner of an intangible is not clearly known. That is, if the intangible itself is not legally protected. Assume in the above example of Ned Co and Ned Co (T) Ltd, that there was a new design of a TV. If the design is not registered, it will be difficult to identify who owns the design, and who is actually supposed to pay royalties between the two companies. Therefore, in such a situation, normally, the company that incurred a huge amount of direct and indirect costs to develop the design is said to be the owner for tax purposes. Therefore, the tax authority has to rely mostly on the information given by the taxpayers to capture the amount of money spent on the design.

9.2.4 Leverage

A company may decide to finance its operation through debt or through equity (issuing of shares). In most countries, subject to certain conditions, the interest of debt financing is deductible for tax purposes. The costs of stock financing (dividend) is not deductible. This may result in a bias between debt financing and stock financing. Companies therefore may take advantage of the bias existing in financing to erode the tax base and shift profit. This is commonly done by adjusting the amount of debt in a group of companies.

In practice a group may decide to use the leverage by:

- i. Placing a third party loan in a country that has a high tax rate. The idea behind it is to benefit from the deductibility of interest expenses to reduce the taxable profit in the jurisdiction that has a high tax rate; or
- ii. By using intra-group financing so that within the group more interest deduction is claimed than the actual net interest expenses to third party's of the group; or
- iii. A group may use the loan from a third party or an intra-group loan to finance a project or transactions that yield tax-exempt income.⁸¹⁴

In any of the above scenarios, the amount of interest paid may be increased in order to take advantage of an unlimited deductibility of interest. Therefore, Action 4 of the OECD/G20 Base Erosion and Profit Shifting Project suggests that the deduction of (net) interest may be reduced by applying an earnings stripping rule. This rule limits the deductibility of net interest based on a percentage of the EBITDA of the taxpayer. According to Action 4 the percentage may vary between 10% and 30% of EBITDA. Also a minimum threshold may be applied which means that a fixed amount of net interest may always be deducted. In some cases specific measures are needed because the earnings stripping rule as a more general measure of limiting interest deductibility will not be an adequate measure of banning the deduction of excessive interest. These measures may apply when the payment of interest is solely created in order to gain a tax advantage.

Apart from limiting interest deductibility, the interest rate between related companies has to be justified. In order to attest the correctness of the interest rate declared in the loan relationship the revenue authority will have to identify factors that are used to set the interest rate. Some of the factors that are commonly used to set interest rates are: the assumed risk in the loan (which may be estimated by analysing the currency of the loan); a security deposited to secure the repayment of the loan, and the duration of the loan. Generally, the revenue authority will be obliged to compare the interest rate between related parties with the prevailing interest rate between unrelated parties under similar circumstances. In practice,

⁸¹⁴ OECD/G20 *Base Erosion and Profit Shifting Project Limiting Base Erosion Involving Interest Deductions and Other Financial Payments*, Action 4, Final Report, 2015, pp. 15-17.

tampering with the interest rate used by related companies is a matter of transfer pricing. Discussions about the interest rate between related parties are aimed at reducing incorrect transfer pricing.⁸¹⁵

9.2.5 Anti-avoidance rules

Every country sets specific rules to capture activities which intend to reduce taxable income. These rules are set to detect and to respond to tax planning activities in order to discourage them. The common types of anti-avoidance rules in domestic tax systems are:

- i. General Anti Abuse Rules (GAAR). These are rules set by domestic tax law to empower the revenue authorities to deny or to limit undue tax benefits as a result of business arrangements which lack economic substance.⁸¹⁶ The principle of GAAR is that all taxpayers should pay their fair contribution. Instead of dealing with the verbatim text of the tax law, the attention should be focused on the real economic merit of the transaction(s) and the intention of the tax law.⁸¹⁷
- ii. Controlled foreign company (CFC) rules. These are rules which are set to limit the erosion of the tax base between a parent and a subsidiary. It is believed that a parent company that has a controlling interest in a foreign subsidiary can shift the tax base or part of it to the subsidiary, particularly if the subsidiary is located in a country that has favourable tax rules. Normally, CFC rules are structured to tax income generated by a non-resident controlled entity with domestic shareholders regardless of whether the income has been repatriated to the shareholders.⁸¹⁸ CFC rules are then expected to ensure that taxable profit remains within the tax base of the parent.⁸¹⁹ Similarly, well-

⁸¹⁵ <http://www.oecd.org/tax/aggressive/discussion-draft-action-4-interest-deductions.pdf>.

⁸¹⁶ <https://www.gov.uk/government/publications/tax-avoidance-general-anti-abuse-rules>, last visited 4 September 2019.

⁸¹⁷ Ibid.

⁸¹⁸ OECD, op. cit. (fn 795), p. 38.

⁸¹⁹ OECD/G20 *Base Erosion and Profit Shifting Project; Designing Effective Controlled Foreign Company Rules* Action 3, Final Report, 2015, p. 13.

structured CFC rules have to complement transfer pricing rules to ensure MNE's are properly taxed.⁸²⁰

The OECD/G20 BEPS project report on Action 3 recommended that CFC rules should have the following features;⁸²¹

- a. Rules should determine what may constitute a CFC;
 - b. Rules should define CFC income;
 - c. Rules should demonstrate how to calculate CFC income;
 - d. Rules for attributing CFC income;
 - e. Rules for preventing and eliminating double taxation.
- iii. Thin capitalization rules. These are rules which are introduced to deny the deduction of certain interest expenses when the ratio between debt and equity is considered to be too high.⁸²²
- iv. Anti-hybrid rules. These are rules which are set to neutralize the tax mismatch created by hybrid arrangements.⁸²³ The neutralization is effected by changing the tax treatment of either the payment or the receipt to minimize possible tax avoidance. The idea is to minimize the possibility for a mismatch between two or more tax laws. In practice, anti-hybrid rules are intended to eliminate the avoidance that may be achieved through the use of hybrid entities or instruments that may result into the following⁸²⁴:
- a. double deductions outcome: where the payment triggers two deductions in respect of the same payment; or

⁸²⁰ Ibid., p.11.

⁸²¹ OECD/G20 *Base Erosion and Profit Shifting Project; Designing Effective Controlled Foreign Company Rules* Action 3, Final Report, 2015, p.11.

⁸²² OECD, Op. cit. (fn 795), p. 38.

⁸²³ <https://assets.kpmg.com/content/dam/kpmg/pdf/2016/04/mamatters.pdf#10>, last visited 2 February 2017.

⁸²⁴ *Public discussion draft BEPS Action 2 Branch Mismatch Structures* 22 August 2017, p. 4.

- b. deduction / no inclusion outcomes: where the payment is deductible under the rules of the payer jurisdiction but not included in the ordinary income of the payee; and
 - c. indirect deduction / no inclusion outcomes: the income from a deductible payment is set-off by the payee against a deduction under a hybrid mismatch arrangement.
- v. Anti-base erosion rules. These are tax rules that prohibit or restrict the deduction of interest or any other related expenses incurred between related parties for other than business purposes. They are commonly incurred to divert the tax base from one tax jurisdiction to another. These transactions may include a dividend distribution, a return on capital, and an acquisition of capital investment in subsidiaries.⁸²⁵

Companies which operate in more than one tax jurisdiction may well have the ability to identify the differences in the tax laws of these countries, the national courts' approaches on the interpretation of the tax law, and the tax administrations of these countries. It may thus be easy to taxpayers to differentiate between a tax system that has strong anti-avoidance rules and an easy-to-pass tax system. Once companies have identified strong and weak tax systems, companies may start to plan their business arrangements or transactions so as to derive tax savings. This planning may cause a group of companies to use loopholes that exist in the tax systems to erode the tax base and shift profits from a high-tax jurisdiction to a low-tax jurisdiction.

9.3 Efforts of the EU to counter BEPS

9.3.1 Introduction

The European Union has been working hard to solve the problem of BEPS, and several proposals and initiatives have been introduced. The initiatives taken are set out in several

⁸²⁵ <http://www.pwc.com/us/en/tax-services-multinationals/newsletters/european-tax-newsalert/assets/pwc-dutch-anti-base-erosion-rules-article-10a.pdf>, last visited 2 February 2017.

statements and documents concerning how to minimize aggressive tax planning. These include:

- a) Council Directive 2011/16 of 15 February 2011 on administrative cooperation in the field of taxation;
- b) Proposal for a Council directive on a Common Consolidated Corporate Tax Base (CCCTB), COM (2011) 121/4 Final; later replaced by two proposals: the proposal for a Council directive on a Common Corporate Tax Base (CCTB), COM (2016) 685 and a proposal for a Council directive on a Common Consolidated Corporate Tax Base (CCCTB), COM (2016) 683;
- c) Communication from the Commission to the European Parliament and the Council on concrete ways to reinforce the fight against tax fraud and tax evasion including in relation to third countries, COM (2012) 351 Final;
- d) Commission Recommendation 2012/771 regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters;
- e) Communication from the Commission to the European Parliament and the Council – An action plan to strengthen the fight against tax fraud and tax evasion COM(2012) 722 Final;
- f) Opinion of the European Economic and Social Committee on The fight against tax fraud and tax evasion ECO/341;
- g) Proposal for a Council directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, COM (2013) 348 Final;
- h) Council Directive 2014/107/EU, amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation;
- i) Council Directive (EU) 2015/121, amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States;

- j) Council Directive 2018/822/EU amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements;
- k) Communication from the Commission to the European Parliament and the Council on transparency to fight tax evasion and avoidance, COM (2015) 136 Final;
- l) Communication from the Commission to the European Parliament and the Council on a Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action, COM (2015) 302 Final;
- m) Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, COM (2016) 25 Final;
- n) Communication from the Commission to the European Parliament and the Council on an External Strategy for Effective Taxation, COM (2016) 24 Final;
- o) Communication from the Commission to the European Parliament and the Council on Anti-Tax Avoidance Package: Next steps towards delivering effective taxation and greater tax transparency in the EU, COM (2016) 23 Final;
- p) Council Directive laying down rules against tax avoidance practices that directly affects the functioning of the internal market (ATAD), 12 July 2016, no. 2016/1164/EU changed by the Council Directive of 29 May 2017, no. 2017/952/EU;
- q) Commission Recommendation 2016/136 on the implementation of measures against tax treaty abuse.

These initiatives so far taken by the EU in fighting against BEPS can be grouped for discussion purposes as follows:

- i. Strengthening the fight against tax avoidance and evasion
- ii. Common general anti-abuse rule
- iii. Exchanging of information
- iv. Improving the cooperation between Member States' tax administration
- v. Enhancing tax compliance through introducing a Taxpayers' Charter

vi. Common (Consolidated) Corporate Tax Base (C(C)CTB)

Each of these groupings is considered in turn below except for the C(C)CB.

9.3.2 Strengthening the fight against tax avoidance and evasion

The fight against corporate tax avoidance and evasion intends to ensure a link between taxation and a place where the economic activity exists. Success in this fight will enhance fairness and economic efficiency in the Internal Market.⁸²⁶ With this in mind, the Commission proposed an anti-avoidance package on 28 January 2016, which was adopted by the Council on 12 July 2016; containing a series of rules to be used to minimize tax avoidance practices. Most important is the introduction of the Anti Tax Avoidance Directive of 12 July 2016, no. 2016/1164/EU, as amended by the Council Directive of 29 May 2017, no. 2017/952/EU (ATAD). Some provisions of this directive will be discussed below.

a. Interest limitation rule

Multinational groups of companies sometimes erode their tax base through the use of loan arrangements.⁸²⁷ In order to reduce tax avoidance through deduction of inflated interest, the Commission proposed a limit on the minimum interest that a taxpayer is entitled to deduct in a tax year, namely 30% of the taxpayer's earnings before interest, tax, depreciation and amortization (EBITDA) or € 1,000,000 whichever was higher.⁸²⁸ The Council adopted only the 30% maximum, although it permitted Member States to allow derogations, *inter alia* to permit taxpayers to deduct exceeding borrowing costs up to € 3,000,000. The interest limitation rule is laid down in Art. 4 of ATAD.

⁸²⁶ COM (2015) 136 Final.

⁸²⁷ COM (2016) 26 Final, p. 7.

⁸²⁸ *Ibid.*, p. 16.

b. Exit taxation

Any company that shifts assets or residence from one Member State to another Member State or to a third country will be subject to exit taxation, which will be imposed on the amount equal to the market value of the transferred asset less their value for tax purposes.⁸²⁹ Exit taxation is introduced for the purpose of preventing base erosion in the state of origin, as, during the exit, a capital gain might already have been created but not yet realized. See Art. 5 of ATAD.

c. Hybrid mismatch rule

In so far as a hybrid mismatch results in a double deduction, the deduction will be given only in the Member State where such payment has its source, and if a hybrid mismatch results in a deduction without inclusion, the Member State of the payer must deny the deduction of such payment. See Art. 9 – 9ter of ATAD.

d. CFC rule

The CFC rules intend to reattribute the income of a low-taxed controlled foreign subsidiary to its parent company. The Commission proposed similar CFC rules to those recommended by the OECD, but Council Directive 2016/1164 took a slightly stricter approach. It requires all non-distributed income derived from specific types of income to be included in the tax base if more than a 1/3 of the overall income of the CFC consists of these specific types of income. The Commission had proposed inclusion where more than 50% of the non-distributed income fell within specific types of income. See Art. 7 and 8 of ATAD.⁸³⁰

⁸²⁹ COM (2016) 26 Final, which also sets out the circumstances in which exit taxation will be levied. The taxpayer may in certain circumstances be given the right to defer payment by paying the tax in instalments over 5 years.

⁸³⁰ Ibid., Art. 7 and 8 as to the computation of controlled foreign company income.

The general anti-avoidance rule proposed in the package, and set out by the Council as a general anti-abuse rule in Article 6 of ATAD, is discussed in section 9.3.3.

e. Establishing strict transparency for tax rulings

The Commission proposed an automatic exchange of information on cross-border tax rulings including transfer pricing arrangements. Appropriate amendments have been made by the Council to Directive 2011/16 on administrative cooperation in the field of taxation to oblige national tax authorities to exchange automatically information about cross-border tax rulings with all Member States.⁸³¹ These are considered further in section 9.3.4.

9.3.3 Setting a common general anti-abuse rule

The EU believes that national laws are not by themselves effective to curb the BEPS problem; there must be collective efforts by the EU Member States. Thus the Commission proposed to Member States the adoption of a common general anti-abuse rule in direct taxation such as corporate tax, income tax and capital gains tax. In Recommendation 2012/772 on aggressive tax planning,⁸³² the Commission observed that:

“It is appropriate to recommend the adoption by member states of a common general anti-abuse rule which should also avoid the complexity of many different ones.”

In the proposed anti-abuse rule, the Commission encouraged Member States, besides having their own anti-abuse law, to include appropriate common clauses in their domestic law to fight against double non-taxation issues and prohibit any arrangement or set of arrangements which lacks economic substance. The Commission requested Member States to adopt a clause to combat double non-taxation in their double taxation conventions which they conclude with

⁸³¹ Directive 2011/16 (O.J. 2011 L 64/1) as most recently amended by Council Directive 2016/881 (O.J. 2016 L 111/8). As to the consolidated version, see <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02011L0016-20170605&qid=1509909271626&from=EN>, last visited 5 November 2017.

⁸³² Recommendation 2012/772 (O.J. 2012, L 338/41), Preamble, paragraph 8.

Members States or third countries.⁸³³ This recommendation was designed to solve *inter alia* the problems that are caused by hybrid instruments which qualify for deduction in one country without being taxed in another country.

As to arrangements which lack economic substance, Member States were encouraged to include in their domestic law a clause which could read as follows:

*“An artificial arrangement or an artificial series of arrangements which has been put into place for the essential purpose of avoiding taxation and leads to a tax benefit shall be ignored. National authorities shall treat these arrangements for tax purposes by reference to their economic substance.”*⁸³⁴

In determining whether there is a tax benefit in a transaction, the Commission suggested that the revenue authorities of the Member States analyse the tax benefit of that particular arrangement and compare the amount of tax a taxpayer would pay with and without such arrangement(s).⁸³⁵

As a result of the above recommendation, Council Directive 2011/96⁸³⁶ (the EU Parent-Subsidiary Directive) was amended. Member States are now required to include in their domestic laws an anti-abuse rule for situations that fall within the scope of the Parent-

⁸³³ Ibid., paragraph 3.2.

⁸³⁴ Ibid., paragraph 4.2.

⁸³⁵ Ibid., paragraph 4.7.

⁸³⁶ Council Directive 2011/96 (O.J. 2011 L 345/8) has now been amended by Council Directive 2013/13 (O.J. 2013 L 141/30); Council Directive 2014/86 (O.J. 2014 L 219/40) and most recently by Council Directive 2015/121 (O.J. 2015 L 21/1); as to the latest consolidated version, see <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02011L0096-20150217&qid=1509911510787&from=EN>, last visited 5 November 2017.

Subsidiary Directive in order to tackle arrangements or series of arrangements with no economic activities.⁸³⁷

Member States are strictly prohibited from permitting companies to take advantages of a transaction or arrangement which seems to be purely taken for the sake of exploring tax advantages. There must be economic reality in any arrangement. Article 1(2) of Council Directive 2011/96 (as amended) thus provides that:

“Member States shall not grant the benefits of this Directive to an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of this Directive, are not genuine having regard to all relevant facts and circumstances.”

The arrangement shall be deemed not to be genuine if a company fails to provide justifiable grounds to undertake the arrangement or transaction. The company is effectively required to prove the economic reality of the arrangement. Article 1(3) of the directive states that:

“For the purposes of paragraph 2, an arrangement or a series of arrangements shall be regarded as not genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.”

A general anti-avoidance rule for corporate income tax was among the proposed measures on the package of anti-avoidance rules, and Article 6 of Council Directive 2016/1116 (ATAD). It provides that:

“1. For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that

⁸³⁷ Council Directive 2015/121(O.J. 2015 L 21/1), Preamble, paragraph 6, states that ‘The application of anti-abuse rules should be proportionate and should serve the specific purpose of tackling an arrangement or a series of arrangements which are not genuine, that is, which do not reflect economic reality.’

defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.

2. For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.

3. Where arrangements or a series thereof are ignored in accordance with paragraph 1, the tax liability shall be calculated in accordance with national law.”

Thus arrangements that commonly lack valid commercial reasons which reflect economic reality are caught.⁸³⁸

9.3.4 Exchanging information among EU Member States

Efforts of the EU towards fighting cross-border tax avoidance, aggressive tax planning and harmful tax competition resulted in the amendment of Article 8 of Council Directive 2011/16 concerning mandatory automatic exchange of information.⁸³⁹ The automatic exchange of information on all cross rulings made by Member States including transfer pricing rulings in cross border situations has now been introduced.⁸⁴⁰ The exchange of information is expected to further minimize the possibilities for MNEs to erode their tax bases from one tax jurisdiction to another. Unlike the previous amendments, the latest amendments state clearly the types of information to be exchanged and the modality of exchanges. The automatic

⁸³⁸ This achieves a central part of the Commission's anti-avoidance package.

⁸³⁹ Directive 2011/16 (O.J. 2011 L 641) has been amended by Council Directive 2014/107 (O.J. 2014 L 359/1), by Council Directive 2015/2376 (O.J. 2015 L 332/1) and by Council Directive 2016/881 (O.J. 2016 L 111/8). As to the consolidated version, see <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02011L0016-20170605&qid=1509909271626&from=EN>, last visited 5 November 2017.

⁸⁴⁰ See Directive 2011/16 (as amended), Art. 8.

exchange of information on cross-border rulings started to be implemented effectively on 1 January 2017.

While that was happening, the Commission proposed further amendments to introduce country-by-country reports. As a result of the adoption of this proposal, a group of companies that has a consolidated group revenue of € 750 million or more is now required to file country-by-country reports annually (a report for each tax jurisdiction in which it does business).⁸⁴¹ The report must include information about the amount of revenue, the amount of profit before tax, and the amount of tax paid. The country-by-country report is to be filed by the parent company with the revenue authority of the Member State in which it is a resident, and the latter is to exchange the country-by-country reports with Member States in which the MNE has a subsidiary.⁸⁴²

The idea of country-by-country reports is among the recommendations made by the OECD/G20 in BEPS report action 13. While it might be possible for EU Member States to implement the OECD report on action 13 in their individual capacities, the Commission found it essential to transpose the political commitment under the BEPS project into national tax systems in a coherent and sufficiently coordinated way, hence the most recent amendments to Directive 2011/16/EU.⁸⁴³ Furthermore, on April 12, 2016, the Commission presented a proposal to make country-by-country reports public in order to enhance transparency and public scrutiny.⁸⁴⁴ The Commission believes that public scrutiny will foster corporate responsibility, increase public trust in the fairness of the national tax system, and will contribute to welfare through tax.⁸⁴⁵

⁸⁴¹ See Directive 2011/16 (as amended), Art. 8 and Annex III, Section 1, points 3 and 4.

⁸⁴² *Ibid.*

⁸⁴³ COM (2016) 25, p.3.

⁸⁴⁴ Proposal for a Directive of the European Parliament and the Council amending Directive 2013/34 (O.J. 2013 L 198/19) as regards disclosure of income tax information by certain undertakings and branches, COM (2016) 198.

⁸⁴⁵ *Ibid.*, Preamble to the proposed directive, paragraph 5.

9.3.5 Improving cooperation between EU Member States' tax administrations

Another effort to solve the BEPS problem was made by the European Commission in a communication to the European Parliament and the Council already in 2012.⁸⁴⁶ The Commission suggested that the best way to minimize aggressive tax planning was through cross-border cooperation between Member States' tax administrations, and through having a clear and coherent policy agreed between Member States vis-à-vis third countries (i.e. non-Member States).

On the issue of cross border cooperation between Member States' tax administrations, the Commission suggested that the Council consider creating teams of auditors within the EU, to identify cross-border tax fraud; they would be expected to examine the movement of money so as to trace significant payment made through off-shore bank accounts.⁸⁴⁷ Further, the Commission suggested enhancing the exchange of information on income received and assets owned by taxpayers. This could help for risk analysis purposes and that could serve as an incentive to influence voluntary tax compliance. The Commission also suggested tackling trends and schemes of tax fraud and tax evasion. It proposed to develop mechanisms or tools to be used to identify trends and schemes of tax avoidance and evasion. The Commission also intended to enhance tax governance and ensure a high level of tax compliance.

On the issue of coherent policy with third countries, the Commission suggested that Member States had to ensure that third countries apply minimum standards of good governance in tax matters. These have been defined by the Commission as:

“A third country only complies with minimum standards of good governance in tax matters where:

⁸⁴⁶ COM (2012) 351 Final on concrete ways to reinforce the fight against tax fraud and tax evasion including in relation to third countries.

⁸⁴⁷ Ibid., paragraph 3.2.3.

(a) It has adopted legal, regulatory and administrative measures intended to comply with the standards of transparency and exchange of information set out in the Annex, and effectively applies those measures;

*(b) It does not operate harmful tax measures in the area of business taxation.*⁸⁴⁸

If third countries fail to comply with the standards of good governance, Member States should publish these countries in a list of blacklisted countries. If a Member State has a double taxation agreement with a blacklisted country, the Member State should seek to renegotiate the convention, or suspend or terminate it in order to improve compliance by the third country with standards of good governance.⁸⁴⁹

Following the above recommendation, the Commission Communication to the Parliament and the Council on a fair and efficient corporate tax system in the European Union: 5 key areas for action⁸⁵⁰ noted that several countries have been blacklisted by various Member States (although quite a few have no blacklisted countries) and their names have been posted on the website of the EU.⁸⁵¹

Likewise the Commission and the Council of the EU intend to strengthen the fairer tax environment by the Directive (EU) 2017/1852⁸⁵² on tax dispute resolution mechanisms in the EU. Earlier, before the introduction of the directive, EU Member States had no strong mechanisms to resolve tax disputes that resulted in double taxation. Disputes were resolved by interpreting and applying the bilateral tax agreements and the Convention on the elimination of double taxation in connection with the adjustments of profits of associated enterprises (90/436/EEC) ('the Union Arbitration Convention'). However, Member States

⁸⁴⁸ Commission Recommendation 2012/771 (O.J. 2012 L 338/37), paragraph 3.

⁸⁴⁹ Ibid., paragraph 4.3.

⁸⁵⁰ COM (2015) 302 Final.

⁸⁵¹ The full list is available at https://ec.europa.eu/taxation_customs/tax-common-eu-list_en, last visited 4 September 2019.

⁸⁵² Council directive of 10 October 2017.

could differently interpret the applicable bilateral treaty or the convention and there was no obligation to come to an agreement on these matters (within a reasonable time).

Therefore, the directive offers a comprehensive, effective and sustainable mechanism for dispute resolution between EU Member States concerning the interpretation and application of bilateral tax treaties and the Union Arbitration Convention.⁸⁵³ The introduction of the directive aims to provide legal certainty, fairness and a business friendly environment to taxpayers. This is because a directive is unlike a convention. It is secondary legislation of the EU, while a convention is not an EU-legal instrument, but a public international law instrument.

In the process of offering a mechanism to resolve disputes, resulting in double taxation Directive (EU) 2017/1852 presents several taxpayers' rights. It concerns the following rights:

- a. Right to appeal
- b. Right to a fair trial
- c. Right to confidentiality

Ad. a

A taxpayer (an affected person in terms of the directive) may file a complaint (an appeal) to the competent authority of each member state concerned requesting a resolution regarding matters that resulted or will result in double taxation.⁸⁵⁴ The taxpayer may file the complaint irrespective of whether or not the taxpayer has recourse to the remedies available under the national laws of the member states concerned. The complaint must be made within a period of three years from the date of receiving the first notification of the action that resulted or will result into the dispute. This period is derived from the three years period mentioned in the OECD Model Tax Treaty, Article 25, paragraph 1.

⁸⁵³ Preamble Directive 2017/1852, paragraph 2 and 4.

⁸⁵⁴ Directive 2017/1852, Article 3.

Once the taxpayer has filed the complaint to the tax authorities of the Member States concerned they are required to decide either to accept or reject the complaint.⁸⁵⁵ The decision to accept or reject the complaint has to be made within a period of six months from the date of receiving the complaint.

Upon accepting the complaint the competent tax authorities shall endeavour to resolve the matter by mutual agreement. The resolution by mutual agreement has to be made within two years from the date of notification of acceptance of the complaint. The taxpayer shall be informed immediately once the agreement has been reached between the member states. The agreement shall be binding to the tax administration provided that the taxpayer has accepted to withdraw the right to any other remedy available. If the taxpayer has already started another remedy, he is required to terminate that proceeding. In case the competent authorities have failed to agree on an accepted complaint, the taxpayer can request the formation of an 'Advisory Commission' that will give an opinion on the disputed matter.⁸⁵⁶ Once the opinion has been given the competent authorities have to agree on the opinion. They may take a decision that deviates from the opinion. However if they cannot agree on a decision they shall be bound by the opinion of the Advisory Commission. Once the decision or opinion has become final it shall be implemented if the taxpayer has accepted the decision or opinion.⁸⁵⁷ The member states may decide to reject the complaint on a limited number of grounds.⁸⁵⁸ In that case, the complaint will not be dealt with. The taxpayer may appeal this decision as well. See art. 5 and 6 of the directive.

Ad. b

The consideration of a fair trial can be traced through the modality on how the complaints are resolved. One of the criteria attributed to a fair trial is the length of time spent to resolve the dispute. The directive has set a maximum time to the competent tax authorities to respond to

⁸⁵⁵ Ibid., paragraph 5.

⁸⁵⁶ Directive 2017/1852, Article 6.

⁸⁵⁷ Ibid., Article 15.

⁸⁵⁸ Ibid., Article 5, paragraph 1.

the complaint. For example, paragraph 5 of article 3 of the directive requires the competent authorities to decide on the acceptance or rejection of the complaints within 6 months of the receipt of the complaint. Likewise if the dispute is accepted for mutual agreement, the competent authorities are required to resolve the dispute within two years.⁸⁵⁹ In case one or more but not all of the competent authorities have decided not to accept a complaint and the so called Advisory Commission has decided that a mutual agreement procedure should be initiated the competent authorities should initiate the procedure within 60 days. If not, the Advisory Commission shall provide an opinion on how to resolve the dispute. The opinion of the Advisory Commission is required to be submitted to the competent authorities not later than six months from the date on which it was set.⁸⁶⁰ Therefore, as presented in this paragraph, the directive has set time limits for the steps resolving the dispute mentioned before.

Another aspect of the fair trail is the availability of impartial and competent persons to resolve the dispute. Article 6 of the directive offers the right to a taxpayer to request the set up of the Advisory Commission. The Advisory Commission must include (among others) one independent person appointed by each competent authority of the member states concerned.⁸⁶¹ The independent persons are expected to be impartial persons. However, an independent person can be rejected by an (another) competent authority if:

- a) *“That person belongs to or is working on behalf of one of the tax administration...”*
- b) *That person has or has had material holding in or voting right in or is or has been an employee of or adviser...*
- c) *That person does not offer a sufficient guarantee of objectivity for the settlement of the dispute to be decided...*
- d) *That person is an employee with an enterprise that provides tax advice or otherwise gives tax advice on a professional basis... ”*⁸⁶²

⁸⁵⁹ Ibid., Article 4.

⁸⁶⁰ Ibid., Article 6, paragraph 2.

⁸⁶¹ Ibid., Article 8, paragraph 1.

⁸⁶² Ibid., Article 8, paragraph 4.

Generally, the consideration of having independent persons in the advisory commission can be said to be among the factors that intend to influence and strengthen the principle of a fair trial.

Ad. c

The right to confidentiality is explained during the process of resolving the dispute. Article 13 has empowered the Advisory Commission to require the competent authority or taxpayer to provide information, evidence or documentation that may be relevant to its decision. However the competent authority (whom the information has been requested) may reject to provide such information provided that the information may contains trade secrets. Article 13 explains that:

“...However, those competent authorities may refuse to provide information to the Advisory Commission in any of the following case:

- a) Obtaining the information requires carrying out administrative measures that are against national law;*
- b) The information cannot be obtained under the national law of the member state concerned;*
- c) The information concerns trade secrets, business secrets, industrial secrets, professional secrets or trade process...”⁸⁶³*

In summary Directive 2017/1852, besides focusing on improving legal certainty on dispute resolution mechanisms, has not ignored taxpayers rights. Especially the right of having a fair trial and the right to confidentiality are well guarded.

⁸⁶³ Directive 2017/1852, Article 13.

9.3.6 Enhancing tax compliance through introducing a Taxpayers' Charter in the EU

9.3.6.1 Introduction

The European Economic and Social Committee (Ecosoc), in its Opinion on the Commission's action plan to strengthen the fight against tax fraud and tax evasion,⁸⁶⁴ observed that taxpayers' compliance is an important element in combating tax fraud. In order to enhance taxpayers' compliance, Ecosoc suggested that taxpayers should be properly informed about the EU and Member States' tax rules; this could be achieved through a one-stop-shop, to deliver all types of tax information to both EU residents and non-residents. Ecosoc also proposed that a European-level tax web portal be built along the lines of the e-justice network.⁸⁶⁵ A web portal at the European level is expected to be a strong tool for taxpayers to acquire all tax information of the Member States.

Moreover, in a view to enhance compliance, the Commission has developed a Model Taxpayers' Charter⁸⁶⁶ which is expected to enhance trust and confidence between taxpayers and tax administrations.⁸⁶⁷ The model of the charter was developed by the Confederation Fiscale Européenne (CFE) and two tax professional bodies in other regions of the world, the Asia-Oceania Tax Consultants' Association (AOTCA) and the Society of Trust and Estate Practitioners (STEP). A Model Taxpayer Charter was presented on 13 November 2015.⁸⁶⁸ On

⁸⁶⁴ Ecosoc Opinion ECO/341 (O.J.2013 C 198/34); as to the action plan, see COM (2012) 722.

⁸⁶⁵ ECO/341, *Ibid.*, paragraph 4.11.

⁸⁶⁶ COM/2012/351 Final, paragraph 3.2.4.

⁸⁶⁷ ECO/341(fn 864), paragraph 4.10 (which mentions 'a European taxpayers' code grouping together existing best practices in the Member States for enhancing trust and confidence between tax administrations and taxpayers, for ensuring greater transparency on the rights and obligations of taxpayers and encouraging a service-oriented approach).

⁸⁶⁸ <http://www.cfe->

[eutax.org/sites/default/files/Press%20Release_A%20Model%20Taxpayer%20Charter%20CFE%20version%20FINAL.pdf](http://www.cfe-eutax.org/sites/default/files/Press%20Release_A%20Model%20Taxpayer%20Charter%20CFE%20version%20FINAL.pdf), last visited 14 February 2017.

8 December 2016, the European Commission published guidelines for a Model for a European Taxpayers' Code⁸⁶⁹ (the details of this model code follow below). The model for a European taxpayers' code provides the taxpayers with rights similar to that presented in the Model Taxpayer Charter.

9.3.6.2 Model Taxpayer Charter

The format of the Model Taxpayer Charter is different from other Taxpayers' Charters already applied in some countries. The Model Taxpayer Charter sets out in detail taxpayers' rights and obligations at each stage of the process of levying tax. It states taxpayers' rights available during the stage of filing a tax return, rights available on assessment and payment of tax, and the taxpayers' rights during the appeal procedures against decisions by revenue authorities. The Model Taxpayer Charter also provides rights and obligation to other stakeholders such as tax officers and tax advisors. Article 3(1) of the Charter states that

*“The persons covered by this Charter include all Taxpayers and their duly appointed Tax Advisors and, in their dealings with Taxpayers and Tax Advisors, all States, Tax Administrations and Tax Officers.”*⁸⁷⁰

The Model Taxpayer Charter explains roles, responsibilities and rights to each of the above stakeholders. Concerning taxpayers' rights, like other taxpayers' charters, this charter provides several taxpayers rights; such as

1. Presumption of being honest and trustful

Article 5(1) of the Model Taxpayer Charter states that

⁸⁶⁹ The document is available at

https://ec.europa.eu/taxation_customs/sites/taxation/files/guidelines_for_a_model_for_a_european_taxpayers_code_en.pdf, last visited 22 November 2017.

⁸⁷⁰ <http://www.taxpayercharter.com/article.asp?id=14>; as to the background, see <http://www.cfe-eutax.org/sites/default/files/Model%20Taxpayer%20Charter,%20preliminary%20report,%20text.pdf>, last visited 22 November 2017.

“A Taxpayer is presumed to be honest and truthful, unless there is evidence to the contrary. Accordingly, information provided by a Taxpayer and Tax Filings are generally presumed to be correct and complete with respect to factual information provided, unless there is reason to believe that the information is incomplete, inaccurate, or misleading. This presumption of honesty and truthfulness is important, and represents a privilege afforded to a Taxpayer, which can be denied in the event of evidence to the contrary.”

The Model Taxpayer Charter does not prescribe any remedy to a taxpayer if the tax administration fails to presume him to be honest and trustful.

2. Availability of relief of penalty and interest for reasonable causes

The Model Taxpayer Charter requires tax laws to provide relief of penalty and interest, and the extension of deadlines for filing tax returns. The relief of interest, penalty and the extension of time for filing tax returns should be given to a taxpayer who has a reasonable cause. The Model Taxpayer Charter however has not explained what may constitute a ‘reasonable cause’. It is left to the tax law, administrative practices, or judicial traditions of the Member States to determine reasonable causes.⁸⁷¹

3. Right of equality

The Model Taxpayer Charter requires taxpayers to be treated equally before the law.⁸⁷² Taxpayers, irrespective of their size, status or importance should be impartially treated. However, that does not mean that countries may not grant exemptions from tax to certain taxpayers such as school, hospitals or charities. The Model Taxpayer Charter prohibits the use of tax law to discriminate taxpayers based on race or religion: the Explanation to Article 5(7) of the Charter states that

⁸⁷¹ Model Taxpayer Charter, Explanation to Art. 5 (6).

⁸⁷² Ibid., Art. 24; see also Art. 5 (7).

“Tax laws shall not be discriminatory by reference to race or religion, subject to very limited exceptions, such as special tax exemptions that might be given historically to aboriginal people.”

Similarly, the principle of equality is extended to the imposition of fines or penalties to a particular industry. The explanation to Article 5(7) goes on to state that

“Tax laws shall not be used as a punishment or fine directed towards a particular industry, occupation or sector of the economy, without due process and just cause (...). Therefore Taxes should not be levied at any particular group arbitrarily or for non-tax reasons.”

4. The right to be informed

A taxpayer has the right to be informed concerning his tax affairs. When a tax administration assesses a taxpayer, the notice of assessment should be sent to the respective taxpayer. Tax administrations should not withhold the notice of assessment of the taxpayer for any reason; save with the consent of the taxpayer himself.⁸⁷³ Similarly, the taxpayer should be informed in a clear and understandable language how his tax obligation has been reached, the basis upon which tax was levied, and how the tax was computed.⁸⁷⁴ The taxpayer should also be informed about the right to appeal the assessment; the information should include general procedures for appeal and deadlines; in general, tax administrations should direct a taxpayer to the source where he can obtain further information concerning how to make a valid tax appeal.⁸⁷⁵

Further, if a tax administration intends to audit the taxpayers' accounts and records, the taxpayer must be informed before the audit is conducted.⁸⁷⁶ The taxpayer should be informed

⁸⁷³ Ibid., Explanation to Art. 7 (1).

⁸⁷⁴ Ibid., Explanation to Art. 7 (2).

⁸⁷⁵ Ibid., Explanation to Art. 7 (5).

⁸⁷⁶ Model Taxpayer Charter, Art. 8 (3).

about the scope of the audit, and the taxpayers' rights available during the audit such as the right to be represented by tax advisor.⁸⁷⁷

5. Right to certainty

Taxpayers have the right to certainty. As observed in section 7.5.3, this involves the clarity and predictability of tax rules. Certainty necessitates a taxpayer understanding the tax effect of his transaction or arrangement. The Model Taxpayer Charter requires tax to be levied through law; no tax should be levied until the legislation is enacted into law.⁸⁷⁸ Therefore this requirement increases the certainty to a taxpayer that there will be no arbitrary imposition of tax. The Model Taxpayer Charter requires tax laws to be clear in such a way that a taxpayer even without specialized professional knowledge can understand the law if he spends reasonable time and effort to study it.⁸⁷⁹ The Explanation to Article 17(1) states that

“Tax legislation shall be written in clear and unambiguous language ... The standard is to be that a Taxpayer without specialised professional knowledge shall be able to understand the law provided the Taxpayer spends reasonable time, effort and study in this endeavor.”

Similarly, the Model Taxpayers' Charter requires a tax administration to provide a taxpayer with guidance on the application of tax law; the guidance should be published and binding on the tax administration unless the published interpretation is withdrawn by the tax administration.⁸⁸⁰ Therefore the tax administration is required to keep updated guidance on its information channels.

Nevertheless, the Model Taxpayers' Charter explains that a tax administration is also obliged to provide clear rules on anti-avoidance. Generally anti-avoidance rules should not be left open to the discretion of the tax administration. Anti-avoidance rules that provide wide

⁸⁷⁷ Ibid., Explanation to Art. 8 (3).

⁸⁷⁸ Model Taxpayer Charter, Art. 17 (3).

⁸⁷⁹ Ibid., Explanation to Art. 17 (1).

⁸⁸⁰ Ibid., Explanation to Art. 12 (5).

discretion to tax administration create uncertainty; hence they are unfair.⁸⁸¹ The Explanation to Article 30 (3) observes that

“What is most important in practical terms concerning tax-avoidance laws is that they be clear, well known, and not open to the discretion of the Tax Administration – or, worse yet, particular Tax Officers. Taxpayers are entitled to reasonable certainty in their tax affairs. Broadly worded tax-avoidance legislation that gives wide discretion in interpretation is unfair.”

6. Right to privacy

The right to privacy is dealt within Article 13(2) of the Model Taxpayer Charter. The charter prohibits unnecessary search of a taxpayer's business premises. Search of the taxpayer's premises must be allowed by courts through a search warrant. There must be due process of law to be followed before a tax officer enters into taxpayers' premises. The Model Taxpayer Charter⁸⁸² explains

“A Taxpayer shall not be subject to unreasonable search and seizure without due process of law, which will normally require a search warrant signed by a judge or a Justice of the Peace. This recognises that search and seizure is an extreme sanction (...) and should only be carried out where there is evidence to suspect dishonesty.”

7. Right to confidentiality

The right of confidentiality is also protected in Article 14 of the Model Taxpayer Charter. The charter requires a restricted access of the taxpayers' information presented to or collected by the tax administration. Taxpayers' information should be accessible only for the tax officer who is in charge of handling the affairs of the taxpayer concerned.⁸⁸³ This does not prevent

⁸⁸¹ Ibid., Explanation to Art. 30 (3).

⁸⁸² Model Taxpayer Charter, Explanation to Art. 13 (2).

⁸⁸³ Model Taxpayer Charter, Art. 14 (1).

the exchange of a taxpayers' information between tax administrations. The Model Taxpayer Charter has, however, not specified what action has to be taken to protect taxpayer's confidentiality during the exchange of information.

8. Right to pay the correct amount of tax

Article 5(4) of the Model Taxpayer Charter deals with the right of a taxpayer to pay no more tax than is required by law. The right to pay the correct amount of tax in the Model Taxpayer Charter carries with it the right of a taxpayer to plan his business transactions or arrangements so as to achieve tax savings. However the arrangement of transactions must be within the law. Article 5(4) provides that

“A Taxpayer shall be responsible for paying only the amount of Tax as required by law. Accordingly, a Taxpayer may plan tax affairs within the law and if the arrangements result in less Tax than that which might otherwise be paid, then so be it...”

To ensure the payment of correct taxes according to the law, Article 8(5) of the Model Taxpayer Charter prohibits tax officers from using threats or other burdensome techniques against a taxpayer as a basis for levying tax, a penalty or amending an assessment made by the taxpayer. Tax laws should be applied as they are written. Article 8(5) states that

“A Tax Officer shall apply the law, without bias or preference, and for this reason shall not use negotiating tactics, such as the prospect of levying a penalty, as a basis for obtaining a Taxpayer's concurrence to adjustments being proposed.”

Similarly, Article 19 of the Model Taxpayer Charter requires a taxpayer to be relieved from double taxation. This is among the modalities to ensure that a taxpayer pays only the correct amount of tax. Therefore, if the same income, of the same taxpayer is taxed more than once under the same type of tax legislation, the taxpayer must be given a tax credit or exemption

or any other mechanisms to relieve him from double taxation. The Model Taxpayer Charter states that

*“Legislation shall provide for relief of double taxation, through an exemption or tax credit mechanism or as may be suitable in the circumstances.”*⁸⁸⁴

If a taxpayer has paid an amount of tax more than the required amount, he should be refunded the amount of overpaid tax together with interest thereon. Likewise, a taxpayer who paid a lesser amount of tax, or delays paying the amount of tax due, is obliged to pay the amount of tax due with interest. The basis of the computation and the rate of interest must be the same for the amount of interest payable or receivable by a taxpayer, and failure to have the same modality of paying interest is deemed to be unfair:

*“The rate of interest charged on late payments of Tax should not exceed the rate of interest paid on overpayments of Tax, and the calculation basis should be the same. Failure to do so results in a bias in favour of the State. This is inappropriate and unfair.”*⁸⁸⁵

9. The burden of proof

The Model Taxpayer Charter requires the burden of proof to be allocated to both a taxpayer and revenue authority depending on the types of case involved. The Explanation to Article 16 of the Model Taxpayer Charter observes that for most cases, a taxpayer is in a good position to prove the facts and the application of the law to the respective facts, because the taxpayer is deemed to have more information.⁸⁸⁶ However for justification of the correctness of a penalty or matters concerning the applicability of an anti-avoidance rule, the burden of proof lies with the revenue authority.⁸⁸⁷

⁸⁸⁴ Model Taxpayer Charter, Art. 19 (1).

⁸⁸⁵ Model Taxpayer Charter, Explanation to Art. 20 (2).

⁸⁸⁶ Ibid., Art. 16.

⁸⁸⁷ Ibid., Art. 16(2), (3).

9.3.6.3 Challenges to the Model Taxpayer Charter

In general, the Model Taxpayer Charter is an information intensive document that is set to be more of a guidance to taxpayers, revenue authorities, and the taxation stakeholders at large. However, there are two challenges to the charter. The first is the legal position of the charter with regard to domestic laws: the legal status of the charter is not certain. Article 26, paragraph 1 of the Model Taxpayer Charter states that:

“A Taxpayer shall have recourse to complain and plead for an appropriate remedy in the event that a Taxpayer's rights are not adhered to as laid out in this Charter through a suitable mechanism established by the State in its legislation implementing this Charter.

Because of the diversity of legal traditions in countries across the world, it is not appropriate for the Charter to specify how a Taxpayer may enforce Charter rights ...”

Article 26 is silent about the legal status of the Model Taxpayer Charter in domestic laws. The charter has thus left those seeking to enforce the rights it sets out in something of a dilemma. The rights would have been better protected had the charter clearly set out how taxpayers may enforce the rights contained in the charter.

Another challenge to the Model Taxpayer Charter relates to the right to confidentiality. The world currently is primarily occupied with issues of reducing Base Erosion and Profit Shifting. The right to confidentiality is exposed to a high risk of being infringed. Countries are continuously extending the scope of exchanging taxpayers' information between themselves. It might have been expected that the Model Taxpayer Charter would have taken into account the existing situation, and at least create basic rights for a taxpayer whose information is about to be exchanged. The taxpayer should be informed concerning the decision to exchange his information, should know about the type of information to be exchanged and possible consequence (remedy) in case the information exchanged is leaked by the recipient state. The Model Taxpayer Charter has failed to do this.

9.3.6.4 Model for a European Taxpayers' Code

The Model for a European taxpayers' code intends to ensure the balance between rights and obligations of both taxpayers and tax administration. Hence it provides a list of rights (expectations) of taxpayers and a list of obligations of taxpayers (expectations of the tax administration). For the purpose of this dissertation taxpayers' obligations shall not be described, only taxpayers' rights will be explained below.

a. Right to pay no more than the correct amount of tax due

This right is described in paragraph 3.1.1 of the model for a European taxpayers' code. The code requires the lawfulness of the amount of tax levied. The taxpayer can then expect to pay tax only as required by law.

b. Right to be informed

The right to be informed is explained in the paragraph 3.2.1 of the model for a European taxpayers' code. A taxpayer can expect to receive from the tax administration timely and accurate information that enable him to meet his tax obligations. Likewise a taxpayer can expect to receive guidelines proactively that may assist particular types of taxpayers or targeted group of taxpayers (such as start-up companies). The guidelines may help taxpayers to anticipate the tax consequences of their transactions or arrangements hence reduce mistakes.

Further the right of information requires tax administration to consider the easiest and convenient channels of communication to taxpayers. For example, tax administration should anticipate that some digital channels of communications may not be easy to some taxpayers.

c. Right to certainty

The right to certainty is enshrined in the paragraph 3.1.1 of the model for a European taxpayers' code. Based on this paragraph, the consideration of certainty is on the application of the law. A taxpayer can expect that every decision of the tax administration is consistent with the wording of the law.

Likewise taxpayer should anticipate how sanctions would be imposed in case of non compliance of the law; thus penalties, interest and fines must be only as provided by the law. The code explains:

“Lawfulness and legal certainty

Taxpayers can expect: (...)

- *“tax administrations to apply the law reasonably and consistently*
- *openness about the intention of tax laws, rules and procedures*
- *tax administrations' decisions to be consistent with the wording of the law*
- *tax administrations to apply sanctions only as provided for by law.”*

d. Right to be assisted

The model for a European taxpayers' code suggests that a taxpayer be given the assistance from tax administration. A taxpayer should be given the best possible help that would make him meet his tax obligations. A taxpayer should be allowed to use hotlines to request for the assistance.

Likewise a taxpayer should be given a tax ruling in case there is uncertainty on the application of the law in a specified arrangement or transaction.

The right to be assisted is provided in the paragraph 3.2.2 and 3.2.5 of the model for a European taxpayers' code.

e. Right to be heard

The right to be heard requires taxpayer be given the opportunity to present his complaints before tax administration or any complaint investigation body. Taxpayer must be given the right to have a dialogue with tax an administration concerning his complaints. Paragraph 3.4.3 of the model for a European taxpayers' code explains

“Taxpayers can expect:

- *to be able to make a complaint to the tax administration or another relevant complaint investigation body*
- *to have a dialogue with the tax administration or other relevant body about their complaint and to be listened to ...”*

f. Right to appeal and fair trial

The model for a European taxpayers' code requires taxpayer be given the right to appeal before an independent competent court (paragraph 3.4.2). The code suggests that during the tax appeal (internal appeal procedures), taxpayers should be allowed to postpone the collection of the disputed amount of tax. Likewise if the tax appeal is presented before the court, taxpayer can expect the court procedures to be efficient and short.

g. Right of privacy

The right of privacy is described in paragraph 3.1.8 of the model for a European taxpayers' code. The privacy is expected during the process of collection of taxpayers' information. During this process, a taxpayer can expect that a tax administration may seek only information that is relevant to its functions. Moreover the tax administration has to ensure the minimum access of the taxpayers' information. That, the permission to access taxpayers' information should be given only to staff who are authorised to have the access. The model for a European taxpayers' code explains

“Taxpayers can expect:

- *tax administrations only to seek information relevant for their functions*
- *tax administrations to permit only those employees within the administration who are authorized to access that information.”*

h. Right to confidentiality

The right of confidentiality is insisted especially for a taxpayer's personal information. Paragraph 3.1.7 explains that a taxpayer can expect privacy of his personal information from tax administration. The tax administration must protect the privacy of the taxpayers' information and to adhere strictly to the law in matter of confidentiality. The taxpayers information should not be given to a third party except as permitted by law. The model for a European taxpayers' code explains

“Fiscal secrecy and data protection

Taxpayers can expect:

- *tax administrations to protect their personal information and to adhere strictly to the law in this regard*
- *that information will not be given to a third party except as permitted by law*
- *the right to request, in line with national provisions, information tax administrations hold on them.”*

9.3.6.5 Summary

Generally the model for a European taxpayers' code has similar challenges with the Model Taxpayers Charter discussed above.

Firstly, just like the Model Taxpayer Charter, the model for a European taxpayers' code is a non-binding instrument.⁸⁸⁸ It is a document which gives guidelines to the Member States of the EU concerning the rights and obligations of taxpayers and tax administrations. It is not a mandatory code.

⁸⁸⁸ Paragraph 2.1 of the Model for a European taxpayers' code.

Secondly, concerning the right of confidentiality, the model for a European taxpayers' code does not explain anything concerning the right of the taxpayer to be informed during the exchange of taxpayer's information between tax administrations.

Therefore, even though the model for a European taxpayers' code may contribute to the enhancement of cooperation, trust and confidence between taxpayers and tax administrations, the model for a European taxpayers' code by itself does not provide strong protection of taxpayers' rights.

9.4 Efforts of the OECD to counter BEPS

Several initiatives have been undertaken, and continue to be taken by the OECD towards solving the BEPS problem. The most important was the Comprehensive Action Plan (CAP) on BEPS adopted by OECD on 19 July 2013,⁸⁸⁹ which was endorsed at the G20 finance ministers meeting in Moscow in September 2013 and which resulted in the publication of the final reports on BEPS on 5 October 2015.⁸⁹⁰ Like the EU, the OECD is struggling to find a fairer and comprehensive corporate tax model that might be used globally. The existing models have allowed several gaps and mismatches which are used by multinationals in aggressive tax planning.

9.4.1 The OECD action plans

As a step towards formulating a more comprehensive international corporate tax model that should beat BEPS, the OECD has published reports on the following actions:

- a) To address tax challenges of the digital economy (Action 1)
- b) To neutralise the effects of hybrid mismatch arrangements (Action 2)

⁸⁸⁹ OECD, *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing, 2013, Accessed through <http://dx.doi.org/10.1787/9789264202719-en>, last visited 20 October 2017.

⁸⁹⁰ OECD *Final Reports, OECD/G20, Addressing Base Erosion and Profit Shifting, 2015*.

- c) To strengthen controlled foreign company rules (CFC-rules) (Action 3)
- d) To limit base erosion via interest deductions and other financial payments (Action 4)
- e) To counter harmful tax practices more effectively, taking into account transparency and substance (action 5)
- f) To prevent treaty abuse (action 6)
- g) To prevent the artificial avoidance of permanent establishment status (action 7)
- h) To assure that transfer pricing outcomes are in line with value creation (actions 8, 9 and 10)
- i) To establish methodologies to collect and analyse data on BEPS and the actions to address it (action 11)
- j) To require taxpayers to disclose their aggressive tax planning arrangements (action 12)
- k) To re-examine transfer pricing documentation (action 13)
- l) To make dispute resolution mechanisms more effective (action 14)
- m) To develop a multilateral instrument to modify bilateral tax treaties (MLI) (action 15)

All of these reports suggest actions to be taken by the states involved in the BEPS-project. A number of these suggestions have already been introduced in the law of a number of these states. Moreover the EU Anti Tax Avoidance Directive (ATAD) is an initiative that directly relates to a number of actions of the BEPS-project.

With respect to taxpayers' rights action 5, 12 and 14 are of particular interest. Action 5 deals among other things with the issue of transparency. In this respect the OECD recommends the compulsory automatic exchange of tax rulings that could give rise to BEPS-concerns. These rulings include, rulings related to preferential regimes, rulings that are made on cross borders unilateral advance pricing arrangements or cross border unilateral transfer pricing rulings, permanent establishment rulings (PE-rulings), rulings giving a downward adjustment of profit, conduit rulings and any other type of ruling where the Forum on Harmful Tax Practices agrees in the future that it would give rise to "BEPS concerns" if it is not automatically exchanged.⁸⁹¹

In action 12, the OECD developed a model to enhance mandatory disclosure rules for aggressive or abusive tax arrangements or transactions. The OECD suggests to have a consistent design on rules governing disclosure of aggressive tax planning:

*"...Develop recommendations regarding the design of mandatory disclosure rules for aggressive or abusive transactions, arrangements, or structures, taking into consideration the administrative costs for tax administrations and businesses and drawing on experiences of the increasing number of countries that have such rules. The work will use a modular design allowing for maximum consistency but allowing for country specific needs and risks ..."*⁸⁹²

As a result, the OECD recommends a modular framework that enables countries to design mandatory disclosure rules that would enhance early information on potential aggressive or abusive tax planning scheme and their users.⁸⁹³ The proposed framework suggests imposing

⁸⁹¹ OECD/G20 Base Erosion and Profit Shifting Project: Countering harmful tax practices more effectively, taking into account transparency and substance; Action 5 (Final Reports) 2015, p. 10.

⁸⁹² OECD, Action Plan on Base Erosion and Profit Shifting, 2013, p. 22.

⁸⁹³ OECD/G20 Base Erosion and Profit Shifting Project: Mandatory Disclosure Rules; Action 12, Final Reports, 2015, p. 10.

a disclosure obligation on both a promoter of a tax avoidance scheme and a taxpayer, or imposing the primary obligation to disclosure to either a taxpayer or a promoter.⁸⁹⁴

Action 14 of the BEPS-project deals with the effectiveness of treaty dispute resolutions. Since the actions taken against BEPS may create extra uncertainty for taxpayers, countries should work on a more effective and timely resolution of disputes through mutual agreement procedures. In this way double taxation that can be an obstacle to cross border trade and investment will be removed more quickly.

In the next paragraph the BEPS-report on action 13, Re-examine transfer pricing documentation, will be discussed.

9.5 Exchange of Information in the OECD BEPS-project

Access to timely and accurate information has great influence on levying the proper amount of tax. Taxpayers as explained earlier are obliged to provide information to the tax authorities; information is filed through tax returns, and the tax authorities may request extra information from taxpayers. This is true during the tax audit. Failure to provide information may lead the tax authorities to use other measures to access the required information, either gathering such information through the taxpayer himself, or through third parties. The latter are commonly banks, insurance companies, debtors or any other person who is believed to hold taxpayers' information.

For Multinational Enterprises (MNEs), tax authorities may gather information of taxpayers by exchanging information. A tax authority from one jurisdiction may exchange taxpayer's information with the tax authority of another jurisdiction. The exchange of information is commonly done between tax authorities of jurisdictions in which the MNE operates through permanent establishments or subsidiaries.

With the report on action 13 the OECD has developed a mechanism that deals with transfer pricing documentation within MNE's. Transparency with regard to transfer pricing is essential

⁸⁹⁴ Ibid., p. 10.

to tax profits where they are actually made within an MNE. In this way profit shifting can successfully be avoided.

While the idea of transparency is crucial for proper taxation, it runs the risk of breaching taxpayers' rights. The right to privacy and confidentiality is at risk of being breached during the exchange of information if countries do not take reasonable consideration to protect it.

Basically BEPS report action 13 suggests that countries adopt a standardised three-tier approach to transfer-pricing documentation. First, entities within MNEs should be required to provide information on their global business operations and on transfer pricing policies.⁸⁹⁵ This information should be filed in a 'master file' that is to be available to all relevant tax administrations. It is intended to provide a general overview 'blueprint' of the MNE. It will contain information about the organisational structure of the MNE, a description of the MNE's business, intangibles, intercompany financial activities, and financial and tax information.⁸⁹⁶ Secondly, an entity within a MNE must file a local file, containing detailed information on each intercompany transaction that has occurred during a tax year. This information is intended to supplement information filed in the master file and to ensure that the MNE has complied with the arm's length principle in its transactions.⁸⁹⁷ The information must therefore identify the parties involved in the transactions, the amount involved, and a company analysis with regard to transfer pricing determination on those transactions.

Thirdly, the parent company of a MNE has to file a country-by-country report. Country-by-country reporting is designed to reveal information regarding the global allocation of MNE income. MNEs are thus required to provide information about their global business operations, tax paid, and indications of the allocation of economic activities among the tax jurisdictions in which the MNE operates.⁸⁹⁸ Country-by-Country-reports should be shared

⁸⁹⁵ OECD/G20 Base Erosion and Profit Shifting Project: Transfer Pricing Documentation and Country-by-Country Reporting: Action 13, Final Report, 2015, p. 14.

⁸⁹⁶ Ibid., p. 14 and 15.

⁸⁹⁷ Ibid., p. 15.

⁸⁹⁸ Ibid., p. 16.

automatically by government-to-government exchange of information. This is also stipulated in the EU Directive 2016/881, 25 May 2016, amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ EU 2016, L 146/8). MNEs will also be required to provide information concerning tangible assets for each of the constituent entities for which financial information is reported. Article 4 of the Model legislation related to Country-by-Country Reporting explains that.

*“...a country by country report with respect to an MNE Group is a report containing
Aggregate information relating to the amount of revenue, profit (loss)
before income tax, income tax paid, income tax accrued, stated capital,
accumulated earnings, number of employees, and tangible assets other
than cash or cash equivalents with regard to each jurisdiction in which
the MNE Group operates.”*

A Country-by-Country-Report is expected to assist tax administration to assess the transfer pricing risk associated with a particular transaction. However Country-by-Country Reporting by its self does not constitute conclusive evidence that a particular transfer pricing arrangement is or is not appropriate. Detailed transfer pricing analysis for individual transaction is still required.⁸⁹⁹ See the other files discussed before.

Some details on Country-by-Country Reporting

A Country-by-Country report is required to be filed by the MNE group that has consolidated group revenue of not less than € 750 million.⁹⁰⁰ The Country-by-Country Report must, as stated before, be filed by a parent company of its MNE Group. It must be filed in the country where the company is a resident for tax purposes.⁹⁰¹ If the parent company is a resident in a country where there is no obligation to file Country-by-Country Reports, any company or

⁸⁹⁹ OECD/G20 Base Erosion and Profit Shifting Project: Transfer Pricing Documentation and Country-by-Country Reporting: Action 13, Final Report, 2015, p. 16.

⁹⁰⁰ Model legislation related to Country-by-country Reporting, Art. 1(2 and 3).

⁹⁰¹ Ibid., Art. 2.

permanent establishment in a group is to file the Country-by-Country Report, provided that such a company or permanent establishment is resident respectively situated in a country that applies Country-by-Country-Reporting for tax purposes.⁹⁰² Similarly, if there is more than one entity in a group that is resident for tax purposes, the group may choose one of the entities to file the Country-by-Country Report.⁹⁰³ The chosen entity is known as the surrogate parent entity. A resident entity of a MNE has an obligation to notify the tax authorities whether it is a parent or surrogate parent entity.⁹⁰⁴

9.6 Assessment of taxpayers' rights in the techniques used to counter BEPS

9.6.1 Taxpayers' rights in the BEPS project

Focusing on the position of taxpayers' rights on the initiatives which have so far been taken by OECD to curb BEPS, it appears that the OECD has reasonably taken taxpayers' rights into a consideration in the BEPS reports already issued. Nevertheless since all plans depend largely on the availability of, and exchange of taxpayer information between countries, the taxpayers' rights might be exposed to the risk of being affected in the implementation of these plans. Specifically, the right to confidentiality is at great risk of being infringed.

9.6.1.1 Right to confidentiality

The requirements under country-by-country reporting require an MNE to file information concerning intangibles, modality of valuing and selling goods or services, information about clients or suppliers, and general information concerning the supply chain.⁹⁰⁵ The information filed by a taxpayer may contain trade secrets, the leakage of which may provide an advantage to a business competitor of the MNE, and lead to unfair competition. Likewise, when a

⁹⁰² Ibid., Art. 2 (2).

⁹⁰³ Ibid.

⁹⁰⁴ Ibid., Art. 3.

⁹⁰⁵ The taxpayer is required to provide general information in the master file and detailed information in the local file.

taxpayer requests from a tax administration a tax ruling that involves transfer pricing matters, or any other tax matters, the taxpayer is required to provide all information related to the transaction made or to be undertaken. The information that may be presented to the tax administration may also contain trade secrets. The information filed in the course of Country-by-Country Reporting or that is filed during the request for a tax ruling may be exchanged between tax administrations. The exchange of the information runs the risk of breaching the taxpayers' right to confidentiality. The confidentiality of the information presented to or acquired by tax authorities must be ensured.

The right to confidentiality does not seem to be totally ignored by OECD. In the report on action 13 Article 6 (2) of the Model Legislation related to Country-by-Country Reporting states that:

“The Country tax administration shall preserve the confidentiality of the information contained in the country by country report at least to the same extent that would apply if such information were provided to it under the provisions of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.”

In order to ensure the confidentiality of the taxpayers' information, the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports sets standards on the use of reports filed through Country-by-Country Reports. Section 5 (1) of the agreement requires confidentiality rules are applied on the information exchanged among tax authorities:

“All information exchanged is subject to the confidentiality rules and other safe guards provided in the convention, including the provisions limiting the use of the information exchanged.”

The issue of taxpayers' confidentiality is also discussed in the BEPS report made on Action 5. The report states on the mechanism of exchanging information concerning general or specific tax rulings made on either transfer pricing rules or any other rules that the sender country may decide what information is important to share. Information exchanged between

countries is supposed to be kept secret. A country that exchanges taxpayers' information and its taxpayer can lay claim to the right of confidentiality. Paragraph 137 of Action 5 observes that

*“Both the country exchanging information and its taxpayers have a legal right to expect that information exchanged pursuant to the framework remains confidential. The receiving country must therefore have the legal framework necessary to protect information exchanged.”*⁹⁰⁶

While the paragraph cited above obliges the receiving country to have a legal framework that ensures confidentiality, it does not state who may claim damages in case of the leakage of taxpayers' confidential information.

The right to confidentiality, besides being promoted in various documents as presented above, involves two challenges that can currently be experienced. The OECD Model Legislation related to Country-by-Country Reporting has largely ignored the presence of taxpayers. Nowhere is a taxpayer required to be informed that his information has been exchanged between revenue authorities. Revenue authorities are given priorities to exchange taxpayers' information between themselves without involving or informing taxpayers at all. However, involving taxpayers during the exchange of information may encourage transparency.⁹⁰⁷ A taxpayer will understand in advance that a particular type of information has been or will be exchanged and the reason for sharing that information should not remain secret. There might be an argument that for the information filed under Country-by-Country Reporting, a taxpayer understands beforehand that information will be exchanged by the relevant tax administrations. Yet there is no harm in reminding a taxpayer about the exchange of information. It is similar to reminding him of his obligation to pay tax due timely, or to

⁹⁰⁶ OECD/G20 Base Erosion and Profit Shifting Project; Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5, Final Report, 2015, p. 55.

⁹⁰⁷ Philip Baker & Pasquale Pistone, 'BEPS Action 16: The Taxpayers' Right to an effective Legal Remedy Under European Law in Cross-Border Situations', *EC Tax Review*, 2016, pp. 335-345.

informing the taxpayer about his right to appeal when a tax administration issues an assessment notice. Those rights may be enshrined in law, and the taxpayer may be aware of them, but normally taxpayers are reminded of these matters.

Paragraph 14.1 of the commentary on Article 26 of the OECD Model Tax Convention has, however, recognized that some domestic laws require a taxpayer to be informed before information is exchanged. It explains:

*“Some countries' laws include procedures for notifying the person who provided the information and/or the taxpayer that is subject to the enquiry prior to the supply of information. Such notification procedures may be an important aspect of the rights provided under domestic law.”*⁹⁰⁸

Nevertheless, the second challenge is the absence of the right to appeal for a taxpayer whose information is exchanged. Taxpayers have not been given the right to appeal, question or stop the exchange of information. Taxpayers cannot challenge the exchange of information.

It is submitted that these weaknesses could be addressed by not leaving the issue of informing taxpayers about exchanging information to the discretion of the countries concerned. The OECD is supposed to ‘enforce’ such mechanisms in its model treaties governing the exchange of information, and should deal with this at its level. To be on the safe side, and, to minimize the degree of risk of infringing the right to confidentiality, it may be thought proper for countries to inform a taxpayer prior to or during the sharing of the information about the information that has been or is about to be exchanged. Also, the exchange of information that contains trade secrets should involve extra care. Tax administrations must ensure the confidentiality of this information. The leakage of this information may result in loss of a

⁹⁰⁸ <http://www.oecd.org/ctp/treaties/2014-update-model-tax-convention.pdf>, last visited 9 February 2017.

market share a company used to possess. This type of information is very important in innovation.⁹⁰⁹

The taxpayer should also be given the right to appeal against the decision or intention of the revenue authority to exchange information. The right to appeal should certainly be available to ensure that the particular exchange of information will not cause leakage of business secrets.

While in Europe the legal setting to ensure confidentiality is reasonably well-established, in developing countries the issue is different. The report of the Global forum on transparency and exchange of information for tax purposes to the G20 on 'Automatic exchange of information: a roadmap for developing country participation',⁹¹⁰ shows that the legal framework of most of developing countries might endanger the confidentiality rule. Paragraph 37 of the report observes that there is a need to strengthen those frameworks to ensure confidentiality standards.

On the side of the EU's efforts, Recommendation 2012/772 on aggressive tax planning⁹¹¹ encourage countries that are non-members of the EU to comply with the standards of good governance in tax matters. If third countries fail to comply with the standards of good governance, Member States should publish these countries in a list of blacklisted countries. The danger of this approach is that, it might in one way or another infringe the right of confidentiality of taxpayers. Consequently, third countries will be forced to reveal taxpayers' information to other countries. It is not explained what might be the legal impact of the

⁹⁰⁹ European Commission, Study on Trade Secrets and Confidential Business Information in the Internal Market; Final study, 2013, p. 109, http://ec.europa.eu/internal_market/iprenforcement/docs/trade-secrets/130711_final-study_en.pdf, last visited 11 December 2017.

⁹¹⁰ <http://www.oecd.org/tax/transparency/global-forum-AEOI-roadmap-for-developing-countries.pdf>, last visited 9 February 2017. Final report to the G20 development working group, 5 August 2014.

⁹¹¹ O.J. 2012 L338/41.

decision of the third countries towards their taxpayers. Such countries might have a legal obligation within their domestic law to promote the confidentiality of taxpayers.

9.6.1.2 Right to appeal

In the efforts to minimize the problem of BEPS, taxpayers' rights of appeal have not been discussed at all. Several decisions have been taken and others are proposed to be taken to solve BEPS. In the measures that have already been taken, the right of appeal has not been directly envisaged. Currently there is no document which gives a taxpayer the right to appeal against:

- the decision of tax authorities to exchange taxpayers' information, as stated before, or,
- a decision of the tax authority to consider a business transaction or arrangement conducted or to be conducted by taxpayers as techniques of tax avoidance.

A tax authority may decide to believe that a particular taxpayer's business transaction or arrangement was done or was about to be done with the intention of avoiding tax. This situation commonly occurs when the revenue authorities believe that the particular business transaction or arrangement is to be categorised among what are considered to be aggressive tax planning techniques.

9.7 Conclusion

The discussion on how to minimize or solve Base Erosion and Profit Shifting (BEPS) is not yet finished. Several laws and regulation have been introduced and continue to be introduced to minimize the BEPS problem.

Both the EU and the OECD believe that BEPS cannot be solved by unilateral efforts. There is a common consensus that collective multinational efforts are necessary to tackle BEPS. This belief is influenced by the fact that most of the techniques of BEPS involve cross-border transactions and arrangements. Another common principle between the OECD and the EU views is the principle of accessibility of taxpayers' information. They both believe that BEPS cannot be solved unless tax authorities are well, timely and correctly informed. On this point

the EU has already widened the scope of information to be exchanged under Council Directive 2014/107 (information concerning financial accounts of taxpayers). Similarly, the exchange of information has been extended through amendments to Directive 2011/16 to include information on tax rulings made for cross-border transactions, and to incorporate the recommendation made by the OECD on the exchange of information through Country-by-Country Reports (Council Directive 2016/881). Member States are thus uniformly obliged to apply OECD recommendations. The European Commission went further by proposing that the Country by Country Reports be accessible to the public (COM (2016) 198). At the time of writing this issue has not yet been decided.

Moreover, the EU and OECD both believe that BEPS is a threat. BEPS contains serious risks towards fairness of the tax system and tax compliance at large.⁹¹² While that belief is justified, the existing risk to fairness through BEPS techniques does not justify the infringement of taxpayers' rights. A balance between taxpayers' obligation to pay tax, and taxpayers' rights should always be assured. The continuing efforts to fight against BEPS have similarly exposed some of taxpayer's rights to a great risk of being infringed. That will be discussed hereafter.

Right to appeal

The right to appeal has not been specifically addressed so far by the OECD under the BEPS project. Among the BEPS reports that have so far been issued, there is no report that has specifically addressed this right. It is submitted that a taxpayer should be informed about the exchange of information. This will enhance transparency and trust between tax administration and taxpayer; it also respects the taxpayer's right to be informed. In addition, a taxpayer should be given a right of appeal to allow him to question or to stop the exchange of information.

Rights to confidentiality

⁹¹² OECD, Meeting of the OECD Council at Ministerial Level: Update; Base Erosion and Profit Shifting, 2013, p. 2.

Generally, the right to confidentiality of taxpayers' information has been addressed in almost every report and directive made by the OECD and the EU respectively. Countries are required to set standards that ensure the confidentiality of taxpayer's information. For example, the BEPS report on action 13 concerning the Country-by-Country Report gives the right to a sending country to refuse to send the information to a country that infringes the privacy of information sent to it previously.

However, to ensure strong protection of the right of confidentiality it is suggested that the OECD should set rules to ensure that information concerning business secrecy remains secret. The OECD remains silent on the issue of business secrets being leaked by the country that receives information. If this happens, huge damage to the taxpayer whose information is leaked may result. Moreover, Commission Recommendation 2012/772 that requires non-Member States to meet the standards of good governance on tax matters may infringe taxpayers' right of confidentiality. The situation may occur because the recommendation imposes pressure on third countries to provide taxpayers' information to requesting states (EU Member States). Failure to comply with the request may lead to these countries being blacklisted. This pressure imposed on third countries may force them to comply with a request that might infringe the confidentiality of taxpayers in their countries.

Right of a fair trial and right to assistance

Supporting evidence to assess the impact of measures against BEPS on some taxpayers' rights, such as the right to a fair trial, and the right to assistance could not be ascertained. In general, the BEPS project and initiatives that have so far been taken by the EU seem to prohibit tax avoidance and planning, despite the fact that, the definition of tax planning and avoidance involves arranging business transactions or arrangements without contravening the tax law.⁹¹³

Right to pay the correct amount of tax

⁹¹³ Montgomery B. Angell, 'Tax Evasion and Tax Avoidance', *Columbia Law Review* Vol. 38, No. 1 (Jan., 1938), pp. 80-97.

A taxpayer is obliged to pay the correct amount of tax. In a tax system taxpayers must be allowed to plan their business activities to allow savings. It does not matter where that saving is coming from as long as taxpayers comply with the existing tax laws. Tax planning which ultimately results in a tax saving is part of taxpayers' rights. This argument is similar to Article 5 of the Model Taxpayers Charter, which states that

*“A taxpayer shall be responsible for paying only the amount of tax as required by law. Accordingly, a taxpayer may plan his tax affairs within the law and if the arrangements result in less tax than that which might otherwise be paid, then so be it...”*⁹¹⁴

Nevertheless, the OECD based on the BEPS report Action 12 introduced a mandatory disclosure of potentially aggressive tax planning schemes. Based on the report, countries are required to introduce mandatory rules that impose an obligation on a taxpayer to disclose a tax planning scheme, and on the promoter of the scheme. The main objectives of the mandatory disclosure rule are explained as

“... to obtain early information about potentially aggressive or abusive tax avoidance schemes in order to inform risk assessment;

to identify schemes, and the users and promoters of schemes in a timely manner;

*to act as deterrent, to reduce the promotion and use of avoidance schemes.”*⁹¹⁵

The mandatory disclosure rules are therefore expected to be an effective and efficient tool to the tax authorities to obtain early comprehensive information on tax avoidance schemes.⁹¹⁶

⁹¹⁴ Model Taxpayer Charter, Art. 5(3), p. 39. Accessed through <http://www.cfe-eutax.org/sites/default/files/Model%20Taxpayer%20Charter,%20preliminary%20report,%20text.pdf>, last visited on 9 February 2017.

⁹¹⁵ OECD/G20 Base Erosion and Profit Shifting: Project Mandatory Disclosure Rules: Action 12, Final Report, 2015, paragraph 15.

⁹¹⁶ Ibid., paragraph 20.

Besides, mandatory disclosure seems a good initiative towards a fair tax system that ensures every taxpayer pays the correct amount of tax. However, the way it is currently proposed seems to treat fairness very theoretically. For example, it is proposed that mandatory disclosure balances compliance costs to taxpayers with the administrative benefit to be acquired by the tax administration.⁹¹⁷ However it is not clear how the balance will be ensured. Paragraph 21 of the report simply recognises that the scope and extent of the disclosure obligation are keys in terms of achieving a balance between the cost to the taxpayer and the benefit to tax authorities, but without detailing the scope and extent at all:

“The scope and extent of any disclosure obligation is key in terms of achieving a balance. Unnecessary or additional requirements will increase taxpayer costs and may undermine a tax administration’s ability to effectively use the data provided.”

It is actually very hard to strike the balance between the two. Mandatory disclosure by itself increases additional compliance costs for taxpayers⁹¹⁸ and may possibly lead to a relaxation by the tax authority. Relaxation is expected because the tax authority may not be involved in reviewing the tax laws to explore the existing loopholes. They will instead wait for the taxpayer to show them how a certain a provision of the tax law that can be used to obtain a tax saving. Paragraph 12 of the report observes that:

“Early detection from obtaining quick and relevant information enhances tax authorities’ effectiveness in their compliance activities. As a result, some of the resources that would otherwise be dedicated to detecting tax avoidance, for example through audit, can be redeployed to review and respond to scheme disclosures.”

The UK for example has already established mandatory disclosure, which requires a promoter of a scheme to disclose the scheme to HMRC within a period of five days from the date of

⁹¹⁷ Ibid., paragraph 20.

⁹¹⁸ OECD/G20, op.cit. (fn 916), paragraph 74, p. 36.

making the scheme available for implementation.⁹¹⁹ A promoter is a person who (in the course of relevant business) designs and makes the arrangement available for implementation or manages the implementation of the scheme.⁹²⁰ A promoter who fails to disclose the arrangement within the required period is subject to a penalty not exceeding £ 5000 and an additional penalty not exceeding £ 600 for each day that the failure continues.

It is submitted that mandatory disclosure is a tool that is intended to end tax avoidance and tax planning. Currently, the rules require tax consultants and advisors (who are commonly promoters) to inform HMRC, immediately when they make the arrangement. Similarly, a taxpayer who uses the scheme is required to notify HMRC on the scheme as well. Failure to notify the HMRC will also expose taxpayers to penalties. However, when a promoter or taxpayer discloses the scheme, Parliament may immediately change the law or regulation to prohibit or restrict the tax benefit that might be extracted from the arrangement. There is a possibility that the amendment of the law may take effect retrospectively. Paragraph 2.2 of the HMRC guidance disclosure of tax avoidance schemes explains that:

“On its own the disclosure of a tax arrangement has no effect on the tax position of any person who uses it. However, a disclosed tax arrangement may be rendered ineffective by Parliament, possibly with retrospective effect.”

This shows that the Government intends to end tax planning and avoidance by using the intelligence and skills of taxpayers and tax advisors.

The world is currently confronted with the idea of forcing taxpayers to pay tax where they add value. This is a viable project towards achieving a fairer tax system both for revenue authorities and for taxpayers. However, intelligent taxpayers who can obtain tax savings without contravening tax laws should not be blamed or considered as hackers. Taxpayers were

⁹¹⁹ Guidance Disclosure of tax avoidance schemes (DOTAS), HMRC. p 100, accessed through https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/457981/DOTAS_guidance_for_publication.pdf, last visited 9 February 2017.

⁹²⁰ Finance Act 2004, section 336.

not involved in making the law; parliaments were. Therefore, when making laws parliaments are supposed to be intelligent enough to prevent loopholes that result in tax avoidance.⁹²¹ Tax planning, as a taxpayers' right, must be upheld.

⁹²¹ Montgomery B. Angell, 'Tax Evasion and Tax Avoidance', *Columbia Law Review*, Vol. 38, No. 1 (Jan., 1938), p. 96.

10 CHAPTER TEN: CONCLUSIONS AND RECOMMENDATIONS

10.1 Introduction

In this chapter I will answer the questions I raised in par. 1.2 of this work. I will start with the more specific research questions. After that I will answer the general research question of this dissertation. Finally I will present a number of recommendations regarding taxpayers' rights in Tanzania.

10.2 The answer to the research questions

The result of comparing the United Republic of Tanzania and the United Kingdom on the promotion of taxpayers' rights leads to the following conclusions. They are given as answers to the research questions that were raised in par. 1.2. I will start with the more specific research questions raised in that paragraph.

Question 1: What is the relationship between human rights and taxpayers' rights?

The study on the above question reveals that there is a close relationship between human rights and taxpayers' rights. However before answering the question of the relationship between taxpayers' rights and human rights, the question whether or not human rights are intended to serve both natural persons and legal persons was examined. The research shows that both legal and natural persons are entitled to human rights. This conclusion is highly evidenced in Europe where there are several cases that involve legal persons (companies) claiming that their 'human' rights have been infringed. However, it was hard to prove the same in Africa. Most of the human rights complaints in Africa were raised to protect natural persons (women and children) and political rights.

About the relationship between taxpayers' rights and human rights it is concluded that, taxpayers' rights are a derivative of human rights. Most of the human rights that are promoted in domestic and international treaties are also accessible to taxpayers. In this research no international treaty was found which explicitly deals with taxpayers' rights, instead taxpayers

claim their rights through human rights treaties such as the European Convention on Human Rights (ECHR), the African Charter on Human and Peoples Rights (ACHPR), Human Rights Acts and Bills of Rights. The research finds that among the human rights which are directly accessible to taxpayers are:

- a. the right to be informed,
- b. the right to certainty,
- c. the right to be assisted,
- d. the right to be heard,
- e. the right to appeal,
- f. the right to a fair trial including the right to be judged by a competent and impartial court,
- g. the right to privacy, and
- h. the right to confidentiality.

However, it is submitted that the time is right to minimize the degree of confusion caused by using the terminology '*human rights*' to refer to tax matters, by introducing separate conventions or treaties that would wholly promote and protect taxpayers' rights. These treaties or declarations should cover only taxpayers' rights. The introduction of separate treaties or conventions only for taxpayers' rights will to a certain degree increase certainty as to the rights a taxpayer is entitled to enjoy. Probably it will also reduce taxpayers' resources being spent to confirm whether or not a certain right is intended for tax matters (such as when taxpayers had to confirm the validity of Article 6 of ECHR in tax matters).

In most taxpayers charters the right to pay no more than the correct amount of tax is also seen as a separate right for taxpayers. As such it has been taken into account in this study and it indirectly refers to the human rights conventions mentioned above.

Question 2: which taxpayers rights are promoted in Tanzania and the UK in particular with respect to corporate taxpayers?

A summary of the findings on this question is presented in table 4 below; detailed explanation follows thereafter.

Table 4: Summaries of findings on question two on matters of promotion of taxpayers' rights

Taxpayers rights	Effectively promoted		Fairly promoted		Weakly promoted		Not promoted	
	UK	TZ	UK	TZ	UK	TZ	UK	TZ
Right to pay correct amount of tax					✓	✓		
Right to be informed	✓			✓				
Right to certainty					✓	✓		
Right to be assisted					✓	✓		
Right to be heard	✓	✓						
Right to appeal	✓			✓				
Right to a fair trial	✓					✓		
Right to privacy	✓			✓				
Right to confidentiality			✓	✓				

Note:

Effectively promoted means: laid down in hard law and there is sufficient mechanism provided in the law to ensure the right can be enforced by the taxpayer.

Fairly promoted means: laid down in hard law or soft law, however there is no or insufficient mechanism to ensure the right can effectively be enforced by taxpayers.

Weakly promoted means: laid down in the administrative documents that are non binding to the tax administration. They cannot be claimed before a court of law, also a right is deemed to be weakly promoted if it is not available in any soft or hard law, but it is available in the practice of the tax administration.

Not promote. The right is neither provided in the law nor is available in practice.

With respect to question two, the tax rules of Tanzania and the United Kingdom, and the practices of the Tanzanian Revenue Authorities (TRA) and Her Majesty's Revenue and Customs (HMRC) were reviewed. The findings are discussed below for Tanzania and the United Kingdom.

Tanzania

The study finds that in Tanzania there is a lot to be done on tax rules and tax practices when compared with the UK. This conclusion is drawn after examining how taxpayer's rights are promoted when tax officers execute their duties. The summary of the conclusion for each taxpayer's right is set out below.

Right to pay no more than the correct amount of tax

The study reveals that this right is weakly promoted in Tanzania. This is because, the right as such is not enshrined in the law. Nevertheless other mechanisms exist in Tanzania to ensure that the taxpayer pays the correct amount of tax. For example tax is levied and imposed through tax laws. A taxpayer who pays more than what is required is entitled to a tax refund; in the same way, a taxpayer who pays less than the amount required has to pay the outstanding amount of tax with penalties and interest. A taxpayer who believes that he has paid more than

is due may appeal against the assessed amount. In general there is some mechanism to ensure taxpayers pay the correct amount of tax.

Right to be informed

The present study shows that this right is ensured in two ways. First, there is a right to be informed generally, which means every taxpayer is informed in general about tax matters or tax law. The second way of ensuring the right to be informed is through drawing this right to the attention of individual taxpayers in relation to their individual tax matters.

The right to be informed is fairly promoted in Tanzania. This right is envisaged in the Constitution, however citizens are not assured of the availability of information. The Government is not obliged to provide information, and for the time being at least, in Tanzania there is no law that clearly governs the access to information.

For tax matters, the right to be informed is generally promised in the Tax Administration Act 2015, yet that Act has not explained anything concerning the manner and modalities of requesting information. The act has not obliged TRA to inform taxpayers. In fact this right is left to the discretion of TRA. It is the management of TRA that may decide to promote this right or not. It is therefore, difficult to taxpayers to file a case in a court of law to demand a right which is not clearly enshrined in legislation.

Right to certainty

Certainty is among the crucial aspects that may induce the voluntary compliance with tax laws. Certainty involves the availability of clear tax rules that may help a taxpayer to fulfil his tax obligations. Rules must be communicated to and understood by the taxpayers. Thus taxpayers must be certain as to the procedures and practices for the payment of tax and the manner of the determination of the taxable object. In Tanzania the right to certainty is weakly promoted. This right is not exclusively provided in law; however the practice from TRA has proven the availability of this right. Generally tax laws and regulations are (reasonably) clear in the sense that, for instance, the Income Tax Act 2004 has in-depth managed to provide a

list of transactions which are subject to tax. Moreover, the Income Tax Regulations have also clarified the procedures which are expected to be observed by taxpayers in calculating the amount of tax payable and making payment of the tax. However, there are still some challenges associated with the right to certainty. It was observed in this research that a taxpayer is not assured of the reliability of the information obtained through the TRA helpline or the official TRA website. That raises uncertainty: the usefulness of the help obtained through these channels is therefore questionable.

Right to be assisted

The right to be assisted is the right which requires a taxpayer to be assisted in case there is any hardship in understanding the tax law or procedures. This right is weakly promoted. The study finds that in Tanzania this right is neither promoted in legal documents nor in the Taxpayers' Charter. It is instead seen to be promoted based on the practice of the TRA. The right to be assisted is very subjective: everyone has different issues on which assistance is needed. Therefore, this right covers a wide range of matters and circumstances. Currently taxpayers may request assistance through telephones, emails or through a physical visit to one of the TRA offices. It is however uncertain to what extent a taxpayer may be assisted. Should a taxpayer expect assistance for a tax planning arrangement? Should a taxpayer expect assistance in filing a return? In practice these matters would probably have been resolved had this right been dealt within the Taxpayers' Charter or in the law. Nevertheless, the assistance obtained does not provide a reliable answer; thus a taxpayer cannot be given a guarantee of escaping punishment.

However the Tax Administration Act 2015 has empowered the Commissioner General to issue tax rulings on request by a taxpayer. A tax ruling is binding on the Commissioner if the taxpayer provides complete and correct information concerning the transaction or arrangement taken or to be undertaken.

Right to be heard

The right to be heard is effectively promoted in Tanzania. No decision is made without giving a taxpayer an opportunity to be heard. This right is promoted in the Constitution of the United Republic of Tanzania and in the Tax Revenue Appeal Act 2000. Article 13 of the Constitution says:

“To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:

when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned;”

Therefore, no decision will be taken on a taxpayer's matter unless the taxpayer is given an opportunity to be heard. The Tax Revenue Appeal Board has in several cases ruled against the TRA when it was informed that TRA took a decision without giving a taxpayer an opportunity to be heard.

Right to appeal

The right to appeal is fairly ensured in Tanzania. Section 51 to 53 of the Tax Administration Act 2015 has explained the procedures to be followed by a taxpayer who intends to appeal against decisions of the Commissioner General. Most of the decisions of the Tanzania Revenue Authority are subject to appeal. This right is available to any taxpayer who is aggrieved by a decision of the Commissioner of the Tanzanian Revenue Authority. An aggrieved taxpayer is required to appeal to the Tanzanian Revenue Authority before submitting his appeal to the Tax Revenue Appeal Board and the Tax Revenue Appeal Tribunal. The taxpayer cannot submit his appeal directly to the Tax Revenue Appeal Board or Tax Revenue Appeal Tribunal unless he has appealed to the Tanzania Revenue Authority beforehand. The Tanzanian taxpayer does not have the possibility to file complaints to a parliamentary agent (for instance an ombudsman). Likewise, no judicial review is seen to be

available for decisions that are not subject to appeal (for example: decisions regarding the discretionary powers of the Commissioner General); the right to judicial review has not been established in tax case law or in the Tax Administration Act 2015.

Right to a fair trial

The right to a fair trial moves parallel with the right to appeal, a taxpayer cannot demand the right to a fair trial unless he is given the right to appeal beforehand. In Tanzania the right to a fair trial is weakly promoted. There is a fear of impartiality of the appeal machineries. A Tanzanian taxpayer has a big problem with access to proper, impartial and fair justice. The existing structure of the tax appeal system does not seem to be composed of independent tribunals. The Tax Revenue Appeal Board (TRAB) and the Tax Revenue Appeal Tribunal (TRAT) are closely related to the Tanzania Revenue Authority (TRA). They are all supervised by the Minister of Finance; that is by the same department. The Ministry of Finance of any country has the role of safeguarding the interests of the existing government financially. Therefore, it is submitted, it is improper to let tax courts or tribunals be controlled by the same department. That structure raises doubts about the independence of the TRAB and TRAT. They may in practice be independent, but it is hard to confirm that. Theoretically it can even be said that (based on the current tax appeal structure) TRA makes tax assessment (on behalf of the Ministry of Finance), and TRAB and TRAT give judgment on behalf of the Ministry of Finance. In other words, the Ministry of Finance in effect, judges its own tax assessment.

Another challenge that exists in the tax appeal system of Tanzania is the assurance of the availability of competent members in the TRAB and TRAT. The Tax Revenue Appeal Act 2000 has not set clear standards on the academic or professional competencies a person has to acquire to qualify to be a member of the TRAB or TRAT. The Act simply requires a person to possess knowledge and experience of taxation, commercial or financial matters; indeed, Section 3 of the Tax Revenue Appeal Act 2000 explains that:

“A person may be appointed to be

Chairman if he is a principal legal officer or a person having adequate knowledge of taxation;

Member of the Board if he has knowledge of and experience in taxation, commercial or financial matters.”

It may well be that in practice the TRAB and TRAT will be composed of members who are incompetent in solving tax disputes. It should be remembered that the decisions of the Tax Revenue Appeal Board are handed down by a simple majority vote. Therefore, if these incompetent members have equal voting powers as the qualified and competent members in making a ruling on a tax case, a fair and impartial decision will be difficult to attain.

Yet another challenge that exists with the tax appeal system in Tanzania is the deviation from the principle of access to justice. It should be the case that every taxpayer is given an opportunity for access to justice, which means all factors that induce justice for taxpayers must be easily accessible: matters like competent and impartial judges, fair trials and adequate – and for those who cannot afford it: free – assistance. In practice the appeal procedures in Tanzania are in conflict with the principle of justice because an appeal is sometimes only possible if the taxpayer is allowed to appeal: a taxpayer can only appeal to the Tax Revenue Appeal Board after objecting to the Commissioner General of the Tanzania Revenue Authority (as observed earlier, all of these organs are closely related).

Finally a taxpayer will have access to an independent and impartial organ only when he appeals against the decision of the Tax Revenue Appeal Tribunal to the Court of Appeal. While the Court of Appeal is independent, when a taxpayer reaches there, this Court will no longer deal with the facts of the case, but only with questions of law. Section 25 (2) of the Tax Revenue Appeal Act provides that

“Appeal to the Court of Appeal shall lie on matters involving questions of law only and the provisions of the Appellate Jurisdiction Act and the rules made thereunder shall apply mutatis mutandis to appeals from the decision of the Tribunal.”

Given all of this it can simply be concluded that a Tanzanian taxpayer is given insufficient opportunity to present his case before an independent and impartial organ and when this opportunity is available it is in a very late stage.

It was not the objective of this dissertation to find out the reasons for the failure of the tax appeal system of Tanzania to meet the fair trial criteria. Yet a brief glance reveals that the Tanzanian Constitution has, to a great degree, influenced the failure. The Bill of Rights of the Constitution of the United Republic of Tanzania, unlike other human rights documents, has not explained clearly the right to a fair trial. Article 13 (6) of the Constitution provides that:

“To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:

when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned...”

The right to a fair trial has not been elaborated to include the need to have an independent and impartial tribunal, although other documents do make this plain. For example, in Article 6 of the European Convention of Human Rights the issue of a fair trial is dealt with as follows:

“In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by the law...”

Moreover, similar words of clear presentation of the right of a fair trial are seen in Article 7 of the African Charter on Human Rights and Peoples Rights.⁹²² The charter provides that

⁹²² From 9 March 2010, Tanzanian NGOs and individuals may appeal to the African Court on Human and Peoples rights provided that they have exhausted all domestic remedies.

*“Every individual shall have the right to have his cause heard. This comprises:
(a) the right to an appeal to competent national organs against acts of violating
his fundamental rights...(d) the right to be tried within a reasonable time by an
impartial court or tribunal.”*

Therefore, the difference in the promotion of the right of a fair trial reveals that the Constitution of Tanzania does not place an obligation to the state to establish independent and impartial tribunals. Even though the African Charter on Human and Peoples Rights has required the existence of competent judges, the influence of regional integration on domestic law is, as was concluded earlier, very minimal.

Right to privacy

The right to privacy is fairly promoted in Tanzania. This right is enshrined in the Constitution of the United Republic of Tanzania and in the Taxpayers' Charter; however there is insufficient mechanism to ensure the effective accessibility of this right. In the Constitution, the right of privacy is promoted highly for natural persons, for corporate taxpayers the right of privacy is promoted in the Taxpayers' charter.

Article 16 of the Constitution provides that

*“Every person is entitled to respect and protection of his person, the privacy of
his own person, his family and of his matrimonial life, and respect and protection
of his residence and private communications.”*

The right of privacy for corporate taxpayers is promoted in the Taxpayers' Charter, paragraph 7.2 of which states that:

*“The taxpayer has a right to privacy and confidentiality for private and business
information supplied to TRA unless the law derogates such privacy and or
confidentiality.”*

The main weakness surrounding this right is the way how this right is promoted. This right is seems to be promoted highly for natural persons. Legal persons do not seem to be the focus of this right. This conclusion is drawn because of how this right is written in the Constitution. The Constitution is concerned more with privacy of family and matrimonial life, and privacy of residence and private communications. Companies are unlikely to demand the protection of privacy of matrimonial life or privacy of family life.

Moreover, the right of privacy for tax purposes may easily be interfered. For example, when a company fails to maintain documents, the Tax Administration Act 2015 empowers the Commissioner of Domestic Revenue and any other tax officer to enter a building, and to have full and free access thereafter to the building, documents or other assets, and to take a copy of any document found in that building. This power may be exercised in day time (between 9 am to 6 pm) and there is no obligation to issue a prior notice to the taxpayer. Similarly, the Commissioner is not required to have a warrant issued for that purpose. With respect to this power section 42 of the Act requires that:

“The commissioner without any prior notice be granted full and free access to any premises, place, document, vessel, vehicle or aircraft...”

Right to confidentiality

The right to confidentiality, similarly with the right of privacy, is fairly promoted. The right is enshrined in the law, however in practice, the mechanisms to ensure confidentiality are not clearly known. Neither the law nor administrative guidance has provided detailed information on how safe the information of a taxpayer is. The extent to which a taxpayer's personal information or business secrecy will be confidential is not surely known. The tax law permits breach of this law. Simply, a taxpayer is promised this right on the one hand and it is snatched back through the other. For example, section 21 of the Tax Administration Act 2015 has imposed an obligation on tax officers to treat all information submitted to them as secret and confidential. It provides that

“A person who is or was employed or engaged by the Authority to provide assistance to the Authority shall treat all information and documents that, by reason of his employment or engagement, come into his possession or knowledge in connection with any tax law, as secret and confidential.”⁹²³

However, if any other tax officer requires information that has been held secret; he may access the information from the tax officer who holds it, provided that the tax officer who needs the information intends to use the information to perform his official duties. Also any person who is authorised by the Commissioner General may access the information that is held secret. In general, the right of confidentiality is seen to be loosely assured. The law has not obliged TRA to inform the taxpayer in case it intends to exchange a taxpayer's information.

In Tanzania, the right of confidentiality may be infringed without any authorization from a court. The main criterion that seems to prevail is the performance of official duties. The TRA may exchange information about a taxpayer with tax authorities of foreign countries provided that the TRA and the foreign country have concluded a treaty that allows sharing of information.

The only scenario where the taxpayer's consent to disclosure is required before disclosing the information is when the taxpayers' information is required by another taxpayers. On this matter, Section 21(5) of the Tax Administration Act 2015 provides that

“This section does not prevent disclosure of information relating to a specific taxpayer to the taxpayer concerned or, with the taxpayer's written consent, to another person.”

The TRA holds taxpayers' information and may use it to perform its responsibility; i.e. the information is used by tax officers to determine the correct amount of tax due. However, the TRA may also share taxpayers' information with other state agencies such as the police and Parliamentary Committees. It is not certain how the confidentiality will be assured during the

⁹²³ Tax Administration Act 2015, section 21.

process of sharing of information. Taxpayers' information may contain information about business products or business processes; it may also contain information about the value of intellectual property rights and information about finished or ongoing research and development (to mention but a few matters). This information is commonly referred to as business secrets. The leakage of business secrets may result in commercial loss, particularly if the information is leaked to a taxpayer's business competitors. It is very unfortunate that there appears to be no remedy to a taxpayer whose information has been leaked.

Conclusion

In general, in Tanzania, the promotion of taxpayers' right needs the improvement. Most taxpayers' rights are lousy promoted; some of taxpayers' rights are not exclusively promoted in the law. Likewise there is no sufficient mechanism to ensure taxpayers effectively utilize the taxpayers' rights.

United Kingdom

The research into how (the tax officers of) Her Majesty's Revenue and Customs (HMRC) respect taxpayers' rights when performing their duties enables the following conclusions to be drawn.

Right to pay no more than the correct amount of tax

In the UK, the right to pay the correct amount of tax is weakly promoted. This right has not been enshrined explicitly in UK law. However, there are some mechanisms in the UK tax systems that enforce the tax administration to levy and collect only the correct amount of tax. If HMRC collects more than the required amount of tax, HMRC must refund the overpaid amount of tax to a taxpayer. Similarly, a taxpayer who pays less tax than is due must pay the amount of tax due that remains unpaid together with interest.

The right to pay the correct amount of tax is also evidenced when a taxpayer is not satisfied with the assessment made by HMRC. Normally when a taxpayer intends to appeal against the assessment, HMRC may offer such taxpayer a review. The review is intended to give HMRC a chance to double-check its previous decision to see whether the assessment was correct.

Right to be informed

In the UK the right of being informed is effectively promoted. This right is enshrined in the laws of the UK. The right to be informed is promoted through the Human Rights Act 1998 that incorporates the European Convention on Human Rights into UK law. In several Articles, the Convention requires persons to be informed in clear and simple language; for example, Article 5 requires a person who is arrested to be informed, in a language which he understands, the reasons for his arrest and of any charge against him; likewise, Article 6 requires a person who is charged with a criminal offence to be also informed in a language which he understands. He also has to be informed of the nature and cause of the accusation against him.

The right to be informed is also promoted in the Freedom of Information Act 2000. Section 1 of this Act requires anyone who requests information to be provided with the information

“Any person making a request for information to a public authority is entitled-

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request... ”

Likewise the right to be informed is promoted in the Taxpayers' Charter. Even though the Taxpayers' Charter by itself is not legally binding document, the Taxpayers' Charter is established through law. Therefore, it forms part of legitimate expectations, and taxpayers may rely on what has been promised by HMRC through the Taxpayers' Charter. A taxpayer is promised to be informed about his right to appeal against any HMRC decision. This is supposed to happen when a tax officer made a notice of assessment to the taxpayer. Moreover, the Charter promises a taxpayer that in case there is a need to require any information from him, HMRC will inform the taxpayer beforehand on the types of information it needs, and the

time to submit the information. If HMRC needs to clarify the information or needs to question a taxpayer, the taxpayer will be about informed the reasons for such inquiries.

The Taxpayers' Charter explains the right to be informed as follows;

“We want to give you as much certainty as we can... we will provide information that helps you to understand what you have to do and when you have to do it...”

In general, the right to be informed is plainly sufficiently enshrined in the UK. The official website of the HMRC contains detailed information about general tax issues. A taxpayer may use the information obtained from the HMRC website to file his tax return or to calculate tax. This was evidenced in the case of *B&J Shopfitting Services v The Commissioners for HMRC*; in this case a taxpayer failed to submit a return on time. The failure was caused while relying on information available on the HMRC website and on assistance from the HMRC helpline. In its submissions, HMRC claimed that failure of the taxpayer to meet his responsibility should not be shielded by the information obtained through the website, because there is a law which governs levying and collection of tax. The Tribunal judge ruled that HMRC is the government's tax collector; and it is reasonable to presume that their published guidance is a correct statement of the law; therefore, the taxpayer was right to rely on the information obtained through the website.

Right to certainty

In the UK, the right of certainty is weakly promoted. There appears to be no specific legal provision conferring certainty rights. However, in practice the certainty right in the UK is promoted under the umbrella of the principle of legitimate expectation. A taxpayer is assured of the certainty of the information available through official channels by HMRC. In *B&J Shopfitting v The Commissioners for HMRC* the judge observed that

“Where it is HMRC who has misstated the law, it seems to me that this is quite a different matter. HMRC has responsibility for gathering the correct amount of tax and it must be reasonable for a taxpayer to rely on HMRC's guidance as a

correct statement of the law ... HMRC must therefore ensure that they do not mislead taxpayers into mistaken actions..."

In the same way, when a taxpayer for example requests a private ruling from HMRC, and he completely complies with all the requirements set by HMRC, ultimately, if it turns out HMRC made an incorrect interpretation of the law, the ruling will still be binding on HMRC.⁹²⁴ Taxpayers will be protected by relying on the information and guidance given by the HMRC.

Right to be assisted

The right to be assisted is weakly promoted in the UK. The right is not enshrined in the law. It is however accessed through the HMRC practices. HMRC issues tax rulings in case there is uncertainty of the application of the law. Likewise, HMRC issues several forms of administrative guidance that intend to clarify the application of the tax law on certain matters.⁹²⁵ This is always true for matters that are not easy to determine, such as determination of deductible interest through the arm's length principle in thin capitalization,⁹²⁶ and in transfer pricing matters.

Right to be heard

The results of this research show that in the UK there is no problem with the right to be heard. The right to be heard is effectively promoted. Taxpayers are always given an opportunity to present their views before any decision taken against them is final. The right to be heard is enshrined in the Human Right Act 1998 and in the Appeal tribunal rules where it is provided

⁹²⁴ <http://webarchive.nationalarchives.gov.uk/20140109143644/http://www.hmrc.gov.uk/cap/links-dec07.htm>, last visited 14 February 2017.

⁹²⁵ See <https://www.gov.uk/government/organisations/hm-revenue-customs/services-information> for a list of manuals and guidance, last visited 6 January 2017.

⁹²⁶ Ibid.

that no appeal shall be ruled upon without giving a taxpayer an opportunity to be heard. Rule 26 of the Tribunal Rules⁹²⁷ provides that:

“...the Tribunal must hold a hearing before making a decision which disposes of proceedings, or a part of proceedings, unless-

(a) each party has consented to the matter being decided without a hearing; and

(b) the Tribunal considers that it is able to decide the matter without a hearing.”

Moreover, the right to be heard in the UK is enshrined in the Taxpayers' Charter, in which HMRC promises taxpayers that:

“...We'll listen to your concerns and answer your questions clearly. We'll presume that you're telling us the truth, unless we have good reason to think otherwise.”

The right to be heard is closely related to the right to appeal. The right to appeal is concerned with giving an opportunity a taxpayer to present his case before the tax court or tribunal, while the right to be heard is concerned with the manner how the appeal is presented. It can be said that giving a taxpayer a right to appeal is an open door for the right of being heard because the general principle is that in every tax appeal there must be a hearing.

Right to appeal

In the UK a right to appeal is effectively promoted. A taxpayer usually has various options for appeal. The taxpayer may appeal at HMRC and adjudicators (both options are within the tax authority; the adjudicator only deals with issues that cannot be brought for a tribunal or court). Taxpayers may also bring a case to the Parliamentary Ombudsman (these cases usually concern maladministration by HMRC and in practice concur with issues that could have been brought for the adjudicators). Lastly, a taxpayer may appeal to the judiciary through the First-

⁹²⁷ <http://www.legislation.gov.uk/uksi/2009/273/contents/made>, last visited 7 May 2018.

tier Tribunal or Upper Tribunal regarding decisions taken by HMRC with respect to the application of the tax law.

Generally the right to appeal is explained in detail in Part V of the Taxes Management Act 1970, in Sections 44-56. Also it is enshrined in the Human Rights Act 1998 and in the European Convention on Human Rights.

Right to a fair trial

The right to a fair trial is effectively promoted in the UK. This right is exclusively enshrined in the Human Right Act and in the European Convention on Human Rights. Article 6 of the Convention provides that:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

The major change to the appeal system in the UK, April 2009, strengthened the appeal system by instituting mechanisms that seem to enhance the impartiality of the appeal machineries. As from that date, the appeal tribunals are brought under the Ministry of Justice not Finance as used to be the case. Likewise members and judges of the appeal tribunal are deemed to be competent academically and in experience. Likewise judges are deemed to be impartial because their budget is no longer financed directly by HMRC as it is used to be.

Right to privacy

The right to privacy in the UK is effectively promoted. The right to privacy is promoted in the Human Rights Act 1998 through the European Convention on Human Rights. Article 8 of the Convention requires everyone's private life to be respected. Moreover, the right to privacy is promoted in the Taxes Management Act 1970; section 20 of that Act prohibits revenue officers from requiring taxpayers' information without the authorization of the Tribunal. A tax officer is not allowed to access taxpayers' information, unless the First-tier Tribunal is satisfied that an officer who is making an application to the Tribunal to access the taxpayers'

information is justified in the sense that he must be an officer who is in the line of his duty (who is authorized to assess that particular taxpayer). The First-tier Tribunal will not allow an officer (even an authorised officer) to access the information unless HMRC proves to the satisfaction of the First-tier Tribunal that there are good reasons why the officer is seeking to take that course of action.

In the UK, a tax officer cannot visit and inspect a taxpayer's premises without issuing a notice to the owner or occupier of the building. The notice must specify possible consequences of obstructing an officer exercising this power. The notice must also state date and time of inspection, and the purpose of the inspection. The notice must also state whether the inspection has been approved by the First-tier Tribunal.

Right to confidentiality

The right to confidentiality is fairly promoted in the UK. This right is promoted in Section 18 and 19 of the Commissioner for Revenue and Customs Act 2005. HMRC in practice takes into consideration taxpayers' confidentiality in executing its duties. There is an incident where HMRC refused to share a taxpayer's information with a Parliamentary Committee on the ground of taxpayer's confidentiality. Similarly, the Courts have recently ruled in favour of the taxpayer when HMRC staff shared taxpayer's information with the press. A possible improvement in the protection of this right is the involvement of a taxpayer during the exchange of information. The availability of a remedy to a taxpayer whose information is leaked should also be clearly stated. Currently HMRC may share the taxpayers' information within and outside the UK between tax administrations. The exchange of information places taxpayer's confidentiality at risk of leakage of information; especially as regards business secrets. The taxpayer is not informed during the exchange of information, nor can he appeal against the exchange of information. Therefore, a taxpayer cannot prevent the exchange of information even if he has a reason to believe that there is a great risk of leakage of the information that contains trade secrets.

Conclusion

These general findings concerning the promotion of the taxpayers' rights in the UK show that the UK does not have severe problems concerning the promotion of taxpayers' rights. The strength became viable when the European Convention of Human Rights was incorporated into UK law by the Human Rights Act 1998.

Question 3: How do international laws and treaties influence the promotion of corporate taxpayers' rights in the UK and in Tanzania?

UK

The study reveals that there is a great influence of regional integration on taxpayers' rights in the UK. Section 1 of the UK Human rights Act 1998 has enshrined the human rights safeguarded in the European Convention on Human Rights in UK domestic law. This means that even though the UK legal system does not allow the direct application of international treaties ratified by the UK, currently all the human rights which are promoted in the European Convention on Human Rights are part of domestic law because they have been included in the Human Rights Act 1998, which is an Act of Parliament. A similar approach was taken to give domestic legal effect to what is now EU law through the European Communities Act 1972.

Moreover, the European Court on Human Right (ECtHR) has ruled in several cases against UK laws. I mean the UK was found to have breached rights conferred by the ECHR. This has resulted in the amendment of provisions of UK law or practices that were found to violate human rights. Similarly, rulings made by ECtHR have contributed to UK case law. UK judges have in many cases referred to the ECHR in their judgments.

As a result of the Human Rights Act 1998, every law passed by the UK parliament now has to be compatible with the ECHR. The UK Parliament will not pass any bill unless the minister responsible submits the bill with the statement that explains the compatibility of the proposed

law with the human rights stipulated in the ECHR. Were regional integration treaties of no importance, the UK would probably not have adopted this rule. The fact that the Conservative Party seriously intended to leave the ECHR and to establish a UK Bill of Rights, particularly to minimize the influence of the ECtHR rulings in the UK courts, is strong evidence to show that currently regional integration has a significant influence in UK law.

The EU as the major vehicle of regional integration in Europe has taken something of a supervisory role. The European Commission strongly supervises the implementation of the decisions issued by the centralised EU judiciary (in particular the ECJ's rulings on preliminary references from national courts of the Member States). The UK courts have been instructed to follow the case law of the ECJ, and this has resulted in the modification of the law on many occasions. The UK as part of the EU has been forced to change several laws which violate fundamental rights.

Therefore, it is submitted that the ECtHR in particular has great influence in domestic laws on the promotion of taxpayers' rights in the UK. The EU influence is largely on matters pertaining to the application and implementation of rights and duties flowing from EU law itself.

Tanzania

Things are quite different in Africa. The influence of regional integration on domestic law is minimal. Taking Tanzania as an example, this study has found that the rule of law of African countries is the result of domestic and international initiatives; the latter especially from donor countries. Domestic scholars, activists and politicians have great influence on the change of law or on administrative practices of African Countries. There is a huge influence of donor countries on the African rule of law. A good example in Tanzania is the (just ended) project of the Business Environment Strengthening Programme for Tanzania (BEST Programme).⁹²⁸

⁹²⁸ The programme was funded by four donors (DANIDA, SIDA, DFID, and the Royal Netherlands Embassy). Some of the objectives of the programme were to reduce barriers in business, to change the culture of

This resulted in the establishment of new laws and changes in existing laws and rules to meet the standards set by the donors. For example, in 2007, as a result of the BEST programme, the Business Activities Registration Act of 2007 was introduced,⁹²⁹ and the Court of Appeal Rules were changed.⁹³⁰ The World Bank has also influenced the establishment of several administrative procedures to meet the standards they initiate.⁹³¹ In general developed nations (Donor Countries) impose conditions on African states when they intend to provide political or economic aid. One of the conditions that is usually imposed by donor countries is to require a country to respect the rule of law. Currently African regional integration instruments do not have much influence to initiate changes of domestic law.

Question 4: How are corporate taxpayers' rights influenced by the recent development with respect to anti-BEPS measures for corporate taxpayers?

The EU and the OECD are still looking for viable solutions to minimize BEPS. Several anti-BEPS measures have already taken by the EU and the OECD. Others measures are still on the drawing-board. It is undeniable fact that proposing anti-BEPS measures is a crucial step towards a fairer tax system. However, some of these measures expose corporate taxpayers' rights to a great risk of being infringed, especially the right to confidentiality. So far, the OECD and the EU have generally promoted the right to confidentiality in most reports and directives made by the OECD and the EU respectively. Countries are required to set standards to ensure confidentiality of taxpayer's information. For example, the BEPS report on action

government and to enhance commercial dispute resolution. It was a five years programme that commenced in 2004.

⁹²⁹ See the report on the implementation of the investment policy review, accessed through http://unctad.org/en/Docs/diaepcb201006_en.pdf, last visited 11 September 2015.

⁹³⁰ <http://www.lrct.go.tz/download/brochures/COURT%20OF%20APPEAL.pdf>, last visited 11 September 2015.

⁹³¹ <http://search.worldbank.org/projects?qterm=tax+system+Tanzania&projsname=&id=&os=10>, last visited 14 February 2017.

13 concerning Country-by-Country Reports allows a sending country to reject exchange of the information to a country that has breached the confidentiality of information sent to it previously.

However, there are some challenges associated with the right to confidentiality. The OECD has not sufficiently dealt with taxpayer's right to confidentiality on cross-border exchange of information. Rules governing confidentiality are largely left in the hands of domestic laws of countries that exchange information or in the bilateral treaty between them. Both the OECD and the EU have failed to oblige countries to notify (inform) a taxpayer about the exchange of information. There is no rule that has been set to let the taxpayer appeal against the exchange of information. It is submitted, therefore, that the OECD and the EU should oblige countries to inform the taxpayer during the exchange of information. Likewise, the taxpayer should be allowed to appeal against the exchange of information if he believes that his confidentiality will be compromised. This will enhance rule of law, transparency, and trust between taxpayers and tax administrations.

Furthermore, it is clear that tax planning, as part of taxpayers' rights is about to perish. The OECD report on action 12 seems to prohibit tax avoidance. This report requires countries to introduce mandatory disclosure. This would require taxpayers (or promoters) to declare tax avoidance scheme to the tax authorities, and to state the possible tax benefit that might be acquired from the scheme. Once the taxpayer made a declaration, the revenue authority may immediately propose the amendment of the tax law provision which resulted in the tax advantages. Generally, it seems tax administrations intend to end tax planning and avoidance by using the intelligence and skills of taxpayers and tax advisers.

The general question: are corporate taxpayers' rights sufficiently promoted in Tanzania?

In general corporate taxpayers' rights are not sufficiently promoted in Tanzania. This conclusion is reached on the basis of the following factors:

- a) There are some taxpayers' rights for corporate taxpayers which in practice are promoted through the Taxpayers' Charter and other administrative guidance. These rights are not enshrined in the law. This is a weak form of protection of taxpayers' rights. The Taxpayers' charter and other administrative guidance on taxpayers' rights made by TRA are non binding documents. A taxpayer cannot use them before a court of law to demand his rights. Taxpayers rights that are promoted in the taxpayers charter but not in the law are
 - i. right to certainty
 - ii. right to pay no more than the correct amount of tax;
- b) The wording of law seems to focus more on natural person then on corporate taxpayers. This may lead one to believe that the particular right is not intended for corporate taxpayers. For example, the wording of the Constitution for the right of privacy;
- c) Tanzanian law permits easy intervention of taxpayers' rights. For example the Tax Administration Act 2005, allows the Commissioner General to inter into a taxpayers premises at anytime and without an earlier approval from the court. Thus the right of privacy is at risk of being breached;
- d) Tanzanian law does not provide detailed and sufficient mechanisms to ensure the availability of taxpayers' rights. This is evidenced in the right to a fair trial. Even though this right is enshrined in the law, the law has not exclusively explained mechanism to ensure a fair trial exists.

10.3 Recommendations

After studying the current tax system of the UK and Tanzania the following recommendations are made.

Tanzania

Tanzania should establish a tax appeal system that should clearly be seen to be independent, competent, and fair to taxpayers and the tax authority. The existing tax appeal systems are seen to jeopardize the independence of the appeal system because of the prevailing relationship between the revenue authority and the appeal boards. The following concrete recommendations result:

- a) To establish tax courts or a tribunal system under the auspices of the Ministry of Justice. Otherwise, there should be an independent division in the High Court to deal with tax matters only, like the existing business and land divisions in the High Court. If the tax appeal tribunals are placed under the Ministry of Justice, it will increase public trust in those bodies. Separating tax dispute resolution bodies from the TRA will improve the feelings that those bodies are independent. Of course, the repositioning of the tax tribunals under the Ministry of Justice does not necessarily mean that the appeal bodies will be more independent than before. There should be more guarantees to secure the independence of the tax appeal tribunals. For example, judges and members of the tax tribunal must be competent, and impartial. The decisions by the judges should not be influenced by anyone, or by anything other than the promotion of justice. This leads to the recommendations in paragraph (b) below.
- b) To establish measurable criteria for a person to qualify for the appointment as a judge or member of the tax appeal tribunals. The current system does not provide clear measurable criteria for a person to qualify to be a member of the TRAB or TRAT. It is not enough to state simply that a person should have knowledge and experience in business. The knowledge required for appointment as a member of the TRAB or

TRAT must be clearly specified. Likewise, the manner to determine the experience required should also be specified.

- c) The right of a taxpayer to be served by an independent tax appeal tribunal should be guaranteed in the Constitution. Currently Article 13 (6) of the Constitution states that

“Any person whose rights are being determined by the Court or any other agency is entitled to a fair hearing and to a right of appeal or other legal remedy against the decision of the court or of the other agency concerned.”

This provision does not address the issue of an independent and competent court or tribunal. It is therefore recommended that the Constitution should explicitly require an independent and competent court.

Concerning the issue of protection of taxpayers' rights, it is submitted that to promote taxpayers rights without protecting them by law is like giving somebody money using one hand and stealing the same back with the other hand. Tanzania has laid down the taxpayers' rights in the Taxpayers' Charter; the legal status of the Taxpayers' Charter however is not binding on the TRA. This leads to the following recommendation:

- d) To incorporate the Taxpayers' Charter in the existing tax law. The Taxpayers Charter should be introduced in the tax law. For instance they should be included in the Tax Administration Act as sections within this act. Moreover, it should be clearly stated that taxpayers' rights apply to natural and legal persons.

Other recommendations concerning the promotion of taxpayers' rights in Tanzania are:

- e) There should be a clear balance between taxpayers' rights and the powers vested in the Tanzania Revenue Authority (TRA). For example, the current powers of the TRA to enter taxpayers' premises endanger the right of privacy of taxpayers. Currently tax-officers may, during daytime, without needing the permission of a court, and without prior notice to a taxpayer, visit and inspect taxpayers' business premises and take

copies of the taxpayers' business documents. It is recommended that the power of TRA to enter business premises should be subject to prior approval by a court or independent tribunal and the taxpayer should be notified. Similarly, the power to arrest should be left to the police. Police are more competent than the TRA to carry out the arrest.

Websites are expected to be an important channel of information. It is recommended that the information obtained from the official website of the TRA must be binding on the TRA. Currently the TRA website has a lot of information that helps a taxpayer, but there is no legal guarantee of the information obtained through the TRA's official website; this means that a taxpayer is not always certain of the validity of the information obtained there from. Of course there may be a fear that hackers might hack the TRA website and place wrong tax information on the site. These are simply among the challenges of the digital world. The Tanzania Revenue Authority is required to have competent personnel in Information Technology to protect the authenticity of the information posted in the websites. Hackers may intervene in all electronic communications including emails, but we cannot simply decide not to allow taxpayers to communicate by emails because of the fear of hackers.

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APPENDICES

ENGLISH SUMMARY

NEDERLANDSE SAMENVATTING

ENGLISH SUMMARY

The study compares the legal position of corporate taxpayers subject to corporate income tax in Tanzania and the United Kingdom. In order to explore this position the legal protection of corporate taxpayers is examined. The first issue that is discussed is the relationship between human rights and taxpayers' rights. With respect to this subject it is tested whether or not human rights are intended to serve both natural persons and legal persons. On this matter, the research shows that both legal and natural persons are entitled to human rights. This conclusion is highly evidenced in Europe where there are several cases that involve legal persons (companies) claiming successfully that their 'human' rights have been infringed. However, it was hard to prove the same in Africa. Most of the human rights complaints in Africa were raised to protect natural persons and refer to political rights. The second issue that is discussed is the corporate tax structure and the background of corporate tax in Tanzania and the United Kingdom. Furthermore the structure of the tax administration and the mechanism of dispute resolution of both countries is described.

Generally the study compares the tax systems of Tanzania and the United Kingdom especially on the promotion of taxpayers' rights. The data were collected and analysed based on the domestic law and other rules of Tanzania and the United Kingdom covering corporate tax, human rights, and taxpayer's rights. International treaties governing human rights in Africa and Europe were also used. Furthermore, domestic and international tax case-law has been used. The study finds that Tanzania needs to do a lot on tax rules and tax practices concerning taxpayers' rights when compared with the United Kingdom. This conclusion is drawn after examining how taxpayers' rights are promoted when tax officers execute their duties in both countries.

Several setbacks are observed in the Tanzanian tax system with respect to the promotion of taxpayers' rights. The study finds that in Tanzania some taxpayers' rights are not enshrined in the law, but are either promoted through administrative manuals or through practices. Likewise, the wording of the law seems to focus more on natural persons than on legal persons and in some instances the law allows for an easy infringement of taxpayers' rights. For instance: the tax authorities may enter into a business premises of a taxpayer without prior authorization from the courts.

The thesis also reviews the influence of regional integration on domestic law, specifically on the promotion of taxpayers' rights. It is concluded that regional integration has substantial influence on taxpayers' rights in the United Kingdom. This conclusion is drawn due the influence of the European Court of Human Rights and the European Union on the domestic law of the United Kingdom. However in Africa, the influence of regional integration on domestic law is minimal. Taking Tanzania as an example, this study finds that the rule of law of African countries is the result of domestic and international initiatives. With respect to domestic initiatives domestic scholars, activists and politicians have great influence on the law and on administrative practices of African countries. As far as international initiatives are concerned there is a considerable influence of donor countries on the rule of law in African countries.

The last part of the thesis reviews how corporate taxpayers' rights are influenced by recent developments with respect to measures against base erosion and profit shifting (BEPS) for corporate taxpayers. It is observed that introducing these measures, as suggested by the OECD, is a crucial step towards a fairer tax system. However, some of these measures expose corporate taxpayers' rights to a great risk of being infringed, especially the right of confidentiality. The OECD has not sufficiently dealt with taxpayers' rights to confidentiality on the cross-border exchange of information. Rules governing confidentiality are largely left in the hands of the domestic lawmakers of countries that exchange information on the basis of bilateral treaties between them.

NEDERLANDSE SAMENVATTING

Deze studie vergelijkt de rechtspositie van vennootschapsbelastingplichtigen in Tanzania en het Verenigd Koninkrijk. In dat kader wordt de rechtsbescherming van vennootschapsbelastingplichtigen onderzocht. De eerste aangelegenheid die wordt besproken is de relatie tussen mensenrechten in het algemeen en de rechten van belastingplichtigen in het bijzonder. Daarbij is de conclusie dat de rechten van belastingplichtigen een uitwerking zijn van mensenrechten die kunnen worden toegepast in belastingzaken. Met betrekking tot dit onderwerp wordt ook de stelling getoetst of niet alleen natuurlijke personen maar ook rechtspersonen een beroep op mensenrechten kunnen doen. Het onderzoek laat naar aanleiding van deze vraag zien dat zowel natuurlijke personen als rechtspersonen aanspraak kunnen maken op de toepassing van mensenrechten. Deze conclusie valt in Europa in hoge mate te onderbouwen omdat rechtspersonen daar in verschillende fiscale zaken met succes hebben weten te stellen dat hun ‘mensenrechten’ zijn geschonden. Voor Afrika is het lastiger te bewijzen dat rechtspersonen ook aanspraak hebben op mensenrechten. De meeste klachten over schendingen van mensenrechten zijn aanhangig gemaakt door natuurlijke personen en hebben betrekking op politieke rechten. De tweede aangelegenheid die wordt besproken is de structuur en de achtergrond van de vennootschapsbelasting in Tanzania en het Verenigd Koninkrijk. Voorts is er aandacht voor de inrichting van de belastingdienst van beide landen en worden de methoden van geschilbeslechting in Tanzania en het Verenigd Koninkrijk besproken.

In algemene zin worden in deze studie de fiscale stelsels van Tanzania en het Verenigd Koninkrijk vergeleken op het punt van de bevordering van de rechten van

belastingplichtigen. De relevante gegevens werden verzameld en geanalyseerd op basis van het nationale recht en het samenstel van andere regels van Tanzania en het Verenigd Koninkrijk dat betrekking heeft op de vennootschapsbelasting, de mensenrechten en de rechten van belastingplichtigen. Hierbij werden ook internationale mensenrechtenverdragen gebruikt die van toepassing zijn in Afrika en Europa. Voorts is gebruik gemaakt van nationale en internationale rechtspraak.

Het onderzoek wijst uit dat Tanzania in vergelijking met het Verenigd Koninkrijk nog het nodige moet verbeteren waar het gaat om de fiscaal juridische regels en praktijken die zien op de rechten van belastingplichtigen. Deze conclusie kon worden getrokken na te hebben onderzocht hoe de rechten van belastingplichtigen worden nageleefd door de medewerkers van de belastingdienst in beide landen.

In het Tanzaniaanse belastingstelsel zijn diverse tekortkomingen op het punt van de bevordering van de rechten van belastingbetalers waargenomen. In het onderzoek is geconstateerd dat sommige rechten van belastingplichtigen niet zijn vastgelegd in de wet, maar worden bevorderd door administratieve aanwijzingen of door praktisch handelen van de belastingautoriteiten. Daar komt bij dat de wettekst zich soms meer lijkt te richten op natuurlijke personen dan op rechtspersonen en dat de wet in sommige gevallen het schenden van de rechten van belastingplichtigen zonder veel problemen toestaat. Als voorbeeld kan de situatie worden genoemd waarin de belastingautoriteiten een bedrijfsterrein van een belastingplichtige zonder voorafgaande toestemming van de rechter mogen betreden.

Het onderzoek richt zich ook op de invloed van regionale integratie op nationale wetgeving, in het bijzonder op de bevordering van de rechten van belastingplichtigen. Uit het onderzoek is naar voren gekomen dat regionale integratie de toepassing van de rechten van belastingplichtigen in het Verenigd Koninkrijk substantieel heeft beïnvloed. Deze conclusie is gebaseerd op de invloed van het Europees Hof van de Rechten van de Mens en de Europese Unie op het nationale recht van het Verenigd Koninkrijk. In Afrika is de invloed

van regionale integratie echter minimaal. Tanzania kan in dit verband als een voorbeeld worden genomen. Het onderzoek wijst uit dat de ‘rule of law’ in dit Afrikaanse land vooral het resultaat is van binnenlandse en buitenlandse initiatieven (anders dan regionale integratie). Met betrekking tot binnenlandse initiatieven moet daarbij worden gedacht aan lokale wetenschappers, activisten en politici die grote invloed hebben op de administratieve praktijken in Afrikaanse landen. Voor wat betreft internationale initiatieven moet worden gedacht aan de aanzienlijke invloed van donorlanden in Afrikaanse landen.

Het laatste onderdeel van dit onderzoek handelt over de vraag in hoeverre de rechten van belastingplichtigen die zijn onderworpen aan de vennootschapsbelasting door recente ontwikkelingen op het gebied van de maatregelen tegen grondslagerosie en winstverschuiving (BEPS) worden beïnvloed. Geconstateerd wordt dat de invoering van deze maatregelen, zoals aanbevolen door de OESO (Organisatie voor Economische Samenwerking en Ontwikkeling), een cruciale stap is naar een rechtvaardiger belastingstelsel. Echter, sommige van deze maatregelen vormen een bedreiging voor de toepassing van de rechten van belastingplichtigen. In dit verband kan worden gewezen op het recht op geheimhouding. De OESO heeft onvoldoende rekening gehouden met het recht op geheimhouding bij de grensoverschrijdende uitwisseling van informatie. De vormgeving van de regels die zien op de geheimhouding zijn grotendeels overgelaten aan de nationale wetgevers van de landen die informatie uitwisselen op basis van een door hen afgesloten bilateraal belastingverdrag.