

# A Critical Assessment of the Jeopardy Tax Assessment Law in Tanzania

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**Abstract:** This article critically assessment of the jeopardy assessment law as enshrined under the Tanzanian Tax Administration Act of 2015. It makes a critical assessment of the drafting of the provisions of the Act while lightly making a comparative analysis of the law from other jurisdictions. It looks at whether or not the Act contains grounds and justifications for invoking the assessment, whether the Act reflects the protective and exigency spirit of jeopardy assessment law as well as comparing the dispute settlement procedures with respect to objecting jeopardy assessment. The law is contained under the provisions of Section 47 of the Tax Administration Act. This article employed qualitative research of a doctrinal or black letter legal research; it examines the wording of the assessment as stated in the Tax Administration Act of Tanzania as well as the rationale for its application in tax assessment. Additionally, the paper adopts a comparative method whereby jeopardy assessment from other jurisdictions is assessed and compared to the law in Tanzania. The study found that the provisions under study have several inefficiencies when assessed against the expected and actual purpose of jeopardy assessment law. The provisions have limited scope, make irrelevant cross references and repetition of the best judgment rule, provide for availability of notice in case of invoking jeopardy assessment and treat the assessment as optional and alternative. In addition there are contradictions within the provisions and there is no definition of jeopardy assessment. It is important for the law to be amended in order to eliminate weaknesses highlighted in this article.

**Keywords:** Assessment, Adjusted assessment, Jeopardy assessment, Self-assessment.

## 1. Introduction

This article critically assesses the jeopardy assessment law as enshrined under the Tanzanian Tax Administration Act of 2015. It makes a critical assessment of the drafting of the provisions of the Act while lightly making a comparative study of the law from other jurisdictions. It looks at whether or not the Act contains grounds and justifications for invoking the assessment, whether it reflects the protective and exigency spirit of jeopardy assessment law as well as comparing the dispute settlement procedures with respect to objecting jeopardy assessments in Tanzania.

The article contains a general overview of tax assessment in Tanzania, highlights forms of tax assessments, makes a comparative discussion on jeopardy assessment by highlighting key features of jeopardy assessment from other jurisdictions, as well as highlighting grounds and justification for invoking jeopardy assessment. Lastly, the article makes a comprehensive discussion on the drafting jeopardy provisions in Tanzania.

### 1.1 General Overview of Tax Assessment in Tanzania

The tax Administration Act<sup>3</sup> is the main legislation governing tax assessment in Tanzania, together with jeopardy assessment, the law provides for two other types of tax assessment, which are self-assessment and adjusted assessment. The phrase tax assessment may be used in its widest sense as covering the entire procedure for imposing liability on the taxpayer.

The term assessment is capable of several interpretations. It sometimes means the computation of income of a taxpayer, it may also mean a determination of the amount of income tax payable and sometimes it may mean the entire procedure of imposing liability on the taxpayer as laid down in the law, this was so defined in the case of *City of London v. Gibbs*.<sup>4</sup>

When the term assessment is used in the widest sense of covering the entire procedure for imposing liability on the taxpayer, it implies that three steps are to be completed. First step, to compute the income assessable, this means computation of a person's taxable income. Second step is to compute the income payable by him on the basis of computation of income and the third step is to issue a notice of assessment intimating the fact of the assessment made on him in accordance with the law.<sup>5</sup>

The law in Tanzania defines tax assessment as a determination of the amount of a tax liability made under a tax law by the Commissioner General or by way of self-assessment and it includes matters prescribed in the Second Schedule to the Act.<sup>6</sup>

### 1.2 Forms of Tax Assessment in Tanzania

There are three main forms of tax assessment under the Act, self-assessment, adjusted assessment and jeopardy assessment. The three types of assessment are explained below.

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<sup>3</sup>Section 3 of the Tax Administration Act, Act no. 10 of 2015 read together with the Second Schedule

<sup>4</sup> 1942 I.T.R Suppl.121 (HI).

<sup>5</sup> Mponuliana, R.G., The Theory and Practice of Taxation in Tanzania, NBAA, (2005) p. 91.

<sup>6</sup> Section 3 of the Act.

### 1.2.1 Self-assessment

Self-assessment is a tax assessment, which is based on a return of income for the year of income as furnished by the taxpayer in accordance with a certain tax law.<sup>7</sup>The Commissioner is deemed to have assessed the chargeable income of the tax payable on the chargeable income for that year, being those amounts shown in the return.<sup>8</sup>

Section 46 (1) of the Act provides for self-assessment and it reads that an assessment of tax shall be made by way of self-assessment where a person liable to pay tax is obliged to file a tax return. In the case of *Africa Online Tanzania LTD v. C. G*<sup>9</sup> it was held that once accepted, the filed return of income constitutes a self-assessment that can become final and conclusive upon expiration of prescribed time.

Self-assessment may be abused by taxpayers and may be a loophole for tax evasion if it is left unchecked. Taxpayers may understate returns. Self-assessment thus requires scrutiny of the Commissioner General (CG).

An attempt to abuse self-assessment provisions was evident for example, in the case of *Commissioner General v. Insignia Ltd.*,<sup>10</sup> in which the CG was not satisfied with the tax return furnished by the appellant. The Commissioner invoked his powers of access and was able to discover a scheme of tax evasion on the part of the taxpayer who was understating its returns.

### 1.2.2 Adjusted Assessment

The Act empowers the CG to adjust any assessment made by the taxpayer under self-assessment.<sup>11</sup> This is what is referred to as adjusted assessment and it is provided under section 48 (1) of the Act. The purpose of this assessment is to ensure that the taxpayer pays taxes due to him as required under the relevant law.<sup>12</sup>The CG may adjust an assessment based on new grounds which were not originally objected to by the taxpayer as was stated in the case of *M.R. Hotels Ltd v. CG*.<sup>13</sup>

In the case of *Wild Spirit Safaris Ltd v. CG*,<sup>14</sup> the Commissioner General used his best judgment to assess an income of the taxpayer. In this case it was held that, taxpayers are required under the law to file returns whether required by the CG or not. It was further held that, if the taxpayer fails to file returns the CG may use his best judgment to assess the income of such person. Best judgment was used by the CG to establish returns of the taxpayer in this case based on the information obtained from similar businesses in the market.

### 1.2.3 Jeopardy Assessment

This is a type of tax assessment which is made by tax authorities for the purpose of saving possible loss of revenue on account of occurrence of some events or accelerated due to certain peculiar circumstances of the taxpayer.<sup>15</sup>Subsection 47 (1) (a) and (b) provides that the Commissioner General may make a jeopardy assessment of tax payable or has become payable by a person under the respective tax law: (a) whether or not the person is required to file a tax return, in the circumstances specified in Section 40(3) (a) and (b)<sup>16</sup> in any other case, where a person fails to file a tax return on time.

Jeopardy tax assessment is said to be a collection device used by taxing authorities to collect tax when the delay associated with ordinary prepayment deficiency procedures would jeopardize or endanger the collection of the tax.<sup>17</sup>The assessment is invoked whenever proceedings to collect income tax for the current or the immediately preceding taxable year are or may be prejudiced or rendered ineffectual due to actions of a taxpayer.

Jeopardy assessment empowers taxing authorities to immediately make a determination of tax for the current taxable year or for the preceding taxable year, or both, and that such tax is immediately due and payable if the authority is satisfied that a taxpayer designs quickly to depart from a country or remove his property or conceal himself or his property, or other such act.<sup>18</sup>

Jeopardy provisions are generally designed in two major forms in many jurisdictions; first are the narrowly tailored jeopardy assessment provisions and second are the broader jeopardy assessment provisions. As argued by Simonetti et al, 2011<sup>19</sup> narrowly tailored jeopardy assessment provisions require that the taxpayer's actions jeopardize the country's ability to assess or collect tax. In contrast the broader jeopardy assessment provisions require only that the collection or assessment of tax be jeopardized by any delay.

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<sup>7</sup>Emmanuel Kasimbazi, Taxpayers' Rights and Obligations: Analysis of Implementation and Enforcement Mechanisms in Uganda, Research Paper Submitted to Center for Development Research, Copenhagen, Denmark (2003).

<sup>8</sup>*Ibid.*

<sup>9</sup> [2010] 3 TTLR 112.

<sup>10</sup> [2006]1TTLR 117.

<sup>11</sup> Mponuliana, *Ibid* p. 92.

<sup>12</sup>Section 48(1) of the Act.

<sup>13</sup> [2004] 2 TTLR 140.

<sup>14</sup> [2002] 1 TTLR11.

<sup>15</sup> Jeopardy assessment as provided for under section 47 of the Act.

<sup>16</sup> The Tax Administration Act, Act no. 10 of 2015.

<sup>17</sup> Michael L. Saltzman, IRS Practice and Procedure, para. 10.05 (2011).

<sup>18</sup>Simonetti, M., et al *Ibid.*

<sup>19</sup>*Ibid*

## 2. Research Methodology

In order to answer the research questions in this article, it is imperative that the methods and methodology utilised are explained. It is often difficult to categorise a thesis, particularly one on the subject of law under any specific headings, as many works of this type involve a hybrid of methods (Salter and Mason, (2007). Henn et al (2006) makes an important distinction between ‘method’ and ‘methodology’, they state that ‘method refers to the range of techniques that are available to us to collect evidence about the social world. Methodology, however, concerns the research strategy as a whole’. This is important, as the research strategy of this article is doctrinal; it examines the wording of the jeopardy assessment as stated in the Tax Administration Act of Tanzania as well as the rationale for its application in tax assessment. Additionally, the paper adopts a comparative method whereby jeopardy assessment from other jurisdictions is assessed and compared to the law in Tanzania. Thus the scope of this study encompasses qualitative research of a doctrinal and comparative nature.

**Qualitative research** is defined as, ‘the interpretative study of a specified issue or problem in which the researcher is central to the sense that is made’ Ian Parker, 1994. This study began with a ‘doctrinal’ or ‘black letter law’ methodology. **Doctrinal research** has been defined as, ‘a detailed and highly technical commentary upon, and systematic exposition of, the context of legal doctrine’.<sup>15</sup> Doctrinal research is relevant to this study since tax law is largely a black letter law subject which is based on the interpretation of statutes and cases. The methodology is also relevant since the research entails a critical, qualitative analysis of the law so as to answer the research questions herein. The article also incorporates a **comparative approach**; it uses comparative law as a method of research rather than as a methodology (Henn et al 2006). Such an approach has been adopted so that the study does not focus the research questions on comparing legal systems; rather, it is using comparative law as a method of measuring whether the jeopardy provisions on tax assessment can remedy loss of tax revenue without unduly frustrating the tax payer. When incorporating a comparative approach in research it is important to identify why the researcher has chosen this approach and how it can be justified as a legitimate method. It is necessary to identify the benefits that can be obtained from comparing laws from different jurisdictions. For example, it can be to identify common principles from different jurisdictions or to compare legal rules from different jurisdictions to find the best solution (Collins, 1991).

Collins argues that seeking to use comparative law as a means of transplanting that law into another legal system is not always effective. This is supported by Kahn-Freund, who argued that legal rules are a product of historical and social development of that country and that a direct transplant of a rule or body of law may not have the same measure of success as it did in its home jurisdiction (Kahn-Freund,1974). In light of these criticisms Collins proposes that the aim of comparative law should be to improve and understand one’s own domestic legal system by analysing how foreign jurisdictions have dealt with the same problem (Collins, 1991). Thus it should be clear that the aim of this study to use comparative law to assess how and on which conditions jeopardy tax assessment is employed in different jurisdictions and to assess whether the law in Tanzania could provide a more efficient solution to the issue.

## 3. Comparative Discussions on Jeopardy Assessment Provisions

The Oxford Advanced Learners Dictionary, 2015<sup>20</sup> elaborates the phrase ‘in jeopardy’ to mean in a dangerous position or situation and likely to be lost or harmed. As a verb, jeopardize is defined as to risk harming or destroying and it is synonymous to endanger. A jeopardy tax assessment is therefore a collection device used by taxing authorities to collect tax when the delay associated with ordinary prepayment deficiency procedures would jeopardize or endanger the collection of the tax.<sup>21</sup>

Merriam Webster Dictionary<sup>22</sup> defines jeopardy assessment as happening whenever proceedings to collect income tax for the current or the immediately preceding taxable year are or may be prejudiced or rendered ineffectual due to actions of a taxpayer who designs quickly to depart from a country or remove his property or conceal himself or his property, or other such act causing the respective tax revenue authority to immediately make a determination of tax for the current taxable year or for the preceding taxable year, or both, and that such tax is immediately due and payable.

From the above explanations, jeopardy assessment law can be said to mean the entire tax administration procedures, which engages protective and exigent processes, which enables taxing authorities collect taxes when the delay associated with ordinary prepayment deficiency procedures would jeopardize or endanger the collection of the tax.

Jeopardy tax assessment provisions area newly introduced aspects of tax administration in Tanzania, which purport to protect the tax revenue, which might be under jeopardy. The Tax Administration Act under sections 47 introduced the provisions<sup>23</sup>.

Under subsection 47 (1) (a) and (b) the Act provides that the Commissioner General may make a jeopardy assessment of tax payable or has become payable by a person under the respective tax law on the following circumstances:

- (a) whether or not the person is required to file a tax return, in the circumstances specified in Section 40(3) (a) and (b)<sup>24</sup>
- (b) in any other case, where a person fails to file a tax return on time.

<sup>20</sup>Margaret Deutter et al. (Eds.), The Oxford Advanced Learners Dictionary. 9<sup>th</sup> Ed., Oxford University Press, London, (2015), p. 816.

<sup>21</sup> Michael L. Saltzman, *IRS Practice and Procedure* (2002), Boston: Warren, Gorham & Lamont, para. 10.05.

<sup>22</sup> <https://www.merriam-webster.com/legal/jeopardy%20assessment>

<sup>23</sup> The Tax Administration Act, Act no. 10 of 2015.

<sup>24</sup> The Tax Administration Act, Act no. 10 of 2015.

Since jeopardy provisions have been newly introduced in the tax administration processes in Tanzania, authors of this article found that it is important to assess the effectiveness of the law before the first test case knocks the doors of the tax courts in the country.<sup>25</sup>

## 2.1 Features of Jeopardy Assessment Provisions

In order to assess the Tanzanian jeopardy assessment law, it is essential to survey common features of the law from other jurisdictions as discussed in the paragraphs that follow hereunder.

### 1.1.1 The Assessment is done by Tax Authorities

Jurisdictions that have jeopardy provisions in their tax laws empower tax authorities to make the assessments instead of the taxpayer.<sup>26</sup> Simonetti, *et al*<sup>27</sup> argue that jeopardy assessment is a powerful tool in the hands of tax authorities and it may injure the welfare of taxpayers, as a result such powers can be exercised only by the Revenue Commissioners in such countries.<sup>28</sup>

The assessment is done in advance of the date on which the return is normally due, if the Commissioner is satisfied that it is required to secure the collection of tax that would otherwise be in jeopardy, and the tax authority bears the burden of proving that proving that the making of a jeopardy assessment was reasonable in the circumstances of a particular case.

In the case of *McWilliams v. Commissioner*,<sup>29</sup> the Inland Revenue Service (IRS) issued a notice of deficiency against the taxpayer, which the taxpayer disputed. Later, the taxpayer decided to move from New Mexico to Washington. Soon after moving to Washington, the taxpayer received a jeopardy assessment notice regarding the disputed tax that indicated that the IRS believed he intended to flee the country. The taxpayer petitioned for review of the jeopardy assessment under IRC section 7429 of the U.S Revenue Code.

The court held that a jeopardy assessment is valid only if it can be proved that one of three conditions is met: firstly, the taxpayer designs to depart from the country; secondly, the taxpayer intends to remove, conceal, or dissipate the property; or thirdly that the taxpayer faces financial insolvency.

### 1.1.2 Exigency Circumstance Concern

Existence of exigency circumstances is an essential feature that justifies revenue authorities to invoke jeopardy assessment orders. The need for exigency circumstances needs to be expressly stated in the tax administration law of a particular country.

In the Federal Court of Canada case of *MNR v. Denise Cormier-Imbeault*,<sup>30</sup> the Minister brought an *ex parte* application under Subsection 225.2(2) of the Canadian Income Tax Act seeking authorization to take immediate actions to collect amounts owed as tax debts by the taxpayer. At that time, the taxpayer was found to owe the Canadian Revenue Authority (CRA) tax debt of over \$406,000 and her only assets known to the CRA having a realizable value were: (i) a balance of around \$581,000 in a joint bank account that allowed unlimited access by both the taxpayer and her husband; and (ii) an undivided half interest in a property assessed at \$54,400.

The Court found that the collection of tax by the Minister would be jeopardized by a delay in collection as (i) many withdrawals were made from the joint bank account in the past; and (ii) the taxpayer's husband did not seem trustworthy, especially since he previously had pleaded guilty to tax evasion, transferred half of his undivided ownership of a property to his wife upon learning that the CRA was in a position to undertake collection measures on his assets and had engaged in efforts to hide the existence of the joint bank account from the CRA.

Thus, existence of exigency circumstances is an essential feature that justifies revenue authorities to invoke jeopardy assessment orders, this criteria is seen under section 94 (1) of the South African Income Tax Act<sup>31</sup> as well as in the U.S. Inland Revenue Code as it was observed in the case of *McWilliams* as discussed above.

In Tanzania, the law empowers the Commissioner General to make a jeopardy assessment of tax payable or has become payable by a person under the respective tax law whether or not the person is required to file a tax return. This provision essentially empowers the Commissioner to assess the tax of a taxpayer on earlier date than the date when such taxpayer is required to file tax returns, the sections does not imply an existence of urgency being the reason behind such earlier assessment of the tax.

The law also empowers the Commissioner to make jeopardy assessment where a person fails to file a tax return on time. Failure to file returns on time as a reason for jeopardy tax assessment does not address the urgency concern in tax administration rather than being considered a tool of curtailing non-filing of returns.

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<sup>25</sup> Authors of this paper declare that most of case laws referred in this article are borrowed from foreign jurisdictions, there has been no case decided specifically on jeopardy assessment by tax courts in Tanzania since the enactment of the law until when this article was prepared.

<sup>26</sup> Fayyad Cassim, Jeopardy Assessment under the Tax Administration Act 28 of 2011, University of Pretoria.

<sup>27</sup> Marc A. Simonetti, Zachary T. Atkins, and Madison J. Barnett, 'Auditors Must Not Use Jeopardy Assessments to Coerce Taxpayers', A Pinch of SALT, (2011) at pp. 113-117, p 114.

<sup>28</sup> The authors sight an example of South Africa whereby even Senior Tax Officials but only the Commissioner of the South African Revenue Service (SARS) cannot exercise such powers.

<sup>29</sup> 103 T.C. at 424.

<sup>30</sup> 2009 DTC 5165.

<sup>31</sup> Act no 58 of 1952

However, the same Act penalizes taxpayers as offenders if they do not comply with its provisions such as non-filing of returns under Section 82<sup>32</sup> hence there could be no need to address such issue by using Section 47 (1) (b) of the Act<sup>33</sup> while the Act already has an alternative punishment.

### 1.1.3 Absence of Notice

When tax authorities are satisfied that conditions to justify jeopardy assessment exist, they usually invoke jeopardy assessment proceedings prior to issuance of notice of assessment to the taxpayer, this occurs if the authority is satisfied that the receipt of the notice would likely further jeopardize the collection of that amount.<sup>34</sup>

The above position also exists in the U.S. whereby Section 6861(a) of the Internal Revenue Code<sup>35</sup> as quoted by Simonetti, *et al*<sup>36</sup> *inter alia* states that “if the Secretary believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by the law), and notice and demand shall be made by the Secretary for the payment thereof the notice for jeopardy assessment is issued together with a demand for an immediate report and immediate payment of such tax”.

The position with regards to notice in the jeopardy assessments is different in Tanzania, the Tax Administration Act<sup>37</sup> provides for notice of assessment in jeopardy assessment as shall be discussed below in this article under part 1.6.

### 1.1.4 Separate Objection Mechanisms

Jeopardy assessment in different jurisdictions embodies a separate objection mechanism. In the U.S., Canada and South Africa objections take a form of judicial review, this is so provided in tax laws of these jurisdictions due to the impact of the assessment to taxpayers if the jeopardy assessment powers are abused; Simonetti, *et al* 2011<sup>38</sup> argue that if used improperly, the jeopardy assessment is akin to drawing a gun in a fist fight, threatening a taxpayer’s constitutional due process rights.

Due to the strictness of the assessment, for example in Canada under Subsection 225.2(8) of the Income Tax Act<sup>39</sup> a taxpayer may file an application for judicial review to set aside the Jeopardy Order upon giving at least six clear days’ notice to the Deputy Attorney General of Canada and the ultimate burden of justifying the grant of the Jeopardy Order falls on the Minister.<sup>40</sup> The burden of proof falls with the tax authorities in South Africa<sup>41</sup> and in the U.S. the secretary bears the burden of proving that the making of a jeopardy assessment was reasonable.<sup>42</sup>

The jeopardy assessment law of Tanzania under section 47 (1) of the Act<sup>43</sup> empowers the Commissioner General to make a jeopardy assessment of tax payable or has become payable by a person under the respective tax law whether or not the person is required to file a tax return, in essence this provision empowers the Commissioner to assess the tax of a taxpayer on earlier date than the date when such taxpayer is required to file tax returns, the sections does not imply existence of any urgency or exigency circumstances.

As it has earlier stated, jeopardy assessment is a powerful tool in the hands of tax authorities and it may injure the welfare of taxpayers. This power needs to be utilized with high caution, in the case of *McCulloch v. Maryland*<sup>44</sup> it was held by the US Supreme Court that the power to tax is the power to destroy; it should be reined as much as possible.

On the part of dispute settlement in respect of jeopardy assessment proceedings, if a jeopardy assessed tax payer is not satisfied with the decision of the Commissioner to make a jeopardy assessment he will have to follow normal time-consuming dispute settlement procedures and in this respect onus of proving that the tax assessment is erroneous or excessive lies on the taxpayer. Section 18 (2) (b) of the Tax Revenue Appeals Act<sup>45</sup> provides that 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.

This position of the law was reiterated in the case of *Afro American Industries Ltd v. Commissioner General*<sup>46</sup> whereby the Tax Revenue Appeals Board held that the onus of proving that the assessment is excessive or erroneous lies on the appellant, the

<sup>32</sup> The Tax Administration Act, Act no 10 of 2015.

<sup>33</sup> Ibid.

<sup>34</sup> Alpert Law Firm, *Defending Jeopardy Assessments*, (2012), [www.alpertaLawfirm.ca](http://www.alpertaLawfirm.ca), p. 3 (Accessed on 30<sup>th</sup> February, 2017).

<sup>35</sup> The U.S. Internal Revenue Code of 1986.

<sup>36</sup> Simonetti, *et al* 2011, *loc. Cit.*

<sup>37</sup> Act no 10 of 2015.

<sup>38</sup> Marc A. Simonetti, Zachary T. Atkins, and Madison J. Barnett, ‘*Auditors Must Not Use Jeopardy Assessments to Coerce Taxpayers*’, *A Pinch of SALT*, (2011) at pp. 113-117, p 114.

<sup>39</sup> The Income Tax Act of Canada of 1985.

<sup>40</sup> Alpert Law Firm, *Ibid.*

<sup>41</sup> Cassim, *loc. Cit.*

<sup>42</sup> Simonetti (2011), *op. cit.* p. 116.

<sup>43</sup> Act no 10 of 2015.

<sup>44</sup> 17 US 316 - Supreme Court 1819.

<sup>45</sup> CAP 408 RE 2006

<sup>46</sup> [2010] 1 TTLR 167.

same position was also stated in the case of *Jumbo Mills v. Commissioner General*.<sup>47</sup> Therefore tax dispute settlement procedures in respect of jeopardy assessment follows the same procedures surrounding general tax disputes and without any peculiarity, different from the position in other jurisdictions.

For the objection of a jeopardy assessed taxpayer against a jeopardy assessment to be accepted, he is bound to pay the amount of tax which is not in dispute or one third of the assessed tax as a mandatory statutory requirement in order for his objection to be admitted. This being the case, depositing the tax as a precondition for admitting an objection may cause unnecessary economical hardships to the taxpayers.

Objecting jeopardy assessment decisions follows the same dispute settlement procedures which are often condemned as being unconstitutional. Section 51 (1) of the Tax Administration Act<sup>48</sup> which provides for basic tax dispute settlement procedures that a person who is aggrieved by a tax decision of the Commissioner General, may object the decision by filing an objection to the Commissioner General, within thirty days from the date of service of the tax decision.

In the case of *M/s Derm Electricity Tanzania Ltd v. CG*,<sup>49</sup> it was held that disposition of 1/3 of the tax before a tax appeal is heard is a procedural requirement and must be complied with. In this case the issue of unconstitutionality of the requirement to deposit a tax not in dispute was determined and it was held that despite the fact that the right of fair hearing is granted by the Constitution, it leaves to the parliament to enact legislation providing the procedure for fair hearing and any aggrieved person who desires to redress a grievance is bound to observe such procedure.

The case of *Enterprises (T) LTD v. Commissioner General*<sup>50</sup> considered the effect on objection proceedings where the objector had not deposited tax not in dispute. The Tax Revenue Appeals Board held that where the appellant did not follow legal procedures of depositing the tax not in dispute he lacks legal mandate to appeal unless he fully complies with the requirement of the law governing objection proceedings.

#### 4. Grounds and Justification for Jeopardy Assessment

The overall tax assessment process includes a substantial extension of the amount of time between the initial issuance of a deficiency notice and the ultimate payment by the taxpayer. Parliaments created jeopardy assessments to protect the governments' interests during this extended time frame.<sup>51</sup> The major goal for invoking jeopardy assessment is the need to urgently collect the tax revenue in advance of the date on which the return is normally due, so as to secure the collection of the tax that would otherwise be in jeopardy.<sup>52</sup>

Grounds for invoking the assessment are expressly stipulated in tax administration laws of different jurisdictions. These grounds are expressly stated in tax laws of several jurisdictions as considerations that the tax administration may consider before invoking the jeopardy assessment; jeopardy provisions in the U.S. Internal Revenue Code<sup>53</sup> are covered under various provisions of the Code such as Sections 6851, 6861, and 6862. Therefore, in the U.S and other jurisdictions jeopardy is said to exist if the respective tax authorities find the existence of some specific grounds. The grounds are listed in the U.S Treasury Regulations<sup>54</sup> at sub-Section 301.6861-1(a) to sub-Section 1.6851-1(a).

The same grounds are listed under Subsection 225.2(2) of the Canadian Income Tax Act<sup>55</sup> as well as in the Income Tax Act of New Jersey<sup>56</sup> as quoted by Simonetti et al<sup>57</sup> in their work. These grounds were reiterated in the U.S. case of *McWilliams v. Commissioner (supra)*,<sup>58</sup>

There are three justifications in support of jeopardy provisions, as founded in the U.S. case of *Fuentes v. Shevin*.<sup>59</sup> In this case the Supreme Court set forth three factors common to justify jeopardy assessment procedures. First, the seizure of the taxpayer's property must be directly necessary to secure an important governmental or general public interest. Second, a special need for very prompt action must exist. Third, a government official must determine under the standards of a narrowly drawn statute that it was necessary and justified in the particular instance.

<sup>47</sup>[2003] 2 TTLR 12.

<sup>48</sup>Act no 10 of 2015.

<sup>49</sup> [2009] 1 TTLR 191.

<sup>50</sup>[2010] 1 TTLR 223

<sup>51</sup> Karen M. Streisfeld, *Denial of Due Process: The Unrecognized Right to an Attorney for Jeopardy Assessed Taxpayers*, 75 Cornell L. Rev. 1425 (1990). Available at: <http://scholarship.law.cornell.edu/clr/vol75/iss6/5>, p. 1432.

<sup>52</sup>Cassim 2014), *loc. Cit.*

<sup>53</sup> The U.S. Internal Revenue Code of 1986.

<sup>54</sup> the U.S Treasury Regulations of 23<sup>rd</sup> October, 2014.

<sup>55</sup>Canada Income Tax Act of 1985.

<sup>56</sup> N.J. Stat. Ann. Section 54:49-7.

<sup>57</sup>Marc A. Simonetti, Zachary T. Atkins, and Madison J. Barnett, 'Auditors Must Not Use Jeopardy Assessments to Coerce Taxpayers', A Pinch of SALT, (2011) at pp. 113-117, p 114.

<sup>58</sup> 103 T.C. at 424.

<sup>59</sup> 407 U.S. 67 (1972).

## 5. Jeopardy Assessment Law in Tanzania

After a survey of jeopardy provisions in various jurisdictions and the analysis of jeopardy provisions as drafted under the Tax Administration Act of Tanzania in the preceding paragraphs, authors have founded the basis upon which the Tanzanian law can be analyzed. The law contains both structural and substantive challenges, which may affect their efficiency and purpose as discussed under this part.

Jeopardy provisions in Tanzania are contained under Sections 47 of the Tax Administration Act.<sup>60</sup> Subsection 47 (1) (a) and (b) of the Act<sup>61</sup> provides that the Commissioner General may make a jeopardy assessment of tax payable or has become payable by a person under the respective tax law whether or not the person is required to file a tax return, in the circumstances specified in Section 40(3) and in any other case, where a person fails to file a tax return on time. Literal understanding of this unambiguous Section can be interpreted to imply that the Commissioner may do the assessment prior to the time for assessment or where the person fails to file a tax return on time.

Hence, the only spirit carried within this section is that of empowering the Commissioner to make earlier assessment or assessment before due date in respect of a particular taxpayer, the section does not establish jeopardy assessment as a means of collecting the tax which would otherwise be in jeopardy by delay as reflected in the above paragraphs.

### 1.2 Scope of Jeopardy Assessment Provisions in Tanzania

The provisions of section 47 (1) (a) and (b) are narrowly tailored; jeopardy assessment provisions in Tanzania specify two grounds that shall trigger the use of such an assessment.<sup>62</sup> In essence the grounds so contained do not intend to serve the main objective of jeopardy assessment as seen in the preceding paragraphs. Subsection 47 (1) (a) of the Tax Administration Act<sup>63</sup> provides that the Commissioner General may make a jeopardy assessment of tax payable or has become payable by a person under the respective tax law whether or not the person is required to file a tax return, in the circumstances specified in section 40(3).

Section 40 (3) of the Act which is cross-referenced under section 47 (1) (a) reads *inter alia* that the Commissioner General shall, make an assessment of the tax liability of the person as required by the tax law, including by way of adjusted assessment, and for this purpose may use any information in the Commissioner General's possession.

Subsection 47 (1) (a) of the Tax Administration Act<sup>64</sup> neither implies nor states the spirit of jeopardy assessment which is to cater for tax collection under exigency circumstances. The subsection further does not specify grounds to invoke the assessment rather than the non-filing of tax assessment. Subsection 47 (1) (b) on its part is silent about the essence and grounds of the assessment, it reads that the Commissioner General may make a jeopardy assessment of tax payable or has become payable by a person under the respective tax law (b) in any other case, where a person fails to file a tax return on time.

For the purpose of carrying the spirit and purpose of jeopardy assessment law as highlighted above, the Section 47 should at least provide that:

The Commissioner General shall make a jeopardy assessment of tax payable or that has become payable by a person under the respective tax law whether or not the person is required to file a tax return if he is satisfied that:

- (1) the taxpayer designs to depart from the United Republic;
- (2) the taxpayer intends to remove, conceal, or dissipate the property; or
- (3) the taxpayer faces financial insolvency.

Should this been the actual wording of the section, then the jeopardy assessment law of Tanzania could be in line with the spirit of the jeopardy assessment law considering the comparative analysis of such law from other jurisdictions such as Sections 6851, 6861, and 6862 of the U.S. Internal Revenue Code,<sup>65</sup> and Subsection 225.2(2) of the Canadian Income Tax Act.<sup>66</sup> It has been observed by the Supreme Court of the U.S. that the absence of either of these features renders a jeopardy assessment case unsuccessful in the court in the case of *McWilliams v. Commissioner*.<sup>67</sup>

### 1.3 Ineffective Cross Referencing

Section 47 (1) of the Tax Administration Act<sup>68</sup> refers to Section 40 (3) whereby the cross referencing presumes that the referred section accommodates provisions for jeopardy assessment. However, that is not the case hence making redundant the referred section as well as the purpose of the Section. Section 40(3) which is referred by section 47 (1) simply provides that the Commissioner General shall make an assessment of the tax liability of the person as required by the tax law, including by way of adjusted assessment, and for this purpose may use any information in the Commissioner General's possession including any information obtained under Subsection (1) or (2).

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<sup>60</sup> Act no 10 of 2015.

<sup>61</sup> *Ibid.*

<sup>62</sup> Simonetti et al., *ibid* note 6 suggest that a narrowly tailored jeopardy assessment provision specify the actions that will trigger the use of such an assessment.

<sup>63</sup> Act no. 10 of 2015.

<sup>64</sup> Act no 10 of 2015.

<sup>65</sup> The U.S. Internal Revenue Code of 1986.

<sup>66</sup> Canada Income Tax Act of 1985.

<sup>67</sup> 103 T.C. at 424.

<sup>68</sup> *Ibid.*

Whereas sub-section 40(1) provides that where a person fails to file a tax return by the due date stated by a tax law or as may be extended under Section 39, the Commissioner General may use the power under the Act to appoint another person to prepare and file information. Subsection 40 (2) provides that any purported filing of a tax return after the due date or in a manner other than that specified in the relevant tax law shall be ineffective.

Therefore, the provisions of Subsection 40 (1) and (2) of the Tax Administration Act<sup>69</sup> provides alternatives by which the Commissioner may obtain information that he may use to make jeopardy assessment and such information may be obtained through information prepared by the person appointed by the Commissioner to prepare and file returns or where a person has filed an ineffective tax return the information contained in such return shall be used to make jeopardy assessment. These provisions have nothing to cement on the jeopardy provisions under subsection 47 (1) this renders the cross referencing between the two sections is ineffective.

#### 1.4 Repetition of the Best Judgment Rule in Assessments

Under the best judgement rule, taxpayers are required to file returns whether or not they are required by the CG. The rule was applied in the case of Tanzania Tax Law Report of *Wild Spirit Safaris Ltd (supra)*,<sup>70</sup> in which the CG used his best judgment to assess the income of the taxpayer who failed to file his returns, in this case it was held that taxpayers are required under the law to file returns whether required by the CG or not.

Subsection 47 (1) (b) of the Tax Administration Act<sup>71</sup> empowers the Commissioner to invoke jeopardy assessment in case a person fails to file a tax return on time. This provision gives powers, which the Commissioner General already had, a critical reading of the provision implies repetition of the best judgment rule, which was established in Tanzania for quit sometime before 2015.

#### 2.0 Conclusion

This article made a critical review of the jeopardy assessment law as enshrined under the Tanzanian Tax Administration Act of 2015. It made a critical assessment of the drafting of the jeopardy provisions by making a light comparative study of jeopardy assessment law from other jurisdictions.

Literature shows that jeopardy assessment is invoked by tax authorities whenever proceedings to collect income tax for the current or the immediately preceding taxable year are or may be prejudiced or rendered ineffectual due to actions of a taxpayer who designs quickly to depart from a country or remove his property or conceal himself or his property, or other such act.

Features of jeopardy assessment law from other jurisdictions such as the U.S., Canada, New Jersey and South Africa are that the assessment essentially address the need to cure exigency circumstance circumstances which if left unhandled might lead to loss of tax revenue, absence of the normal tax assessment notice is also common in the case of jeopardy assessment.

The U.S. is among jurisdictions which have pioneered the jeopardy assessment law and it is where most cases showing the practical aspect of the concept could easily be drawn by the authors. Other jurisdictions were considered based on the availability of literature while South Africa was chosen for the purpose of obtaining the experience of a country from within the African continent.

This study found that jeopardy assessment law of Tanzania is narrowly tailored, the law is featured with some inefficient cross references, repetition of the best judgment rule and do not reflect special notice requirement different from notices issued by the Commissioner as per the general tax administration processes which is contrary to the spirit of the assessment generally.

#### 7. Recommendations

This article recommends for the amendment of the jeopardy assessment provisions in the Tax Administration Act of Tanzania of 2015 before the first test case emerge. Jeopardy assessment law needs to be improved so that it features crucial elements, which essentially aim at curing the exigency circumstances for serving tax revenues under jeopardy.

The Tax Administration Act should thus expressly define, outline and widen the scope of jeopardy assessment in Tanzania by implying the protective and urgency spirit of the assessment. The Act should further show the grounds and justifications for the assessment as well as establishing a special dispute settlement procedure with respect to jeopardy assessment.

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