

THE SCOPE OF THE LEGALITY PRINCIPLE OF TAXATION IN THE LIGHT OF TURKISH CONSTITUTIONAL COURT’S JUDGMENTS

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Abstract

In order to determine the scope of the legality principle of taxation which is regulated in Turkish Constitution, the criteria adopted by Turkish Constitutional Court (“TCC”) are important. The aim of this study is to evaluate these criteria and observe the compliance of Turkish tax legislation with them. As a result of this examination, it is determined that the criteria were not fully settled and that the current tax legislation do not comply with them sufficiently. However, taxpayers should be able to foresee which rules are regulated by laws and which are regulated by other formal sources of tax law. In its recent judgments, the Court softened its strict supervision of formal dimension of the principle, which is “no tax without law”. It can be considered that the case-law of European Court of Human Rights (“ECtHR”) is effective on this approach. According to the case-law of ECtHR, the concept of “lawfulness” refers to the quality of the law in question. However, Article 73 of Turkish Constitution is the special provision in respect of tax law. Thus, the tax rules which are basically foreseeable by taxpayers are the rules which are regulated in the laws in both formal and material meanings.

Keywords: Legality Principle of Taxation, Foreseeability, Constitutional Principles, Taxpayer Rights

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1. Introduction

Article 73 of Turkish Constitution only draws a frame for the constitutional principles of tax law, although it can be said that it is closer to “regulatory constitution” type since it has been prepared with casuistic method (Özbudun, 2018: 57-58).

This is natural because the content of the principles – unlike their purposes- are unclear to a certain degree. Constitutional principles are rather constitutive and protective (Saban, 2014: 57). A constitution which goes into too much detail may not comply with the changing needs (Özbudun, 2018: 58).

Although constitutional “principles” are the fundamental grounds of tax law, taxation process is conducted with the “rules” which are regulated by other formal sources of tax law. Taxpayers deal with administrative actions which arise from these rules. Therefore they should foresee these rules in detail.

The pre-condition of the foreseeability is accessibility. This is very important with regards to taxpayers’ legal security considering today’s stubborn fact: “the inflation of norms” (Kaboğlu, 2002: 25).

In this regard, one should first determine the scope and limits of the legality principle of taxes.

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As a beginning, these questions can be asked:

In order to comply with the legality principle of taxation, to what extent a detailed regulation expected from tax laws? Which matters must be regulated solely by law?

In this study, the criteria adopted in Turkish Constitutional Court's ("TCC") judgments on this topic and the compliance of current Turkish tax legislation with aforesaid criteria are reviewed.

2. The Criteria Adopted in Constitutional Court's Judgments with regards to the Scope of Legality Principle of Taxation

2.1. Main Elements of Tax

Third paragraph of Article 73 states that taxes, fees, duties and other such fiscal obligations shall be imposed, amended or revoked by law (In this article, the concept of "tax" will be referred to all these fiscal obligations unless indicated otherwise).

TCC states that it is not sufficient for the legislator to allow levying a tax only by stating the subject of it (TCC, Case no. 1986/20, 1987/9, 31.03.1987).

The answer to the question of which rules are to be regulated by law, the concept of "main elements" comes out in the TCC judgments. However, the meaning and scope of "main elements" have not been clarified in these judgments. Instead, some main elements have been counted by sampling.

There is no hesitation that some elements of tax are main elements. For example, the subject of the tax, the taxpayer, tax base, tax rate are undoubtedly main elements. On the other hand, while the method and period of payment of the tax have been counted among the main elements of tax (TCC Case no. 1996/49, 1996/46, 11.12.1996), in another judgment TCC stated that the tax law, which authorizes the Department of Finance to determine the method and place of payment, was not unconstitutional (TCC Case no. 2007/114, 2011/36, 10.02.2011).

In Turkish tax law doctrine, it is suggested that not only the main elements of the tax but also the duties and procedural issues arising from the tax should be regulated by law (Güneş, 2011:18; Kumrulu, 1979: 150). Thus, the assessment, notification, accrual, collection of the tax, valuation, tax duties, tax inspection, tax disputes and sanctions are accepted within the scope of the legality principle of taxes.

In some of its judgments, TCC stated that not all the main elements of the tax should be regulated in the same provision, in the same paragraph or even in the same law. (TCC Case no. 2016/150, 2017/179, 28.12.2017; TCC Case no. 2011/16, 2012/129, 27.09.2012). In my opinion, it should be possible for the taxpayers to find all the main elements of a tax in the same law that regulates the relevant tax.

Another issue to be addressed is that the different tax rules on the same subject may cause contradiction and therefore lack the required foreseeability. In the current situation regarding whether the advertisement expenses for all kinds of alcohol and alcoholic beverages, tobacco and tobacco products can be deducted from income tax and corporate tax base; there are different regulations in Turkish tax legislation such as Income Tax Law, Corporate Tax Law, Law

on the Prevention and Control of the Losses of Tobacco Products, and general communiques of the Ministry of Treasury and Finance. This created confusion in practice and caused conflicting judicial decisions (Gümüşkaya, 2018: 309-329).

As regards the tax liability of legal representatives, the regulations in two separate tax laws (Article 10 of the Tax Procedure Law and duplicate Article 35 of the Law no 6183 on the Procedure for the Collection of Public Receivables) also cause uncertainty in practice. In fact, TCC annulled the provision “*The provisions of the Tax Procedure Law no.213 on the liability of legal representatives do not remove the responsibility set out in this Article*”, which is included in the last paragraph of duplicate Article 35 of Law no.6183, on the grounds that it caused uncertainty on which one of the two provisions is applicable (TCC Case no. 2014/144, K.2015/29, 19.03.2015).

In my opinion the uncertainty has not disappeared after the annulment. Because the regulations that are still in force are not complementary, they both regulate the basic conditions of legal representative’s tax liability separately. This enables the tax administration to implement these regulations selectively, since it cannot be said that the special law-general law distinction is fully adopted in tax practice regarding this issue. Therefore, it is necessary to clarify the application criteria of these regulations.

2.2. Issues Related to Practice, Technique, Expertness and Details

TCC accepts that the authority can be given by law to the executive with regards to establish regulatory administrative acts on issues related to practice, technique, expertness and details (TCC Case no. 1996/49, 1996/46, 11.12.1996). Although it is not mentioned in the Constitution, it is accepted that the administration may issue anonymous regulatory acts to regulate the details of the law under different names such as circular, general communique. (Sevgili Gencay, 2014:401). However, no criterion has been introduced to allow for a precise distinction.

For instance, TCC ruled that the provision of Tax Procedure Law, which authorizes the Ministry of Treasury and Finance the right to issue new documents, is not contrary to principle of legality. It stated that adding a new document to the document order did not directly interfere with the tax base (TCC, Case no 1990/29, 1991/37, 15.10.1991).

In another judgment, abovementioned authority given to the Ministry has been determined as a measure to monitor the daily events and to arrange technical or detail issues (TCC, Case no 2009/5, 2011/31, 03.02.2011).

However, drawing up or receiving a new document for tax purposes is either a duty or a right of the taxpayer. Hence the authority to issue formal duties that affect the right to property of the taxpayer is an authority that should belong to the legislature.

In its other judgment, TCC hold that the provision in Article 94 of the Income Tax Law, which authorizes the Ministry of Treasury and Finance to hold the parties or intermediaries liable for the payment of taxes with regards to transactions subject to taxation, is not unconstitutional (TCC, Case no. 2014/183, 2015/122, 30.12.2015). In this judgment, TCC rejected the appeal by stating that the authority given to the Ministry was limited and exceptional and the general communiques were foreseeable as they were published in the Official Gazette.

However, considering the criteria adopted in the judgments of TCC itself, “tax liability” is also a main element as a “taxpayer” and should therefore be regulated by law. I believe that a provision which holds a third person responsible for paying the tax should be regulated in the law.

Provisions stating that the Ministry of Treasury and Finance is authorized to set procedures and principles in tax laws are frequently included in Turkish Tax Legislation. Instead, it may be more appropriate to grant the Ministry the authority to clarify the details of the application of the relevant article, as it is used as a criterion in the case-law of TCC.

2.3. Amendments in the Lower and Upper Limits of the Law on Specific Issues

The judgments of TCC regarding Article 73/4 should also be mentioned. TCC emphasizes that the authority to be given to the President of the Republic (formerly to the Council of Ministers) by law is limited to the specific issues mentioned in the article which are exceptions, exemptions, reductions and rates (TCC Case no. 2010/11, 2011/153, 17.11.2011).

However, the implementation of the restriction on the lower and upper limits of the law is arguable. For example, TCC hold that the provision which authorizes the Council of Ministers to determine the rates of title deeds separately for the properties according to a number of criteria set out in the law (not according to the lower and upper limits) is not contrary to Article 73/4. (TCC Case no 2017/117, 2018/28, 28.02.2018). Because, according to TCC, the relevant criteria are specific in the law, it is not possible for the administration to act arbitrarily. However, 73/4 states that the Council of Ministers (after the amendment, the President) can only be granted the right to change rates within the “lower and upper limits” of the law. Since it contains qualitative boundaries rather than quantitative boundaries i.e. the lower-upper bound, it is contrary to Article 73/4.

3. The Supervision of Turkish Constitutional Court Regarding the Principle of No Taxation Without Law

Regarding the current judgments of TCC, it can be said that TCC has softened its rigid supervision on the “formal dimension” of the principle of legality of tax. The reason of this approach may be the criteria adopted by the European Court of Human Rights (ECtHR) in terms of lawfulness. Naturally, ECtHR does not review if the relevant rule is regulated in a law by the legislator. ECtHR explicitly emphasizes that the concept of law for the purposes of ECHR includes not only laws but also subsidiary legislation and case-law since the important thing is the quality of the rule (ECtHR, Hentrich/Fransa, no.13616/88, 22.09.1994, §.42; ECtHR, Beyeler/İtalya, no.33202/96, 05.01.2000, §.109).

Likewise, regarding the lawfulness of tax-related interference to the property right, TCC examined whether the unpredictability of the provisions of the law was eliminated by subsidiary legislation or case-law (TCC, Case of Türkiye İş Bankası Şubeleri, Case no. 2014/6193, 15.10.2015, § 60).

However, the principle of the legality of tax which is regulated in the Article 73 of Turkish Constitution provides a higher level of protection by means of requiring a law for the tax-related interference to be lawful (TCC General Assembly, Case of Türkiye İş Bankası A.Ş. no: 2014/6192, 12.11.2014, § 47). Since Article 73 is the special provision in terms of tax law, which is basically foreseeably for taxpayers is necessarily a law in both formal and material meanings.

Therefore, it should be clarified which elements of the tax are regulated by law. These rules should be regulated mainly in tax laws, in a systematic way and not as additional, temporary and duplicated articles (Karakoç, 2006:29). Contradictory and retrospective rules should be avoided as much as possible. Regulations of the executive should be explanatory and related to details of the law.

4. Conclusion

After examining the current relevant judgments of TCC, it is determined that the criteria regarding the scope and limits of the legality of taxation are not fully established and current tax legislations do not comply with the existing criteria. In my opinion, the solution of this problem may be to regulate the “principle” as a “rule” which has certain limits and content. As explained by Ronald Dworkin, there is a qualitative difference between legal principles and rules (Dworkin, 1977:24). As mentioned before, the content of the principles – unlike their purposes- are unclear to a certain degree.

In this context, I believe that the principle of legality can also be regulated as a rule of law, for example in the Tax Procedure Law in order to clarify which issues will be regulated only by laws. This suggestion does not refer to include the same text in the constitution as in Article 37 of Public Fiscal Management and Control Law no.5018. It rather refers to a more detailed rule as in article 4 of Misdemeanor Law no.5326. The clarification of the content of the principle as a rule with its uniform application in the judicial decisions will both contribute to the legal certainty and stability of tax administration’s actions.

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