İSTANBUL UNIVERSITY PRESS

Maliye Çalışmaları Dergisi - Journal of Public Finance Studies
MCD 2023, 70 : 70–83
DOI: 10.26650/mcd2023-1320762

Research Article

Assessments on Compliance/Non-Compliance of the Digital Service Tax in Regard to Constitutional Principles of Taxation*

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ABSTRACT

The Digital Service Tax was introduced to the Turkish tax legislation with Act 7194 published in the Official Gazette dated 07.12.2019. However, the Digital Service Tax, like any tax, must comply with the constitutional principles of taxation. There are seven principles of taxation in the financial sense in the constitution. These principles are contained in article 73 of the constitution. There are principles related to taxation in other articles of the constitution. As a result, the Digital Service Tax is incompatible with the principle of tax justice, the principle of equality of tax, the principle of being able to pay taxation, the principle of the generality of tax, the principle of fair and balanced distribution of tax burden and the principle of legality of the tax, while it is compatible only with the principle that the tax should be the equivalent to public expenditures. These compatibilities and incompatibilities are also valid for the actions of the OECD and the EU on the digital economy. In other words, the Digital Service Tax does not comply with the conditions of the day either. The conclusion reached in general terms is that the digital service tax shows a severe incompatibility with the constitutional principles of taxation.

Keywords: Digitalization, digital service tax, constitutional taxation principles, public expenditures, BEPS

Submitted : 28.06.2023
Revision Requested : 20.07.2023
Last Revision Received : 24.09.2023
Accepted : 29.09.2023
Published Online : 09.10.2023

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1. Introduction

In the 21st century, the beginning of the globalization of the world and its interaction with the internet appear as an undeniable reality because the discovery and widespread use of the internet has led the traditional world economy to many changes. Through the Internet, shopping from one end of the world at a click has led to the formation of a new economic system called the digital economy and has made it necessary for almost all sectors to adapt to the digital economy.

Although this new economy, which entered the life of humankind in the 2000s, provided convenience in many areas, it brought with it some negative consequences because before governments were faced with the phenomenon of the digital economy, they had developed some rules in the economic and political field in a national sense and were trading through these rules.

The globalized structure has opened a new era in the era of traditional trade and traditional money through information technologies and cryptocurrencies. The fact that communication is now being done from one end of the world to the other in a globalized world, the transfer of material assets through digital means, the digitalization of banking and payment systems, and the emergence of a non-cash payments society with individuals adapting to this transformation shows how much transformation the world economy is experiencing in a digital sense.

With digitalization, many digital companies have been established and started trading in an electronic platform. In the first place, these companies operating on a national scale have started to carry out commercial activities in a global sense through the internet. Thus, multinational companies have been formed. These companies operate without opening a permanent workplace in countries other than their own and earn enormous revenues. Although they are subject to tax in their own countries, they do not pay taxes because they do not have a physical workplace in other countries where they operate, which causes a tax loss in those countries. Each country has its unique acts and regulations.

When we talk about taxation, Adam Smith is one of the main economists that comes to mind first. It is possible to explain Adam Smith's principles of taxation as fairness, certainty, economics, and appropriateness. In Turkey, the tax acts comply with the articles of other countries' tax laws, which are similar from a global point of view, but it should be noted that each country has its own tax system.

Multinational companies are taking advantage of different tax acts of different countries, causing tax evasion, and tax arbitrage situations to be in their favor. As a result, the problem of double taxation arises. The attempts of governments to create a solution of their own to eliminate this problem have raised more problems regarding the taxation of the digital economy, which needs clarification. In this context, the OECD and the UN, which are international organizations, have made suggestions.

The Republic of Turkey is one of the countries that closely follows the current international events on the taxation of the digital economy and makes regulations when necessary (Sağlı, 2020). According to Article 3/1 of the Corporate Tax Act (The Act numbered 5520, Official Gazette, 21st of June 2006, No: 26205) in Turkish Tax Law, legal entities or business centers residing in Turkey from the institutions listed in Article 1 of the act are taxed on all earnings they earn both inside Turkey and outside Turkey. In contrast, legal entities and business centers listed in Article 1 of the act according to Article 3/2 are taxed only on their earnings earned in Turkey. Thus, the full-fledged taxpayer is explained in the first paragraph of the article and the limited taxpayer is explained in the second paragraph. According to the provisions of the Tax Procedure Act in Article 3/3 /a, the commercial profits obtained from work performed in these places or through these representatives by foreign institutions that have a place of business in Turkey or have a permanent representative will be the corporate income of the limited taxpayer. In addition, Article 156 of the Tax Procedure Act describes the workplace as a place reserved for the execution of commercial, industrial, agricultural or professional activity, such as a store, office, administrative office, practice, factory, branch, warehouse, hotel, coffee shop, entertainment and sports venues, field, vineyard, garden, farm, livestock facility, mines, quarry, construction site, steamship buffet, or a place used in these activities.

If the explained articles of the act are also considered, it becomes necessary to comply with limited or full-fledged taxpayer criteria for an institution to be taxed on its earnings in Turkey. Another important criterion is that a permanent workplace is mandatory. However, according to the provisions of the Corporate Tax Act, the Tax Procedure Act, and the Income Tax Act, it is becoming impossible to tax digital economy tools that are not included in this framework. Almost none of the multinational companies providing digital services have a representative in Turkey. Thus, they cannot be taxed on the income they receive (Kahraman, 2019).

Since a co-decision has not yet been reached in the international arena, the Republic of Turkey has decided to tax the earnings of 'Multinational Companies Providing Digital Services' operating domestically (Çelener 2019a, p. 2228).

Therefore, it is an obligation for digital activities to be taxed in terms of fairness in taxation with regard to article 73/2 of the Constitution of the Republic of Turkey (Demirhan, 2020, p. 85).

On 5.12.2019, Act No. 7194 on Digital Service Tax and Amendments to Some Acts and Decree Act No. 375 were adopted and entered into force on 1.3.2020. Thus, as of 2020, a Digital Service Tax in Turkey has been included in the Turkish Tax System as a new tax. In addition to the Digital Service Tax, Property Tax on High Value Residence and Accommodation Taxes were adopted and imposed.

1,060,932 TL in 2020, 1,424,765 TL in 2021, 4,631,454 TL in 2022 and 3,336,272 TL in 2023 (until June) were generated from the Digital Service Tax (Republic of Turkey Ministry of Treasury and Finance, 2023). Therefore, this suggests that the digital service tax has many effects in the economic and financial fields. Some studies have been conducted in the literature on what these effects are. It is possible to summarize the literature in question in the following ways:

- According to Kaya Mutlu (2020), the Digital Service Tax is a controversial tax that was hastily enacted as a balancing tax in Turkey. However, if the global tax reform is implemented, there will be no need for a Digital Service Tax.
- Demirhan (2020) argued that the Digital Service Tax rate in Turkey is high in contrast to other countries and this rate should be reduced.
- Durdu (2020) stated that Turkey's Digital Service Tax rate is high compared to the European Union countries. As a result, he concluded that the regulatory impact analysis of the Digital Service Tax act is insufficient.
- Ergün (2022) revealed that the implementations of the Digital Service Tax in different countries are similar, but there are differences in tax rates among countries.
- Çelikkaya (2021) suggested that a comprehensive Digital Service Tax could be a good solution for cross-border digital services.
- Ubay and Ünsal (2021) stated that Turkey is one of the leading countries taking steps to solve the Digital Service Tax problem. Therefore, the Digital Service Tax has become one of the actions taken by Turkey both to solve the problem of digitalization and to increase tax revenue.
- Mert and Bayar (2020) revealed the necessity of considering the Digital Service Tax at the international level and ensuring consensus in implementing this tax to protect and ensure equality among companies.
- Eroğlu and Aksu (2019) revealed that the current value-added tax rules are insufficient to tax digital services.
- Ekeryilmaz (2021) stated that with act No. 7194, which includes the Digital Service Tax, the principles of tax justice and certainty in taxation will be observed and tax revenue can also be generated.
- Akkaya and Gerçek (2019) stated that although Turkey is among the countries that have taken the first step in taxing the digital economy, the primary solution can be achieved with a tax regime to be established by the OECD.
- Çelener (2019b) emphasized that there are missing aspects of the Digital Service Tax implemented in France. However, until multilateral solutions are found, unilateral applications need to be developed.
- Zıvalı and Demirli (2022) emphasized that it is crucial to develop a global-sized taxation regime to be established by international organizations, such as the OECD and the EU instead of national solutions and to ensure the binding nature of this regime.
- Fırat (2020) stated that the Digital Service Tax rate applied in Turkey is high, and if this continues, there will be some financial problems in the future, as the tax will be reflected to consumers.
- Kim (2019) considered the Digital Service Tax within the scope of income and consumption taxes.
- Cui (2018) argues that it is correct to impose a Digital Service Tax and that this will facilitate market entry.

When we review the studies in the literature, the studies were generally conducted in 2020. In addition, a ratio comparison between Turkey and other countries has also been made in the studies. Moreover, the OECD and EU realized some works for the taxation of the digital economy. That's why, firstly, these works were mentioned in the study. However, from the point of view of constitutional principles, the Digital Service Tax has yet to be evaluated using any single methodology. The Digital Service Tax has been evaluated in this study using the teleological interpretation method in terms of constitutional taxation principles. For this purpose, the teleological interpretation method is briefly mentioned first in the method section. Then, within the scope of this method, the constitutional principles of taxation and the Digital Service Tax are explained theoretically from the point of view of the Turkish Tax System. The compatibility and incompatibility of the Digital Service Tax with the constitutional taxation principles are mentioned in the discussion section. Although the principles of taxation are explicitly mentioned in article 73 of the constitution, it is possible to comment on the principles of taxation in some other articles. For this reason, while taking the constitutional principles

of taxation into the focus of the study, criticisms of the Digital Service Tax will be made at other points that are deemed necessary.

2. Examples of Actions for Digital Economy: OECD and EU

Along with digitalization, the spread of Internet use over the world, crossing country borders has allowed technologically developed countries to trade wherever they want within the framework of the concept of globalization, which has posed a problem for governments with their own acts and regulations. This is because each government has created tax acts according to its own social structure and economic development. Companies in these countries that can trade globally are defined as multinational companies. These companies take advantage of different tax acts and cause situations such as tax evasion, and tax arbitrage in a way that will be in their favor. As a result, the problem of double taxation arises. As a matter of fact, the attempts of governments to create a solution for the elimination of this problem may cause more problems in the taxation of the digital economy, which is a complex situation. For this reason, organizations such as the Organization for Economic Development and Cooperation (OECD) and the European Union (EU), which are described as units that assume consultants in economic matters, have tried to create a solution to this problem.

2.1. Actions of OECD

The actions of the OECD can be examined in three parts: the Turku Conference, the Ottawa Conference, and the action plan on BEPS.

2.1.1. Turku Conference

The Turku Conference held in Finland on November 19-21, 1997, aimed to solve the taxation problems arising in e-commerce and eliminate the distrust of the internet environment. In addition, the OECD's first report on the challenges facing tax administrations and taxpayers in electronic commerce was discussed. Additionally, the conference concluded that the OECD is an institution that can be consulted on e-commerce issues, that tax authorities have transparent and equal access to information stored in all kinds of environments and that it is an institution that ensures joint international cooperation in order to better implement tax acts (Akçaoğlu, 2011, p. 100-101). The significant conclusions at the Turku Conference are as follows: the acceptability of the tax system put into effect by taxpayers should be ensured, while traditional trade should not affect e-commerce positively or negatively in any way and should not hinder its development. It is also accepted that states cannot implement their own solutions (Şahin, 2007, p. 191).

2.1.2. Ottawa Conference

At the conference held in Canada on October 7-9, 1998, an attempt was made to create solutions to the problems of the Turku conference. In addition, the principles adopted by the CFA (Committee on Fiscal Affairs) regarding the taxation of e-commerce were approved by the ministers at the Ottawa conference. It is possible to state these principles as impartiality, efficiency, effectiveness, fairness, simplicity, equality, flexibility, and openness (Akçaoğlu, 2011, p. 102).

2.1.3. Action Plan on BEPS (Base Erosion and Profit Shifting

As a result of the rapid increase in digitalization in the globalized world, the BEPS plan, which has an international character and is aimed at preventing tax avoidance, was created by the OECD at the request of the G20 countries when it entered the agenda of politicians. The BEPS action plans are based on three core principles: coherence, substance over form and transparency (Diclehan, 2017, p. 152). This plan is the only globalization harmonization effort in the context of taxation of the digital economy, so it is the change with the widest digital taxation content to date (Artar, 2019, p. 132). In the final declaration of the G20 Leaders' Summit held in Antalya under the presidency of Turkey in 2015, "a package of measures developed within the scope of the G20/OECD BEPS project in order to achieve a more equitable and modern international tax system globally" was announced and approved. 15 Action plans were announced to prevent harmful tax practices (Yılmaz, 2015, p. 3). These actions are related to the following points (OECD, 2013, p. 14-24):

- to address the tax challenges of the digital economy,
- to neutralise the effects of hybrid mismatch arrangements,
- to strengthen controlled foreign company rules,
- to limit base erosion via interest deductions and other financial payments,
- to counter harmful tax practices more effectively by taking into account transparency and substance,
- to prevent treaty abuse,
- to prevent the artificial avoidance of permanent establishment status,
- to assure that transfer pricing outcomes are in line with value creation,
- to establish methodologies to collect and analyse data on BEPS and the actions to address it,
- to require taxpayers to disclose their aggressive tax planning arrangements,
- to re-examine transfer pricing documentation,
- to make dispute solution mechanisms more effective, and
- to develop a multilateral instrument.

2.2. Actions of the EU

In recent years, when the globalized economic structure has witnessed digitalization, the European Union (EU) has conducted a number of studies with the OECD, which is one of the other international institutions and organizations, on the inadequacy of the traditional economic structure and tax system. These studies were continued with the European Strategy 2020, which was presented to the public after the preparation of the Lisbon Strategy in 2000. In these strategies, the aim of the EU is to make maximum use of the opportunities that Information Communication Technologies (ICT) have revealed in the fields of employment, economic development, and innovation. In this context, the European Strategy 2020 also emphasized the need to create a "Digital Single Market" in the EU in terms of its transformation into an information society (Akses, 2014, p. 1).

3. Methodology

Teleological interpretation was used as the method in the study. In this study, the Digital Service Tax is discussed in terms of the taxpayer, responsibility, exception, exemption, base, rate, payment, and declaration. Subsequently, the constitutional principles of taxation were revealed on the basis of article 73. Therefore, by induction, it was evaluated by interpreting whether the Digital Service Tax is in accordance with the spirit of the constitution. During this assessment, the needs of the era were considered within the scope of OECD and EU works. Thus, by making a teleological interpretation, it was evaluated whether the Digital Service Tax is in accordance with the constitutional principles of taxation.

4. Findings

4.1. The Theoretical Basis of the Digital Service Tax

4.1.1. The Subject of the Digital Service Tax

In the first article of act No. 7194, the subject of the Digital Service Tax is clarified. The considerations related to this are as follows (Uçar and Tosun, 2020, p. 24):

- All kinds of advertising services are shown in digital environment (advertising control and performance measurement services, services such as data transfer and management related to users, as well as technical services related to the display of advertising), (e.g., Adwords, Admob, and Adsense).
- Services for the creation and operation of digital platforms where users can communicate with other users (e.g., Instagram, Facebook, Whatsapp, and Linkedln).
- The sale of any Visual, Audio, or digital content (including computer programs, videos, applications, music, games, in-game applications and the like) in the digital environment and the services offered in the digital environment for listening, watching, playing, or recording these contents in a digital environment or using them on electronic devices (e.g., i-tunes, I play, Spotify, Netflix, and Exxen).

In addition to the above items, the brokerage service offered in the digital environment is also subject to the Digital Service Tax (Duran 2019, p. 675). The second article of the act in question has been clarified to resolve the ambiguous situations related to providing digital services in Turkey. In this context, providing digital services in Turkey means that Turkey also benefits from digital services.

Suppose a digital service is provided to individuals located outside Turkey in exchange for the price paid. In that case, the service provided is not included in the subject of the tax because it is outside Turkey (Kaya Mutlu, 2020, p. 462).

4.1.2. Taxpayer and Tax Responsible for the Digital Service Tax

The taxpayer of the Digital Service Tax, which is explained in article 3 of the Act, is specified as a digital service provider. In terms of the Income Tax Act No. 193 dated 31/12/1960 and the Corporate Tax Act No. 5520 dated 13/6/2006, whether someone is a full-fledged taxpayer or not and whether these activities are carried out through a workplace or permanent representatives located in Turkey do not affect the liability of the Digital Service Tax. It is also understood from the text of the Act that it does not matter whether these people are full-fledged or limited taxpayers in terms of Digital Service Tax liability. In this context, it is impossible to establish a linear relationship between Digital Service Tax liability and income tax and corporate tax liability, since whether a company is a workplace, or a permanent representative does not affect its Digital Service Tax liability. Digital service providers may be subject to Digital Service Tax liability even if they are not income or corporate taxpayers in Turkey (Karabulut, 2020, p. 279).

Digital service providers who will file a declaration for the first time must fill out the form at the address of the Revenue Administration at www.digitalservice.gib.gov.tr before submitting a declaration. After the approval of the form filled in the electronic environment, the Digital Service Tax liability is imposed on digital service providers through the Large Taxpayers Office. The Ministry of Treasury and Finance has held the following persons responsible for the payment of tax according to the second paragraph of article 3 of the Act: A person who does not have a residence, business center or workplace within the borders of the Republic of Turkey, and who does not process transactions with the parties to the taxable transactions to ensure the safety of the tax to be collected from the taxpayers in other cases deemed necessary and payment intermediaries (General Communique on Digital Service Tax Application 2020).

4.1.3. Digital Service Tax Exemption

Digital Service Tax exemptions are explained in the first five paragraphs of article 4 of Act No. 7194 which covers tax exemption for audio products, game applications, use and recording of video applications in digital media, sales of goods and services through digital platforms or similar ways. Those who earn less than 20 billion TL in Turkey and less than 750 million Euros worldwide from these activities, which are counted as such, are exempted from Digital Service Tax. (Uçar and Tosun, 2020, p. 25). In this context, the figures mentioned also determine the limit of being a digital service taxpayer. Therefore, it is necessary to exceed the mentioned figures to collect the Digital Service Tax. The fact that the exemption limit is broad causes the revenue to remain within the scope of the exemption even if it is obtained. For example, the President has the authority to reduce the exemption limits to zero or to triple the services subject to the tax, separately or together, according to their departments. (Kaya Mutlu, 2020, p. 467).

4.1.4. Digital Service Tax Exception

The exceptions in the Digital Service Tax explained in the sixth paragraph of article 4 of Act No. 7194 are as follows (General Communique on Digital Service Tax Application 2020):

- The services specified in Article 4 of the banking act,
- Sales of products manufactured as a result of R& D studies within the scope of Act No. 5746 and, in particular, the services offered through them,
- Activities for which special communication tax is levied on,
- The services paid for treasury share within the framework of the additional article 37 of Act No. 406, and
- Payments written in article 12 of the Act on Electronic Money Institutions

4.1.5. The Tax Basis and Rate of the Digital Service Tax

Article 5 of Act No. 7194 explains the issues related to the base, ratio, and calculation. The tax base of the Digital Service Tax is the revenue earned from the services included in the subject of the tax during the relevant period. If the proceeds are obtained in the form of foreign currency, the basis is determined by converting the Central Bank of the Republic of Turkey to TL at the period's exchange rate on the date of receipt (Gümüş, 2020, p. 468).

Under the second paragraph of article 5 of the Act, although there can be no deduction from the tax base under the name of expenses, taxes and costs, the Digital Service Tax is not shown separately in documents that can be counted as invoices (Kaya Mutlu, 2020, p. 469). In this context, the Digital Service Tax base is subject to gross calculation. The rate of the Digital Service Tax is 7.5%. This ratio is stated in the third paragraph of article 5 of the Act (General

Communique on Digital Service Tax Application 2020). The President has the right to reduce this rate to 1% or double it (Duran, 2019, p. 676).

The Digital Service Tax rate in Turkey is high in contrast to other tax rates worldwide, which range from 1.5 % to 7.5% (Kaya Mutlu 2020, p. 470). In this context, when we look at the Digital Service Tax rates received in Italy at 3%, Austria at 5%, France at 3%, Hungary at 7.5%, Belgium at 3% and Poland at 1.5%, the Czech Republic at 7%, Spain at 3%, UK at 2%, and Pakistan at 5% (Asen, 2021; Fırat, 2020, p. 31), Turkey and Hungary are the countries with the highest Digital Service Tax rates

4.1.6. The Taxation Period in the Digital Service Tax, the Declaration, Levying, and Paying of the Tax and the Tax Security

The Digital Service Tax regulated in Article 6 of Act No. 7194 explains, the taxation period, declaration, pay and tax security sections.

According to the first paragraph of the sixth article, the taxation period in the Digital Service Tax is one month of the calendar year. However, the Ministry of Treasury and Finance is authorized to take the tax quarterly instead of monthly in cases when it is necessary (General Communique on Digital Service Tax Application 2020). In the second paragraph of the sixth article, the Digital Service Tax is calculated upon the taxpayer's declaration. In addition, those who are deemed obliged to make a tax deduction in the second paragraph of article 3 of the Act are also held responsible for submitting their returns by the evening of the last day of the month following their returns, just like the digital service taxpayer. Even if taxpayers cannot earn taxable income during the taxation period, they are obliged to submit a declaration related to this relevant period (General Communique on Digital Service Tax Application 2020). According to the fourth paragraph of article 6 of the Act, the Digital Service Tax is calculated by the tax office to which they are affiliated in terms of this tax for digital service providers in the state of value-added tax liability. However, for those who do not have value-added tax obligations, the Digital Service Tax is calculated by the Ministry of Treasury and Finance in terms of this tax. This tax is calculated for legal entities or natural persons obliged or deemed obliged to make a tax deduction (Duran, 2019, p. 677).

According to the sixth paragraph of article 6 of the Act, taxpayers who are required to file a declaration and those who are obliged to pay taxes have been held responsible for making payments of the Digital Service Tax for a taxation period within the period of filing a declaration (Duran, 2019, p. 677). While the tax can be paid to tax offices and banks authorized for collection, another way is the website of the Revenue Administration. Collection can be made using the pay options of authorized banks (General Communique on Digital Service Tax Application 2020).

The issue of tax security is included in the seventh article of Act No. 7194. According to this, if the taxpayer does not pay the Digital Service Tax, a notice is sent to the relevant authorities through the tax office and an announcement is made on the official page of the Revenue Administration that the taxpayer has not paid the Digital Service Tax. If the taxpayer has not completed his/her payment within 30 days after the announcement, the Ministry of Treasury and Finance shall place an access barrier to the service provided by the payee providing the digital service until the payment is made. The provision of access barriers is notified to the Information Technologies and Communication Authority. Access is blocked twenty-four hours after this provision's notification (Kaya Mutlu, 2020, p. 472-473).

4.2. The Principles Contained in Article 73 of the Constitution

4.2.1. The Principle of Tax Justice

Fair taxation assumes the duty of the touchstone of constitutional principles. As a result of the new world order, governments can use taxation as a fiscal policy tool by approving its implementation for social and financial purposes. The objectives of tax are classified under three headings. Specifying these classifications for financial, economic, and social purposes would be appropriate. While the main purpose of the financial goal is to generate income, economic and social goals (especially social goals), which are called extra-fiscal functions in the literature, are of great importance in terms of ensuring tax justice (Muter, Çelebi and Sakınç, 2016, p. 131-132).

Adolph Wagner suggests that tax can be used for socio-political purposes (Keskin, 2020, p.132). Wagner has advocated that the unfair income distribution and unfair competitive environment under market conditions should be reduced to the lowest level through tax regulations (Neumark, 1950, p. 45). Because he adopted this view, Wagner attached great importance to the principles of the generality of tax and equality of tax for the formation of tax justice.

While the concepts of justice and equality have similar definitions that are acceptable to almost every degree, tax justice and tax equality differ from this point. The primary purpose of tax justice is to distribute the tax burden equally among individuals and to provide certainty about how the extra fiscal functions of the tax should be used correctly

as a means. In adverse situations that may occur in the use of the social and economic objectives of the tax, which is characterized as an extra fiscal function, as a fiscal policy tool, and in matters such as the taxpayer, amount, payment time that occur in the taxation processes from the event that gave rise to the tax, tax justice becomes essential. In addition, paying taxes according to the solvency of individuals living within the country's borders that adopts the principle of tax justice is another feature of this principle. It is necessary to talk about horizontal and vertical justice that come into play here (Kılıç, 2018, p. 397).

In the concept of horizontal justice, people at the same income level are taxed at the same rate, while in the concept of vertical justice, people belonging to different income groups are taxed at different rates. While the concept of horizontal justice was assimilated into the rule of law, the concept of vertical justice was adopted in the social state. This situation, however, turns into a complementary feature situation from the point of view of tax justice. For tax justice to become fully operational, its compliance with other principles is important (Gök, Biyan and Akar, 2013, 271).

4.2.2. The Principle of Tax Equality

The principle of equality, which has been one of the constitutional principles of governments since the 1700s and has undergone a constant transformation in terms of development, continues to be one of the constitutional principles. In the tenth article of the Constitution of the Republic of Turkey, this principle emphasizes the equality of every individual in terms of the act, regardless of language, religion, color, gender, faith, race, and sect (Tekin and Gümüş, 2014, p. 249).

The principle of equality is one of the crucial principles of constitutional and tax law. In the implementation of the provisions coordinating the tax and other financial responsibilities of a country, one of the principles of equality is that taxpayers should not be subjected to any discrimination (Çomaklı and Gödekli, 2011, p. 53-54). Horizontal and vertical justice, which are the subject of the principle of justice, are also considered necessary in the principle of equality. The principle of equality is at a critical point in terms of ensuring tax justice because in this principle, it advocates the equal sharing of the tax burden by considering individuals' ability to pay. Therefore, the ability to pay is considered an essential criterion for the principle of equality to become operational. (Gerçek, Bakar, Mercimek, Çakır and Asa, 2014, p. 94).

It is possible to divide the principle of equality into two aspects: substantive and formal. Substantive equality can be explained as the classification of people into a particular group due to similar characteristics that they have and the equal treatment of those in the same, equal situation as a result of this classification, while formal equality can be explained as the complete and objective application of the provisions of act regardless of any personal characteristics of people (Tekin and Gümüş, 2014, p. 249).

4.2.3. **The Principle of Taxation According to the Ability to Pay**

The principle of ability to pay can be expressed as the participation of individuals in the tax burden according to the amount of income and wealth they have, above the amount of income they have earned to support themselves and their family for public services, without any discrimination and regard to interests. The principle of taxation according to the ability to pay is compatible with the principle of proportionality because, in the principle of proportionality, it is important to what extent taxpayers will be taxed. (Tekbaş 2010, p. 160).

Even if the ability to pay (mali güç) and solvency (ödeme gücü) are used together, there are some significant differences between these two concepts. A person is taxed in solvency only according to their income status, while the ability to pay, spending and wealth amounts are taxed in addition to the individual's income status. For this reason, the ability to pay is more comprehensive than solvency (Budak, 2010, p. 8). According to the decision of the Constitutional Court (Date: 18.07.1995, Docket No: 1994/84, Decree No: 1995/33), a fair and balanced distribution of the tax burden is ensured by considering income, capital, and expenditures, which are considered scientific indicators of financial power in a country governed by the rule of law. The ability to pay, considered the criterion of tax liability in practice, determines the liability of individuals or organizations according to the level of economic value. The legislator makes tax acts according to this point of view and regulates taxation with various measures and methods at this ability rate. Thus, the indicators of ability to pay have been determined. In another decision of the Constitutional Court (Date: 28.3.2001, Docket No: 1999/51, Decree No: 2001/63), it was stated that "*ability to pay is the source, basis, cause and condition of existence of solvency*" and emphasized that financial power has a broader meaning than solvency. In other words, the ability to pay covers income, wealth, and expenditure, and, in this respect, has a broader meaning than solvency.

From the point of view of understanding the principle of ability to pay, two issues are essential. The concept of

ability to pay and how to measure taxpayers' ability to pay and by what to measure taxpayers' ability to pay, whose tax has been allocated, should be measured in an equal and fair way (Tekbaş, 2010, p. 160). According to the principle of ability to pay, an increase in the individuals' ability to pay also leads to increased tax burdens.

This principle is an extension of the tax justice principle of the social state because the social state has adopted the concept of vertical justice. However, the principle of the ability to pay also appears as an extension of the principle of tax equality (Üstün, 2003, p. 260). In the tax sense, some exceptions and exemptions may violate the principle of taxation according to the ability to pay. Thus, some violations of tax justice will occur. The privilege granted to prevent these negative situations from occurring mustn't contradict the principle (Budak and Yakar, 2007, p. 141).

4.2.4. The Principle of Generality of Tax

In article 73 of the Constitution, it has been emphasized that everyone is responsible for taxation to finance public expenditures according to their ability to pay. The word "everyone" in this article explains the principle of generality. It is a requirement of the principle of generality that people living within the country's border and benefiting from public services are taxed without discrimination to finance public expenditures that will be incurred due to these services; the intention is that there is no discrimination, the primary purpose is to subject people to taxes on their earned income without dividing them according to their income status (Üstün, 2003, p. 257).

Subjecting people to social classifications also contradicts the equality principle of taxation because the principle of generality complements each other with the principle of equality as a principle that has taken place in the constitution as a requirement of the rule of law (Çağan, 1980, p. 138). The expression of paying according to the ability to pay in article 73 also aims at taxing everyone in a general sense. The purpose of taxing all individuals is to prevent the formation of an unfair environment by taxing a particular section or group and to reduce the tax burden by taxing every individual living within the country's border (Tekbaş, 2010, p. 151). While the principle of generality stipulates that every individual in the society should be subject to taxation, taxation according to their ability to pay will enable the formation of an environment of justice in a tax sense, making this principle workable (Arslan, 2016, p. 227).

Today, governments softly apply the principle of generality instead of applying it in a challenging, precise way to create economic goals and social justice. Although exemptions and exceptions may be perceived as a situation contrary to this principle, it is not thought that the compliance of the decisions taken and implemented by legislators in such transactions with constitutional principles will create a problem, especially if they do not constitute a violation of the principle of generality (Tekbaş, 2010, p. 152).

4.2.5. The Principle of Fair and Balanced Distribution of Tax Burden

The phrase "Fair and balanced distribution of the tax burden is the social purpose of fiscal policy" contained in paragraph 2 of article 73 of the Constitution, was first expressed in the Constitution of 1982 (Erkin, 2012, p. 245). The principle of fair and balanced distribution of the tax burden requires government intervention in the economy as a result of the social state principle. In any case, this intervention should be one of the social goals of public economics (Akdoğan, 2009, p. 210). The understanding of equality in the social state is defined as equality of opportunity in accordance with social justice. In this context, taxing people based on vertical fairness when taxing is the right approach in terms of a fair and balanced distribution of the tax burden.

According to Constitutional Court, this principle is essential in a social state governed by the rule of law. Thus, the necessity of the principle of fair and balanced distribution of the tax burden has been discussed in the literature (Üstün, 2003, p. 261). For this reason, it is foreseen that if the principle of taxation according to the ability to pay is maintained, a situation of fair and balanced distribution of the tax burden will occur.

4.2.6. The Principle of Legality of Tax

The third paragraph of article 73 of the Constitution states that taxes and similar responsibilities will be imposed and abolished by law. It will not be wrong to state that while stating the tax and similar responsibilities contained in this article as fees, and duties, it also indicates all the remaining financial obligations (Kaneti, Ekmekci, Güneş and Kaşıkcı, 2019, p. 56). The principle of legality is also mentioned in Articles 7 and 87 of the Constitution of the Republic of Turkey (Teziç, 2005, p. 16). Using the taxation authority of the body that has the power to enact laws explains the principle of the legality of taxation. In other words, taxes are imposed and abolished only by law.

The principle of legality is one of the first norms of tax law. With the Magna Carta, it was accepted by the people and the state that tax transactions would be imposed and abolished by a law (Üstün, 2003, p. 262-263). With this statement, the principle of legality is of primary importance in preventing arbitrary taxes and protecting the rights of individuals.

This principle does not determine whether the tax will be imposed or abolished only. The elements of the tax, such as paying method, amount, and statute of limitations, also fall under the jurisdiction of the principle of legality. Thus, thanks to clearly stated tax acts, tax complexity will be eliminated, and tax disputes will be minimized. It is helpful to mention the principle of retrospective, which is an extension of the principle of legality in this section because, in the events that give rise to the tax that has been challenged in the past, there is a question of retrospective thanks to the principle of legality (Gerçek et al., 2014).

The principle of legality is of great importance in the government's foreign policy. In this way, significant gains can be achieved in combating crime concerning other governments (Evren, 2011, p. 976). In addition, the principle of legality is seen as an ideological basis for the legal paths an individual will take when they think they have been wronged. (Tekin and Gümüş, 2014, p. 250).

4.2.7. The Principle that the Tax Should be Equivalent to Public Expenditures

The government needs a regular and fixed source of income to finance public expenditures. Taxes, which will meet this requirement regularly and fixedly, are seen as a primary source (Yüce, 1999, p. 1). The statement "Everyone is obliged to pay taxes to cover public expenditures" in article 73 of the Constitution of the Republic of Turkey clearly states the necessity of a tax for public expenditures. However, it is not possible to resort to the tax method for any expenditure that is not a public expenditure (Keskin, 2020, p. 154).

Considering the word "everyone" mentioned in the act, the legislator also emphasized that citizens fulfill their tax obligations in finance for their expenditures in the public sphere. The financial purposes of tax and the principle that tax should be the equivalent to public expenditures complement each other because the financial purpose of tax is to be taxed according to the individual's ability to pay for the financing of public expenditures, and the taxation process is carried out at the lowest possible level (Aksoy, 1994, p. 182). The point that wants to be explained here is that both taxes should be considered financing for public expenditures for financial purposes and generally adopt the same idea as the principle that taxes are the equivalent of public expenditures.

5. Discussion and Concluding Remarks

Act No. 7194 "Digital Service Tax and Amendments to Some Laws and Decree Law No. 375" were included in Turkey's tax system on December 7, 2019. This tax has the characteristics of a tax applied on a national scale. Although the Republic of Turkey has stated that it has enacted the Digital Service Tax to provide a fair contribution for financing public expenditure from servers engaged in digital activities in its own country, many inconsistent situations of this tax stand out from the point of view of constitutional taxation principles. This study considered these inconsistencies by evaluating the Digital Service Tax in terms of constitutional taxation principles.

In the context of the classification of taxes, it is not clear whether the Digital Service Tax is direct or indirect. As such, how to use the income generated by this tax also appears to be an open-ended situation. In the law system of Turkey, keeping income to account in the form of the net amount of earnings and income creates a contradictory situation (Kaya Mutlu, 2020, p. 459). Even if the Digital Service Tax is currently calculated and paid on the taxpayer's income, this will likely be reflected on the consumer and the actual taxpayer will be a consumer, as in expenditure taxes. In this context, a situation that contradicts the principle of fair and balanced distribution of the tax burden will arise. The principle of fair and balanced distribution of the tax burden is an extension of the principle of the ability to pay because a system in which tax is paid according to the ability to pay will become possible only with a fair and balanced distribution of the tax burden (Uçar and Tosun, 2020, p. 34).

The tax base of the Digital Service Tax, as explained in the previous parts of this study, is the revenue obtained from the services included in the tax subject during the relevant taxation period. If the revenue is calculated in foreign currency, the foreign currency is converted into Turkish currency at the exchange rate of the Central Bank of the Republic of Turkey, which is valid on the date of receipt of the revenue. No deduction is made from the tax base for costs, expenses, and taxes. In addition, the tax base of the Digital Service Tax, which indicates that it is not possible to present documents other than invoices, reveals that the tax base is calculated in gross in paragraphs 1 and 2 of article 5 of the Act entitled "Tax base, rate and calculation." According to article 6/7 of the Act, the digital service tax paid by Digital Service Tax taxpayers can be deducted by these taxpayers as an expense for determining the net income based on income and corporate tax. In this context, the Digital Service Tax may be deducted as an expense in determining the net income related to income tax and corporate income tax. However, it is unlikely to be deducted from the tax payable.

When we look at the arrangements of all these base accounts, it is seen that the base account in the Digital Service Tax contradicts the principle of the ability to pay taxation (Kaya Mutlu, 2020, p. 469). If the net amount of earnings is

taken as the basis when calculating the Digital Service Tax base, it is possible that this situation, which constitutes a contradiction, will be compatible with the ability to pay principle of taxation.

The Digital Service Tax has caused several situations that need to be clarified since it is a tax that has been created comprehensively in terms of this issue. Although the Digital Service Tax is defined and explained in specific terms in the general communique on the Digital Service Tax application, concepts such as user, digital service, advertising control and performance measurement services are not included in the definitions in the act communique. No explanation has been made regarding the concepts mentioned in the communique either. In addition, although it is stated that the exemption limits in the fourth article of the Digital Service Tax law will be based on the previous accounting period when calculating the limit of 20 Million TL to 750 Million Euro, the disclosure of the Digital Service Tax in the sixth article as monthly periods of the calendar year of the taxation period has also caused uncertainty about whether the Digital Service Tax should be understood as a monthly or a calendar year taxation period regulated by the Income Tax Act. This also contradicts the principle of certainty, one of the tax principles. In this context, although the aforementioned ambiguous situations were not included in the published Digital Service Tax Act Communique, it would be appropriate to include them in later communiques and narrow the breadth of services included in the subject of the Digital Service Tax.

The issues related to the period, tax collection, declaration and tax payment are regulated in article 6 of the Act. However, some issues related to the regulations made in the sixth article of the Act and the third part of the general communique are open for discussion. Firstly, according to the regulations, each taxpayer/responsible person must make a separate declaration on his/her/its behalf. However, since this situation may cause various problems regarding group companies, it is necessary to introduce a single Digital Service Tax obligation and provide the opportunity to file a single declaration.

Another issue is related to the problem of double taxation. The fact that the subject of the Digital Service Tax is the revenue of companies, and this has the characteristics of commercial earnings, opens the possibility of two taxes being levied on one base. In this context, double taxation may also occur, resulting in a situation contrary to the right to property and the principle of proportionality (Kaya Mutlu 2020, p. 472). Although the act allows the deduction of the paid Digital Service Tax from the Income Tax base as an expense, the current position will minimize the double taxation effect, but will not ensure its complete elimination. This problem can be solved if the provision is arranged from the beginning in a way that allows the deduction of the paid Digital Service Tax from the Income Tax to be paid.

Another issue concerns the provision entitled ‘Correction’ in the general communique III/F. Since it is impossible to refund the digital service provided in this provision, and the Digital Service Tax is a tax levied on revenue, there is no correction and refund of the calculated tax on digital services. Requests for correction within the scope of the tax error regulated in the Tax Procedure Act No. 213 are subject to valuation by the provisions of the act. In this context, with the general communique, the possibility of error correction as belonging to tax error has been eliminated in the Digital Service Tax. Although the following sentence states that the way to benefit from the general error correction provisions is open, blocking a right granted by the act through the regulatory process of the administration only due to actual impossibility will constitute a violation of the principles of the legality of the tax.

In the Digital Service Tax, a measure is provided in article 7/1 of the Act against the possibility of declaring and paying the tax at the correct time and manner within the scope of tax security. In this measure, it explains that digital service providers covered by this act who do not fulfil their responsibilities for filing and paying taxes covered by the Tax Procedure Act on time, or their authorized representative in Turkey, may be notified utilizing notification methods, electronic mail, or all other means of communication listed in the Tax Procedure Act using the domain name, communication tools, IP address, and similar sources on the internet pages through the tax authority authorized to calculate the Digital Service Tax to fulfill these responsibilities.

If the warning is ignored and unpaid within 30 days, the Ministry of Treasury and Finance blocks access to services. The authority for sanctions is the Ministry of Treasury and Finance. The sanction is not a fine, as is the case for tax misdemeanours, but a direct denial of access. However, if this situation occurs, a consequence, such as an inability to reach workplaces will occur for taxpayers who conduct their trade through Internet sites. Blocking access in this way is like a workplace closure penalty. This article of the act explained in the general communique aims to link the tax payment to the guarantee. However, the regulation of the provision poses problems in some respects. Thus, although the goal is tax security, the provision of a sanction that is not foreseen for the security of other taxes for practical reasons may create a situation contrary to the principles of proportionality, legal security, and equality.

In this case, it can also be ensured that this sanction is subject to revaluation and that it fulfills its functionality with constitutional principles by ensuring its applicability in a way that has a harmonious adaptation in the direction of tax law principles.

It is necessary to refer to article 7 of the Digital Service Tax Act here. A tax security institution has been accepted with this act and it has been stated that in some cases it may be decided to block access to the services offered by digital service providers (Rençber, 2020a, p. 573). However, according to article 22 of the Constitution, everyone has the freedom of communication, and without a decision duly given by a judge on one or several of the grounds of national security, public order, prevention of crime, protection of public health and public morals, or protection of the rights and freedoms of others, or without a written order of an agency authorized by law in cases where delay is prejudicial, again on the above- mentioned grounds, communication shall not be impeded nor will one's privacy be violated. Even if it is examined only in this context, paragraph 2 of article 7 of the Digital Service Tax Act, which authorizes the Ministry of Treasury and Finance to block access, clearly violates the Constitution (Rençber, 2020b, p. 33).

In Article 4 of the Digital Service Tax Act communique, where exemptions and exceptions are explained, it is possible to characterize the authorization of the President to raise or lower the limit of 20 Million TL and 750 Million euros separately or together up to three times according to the types of services included in the subject of the tax as a violation of the principle of legality and the principle of legal security due to the introduction of the executive wing to impose and remove taxes only by act (Uçar and Tosun, 2020, p. 38). Another problem is that the Ministry of Treasury and Finance is shown as the authorized authority to bring notification and certification responsibility and to determine the procedures and principles related to it in the Communique of the Digital Service Tax Act. Although this situation conflicts with the principle of legality, the fact that it has the character of an act in the Digital Service Tax Communique is accepted within the context of constitutional principles.

Although the principle that the tax should be equivalent to public expenditures is not considered to be a fixed definition in the context of indirect and direct taxes created by the Digital Service Tax, this tax also constitutes a significant benefit in financing public expenses by constitutional principles, and at a rate of 7.5%, which allows the government to make the best use of taxes, which are the ideal way to meet public expenditures.

There is a general international situation that it is appropriate to tax digital service expenses in the countries where the earnings are received because their earnings are very high while they have a low cost. It is observed that multinational companies providing digital services generate income in the countries where they operate. However, they are not taxed in the same way as companies established in that country because they do not own any physical assets, and this contradicts the principle of fairness of taxation by causing injustice. As a result of the inability of international tax law norms to adapt to the transactions included in the subject of tax in the digital economy, this situation leads to an increasing gap in the economic and welfare level between developed and developing countries.

The OECD and the UN have taken measures because the digital economy has dramatically changed the traditional understanding of trade and caused some problems, especially in the tax sense. However, the structure of the digital economy, which has not reached complete unity in the tax sense, has caused economic difficulties among countries in a global sense. Unfortunately, the double taxation incident creates significant problems in Turkey, as in every country because some multinational companies transfer their gain to places where they can pay the least tax. From the point of view of Turkey, the Digital Service Act faces the problem of exactly where to place it within the scope of indirect/direct tax, which causes a complete reversal of the principle of tax justice. The only way to solve this problem is to adopt a standard general digital service tax globally.

Even if the proposals presented have explained that no action specific to the digital economy is required from the EU point of view, it has been stated that in addition, it will be appropriate to measure the adequacy of measures taken to prevent tax avoidance that is already in place and to monitor this situation, while the OECD has stated that today digitalization has included all economic activities in the world as a whole from a global perspective, noting that the solutions proposed within the scope of financial protection are not sufficient, and the risk factors posed by the digital economy with BEPS actions have been taken into account.

Other countries, such as Turkey, have also included the Digital Service Tax in their tax systems as a balancing tax because there is yet to be a clear decision on the taxation of income generated due to internationally recognized digitalization. The Republic of Turkey has decided to tax the earnings of multinational companies providing digital services operating in its own country by taking a national measure since a joint decision has yet to be reached internationally. Because if paragraph 2 of Article 73 of the Constitution of the Republic of Turkey is taken as a basis, it is necessary for digital activities to be taxed in terms of tax justice.

The fact that the digital service tax does not find its unique place in the Turkish tax system and that the tax comes into force immediately without discussing all aspects of it in every sense indicates that this tax is taken as a tax for financial purposes. Another critical issue, in this case, is that the digital service tax constitutes some violations of constitutional principles. To solve these problems in a fundamental sense, it is necessary to determine a tax that should be levied on a global scale. This tax, which will be accepted by all countries globally, will help solve the complex structure created

by the Digital Service Tax in all other countries, including Turkey. A great responsibility also falls on the OECD to ensure the acceptability of a common tax.

Ethics Committee Approval: N/A.

Peer-Review: Externally peer-reviewed.

Author Contributions: Conception/Design of Study- R.K.; Data Acquisition- Ö.G.; Data Analysis/Interpretation- Ö.G.; Drafting Manuscript- R.K.; Critical Revision of Manuscript- Ö.G.; Final Approval and Accountability- Ö.G.

Conflict of Interest: The authors have no conflict of interest to declare.

Grant Support: The authors declared that this study has received no financial support.

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How cite this article

Kilickaya, R., & Gumus, O. (2023). Assessments on compliance/non-compliance of the digital service tax in regard to constitutional principles of taxation. *Maliye Çalışmaları Dergisi-Journal of Public Finance Studies*, 2023; 70, 70-83. https://doi.org/10.26650/mcd2023-1320762