

THE RIGHT TO GOOD ADMINISTRATION IN TAX INSPECTION PROCESS

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Abstract

The right to good administration, which is one of the significant features in the scope of administration field of a contemporary rule of law, particularly requires certain qualities such as impartiality, transparency, proportionality, prohibition of discrimination, right to access information, right to be heard, right of defense, right to a fair trial within reasonable time and justification of decisions. The right to good administration constitutes the legal assurance of individuals who are relatively weak against the state which is equipped with the privileges of the public power. These assurances are also applied to tax law practices. The specific principles and requirements of the right to good administration should also be considered during the tax inspection process. This study herein assesses “tax inspection”, which is a technical tax law institution, under the light of requirements of the right to good administration.

This study further includes the normative foundations of the right to good administration under international and national law and explains the assurance mechanism in the scope of this right along with the functions of such mechanisms. Subsequently, it discusses the process and institutional structure of the tax inspection which is one of the audit mechanisms for the taxpayer under Turkish tax law. Then, the legal and administrative regulations made in the relevant tax legislation with regards to the right to good administration are briefly examined. In this context, the individual application decision by the Constitutional Court which was published in March, 2018 (Application No: 2015/6728) was evaluated here as a remarkable example of how the existing regulations can be applied differently in similar concrete cases and how they can give rise to different results in terms of obligations during the tax audit processes.

Keywords: Tax inspection, right to good administration, taxpayer rights, rule of law.

JEL Code: H20, K34.

1. Introduction

The purpose of the tax inspection is to investigate, determine, and ensure the accuracy of the taxes to be paid. Since the Tax Procedure Law is an administrative procedure code in the field of taxation, it is obligatory for those who are authorized to conduct an inspection to do it within the framework of these rules (Saban, 2015: 454). The tax administration using the public power privilege should do the inspection in a way that is lawful and does not eliminate the rights of the taxpayer. Nowadays, it is accepted that if the principles of the right to good administration are taken into account, it is another indicator that the tax inspection, whose technical details are specified in the legislation, is conducted lawfully.

During the 2015 Congress of the International Fiscal Association (IFA) on “The Practical Protection of Taxpayer’s Rights”, rights of taxpayers subject to tax inspections, which is one of the processes of the tax audit, has been discussed (Baker/Pistone, 2015:43). The fact that the tax administration, which has the superior public power, obtains ‘legal evidence’ on the taxpayer who is subject

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to the tax inspection will have a direct effect on the lawfulness of the process. Especially the member states of the European Union and the governments, which take into account the requirements of contemporary rule of law, accept that rights and interests of the taxpayer must be protected by law and should not be overlooked while the factual and legal basis research on tax is being carried out.

2. Conceptual Determination: Right to Good Administration

Good administration refers to acting in accordance with the rules and procedures provided for a certain activity. Even though it varies depending on the field of activity, there are good administration principles such as impartiality, accuracy, and promptness that apply horizontally to all administrative activities (Karakul, 2015: 62).

The report of the Venice Commission on 9 March 2011 on concepts “good governance” and “good administration” concludes that the concept of good governance is not included in the constitution of any state in Europe. The inclusion of “good governance” in judicial decisions is limited to a few exceptional examples whereas the “good administration” concept is more widely used on a national scale (Karakul, 2015: 82).

3. Normative Foundations

The regulations which embody the normative foundations of the right to good administration have been examined by a dual distinction. Firstly, the sources of good administration in international law, and then the regulations in our domestic legal system are discussed.

3.1. International Law

The first time when the right to good administration has been regulated on the international level is in the Charter of Fundamental Rights of the European Union. In the same vein, the Council which prepares the Charter has accepted the right to good administration as a general principle of the law when it is included in the Charter and it is based on the Community case law (Şimşek, 2007: 91). The Code of Good Administrative Behaviour and the Committee of Ministers of the Council of Europe Recommendation No. CM/Rec (2007/7) to the Member States contain several provisions on the right to good administration (Statskontoret, 2005/4: 13,14). Although the right to good administration in the European Convention on Human Rights is not clearly regulated, the rights and freedoms defined in the Convention appear as assurances of the understanding of the rule of law which is shaped by European legal culture (Kaboğlu, 2018: 289). Resolution (77) 31 on the Protection of the Individual in Relation to Acts of Administrative Authorities, embodies the need for “assistance and representation” along with certain requirements for an administrative act such as the right to be heard, access to information, justification of decisions and right to legal remedies. It has been pointed out the need to grant the individual, whose rights and freedoms have been affected adversely by an administrative act, the right to be assisted legally and the right to defend oneself through legal representative. Moreover, the regulations deemed as consequences of legal culture of the Council of Europe such as the European Social Charter, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, European Charter of Local Self-Government and recommendations are among the legal regulations aimed to fulfill the requirements of the right to good administration.

3.2. National Law

Although there is no legal norm in which the right to good administration is clearly stated in our national law, there are various provisions of the Constitution, which guarantee the requirements in respect thereof. The principle of the rule of law in Article 2 of the Constitution, the principle of equality (art. 10), the nature of fundamental rights (art. 12), the protection of fundamental rights and freedoms (art. 40), the right of petition, the right to information and appeal to the Ombudsman (art. 74), judicial review (art. 125) include a couple of basic regulations concerning the right to good administration.

It must be noted that there is no General Administrative Procedure Act in Turkish law. The ongoing efforts on this issue since 1998 have not yielded any results. Instead, however, different laws have been adopted concerning the administrative procedure. For instance, Law No. 4982 on the Right to Information, which regulates the procedure and the basis of the exercise of this right in accordance with the principles of equality, impartiality, and openness which are considered as requirements for a democratic and transparent government. Law No. 6698 On the Protection of Personal Data and Law No. 6328 on the Ombudsman contains regulations on this issue in question. Articles 1 and 5 of the Law on the Ombudsman mention basic principles of good administration. Article 6 of the Regulation on Application of the Law on the Ombudsman titled “good administration principles” defines clearly the principles of good administration envisaged as the supervisory criteria of the institution

4. Requirements for the Right to Good Administration

As a reflection of the rule of law principle, right to good administration includes a series of material and procedural requirements such as impartiality, proportionality, transparency, non-discrimination, right to be heard, decision making within in a reasonable time and justification of decisions, and legal remedies (Şimsek, 2007: 99). In this study, the requirements of the right to good administration such as impartiality, proportionality, transparency, justification of decisions, non-discrimination, right to access to information, right to be heard, right of defense, which are the most related ones to the taxpayers’ rights in tax inspection processes, were addressed.

Impartiality requires to act in accordance with objective and legal rules, regardless of personal interest and to avoid arbitrary acts and privileged practices. Proportionality is a principle that emerged in relation to the protection of the rights of people against public regulations. Discrimination is the unequal treatment to those who are in a similar or identical situation and unequal treatment without any justified reasons (Raad, 1986: 11). This principle protects individuals in similar situations from discrimination (Yaltı, 2006: 185).

Transparency requires the administration to be open and transparent in accessing and sharing information in the process of decision-making and decision-implementing. The right to be heard implies an opportunity of self-disclosure to persons on the subject matter of the administrative act, prior to the administration’s decision limiting persons’ legal status or affecting their rights. The individual’s right of self-defense depends on his/her knowledge on the subject. It is not possible for the person who does not know that there will be any act about him/her, the person who is not warned that his/her behavior is wrong, and who does not have any information about the content of the files and documents kept by the administration, to participate in the process and explain their opinions (Akillioğlu, 1983: 101).

5. Evaluation of good administration in tax inspection process: theory and practice

5.1. Tax Inspection in Theoretical Dimension: Concept, Institution, Process

A tax inspection is an in-depth investigation of the taxpayer's book accounts, documents, and inventory in order to ensure the accuracy of the taxes to be paid (Öncel et al. 2015: 100). Tax inspection means confirmation of events and facts in terms of both the taxes and tax penalties by binding them to evidence (Yaltı, 2016: 54). All taxpayers are not subject to tax inspection, as well as the inspection does not cover only taxpayers (Oktar, 2018: 231). One of the conditions for a sound functioning tax system based on declaration is that tax inspections are widespread and effective (Karakoç, 2014: 322). Since it is not possible for each taxpayer to go through tax inspection, the system requires the conduct of tax inspections to be on the basis of efficiency and performance (Soydan, 2015: 452).

During the tax inspection process, some rights of the taxpayer should especially be protected. This is not only the obligation of the tax administration towards the taxpayer but also a requirement for the right to good administration. Fundamental amendments with respect to the tax inspection process were imposed by Law No. 6009. Subsequently, important innovations protecting the rights of the taxpayer in the audit process were made by regulations. Article 5 of the Regulation on the Tax Audit Procedure states that the tax inspectors should act according to principles of impartiality, fairness, transparency, integrity, and rule of law during a tax audit. It must be noted that tax inspections may still be initiated even if no risk has been identified with regard to the taxpayer and no one has denounced or made a complaint against the taxpayer (Arık, 2017: 399). In other words, the inspection process is not foreseeable, is rather vague. If there is no specific mechanism to control the impartiality of the administration and the fact that the inspector is granted the authority of seizure without the decision of the judge in the event that the concerned persons refrain from signing the minutes, (Uzun Çam, 2017: 198) seriously damages the rights of the taxpayer.

5.2. Judicial Approach: Constitutional Court Decision

In an individual application decision² of the Constitutional Court, the Court shows a concrete example which proves that the tax legislation and its implementation do not work in parallel. According to said individual application decision, the tax administration conducts proceedings that give different tax consequences to taxpayers who are in a similar situation in the tax inspection process causes discrimination in relation to the right to property.

It is important to underline that the comparability, justification and proportionality tests are gradually applied to the facts of the case when the Court deliberated whether prohibition of discrimination is violated. Accordingly, it was concluded that since the consequences of the discriminatory interference without an objective and reasonable justification with the right to property were not rectified, the extent of the interference and the severity of the consequences as well as the administrative acts which led to these consequences caused an excessive burden on the applicant. Thus, in the above-mentioned case, the Constitutional Court found a violation of the prohibition of discrimination in the context of the right to property and emphasized good governance principles.

² Constitutional Court, Reis Otomotiv Ticaret ve Sanayi A.Ş., Application No: 2015/6728, T: 01.02.2018, (Official Gazette: 07.03.2018, 30353).

6. Conclusion

Since 2010, a number of regulations have been made in favor of the taxpayer in our legislation. When these regulations are examined, it has been seen that the principles and rules that meet the requirements of the right to good administration are mostly included in the regulations with respect to tax inspection. By limiting the subject, period and the information and documents to be requested during the tax inspections, a possible abuse of the power of discretion of the tax administration is prevented. Moreover, certain important steps have been taken to ensure that taxpayers' objections and disclosures are recorded in the minutes, and to protect the right of defense and the right to be heard of the taxpayers.

In the event that individuals subject to tax inspection hesitate to sign the minutes, Article 141/2 of the Tax Procedure Law authorizes the tax inspector to seize their documents and books, which contains facts and accounts mentioned in the minutes, regardless of their consent and not to return these documents and books until the taxes and fines incurred as a result of the inspection are finalized. This provision grants the inspector the authority of seizure without the decision of the judge. This measure, which is intended to ensure the signature of the minutes, results in a disproportional interference. In the same vein, the fact that the tax technique reports, which are the basis of the tax inspection reports, are not given to the taxpayer due to tax privacy, restricts the right to access to information, the right of effective defense and hence the right to a fair trial. In order to remove the regulations that restrict or eliminate the above-stated rights of the taxpayer, legislation and its implementation should be consistent. In this way, the assurances and the effective protection of taxpayers' rights in the inspection process can be ensured.

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