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THE LEGALITY PRINCIPLE OF TAXES IN THE CONSTITUTION OF REPUBLIC OF TURKEY

Abstract:

The legality principle of taxes is arranged in the 73rd article of Turkish Constitution: "Taxes, dues, fees and similar charges shall be enacted, amended and repealed by the law". By this provision, it has been stressed that the basic authority on taxation appertains to national assembly.

The provision granting the authority about taxation to Council of Ministers is set at the 4th (the last) paragraph article 73 of Turkish Constitution: "Council of Ministers may be empowered to make amendments within the lower and upper limits prescribed by the law on provisions of exemptions, exceptions, reductions and rates related to taxes, duties, fees and similar charges".

In this study, we try to explain the scope of the legality principle of taxes in Turkish Constitution. Also the authority about taxation given to the Cabinet is also examined in this presentation.

Keywords:

Tax, legality principle of taxes, Turkish Constitution

JEL Classification: K34

I. In General

The legality principle of taxes is arranged in the 73rd article of Turkish Constitution. This article is arranged in the fourth chapter named “Political Rights and Duties” of the second part named “Fundamental Rights and Duties” of the Turkish Constitution.

The article named “Duty to pay taxes”. This article consist of four paragraphs: *“Everyone is under obligation to pay taxes according to his financial resources, in order to meet public expenditures.*

An equitable and balanced distribution of the tax burden is the social objective of fiscal policy.

Taxes, fees, duties, and other such financial obligations shall be imposed, amended or revoked by law.

The Council of Ministers may be empowered to make amendments on provisions of exemptions, exceptions, reductions and rates related to taxes, duties, fees and other such financial obligations within the lower and upper limits prescribed by the law”.

This article covers the basic constitutional principles directly related with the tax obligations. These principles respectively are the generality of taxes, to meet the public expenditure, to be based on ability to pay tax, an equitable and balanced distribution of the tax burden and the legality of taxes.

In fact these principles are with in conjunction with each other. These principles are also formalized expressions of the rule of law and the welfare state (SOYDAN, 1998: 100; ÜSTÜN, 2003: 254).

Taxes and taxation authority is the basis of the constitution. The exercise of authority of taxation is required to comply with these constitutional principles (ÇAĞAN, 1982: 95; BAYRAKLI/SEZER, 2000: 160; ÜSTÜN, 2003: 255).

II. Taxation Principles Of Turkish Constitution

A. Generality Of Taxes

The first paragraph of 73rd article is: *“Everyone is under obligation to pay taxes according to his financial resources, in order to meet public expenditures”.* The generality principle is stated in this paragraph with the phrase of “everyone”. The concept of “everyone” should be evaluated with the ability to pay tax (to pay tax according to the financial power) concept. The people who have financial power to pay tax should be understood from the word of “everyone”, not all the citizens and foreigners living in the country (ALİEFENDİOĞLU, 1981: 71). According to this, taxes may not be taken from people that haven’t got adequate financial power.

The principle of generality of taxes is coincides with the principle of equality, in terms of rule of law (ÖNCEL/KUMRULU/ÇAĞAN, 2014: 40; KUMRULU, 1979: 155-156).

B. Taxes Are Taken To Meet The Public Expenditures

Everyone has to pay taxes “*in order to meet public expenditures*”. To participate in public expenditures does not mean to provision for some certain public services. Taxes are taken to meet all of the public expenditures based on financial power (ALİEFENDİOĞLU: 62). Taxpayer has to contribute according to his financial power to all public expenditures, even for public services that he has no benefit.

To express that taxes are not to be based on private interest, this principle is also called as the principle of non-reciprocity (complimentary) (ŞENYÜZ/YÜCE/GERÇEK, 2014: 20).

C. The Principle Of Ability To Pay Tax (To Be Taken According To The Financial Power)

Taxes are taken according to taxpayers’ financial power (ability to pay tax). Everyone has to pay taxes “according to his financial resources”. This principle is only valid for taxes in a narrow sense (ÖNCEL/KUMRULU/ÇAĞAN, 2014: 52; ERGINAY, 1983: 61). This doesn’t apply to fees, duties and other such financial obligations.

Everyone’s income and wealth levels are different from each other. These differences should be taken into account during taxation and everyone should be taxed according to his financial power. According to this principle, the tax burden should be increased as the financial strength increases.

The financial power of taxation is related to the principle of the welfare state on tax justice (ÇAĞAN, 1982: 148; ÖNCEL/KUMRULU/ÇAĞAN, 2014: 52).

D. An Equitable And Balanced Distribution Of The Tax Burden

According to the Constitution, “*An equitable and balanced distribution of the tax burden is the social objective of fiscal policy*”.

This principle is a natural result of the principle of the social state. With this principle, it has been pointed out the necessity to keep in mind that the social obligations of the State in the field of taxation.

The provision of distribution of fair manner of national income and wealth should be observed through taxes, as well as equitable and balanced distribution of the tax burden in a welfare state (ÇAĞAN, 1982: 191; BAYRAKLI/ODABAŞ, 2000: 153).

It has been suggested that the principle of ability to pay tax also cover this principle (BATIREL, 2000: 5; ÜSTÜN, 2003: 259). When the principle of ability to pay tax (taxing according to the financial power) followed, fair and balanced distribution of the tax burden will also be provided.

E. The Legality Principle Of Taxes

The legality principle of taxes is arranged in the 73rd article of Turkish Constitution:

“Taxes, fees, duties, and other such financial obligations shall be imposed, amended or revoked by law”.

III. The Legality Principle Of Taxes

A. Historical Progress

1808 Sened-i İttifak (Charter of Alliance):

Charter of Alliance was signed between the representatives of central government and Ayans (local notables) under the rule of Mahmut II, due to the increase in power and efficiency of Ayans in their provinces. It shows the decay of the central authority of the state.

The first steps have been taken for the formation of the principle of “no taxation without representation (legality principle of taxes)” (ŞENYÜZ/GERÇEK/YÜCE, 2014: 18).

1839 Gülhane Hattı Hümayûnu (Tanzimat Fermanı)

Sultan unilaterally limited his own powers to tax in the Decree of Tanzimat. It was stipulated that taxes must be based on taxpayer’s ability to pay and levied by only tax statutes and arbitrary taxation had been forbidden.

The First Constitution: 1876 Kanun-u Esasî:

This was the first constitution of Ottoman/Turkish State. Taxes and other charges can be imposed solely by law. This constitution did not limit powers of Sultan.

1876 Kanun-i Esasi regulated the legality of taxation. In addition to this principle, Kanuni Esasi contained rules of uniformity, equity, taxation based on ability to pay. In spite of involving these rules, the first constitution did not restrict Sultan’s powers and preserved powers to abolish the assembly and legislate when the assembly does not gather. In 1909, some amendments were made in order to narrow down the powers of Sultan (ÖZBUDUN, 1993: 4-5; ÇAĞAN, 1982: 37-38; GÜNEŞ, 1998: 84-86; ÜSTÜN, 2007: 57-58; KUMRULU, 1979: 149).

Second Constitution: 1921 Teşkilat-ı Esasiye:

Teskilat-i Esasiye that embodied all the powers of sovereignty in the parliament was enacted by the Turkish Grand National Assembly (TGNA) on 20 January 1921. The 1921 Constitution was the only constitution that did not contain any article concerning taxation. Due to the extreme circumstances, none of the 23 articles was in reference to taxation (ULUATAM/METHİBAY, 1999: 26-27; GÜNEŞ, 1999: 88; ÜSTÜN, 2007: 58).

1924 Constitution was the first constitution adopted by Republic of Turkey. Differing from previous ones this constitution made a definition of tax: “*Tax is public’s contribution to meeting the expenses of the state*”. Legality was regulated in the 1924 Constitution. Article 85/1. In compliance with this article, taxes are levied by the lawmaking body.

1961 Constitution: Principles of legality, uniformity and equity were arranged in the 1961 Constitution. The Constitutional Court was established by this constitution, thus regulations against the principle of legality could be subject to examination and legal sanction.

The 1961 Constitution contained two paragraphs. First part was the same as current Constitution article 73 paragraph 1. Second paragraph was in reference with the principle of legality which was the same as the current article 73 paragraph 3.

“Everyone is under obligation to pay taxes according to his financial resources, in order to meet public expenditure.

Taxes, duties, fees and similar charges shall be enacted by the law”

Uniformity of taxes, purpose of meeting the public expenditure, taxation based on financial resources and principle of legality was arranged in this article.

The 1961 Constitution consisted of more wide-ranging and elaborate clauses concerning taxation than the previous ones. One of the distinctive features of this constitution was adopting a judicial review of statutes. In this way legality of taxation became more of a concrete concept than an abstract ideal and the laws against this principle was annulled by the Constitutional Court (OCAKÇIOĞLU, 1982: 452; ARIKAN, 1994: 172).

The 1961 Constitution did not regulate modifying and abolishing the laws whereas it was arranged that taxes, duties, fees and others charges can be imposed by the law. The Constitutional Court ruled that taxation holds the concept of altering the tax rates within it. Lowering and raising taxes are as important as imposing taxes, therefore these should be done by the law (Constitutional Court (AYM.), 15.6.1971 gün (date) and E. 1970/55, K. 1971/57).

On 22 September 1971 Law No. 1488 made major amendments upon the 1961 Constitution and gave Council of Ministers a limited authority about taxation. Article 61 the last paragraph : *“The Council of Ministers may be empowered to amend the percentages of exemption, exceptions and reductions in taxes, fees, duties and other such financial impositions, in compliance with measures and principles, within the minimum and maximum limits prescribed by law”*.

1982 Constitution (The current Constitution): The article about taxation is arranged in the 73rd article. This article has 4 paragraphs. The legality principle of taxes is arranged in the third paragraph: *“Taxes, fees, duties, and other such financial obligations shall be imposed, amended or revoked by law”*.

B. General Outlines of Principle of Legality

Legality of taxation indicates the lawmaking body using its power to tax. In today’s democratic countries the legislature holds the power to tax (SAYGILIOĞLU, 1987: 67). In other words, taxes can be levied by a law made by the legislature. This principle is based on the presumption which is also known as the law of no taxation without representation that taxpayers are represented in the legislative body (AKTAN, 1998: 13; GÜNEŞ, 1998: 15). According to article 73/3 of the Constitution, the public uses power to tax through the representatives in the legislature and in a way gives its consent to be subject to taxation.

The Constitution aims to regulate principles that prevent arbitrary and discretionary implementations by adapting that all kinds of financial impositions shall be imposed, amended, or revoked by law (KANETİ, 1989: 36; AYM., 31.3.1987 date and E. 1986/20, K. 1987/9).

Main reason behind the necessity of the principle of legality is that taxation is firmly related to the fundamental rights and freedoms of the individuals (ÇAĞAN, 1982: 100; GÜNEŞ, 1998: 29). In addition, this principle is an effective instrument of supremacy of the legislature against executive branch.

In addition to taxes, duties, fees and other financial impositions are mentioned in the relevant article.

Taxes, fees, duties, and other such financial impositions shall be imposed, amended, or revoked by law.

There are several consequences of this principle.

In compliance with this principle, interpretation must be done within legal limitations. Comparison (analogy), gap filling and law making are not allowed unless it is stated in a law. The executive body cannot impose tax by an administrative transaction or judicial bodies can not levy, revoke or amend taxes, otherwise there is a danger of issuing new tax subjects and tax bases by way of comparison (ÇAĞAN, 1982: 7, 100; GÜNEŞ, 1998: 142-143).

As a result of legality, taxes must be evident. In other words, tax laws must contain every aspect of taxation. Taxation, amount, collection times and forms of taxes should be clear and precise in terms of both tax administrations and taxpayers. This principle is based on the concept of the tax laws that their language is simple, clear and the sentences are properly formed; the system is easily understandable and rational. Clear process and understandable rules on tax aim to prevent arbitrariness (GÜNEŞ, 1998: 17-19; ÇAĞAN, 1982: 172-173; ÖNCEL/KUMRULU/ÇAĞAN, 2014: 46). Thus, as well as the prevention of arbitrariness, tax laws will be easily understandable by everyone and tax disputes will be reduced to minimum.

The main elements of taxation that are tax, taxpayer, taxable event, rates, exemptions and reductions must be organized in all aspects of the law. In addition, the legality of taxation is not concerning solely the elements of the tax credit, it requires that tax duties and procedures must be regulated by law as well (KÜTÜKÇÜ, 1998: 129; AYAZ, 1996: 61). Thus, this principle can prevent arbitrary implementations.

As a result of the tax legality principle, freedom of contract and free will are not included in tax law (ÇAĞAN, 1982: 101; GÜNEŞ, 1998: 145). In addition, Article 8 of the Tax Procedural Code : "*Tax offices are not bound by contracts formed by individuals in reference to tax imposition and tax liability unless otherwise is stated in tax laws*". These provisions make easier to monitor taxpayers, to collect taxes and prevent the impossibility of collection of the taxes.

Another result of the legality principle is that executive body does not carry discretionary authority (More information about discretionary power of tax administration, see:

ÜSTÜN, 2007: 197). Legal administration as a result of legality principle is firmly related to each other. Legal administration principle requires an implementation of general, objective tax laws in order to carry subjective, personal taxation procedures. In other words this principle of legality is in reference to substantive and procedural law (SAYGILIOĞLU, 1987: 70-71; ÇAĞAN, 1982: 145).

Applying valid laws to the situations that occurred before the enactment of this laws is prohibited which is another outcome of legality principle. Legal security requires the principle of prohibiting the application of tax laws to situations occurred before the enactment (GÜNEŞ, 1998: 135). Otherwise these applications undermine trust of taxpayers in the rule of law and the state; disrupts certainty and stability of the economic and commercial life. Taxpayer makes plans to pay his taxes according to the law in force and arrange his business thinking valid laws at the time. The implementation of valid laws is a security for individuals (AYM., 7.11.1989 date and E. 1988/6, K. 1989/4).

There are not any regulation concerning this kind application of laws in the Constitution. This prohibition is divided into two categories: genuine and fictitious. Genuine one is to implement current laws to situations that caused all of their legal consequences before the enactment whereas fictitious kind is with reference to situations that has not finished causing all of the legal consequence before the enactment. The first kind is unconstitutional but fictitious kind is possible legally (ÇAĞAN, 1982: 179, 184; AYZAZ, 1996b: 62; BIYIK, 2000: 42). This prohibition is also valid in terms of tax laws and areas that executive body has the power to tax (ÖNCEL/KUMRULU/ÇAĞAN, 2014: 50).

C. Exceptions To The Principle of Legality

The provision granting the authority about taxation to Council of Ministers is set at the 4th (the last) paragraph article 73 of Turkish Constitution which legislates the taxation: *“The Council of Ministers may be empowered to make amendments on provisions of exemptions, exceptions, reductions and rates related to taxes, duties, fees and other such financial obligations within the lower and upper limits prescribed by the law”*.

The Council of Ministers exercises the authority and is granted in the framework of above mentioned provision to make regulations on taxation. Owing to this granted authority, increases in taxes and amounts related to taxation are implemented. And the erosion of relevant amounts against inflation is prevented by this granted discretionary power.

This authority can only be exercised by Council of Ministers. The Council of Minister may neither delegate this authority to another organ nor may this authority be granted to another organ even by law (GÜNEŞ, 1998: 198; ARIKAN, 1996: 23; KÜTÜKÇÜ, 1998: 130). Usage of this authority by an organ other than Council of Ministers would be unconstitutional.

This authority can only be given by law and only by exercised within the lower and upper limits predefined by law. There must be a tax of which all components regulated by law and Council of Ministers must be granted with the authority of making amendments by

predefining the lower and upper limits in terms of specified components (For more information, see, ÜSTÜN, 2007: 61, 196 et al.).

Authority to make amendments in four basic taxation components specified in Article 73/4 of Constitution, namely tax exemptions, tax exceptions, reductions and rates can be granted to Council of Ministers. Legislative organ keeps the exclusive authority in terms of regulating the all basic components other than the ones specified in abovementioned article (ÜSTÜN, 2012: 39 et al.).

Another exception to the principle of legality is arranged in the article 167 paragraph 2: “In order to regulate foreign trade for the benefit of the economy of the country, the Council of Ministers may be empowered by law to introduce additional financial impositions on imports, exports and other foreign trade transactions, except taxes and similar impositions, or to lift them”.

This authority arranged in the article 167, is very broad. The Council of Ministers must be authorized by law in accordance with the principle of legality, according to the limits that arranged in the article 73, paragraph 4 of the Constitution (ÜSTÜN, 2007: 218).

The last exception to the principle of legality is arranged in the article 91: “*The Grand National Assembly of Turkey may empower the Council of Ministers to issue decrees having the force of law. However, with the exception of martial law and states of emergency, the fundamental rights, individual rights and duties included in the first and second chapters and **the political rights and duties** listed in the fourth chapter of the second part of the Constitution, shall not be regulated by decrees having the force of law*”.

Duty to pay taxes is arranged in the chapter of political rights and duties. So in the times of martial law and state of emergency, the Council of Ministers can make regulations about taxation by decrees having the force of law (ŞENYÜZ/YÜCE/GERÇEK, 2014: 24; ÜSTÜN, 2007: 219).

IV. Conclusion

The principles contained in the Constitution related to the tax law, primarily underlines the boundaries of the State’s taxation authority and guarantees the peoples’ rights and liberties. Already, using the taxation authority, essentially, is limited to the basic constitutional principles.

The principle of legality is the most important principle in tax law. It expresses that taxes (and also fees, duties, and other such financial obligations) shall be imposed, amended or revoked only by law.

According to this principle, interpretation must be done within legal limitations. Comparison (analogy), gap filling and law making are not allowed unless it is stated in a law.

The prohibition of analogy and filling the legislative gaps in tax law, inability to apply to customs and traditions and the necessity of being apparent of tax codes are all the results of the principle of legality of tax.

According to legality principle of taxes, basic components concerning a tax are certainly be regulated in laws. Tax subject, taxable event (event giving rise to taxation), taxpayer, tax base, tax rate (tax tariff) comprise the basic components of taxation and by all means, they must be regulated by law. Otherwise arbitrary treatments can take place.

The authority given to the Council of Ministers about taxation is required for the timely and effective intervention in the economy through taxes. However, when using this authorization the Council of Ministers always have to comply with the limits set out in the constitution.

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