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EVALUATION OF EFFECTIVE REPENTANCE IN THE PUNISHMENT OF TAX EVASION CRIMES IN TERMS OF TURKISH TAX CRIMINAL LAW PRINCIPLES

VERGİ KAÇAKÇILIĞI SUÇLARININ CEZALANDIRILMASINDA ETKİN PİŞMANLIK KURUMUNUN VERGİ CEZA HUKUKU İLKELERİ BAKIMINDAN DEĞERLENDİRİLMESİ

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Öz

Vergi kaçakçılığı suçlarının cezalandırılmasında etkin pişmanlık kurumu, 7394 sayılı Kanun m. 4 ve 6 ile VUK m. 359 ve VUK geçici m. 34'e eklenen hükümlerle düzenlenmiştir. Buna göre Kanunda belirlenen şartları taşımaları halinde, vergi kaçakçılığı suçlarında verilecek hürriyeti bağlayıcı cezaların indirilmesi mümkün olacaktır. Vergi kaçakçılığı suçlarında etkin pişmanlık hükümleri; soruşturma, kovuşturma ve infaz aşamalarında uygulanabilir olmakla birlikte şartlarına göre verilecek hürriyeti bağlayıcı cezaların yarısı veya üçte birinin indirilmesine imkan vermektedir. Doktrinde etkin pişmanlık düzenlemesinin birtakım sorunlar doğurabileceği belirtilmektedir. Bu tartışmalar, düzenleme şartlarının anayasal bazı ilkeler üzerinde aykırılık oluşturması, muhteviyatıyla ilgili yanıltıcı belgeyi düzenleme veya kullanma fiillerinin zincirleme suç kapsamında birlikte ele alınması, soruşturma, kovuşturma ve infaz aşamalarındaki etkin pişmanlık hükümlerinden faydalanabilmek için yapılması öngörülen vergilendirmeyle ilgili ödemenin zamanı ve usulü, mütalaa şartı ve olağan kanun yolları aşamasında etkin pişmanlık hükümlerinin nasıl uygulanacağına ilişkin olarak yapılmaktadır. Buradan hareketle bu çalışmada etkin pişmanlık düzenlemesinin, vergi ceza hukuku ilkeleri bakımından anayasa, ceza ve vergi hukuku ilkeleri esaslarına göre değerlendirilmesi amaçlanmaktadır. Kanuni düzenlemeyle birlikte kovuşturma aşamasında Yargıtay da vergi kaçakçılığı suçlarının cezalandırılmasında etkin pişmanlık hükümlerinin uygulanmasını öngörmüştür, bu kararlar da çalışmamın kapsamına alınmıştır.

Anahtar Kelimeler: Vergi ceza hukuku, vergi ceza hukuku ilkeleri, etkin pişmanlık, vergi kaçakçılığı suçları, vergi kaçakçılığı suçlarının cezalandırılması.

Abstract

Effective repentance in the punishment of tax evasion crimes is regulated by Article 4 and 6 of The Law on Amendments of Treasury-Owned Immovable Property Valuation and the Value Added Tax Law and The Law on Amendments of Certain Other Laws and Decrees (Law No. 7394, dated 08.04.2022) with the provisions added to Article 359 and Provisional Article 34 of Tax Procedure Law (Law No. 213, dated 04.01.1961). Accordingly, if they meet the conditions determined in the Law, it will be possible to reduce the freedom-binding penalties to be imposed on tax evasion crimes. Effective repentance provisions in tax evasion offenses are applicable at the stages of investigation, prosecution and execution, but also allow the reduction of half or one third of the freedom-binding punishments to be imposed according to their conditions. It is stated in the doctrine that effective repentance regulation may cause some problems. These discussions are made the violation of the regulation conditions on some constitutional principles, the acts of arranging or using a misleading document related to its content are considered together within the scope of a successive crime, the time and procedure of the payment related to the taxation envisaged to be made in order to benefit from the effective repentance provisions during the investigation, prosecution and execution stages, opinion requirement, and how to apply effective repentance provisions at the stage of ordinary legal remedies. From this point of view, in this article, it is aimed to evaluate the effective repentance regulation in terms of tax criminal law principles, according to the principles of constitutional, criminal and tax law. Along with the legal regulation, the Court of Cassation also envisaged the implementation of effective repentance provisions in the punishment of tax evasion crimes during the prosecution stage, and these decisions were also included in the scope of the article.

Keywords: Turkish tax criminal law, tax criminal law principles, effective repentance, tax evasion crimes, punishment of tax evasion crimes.

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I. INTRODUCTION

Tax evasion crimes are regulated in Articles 359/a, b, c, ç of Law No. 213. The law has evaluated tax evasion crimes under four headings and has decreed a *freedom-bindings penalties* (prison sentence, imprisonment) in return. According to the first of these, account and accounting fraud, opening an account on behalf of non-real persons, using double ledgers, ledger/document etc. falsification, preparation of misleading documents in the books and records that are kept or regulated, and obliged to be kept and presented in accordance with tax laws, the person who commits one of these acts is punished with a imprisonment from eighteen months to five years (Law No. 213, art. 359/a). Secondly, the person who destroys, puts another page and arranges falsely in the books and records that are kept or regulated, and obliged to be kept and presented in accordance with tax laws, is punished with imprisonment from three years to eight years (Law No. 213, art. 359/b). Thirdly, the person who print or knowingly use documents that can be printed by the person who have an agreement with the *Ministry of Treasury and Finance*, without an agreement with the Ministry, is punished with imprisonment from two to eight years (Law No. 213, art. 359/c). Fourthly, although not authorized by the Ministry of Treasury and Finance, the person who remove the seal of the payment recorder device, change the hardware or software, or interfere with the memory units of the payment recorder device whether it is authorized or not, and prevent the transmission of documents, information or data that should be transmitted electronically to the related public institutions and organizations or causes them to be conveyed in an untrue way, is punished with imprisonment from three to eight years (Law No. 213, art. 359/ç).

Effective repentance (or *active repentance*, Turkish: *Etkin pişmanlık*), as an institution specific to criminal law, is a special regulation that enables the reduction or abolition of the prison sentence to be imposed, in the punishment of certain crimes, in the case of the existence of the stipulated conditions.

In terms of penalizing tax evasion crimes, the effective repentance institution was regulated by adding additional paragraphs to the Art. 359 of Law No. 213 with the Article 4 of Law No. 7394 and adding the Provis. Art. 34 of Law No. 213 with the Article 6 of Law No. 7394. In this respect, thanks to effective repentance, it has become possible to reduce tax evasion crimes by half or one third of the punishments that can be imposed during the investigation, prosecution and execution stages. Ensuring the reduction of prison sentences for tax evasion crime through effective repentance regulation reveals the effect and importance of this institution. Based on this general framework, in this article, it is aimed to review the effective repentance institution in the punishment of tax evasion crimes. The difference of this article is to consider the effective repentance institution as a whole in the punishment of tax evasion crimes in terms of tax criminal law principles, as well as to evaluate the advantages and legal problems of the institution and its situation in practice.

Effective repentance regulation in the punishment of tax evasion crimes has been discussed in various aspects in the doctrine and it has been revealed that this regulation will create some potential problems. These discussions in the doctrine focused on the principles of effective repentance in tax evasion crimes are in contradiction with some principles of the constitution, the acts of issuing and using misleading documents related to their content are included in the provisions of the successive crime within the same calendar year, determining when, where and how the tax-related payment will be made at the stages of investigation, prosecution and execution, the suspension of the opinion condition in some cases, the procedure on how to apply the provisions of effective repentance in ordinary legal remedies.

Based on this framework, the article mainly consists of examining five basic subjects. First, the concept and general features of effective repentance will be introduced. The definition and legal nature of effective repentance will be examined. The effective repentance institution will be compared with other similar institutions such as *penitence and rectification* (Law No. 213, art. 371), *voluntary abandonment* (*Turkish Penal Code* (Law No. 5237, dated 26.09.2004[3]), art. 36) and *reconciliation* (Law No. 213, annex art. 1-12; *Code of Criminal Procedure* (Law No. 5271, dated 04.12.2004), art. 253-255). Secondly, the issue of penalizing tax evasion crimes will be evaluated within the framework of Article 359 of Law No. 213. Thirdly, the regulation on effective repentance in the punishment of

[3] (Day/month/year). All dates in the artcle will be displayed this way.

tax evasion crimes (Law No. 213, art. 359/3-6) will be discussed. The innovations brought by the institution to the legislation will be evaluated. Fourthly, the effects and potential legal problems of the effective repentance regulation in the punishment of tax evasion crimes in terms of Turkish tax criminal law principles will be examined. The effects and legal problems that can be created by the regulation of effective repentance in the punishment of tax evasion crimes will be discussed. Finally, the Court of Cassation decisions regarding effective repentance in the punishment of tax evasion crimes will be examined. In this respect, the current situation of effective repentance in tax evasion in practice will be revealed. From this aspect, the advantages and legal problems that the effective repentance institution will create in the punishment of tax evasion crimes will be reviewed.

In Turkish law, the institution of effective repentance has not been regulated as a general regulation applicable to all crimes, but has been specifically regulated for some crimes. For example, effective repentance provisions are also included in another limited number of crimes such as *the deprivation of liberty* (Law No. 5237, art. 109-110), *theft* (Law No. 5237, art. 141-146), *the damage to property* (Law No. 5237, art. 151-153), *abuse of trust* (Law No. 5237, art. 155), *fraud* (Law No. 5237, art. 157-159), *fraudulent bankruptcy* (Law No. 5237, art. 161-162). Since this article is only for examining the provisions of effective repentance in tax evasion, the other crime types related to effective repentance are excluded from the scope of this article.

II. LITERATURE REVIEW

After the regulation of the effective repentance institution in the punishment of tax evasion crimes with the Law No. 7394, various studies have been carried out in terms of the characteristics of this regulation and the possible problems it would lead to. *Özgenç*, in his article examining the effective repentance in tax evasion, evaluated the provisions introduced to Law No. 213 by Law No. 7394, that the upper limits of tax crimes were increased, that tax loss should not occur as a result in order for tax evasion crime to occur, the conditions brought by the regulation on effective repentance, that this institution hinders the right to seek freedom as in Article 36/1 of the Constitution and the need for a criminological investigation for effective implementation of effective repentance and set forth his solutions related to these issues (Özgenç: *Vergi Kaçakçılığı Suçunda Etkin Pişmanlık, 8.4.2022 tarihli ve 7394 sayılı Kanunla Getirilen Hükümlerin Değerlendirmesi*, https://izzetozgenc.com/data/contents/vergi-kacakciligi-sucunda-etkin-pismanlik.pdf, Accessed 27.10. 2022). *Şen and Serdar*, in their article in which they evaluated the amendments made in the tax procedure law with Law No. 7394, examined the features of the provisions regulated in the tax procedure law with this amendment (Article 359 and 367 of Law No. 213; Provisional Article 34 of Law No. 213) and the situation in terms of successive crimes (Article 43/1 of the Law No. 5237), this institution's repentance and reform (Law No. 213, art. 371) differences, that this institution is controversy to Articles 125 and 36 of the Constitution; and they examined the situation from the point of tax principles as in Article 73 of the Constitution (Şen and Serdar: *7394 sayılı Kanunla Yapılan Vergi Usul Kanunu Değişiklikleri*, https://sen.av.tr/tr/ makale/7394-sayili-kanunla-yapilan-vergi-usul-kanunu-degisiklikleri, Accessed 27.10.2022). *Candan*, in his article on penalty reduction in effective repentance in tax evasion cases, examined effective repentance regulation to be applied to tax evasion crimes; the implementation of the judgment, and the consequences of the judgment thereto, in their articles, where they evaluate the changes made in the tax evasion crime with the Law No. 7394 (Candan: *Kaçakçılık Suçunda Ceza İndirimi/Soruşturma Ve Kovuşturma Evrelerinde Etkin Pişmanlık*, https://turgutcandan.com/2022/03/29/kacakcilik-sucunda-ceza-indirimi-sorusturma-ve-kovusturma-evrelerinde-etkin-pismanlik/, Accessed 27.10.2022). *Batı and İnci* examined the effective repentance provisions in the tax evasion crime, its effects on the favorable laws and statute of time limitations, the application of the successive crime provisions, the problem of the competent court in the determination of the law in favor and the opinion requirement. In his article, where he discusses effective repentance in tax crimes (Batı and İnci, 2022: 30-48). *Doğrusöz* explains the basic features of effective repentance in tax crimes, the unconstitutional aspects of the institution, the effects of effective repentance on retroactive application, the provisions and problems of successive crime, and the situation of controversy to Articles 36 and 125 of the Constitution (Doğrusöz: *Vergi Suçlarında Etkin Pişmanlık ve Hukuk*, https://www.bumindogrusoz.com/article/verg-suclarinda-etkn-psmanlik-ve-hukuk, Accessed 27.10.2022; Doğrusöz: *Vergi Suçlarında Etkin Pişmanlığın Geriye Dönük*

Uygulaması, https://www.bumindogrusoz.com/article/verg-suclarinda-etkn-psmanligin-gerye-donuk-uygulamasi, Accessed 27.10.2022; Doğrusöz: *Vergi Suçlarında zincirleme Suç ve Olası Sorunları*, https://www.bumindogrusoz.com/article/verg-suclarinda-zncrleme-suc-ve-olasi-sorunlari, Accessed 27.10.2022; Doğrusöz: *Etkin Pişmanlığın Koşullu Da AYM'de*, https://www.bumindogrusoz.com/ article/etkn-psmanligin-kosulu-da-aymde, Accessed 27.10. 2022). In their article, *Şişman and Sarsıkoğlu,* in which they examine the effect of effective repentance in tax evasion, examined the effective repentance and its legal nature, the conditions of reduction from the penalty due to effective repentance, and the problems that the provision of effective repentance might entail (Şişman and Sarsıkoğlu, 2022: 1591-1625). *Yılmaz Furtuna and Laloğlu*, in the article in which they evaluated effective repentance in tax evasion crime in the context of Law No. 7394, examined the definition of effective repentance, its legal nature, and its comparison with similar institutions, the regulation of effective repentance in tax evasion crime in the tax procedures law, and the status of the provisions introduced by Law No. 7394 in terms of constitutional and universal rights (Yılmaz Furtuna and Laloğlu, 2022: 347-372). *Geçer,* in his article, in which he evaluated the amendment made in Article 359 of Law No. 213 in terms of the principle of non bis idem, examined non bis idem principle; sample decisions related to this issue and regulations in Law No. 213; and the institution of effective repentance attached in Article 359 of Law No. 213 (Geçer, 2022: 273-324). In his article, *Aslanpınar*, in which he evaluated effective repentance and conditional penalty reduction in tax evasion, examined the general characteristics of the regulation on effective repentance in tax evasion crimes, the application of the regulation in favor, the effects of successive crimes, the situation and possible problems of the cases before the tax court. In his article, in which he evaluated the effective repentance institution for tax evasion crimes in the tax procedure law (Aslanpınar: *Vergi Kaçakçılığı Suçlarında Etkin Pişmanlık: Bedelli ve Şartlı Ceza İndirimi*, https://www.aslanpinar.com/yayinlarimiz/makaleler-ve-kose-yazilari/vergi-kacakciligi-suclarinda-etkin-pismanlik-bedelli-ve-sartli-ceza-indirimi?gdprAccept, Accessed 27.10.2022). *Ozansoy* examined tax evasion acts and penalties, effective repentance in tax evasion crimes, the problems that the institution will cause, the problem it will create in terms of fraudulent documents and the effects of moderation of the opinion conditions (Ozansoy, 2022: 37-42).

III. IN GENERAL

In the Law No 213, some unlawful acts are considered as crimes and prison sentences are foreseen for them (Karakoç, 2019: 297; Taşkan, 2021: 289). While sanctions may be imposed by the tax administration in terms of tax misdemeanors, the sanctions regarding the actions considered as crimes may be imposed as a result of the proceedings to be carried out by the criminal courts (Öncel, Kumrulu, Çağan and Göker, 2022: 208; Candan, 2019: 345; Bilici, 2020: 116; Batı, 2021: 315). As a matter of fact, in Article 38/10 of *The Constitution of the Republic of Turkey* (Law No. 2709, dated 18.10.1982), it is stated that, "*The administration cannot impose a sanction that results in the restriction of personal freedom. Exceptions can be made to this provision by law in terms of the internal order of the Armed Forces*".

The tax crimes regulated in Law No 213 are *tax evasion crime* (smuggling crime) (Law No 213, art. 359), *violation of tax privacy* (secrecy of taxes crime) (Law No 213, art. 362) and *the crime of doing private business of taxpayers* (Law No 213, art. 362). More than one type of crime and different punishments are regulated in Article 359 of Law No 213 (Kaneti, Ekmekçi, Güneş and Kaşıkçı, 2022: 380; Şenyüz, 2020: 438; Batı, 2021: 315; Karakoç, 2019: 298). In terms of the offenses stipulated in Article 359/a-1, 2 of Law No 213, imprisonment from 18 months to 5 years, in terms of the offenses stipulated in Article 359/b, ç, from 3 years to 8 years and in terms of the offenses stipulated in Article 359/c, imprisonment from 2 years to 8 years are regulated.

Various action elements are envisaged in the tax evasion crimes, such as cheating on accounts and accounting, falsifying or concealing book records and documents, destroying books, records and documents, and printing documents that can be printed by people who have an agreement with the

Ministry of Treasury and Finance. We can state that a crime can be committed with more than one type of action (Mutluer and Dayanç Kuzeyli, 2019: 227), in this respect, it is a selective action crime[4].

The element of action, which is defined as "*those who open accounts on behalf of persons who are not real or have nothing to do with registered transactions*", as stipulated in Article 359/a-1 of Law No 213, is defined as a crime on its own (Candan, 2019: 372; Şenyüz, 2020: 461; Karakoç, 2019: 323). A separate result was not sought for the crime to take place. As a result of the action stated in the paragraph of the same article as *"the ones who record the accounts and transactions that are required to be recorded in the books in other books, documents or other recording mediums wholly or partially in a way that will result in a decrease in the tax base"*, has been sought as a result (Şenyüz, 2020: 460; Mutluer and Dayanç Kuzeyli, 2019: 229; Karakoç, 2019: 323). If the result is realized, a crime will occur. Only crimes for which action is sought are formal crimes, the result of which is adjacent to the action (Saban, 2021: 429). Crimes in which action and result are sought together are material crimes (Saban, 2021: 429; Mutluer and Dayanç Kuzeyli, 2019: 229). In the tax evasion crimes, there is both a material crime and a formal crime. We can also state that the types of crimes for which no result is sought in the regulation of the article are also danger crimes (Karakoç, 2019: 324)[5].

The rule in our law is that crimes are committed intentionally (Kaneti, Ekmekçi, Güneş and Kaşıkçı, 2022: 395; Taşkan, 2021: 293; İçten, 2022: 29). If stipulated in the law, committing crimes by negligence is punishable (Şenyüz, 2020: 462; İçten, 2022: 29). As a matter of fact, in Article 22/1 of Law No. 5237, it is stated that "*Acts committed by negligence are punished in cases clearly specified by the law"*. Intention, on the other hand, is the state of knowing and willingly committing the elements of the crime stipulated in the law, as regulated in Article 21/1 of Law No. 5237. Since the negligent state of the crime is not foreseen in the law, it can only be committed intentionally. Since no specific motive is sought in the regulation of tax evasion crimes, we can say that it can be committed with general intent (Saban, 2021: 433; Mutluer and Dayanç Kuzeyli, 2019: 232; Kaneti, Ekmekçi, Güneş and Kaşıkçı, 2022: 396; Karakoç, 2019: 328). However, it can be committed with special intent in the types of crimes where harm or knowing element is sought (Saban, 2021: 433; Mutluer and Dayanç Kuzeyli, 2019: 232; Karakoç, 2019: 328).

IV. THE CONCEPT AND GENERAL FEATURES OF EFFECTIVE REPENTANCE

The *repentance* (or remorse, regret) is explained as "*the possibility of the perpetrators (perpetrators) of the acts that the law considers a crime to be freed with less punishment by informing their accomplices*" in the legal sense (Yılmaz, 1996: 743). In the event, it is possible to define *effective repentance* as "*The situation where the perpetrator prevents the realization of the result for reasons in his own power after the end of the action"* (Dönmezer and Erman, 2021: 151)*; "The activity of eliminating the effects of these actions after the completion of sufficient and necessary actions to bring about the result and the crime event*" (Bayraktar, 1968: 123).

Following the completion of the execution actions of the crime, the perpetrator, who feels remorse, takes actions to voluntarily eliminate the effects of the consequences of the crime (Özgenç, 2014: 476; Demirbaş, 2021: 511; Koca and Üzülmez, 2016: 428); efforts to prevent the result by giving up the crime (Centel, Zafer and Çakmut, 2020: 478) is expressed as effective repentance. In other words; effective repentance is the institution that ensures that the perpetrator is not punished or the punishment to be given is reduced, depending on these actions, in case the perpetrator makes some actions that show his repentance after the crime is completed with all its elements (Hakeri, 2019: 517).

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[4] For detailed discussions on this subject, see Kaneti, Ekmekçi, Güneş and Kaşıkçı, 2022: 387; Şenyüz, 2020: 438; Batı, 2021: 316-317; Öner, 2019: 181.

[5] "*General intent is sufficient for the crime of hiding books, records and documents. In addition, this crime is not a harm crime, it is a danger crime. As a result, for example, the tax liability of the perpetrator is accepted as a public loss in terms of the crimes of issuing and using fake invoices, but it is not accepted as a public loss in terms of the crime of hiding books, records and documents, which is a danger crime. Because, this damage is not a result of the crime of hiding books, records and documents. Criminal Chambers practices have similarly stabilized*." The decision of the General Assembly of Criminal Chambers of the Court of Cassation, dated 21.10.2020 and numbered *E*. (*Docket Number*, Turkish: *Esas No*., in short *E*.) 2019/1027, *K*. (*Decision Number*, Turkish: *Karar No*., in short *K*.) 2020/1050. (All the decisions used in this article were accessed from *Kazancı Hukuk*, https://www.kazanci.com.tr).

Effective repentance means that the repentant perpetrator compensates for the damage he has caused or takes any action that shows remorse for this act, after the crime has been completed with all its elements, including its legal consequences (Zafer, 2019: 517; Akbulut, 2018: 648).

Although effective repentance is a criminal law institution as "*post-criminal repentance"* (Özbek, Doğan, Bacaksız and Tepe, 2018: 503), it is not regulated in the general provisions of the Turkish Penal Code. The legislator has specifically regulated effective repentance in some crimes that are included in the special provisions of the Turkish Penal Code or regulated in other laws. There is no effective repentance institution foreseen for all crimes. As a matter of fact, it is not possible to organize an effective repentance institution due to the nature of some crimes (Artuk, Gökcen and Yenidünya, 2015: 618; İçer, 2017: 775). For example, while an effective repentance institution was regulated for the crime of "*deprivation of liberty*" (Law No. 5237, art. 109) in the Law No. 5237, it was not regulated for the crime of "*deliberate murder* (or deliberate killing)" (Law No. 5237, art. 81). In other words, effective repentance is not a general state that affects criminal responsibility (Koca and Üzülmez, 2016: 428) and its provisions can only be applied to the crimes for which they are regulated (Hakeri, 2019: 517). Merely, effective repentance has no effect, except for the crimes specifically regulated in our legislation; in terms of other crimes, the remorse after the commission of the crime is not of any importance (Dönmezer and Erman, 2021: 152), but depending on the nature of the concrete case, it can be considered as a reason for *discretionary reduction.*

Since effective repentance is specific to the scope of the crime in which it is regulated, its conditions and consequences also differ. For this reason, it is not possible to talk about a uniform effective repentance institution. Considering the opinions in the doctrine and the explanation of the legislator in the justification of the article, it can be said that the legal nature of the effective repentance institution is "*personal reason affecting the punishment*"[6].

It results in a sanction if the perpetrator shows remorse after the completion of the crime and does some actions specified in the law (Akbulut, 2018: 649); the actions that the law seeks to be made in each special arrangement may differ: *Facilitating the arrest of criminals by reporting the crime* (Law No. 5237, art. 93), *leaving the victim in a safe place without harming them* (Law No. 5237, art. 110), *redressing the loss of the victim* (Law No. 5237, art. 168), etc. In order for effective repentance to be implemented, the perpetrator is not only expected to feel remorse, but also to perform the acts that show remorse and are prescribed in the law (Akbulut, 2018: 649).

When all these explanations are examined, effective repentance is the situation when the perpetrator completely performs the acts that are the subject of the crime and tries to prevent the negative result that occurs after the crime (Gödekli, 2017: 283). As a result of this effective struggle, the perpetrator is either not punished or his sentence is reduced (Yılmaz Furtuna and Laloğlu, 2022: 351).

In terms of some of the crime types in which effective repentance takes place, while effective repentance completely prevents the perpetrator from being punished, some only allow the punishment to be reduced. Therefore, effective repentance, in connection with some types of crimes, constitutes a personal reason that abolishes the penalty or requires a reduction in the penalty, depending on the stage in which it occurs in the trial (Koca and Üzülmez, 2016: 428; Zafer, 2019: 517).

In order for the effective repentance provisions to be applied, it is essential that the *perpetrator's real remorse* be mentioned (Hakeri, 2019: 519). However, as a rule, *the victim's consent* is not required for this (Koca and Üzülmez, 2016: 428). From this aspect, according to the Court of Cassation, in cases where a condition such as "reparation of the damage suffered by the victim completely by restitution or compensation" is required for the effective repentance provisions to be applied, it is not obligatory for the perpetrator to express his remorse while this condition is met; also considering the nature of the event, the perpetrator's compensation for the damage can be seen as a manifestation of repentance (Hakeri, 2019: 519). Moreover, according to a decision of the Court of Cassation, effective repentance regulations aim to encourage the person to realize her own mistake,

[6] In practice, the institution of effective repentance is accepted as the personal reason affecting the punishment in the decisions of the Court of Cassation (The decision of the General Assembly of Criminal Chambers of the Court of Cassation, dated 18.09.2018 and numbered E. 2015/155, K. 2018/355; the decision of the 19th Criminal Chamber of the Court of Cassation, dated 03.04.2019 and numbered E. 2019/ 23643, K. 2019/6679).

regret it and eliminate the consequences of the injustice which caused by her, after the crime is completed[7].

Since the compensation of the damage by the third parties *without the knowledge of the perpetrator* or by *forceful execution* cannot be understood as a real repentance, it should not be possible to apply the provisions of effective repentance (Hakeri, 2019: 519). Likewise, in cases where the damage is partially compensated or the effects of the crime are partially eliminated, effective repentance provisions are not applied unless otherwise clearly stated in the special provision (Koca and Üzülmez, 2016: 428). However, in *crimes committed against property*, in cases of *partial restitution* or *compensation*, the victim's consent may make it possible to apply effective repentance provisions (Koca and Üzülmez, 2016: 428).

We can also explain the general characteristics of effective regret by comparing it with similar institutions. Effective repentance institution is different from *penitence and rectification* (Law No. 213, art. 371). According to Article 371/1 of Law No. 213, in *taxes based on declaration*, if taxpayers who commit acts that require the penalty of *loss of tax* and other persons who participate in the processing of these acts, inform the relevant authorities of their illegal acts with a petition, the penalty for loss of tax is not imposed under the conditions written in the law. For this, before the taxpayer notifies; it is necessary that no notification has been made about this issue, tax inspection or assessment commission has not been started, that is *the loss of tax misdemeanors* has not been learned (Law No. 213, art. 371/1-1, 2). The penitence and rectification is applied in terms of taxes *levied* and *accrued* upon declaration (Karakoç, 2019: 336; Karakoç, 2017: 65; Mutluer, 2011: 234). However, *the tax debt* and *the default interest* must be paid by submitting the declaration regarding *the missing tax base* (Law No. 213, art. 371/1-3-5). These provisions are not applied in terms of *property tax* (Law No. 213, art. 371/2). It is seen that penitence and rectification will only prevent the application of *the fine* foreseen for the loss of tax misdemeanors, but will not have any effect in terms of *the irregularity misdemeanors* (Bilici, 2020: 138-139; Kırbaş, 2015: 182; Batı, 2021: 477). Moreover, taxpayers who benefit from penitence and rectification cannot be prosecuted for tax evasion and participating in tax evasion, *the public prosecution* ends (Kaneti, 1986/1987: 221; Mutluer, 2011: 233; Öner, 2019: 169, Şenyüz, Yüce and Gerçek, 2016: 249; Öncel, Kumrulu, Çağan and Göker, 2022: 247)[8]. On the other hand, in terms of tax criminal law, the effective repentance institution is a regulation brought only for tax evasion crimes, not for the loss of tax misdemeanors. While penitence and rectification are a special regulation regarding tax criminal law, effective repentance can be applied in certain crimes as a concept of criminal law. Penitence and rectification is an arrangement that reduces or eliminates tax debt and administrative fines, but effective repentance is an arrangement for reducing the freedom-binding penalty given for tax evasion.

The Effective repentance institution is different from the *voluntary abandonment* institution (Law No. 5237, art. 36). Voluntary abandonment, in other words *voluntary renunciation*[9], is regulated in Article 36 of Law No 213's general provisions. In the regulation of the article, it is stated that "*If the perpetrator voluntarily abandons the execution actions of the crime or prevents the completion of the crime or the realization of the result with his own efforts, he will not be punished for the attempt; but if the complete part essentially constitutes a crime, it is punished only with the penalty for that crime."* Various opinions have been put forward in the doctrine regarding the reason why the person is not punished in case of voluntary abandonment. These are mainly; *subjective theories*, *objective theories*, and *crime policy theories* (Yılmaz, 2016: 2566; Bozdağ, 2020: 84; Akdağ, 2013: 95 et al). The legislator stated this question in the justification of the article: *"Encouraging the perpetrator to voluntarily give up on completing the crime, both at the stage of the enforcement actions and after the enforcement actions are over, is one of the basic tools of modern crime policy. In the Turkish Penal Code No. 765, voluntary abandonment, which is accepted only during the continuation of the enforcement actions, is also foreseen in terms of events in which the enforcement actions are finished but the result does not occur. Thus, voluntary abandonment becomes possible at all stages in the*

[7] The decision of the General Assembly of the Criminal Chambers of the Court of Cassation, dated 15.09.2022 and numbered E. 2022/3-296, K. 2022/554.

[8] For evaluations on this subject, see Karakoç, 2019: 340; Karakoç, 2017: 70.

[9] See, the Article 61/2 of *Abrogated Turkish Penal Code* (Law No. 765).

execution of the crime. It is explained as, however, "for the acceptance of voluntary abandonment after the execution proceedings are over, the person who gives up must make a serious effort to prevent the completion of the crime." The legislator stated that he tries to increase the incentive to voluntary abandonment, in accordance with the modern crime policy he follows. It can be stated that the *legislator* is based on the theory of crime policy (Hakeri, 2019: 507; Yılmaz, 2016: 2568). In the doctrine, the view of crime policy is dominant (Hakeri, 2019: 507; Demirbaş, 2021: 509; Bayraklı, 2016: 6; Akdağ, 2013: 98)[10]. The conditions for voluntary abandonment are that the crime is not completed and that the renunciation is voluntary (Artuk, Gökcen and Yenidünya, 2015: 613-614; Hakeri, 2019: 506; Bozdağ, 2020: 85; Bayraklı, 2016: 2)[11]. After the crime is completed with all its elements, there will be no voluntary abandonment. Failure to complete the crime must be the result of the perpetrator's voluntary abandonment (Akdağ, 2013: 103). The perpetrator's renunciation should not arise as a result of external influences (Centel, Zafer and Çakmut, 2020: 477; Koca and Üzülmez, 2016: 425; Şenol, 2017: 515; Bayraklı, 2016: 2; Akbulut, 2018: 638). In order for the perpetrator to benefit from voluntary abandonment, it is not necessary to have a real motivation to give up; that is, voluntariness does not require repentance (Centel, Zafer and Çakmut, 2020: 477; Zafer, 2019: 515), and it is not appropriate to expect the perpetrator to give up sincerely (Dönmezer and Erman, 2021: 147). The main thing is that the perpetrator has control over his own decision (Özbek, Doğan, Bacaksız and Tepe, 2018: 506). Although the perpetrator has the conditions favorable to complete the crime, he must prevent the outcome (Bayraktar, 1968: 152; Demirbaş, 2021: 510; Hakeri, 2019: 508)[12]. In the end there are several differences between voluntary abandonment and effective repentance. While voluntary abandonment is regulated as a general provision in the Law No. 5237, effective repentance is regulated exclusively for some crimes. While voluntary abandonment can be applied in terms of crimes whose result has not been realized, it cannot be applied after the result is realized. Effective regret is an institution that can be applied after the result is realized[13]. As a result of voluntary abandonment, the perpetrator is not punished for the crime he started to execute. If the actions he has taken until the moment he starts to perform the act of renunciation constitute another crime, he will only be responsible for this crime[14]. On the other hand, effective repentance may result in the reduction of the penalty stipulated within the scope of the crime or the absence of a penalty.

The effective repentance institution is also different from the *reconciliation* institution (Law No. 213, annex art. 1-12; Law No. 5271, art. 253-255). According to *The Turkish Language Association*, reconciliation is explained as "*consensus agreement, compromise*" (Türk Dil Kurumu: *Güncel Türkçe Sözlük*, www.sozluk.gov.tr, Accessed 29.10.2022). In the legal sense, it is defined as "*Peaceful settlement of the disputes that arise*" (Yılmaz, 1996: 846). In our legislation, reconciliation institutions are regulated in different ways in more than one law[15]. The main ones are regulated between Articles 253 and 255 of Law No. 5271 and between the Additional Articles 1 to 12 after 376 of the Law No. 213. Reconciliation institutions regulated in these two laws are subject to different procedures and principles.

Within the scope of the reconciliation institution stipulated in the Law No. 5271, the perpetrator and the victim come to an agreement and end the progress of the criminal procedure (Centel and Zafer, 2021: 592; Yurtcan, 2005: 722; Çulha, Demirağ, Nuhoğlu, Oktar, Tezcan and Yenisey, 2019: 81; Gökcen, Alşahin and Çakır, 2017: 74). It is not possible to apply the reconciliation

[10] But, *Bayraktar* has the opposite view and adopts the cancellation theory, which is among the subjective theories (Bayraktar, 1968: 137).

[11] See, the decision of the General Assembly of the Criminal Chambers of the Court of Cassation, dated 29.06.2021 and numbered E. 2020/93, K. 2021/319.

[12] See, the decision of the 14th Criminal Chamber of the Court of Cassation, dated 12.01.2015 and numbered E. 2014/8285, K. 2015/7.

[13] See, the decision of the General Assembly of Criminal Chambers of the Court of Cassation, dated 11.07.2014 and numbered E. 2013/1-126, K. 2014/364.

[14] "*In case of voluntary abandonment, the person is not punished, but if the actions done so far constitute an additional crime, he is only held responsible for that crime*." (The decision of the General Assembly of Criminal Chambers of the Court of Cassation, dated 09.06.2015 and numbered E. 2014/14-600, K. 2015/194).

[15] There is also a reconciliation institution stipulated in the Provisional Article 6 of the *Expropriation Law* (Law No. 2942, dated 04.11.1983.

institution for all crimes, it is possible only for the crimes within the scope of the reconciliation institution (Centel and Zafer, 2021: 593-594; Gökalp, 2013: 24)[16]. The aim of the reconciliation institution is to play an active role and to end the conflict between the perpetrator and the victim in a way that satisfies the parties, outside of criminal proceedings (Şahin, 1998: 228; Gökalp, 2013: 28-29; Ekici Şahin and Yemenici, 2018: 453). The conclusion of the dispute outside the judicial authorities also alleviates the heavy workload of the judiciary (Yurtcan, 2005: 722; Çulha, Demirağ, Nuhoğlu, Oktar, Tezcan and Yenisey, 2019: 81; Şahin, 1998: 223-224). The reconciliation envisaged in the Law No. 5271, in other words, the reconciliation process is carried out by a third party, the mediator (Gökcen, Alşahin and Çakır, 2017: 76; Ekici Şahin and Yemenici, 2018: 447-448). The reconciliation between the perpetrator and the victim can take place in return for an act or without an act (Ekici Şahin and Yemenici, 2018: 498). A decision not to prosecute at the investigation stage if reconciliation is achieved is made; in the prosecution stage, the case is decided to be dropped (Gökcen, Alşahin and Çakır, 2017: 77-80). If the reconciliation has taken place in an act and the performance is postponed to a later date, the decision to postpone the opening of the public case is decided during the investigation stage, and the announcement of the verdict is postponed during the prosecution stage (Centel and Zafer, 2021: 602-603; Gökcen, Alşahin and Çakır, 2017: 77-80). In case of performance of the deferred action, it is decided not to prosecute at the investigation stage, and to dismiss the case at the prosecution stage (Centel and Zafer, 2021: 602-603). If the act is not performed, a public lawsuit is filed at the investigation stage, and the judgment is announced at the prosecution stage (Centel and Zafer, 2021: 602-603).

The reconciliation institution envisaged in the Law No 213 is of two types, "*Pre-Assessment Settlement*" and "*Post-Assessment Settlement*" (Şenyüz, 2020: 334; Kaneti, Ekmekçi, Güneş and Kaşıkçı, 2022: 446; Saban, 2021: 453-455; Mutluer and Dayanç Kuzeyli, 2019: 258-259; Karakoç, 2019: 237; Taşkan, 2021: 233). The settlement institution in the Law No 213 is an administrative solution that offers the opportunity to resolve the dispute between the taxpayer and the tax administration at the administrative stage without being subject to the judicial process (Kaneti, Ekmekçi, Güneş and Kaşıkçı, 2022: 446; Mutluer and Dayanç Kuzeyli, 2019: 258; Saban, 2021: 453; Şenyüz, 2020: 332; Kızılot and Taş, 2013: 147; Batı, 2021: 425; Bilici, 2020: 180; Yüce, 2019: 83; Öncel, Kumrulu, Çağan and Göker, 2022: 246; Buluttekin, 2018: 129; İçten, 2022: 157; Altay, 2021: 291; Tekin and Can Avşar, 2019: 506). It is not a mandatory administrative route to be consumed but is optional (Erdem, 2010: 374; Yüce, 2019: 83; Şenyüz, 2020: 332; Öncel, Kumrulu, Çağan and Göker, 2022: 246; Başaran Yavaşlar, 2008: 311; Buluttekin, 2018: 130; İçten, 2022: 157; Eroğlu and Eftekin, 2015: 234). While it is possible to benefit from the settlement institution in terms of tax misdemeanors, it is not possible to benefit from the point of the crime of tax evasion regulated in the Law No 213 (Karakoç, 2019: 234; Kaneti, Ekmekçi, Güneş and Kaşıkçı, 2022: 446; Batı, 2021: 425; Mutluer and Dayanç Kuzeyli, 2019: 258; Kızılot and Taş, 2013: 149; Yüce, 2019: 91; Erdem, 2010: 376; Öner, 2019: 242; Yüce, 2019: 88; Taşkan, 2021: 236; Taşdelen 2010: 108). The reconciliation process is carried out by a commission, as opposed to the execution of a single person as *a mediator* as stipulated in other branches of law (Şenyüz, 2020: 333; Taşkan, 2021: 233, 237). In case of reconciliation, the taxpayer gains economic benefit by reducing the amount in terms of the original tax and tax misdemeanor penalties or by completely deleting it. If the agreed amount is not paid by the taxpayer, the settlement and its consequences will not be eliminated, and the tax administration will proceed to collect it by force in accordance with the general provisions (Batı, 2021: 428; Öner, 2019: 243; Kızılot and Taş, 2013: 150; Şenyüz, 2020: 334; Karakoç, 2019: 247).

All in all, there are several differences between reconciliation institutions and effective repentance. The reconciliation institution regulated in the Law No. 5271 is a mandatory remedy and litigation condition that must be exhausted (Ekici Şahin and Yemenici, 2018: 454; Gökcen, Alşahin and Çakır, 2017: 74; İçten, 2022: 166). Effective repentance is not a compulsory way to be consumed within the scope of the crime for which it is envisaged. The reconciliation institution regulated in the Law No 213 is regulated in terms of tax base and tax misdemeanor penalties (Mutluer and Dayanç Kuzeyli, 2019: 258, 259; Kaneti, Ekmekçi, Güneş and Kaşıkçı, 2022: 446; Buluttekin, 2018: 129).

[16] *Yenisey* states that the scope of reconciliation institution should be expanded even to cover most of the crimes against property (Yenisey, 2013: 457).

Effective repentance, on the other hand, is regulated exclusively for certain crimes. In reconciliation institutions, the process is carried out by a person or commission acting as a conciliator. Effective repentance is an institution that can be benefited by the perpetrator by providing the conditions. Failure to fulfill the agreed matters in the reconciliation institution regulated in the Law No 213 does not end the reconciliation results. In the institution of effective repentance, it can be used if the conditions are fully fulfilled by the perpetrator. In the settlement institution regulated in the Law No. 5271, the parties can be natural persons and private law legal entities. In the reconciliation institution regulated in the Law No 213, the applicant is the taxpayer and the other party is the reconciliation commission. In effective repentance, there is no reciprocal process, and the victim of the crime may be a public, natural person or private law legal entity. It is sufficient for the perpetrator to fulfill the conditions of effective repentance. In reconciliation institutions, the will of the parties is dominant, and the parties must meet and agree on a common ground (Buluttekin, 2018: 129). In effective repentance, the perpetrator does not have to agree with the victim. The will of the victim has no effect in the process.

V. PUNISHMENT OF TAX EVASION CRIMES

In terms of tax evasion crimes[17], three different penalties are foreseen. These are is a prison sentence from 18 months to 5 years for the crimes stipulated in Article 359/a-1,2 of Law No 213, from 3 years to 8 years for the crimes stipulated in Article 359/b, ç, and from 2 years to 8 years for the crimes stipulated in Article 359/c[18].

In line with the regulations in Articles 11[19] and 12[20] of Law No. 5235, the court in charge of tax evasion crimes is *the criminal courts of first instance*. In cases where the *successive offence*

[17] The legal nature and judicial processes of tax evasion and tax misdemeanor penalties are subject to different procedures. In line with the accusation of tax evasion crimes, the perpetrator is tried in criminal courts within the framework of criminal procedure procedures and the verdict is decided by the court. However, in tax misdemeanors, the penalty is arranged by the administration. In case it is subject to trial by the addressee, auditing is carried out in tax courts within the framework of administrative proceedings. The aim of the criminal procedure is to reveal the material truth with the evidence obtained in accordance with the law (Gökcen, Alşahin and Çakır, 2017: 3). In administrative proceedings, the aim is to supervise and ensure the compliance of the administration with the law (Kalabalık, 2015: 2. For detailed information, see Kaplan, 2022: 9-21; Akyılmaz, Sezginer and Kaya, 2020: 65-76; Ulusoy, 2022: 1-15; Günday, 2022: 1-30). Tax misdemeanor penalties can be audited by tax courts in terms of authority, form, reason, subject, and purpose, since they are transactions. Due to these differences, it will be possible for the courts to give different judgments in cases where a criminal trial is initiated for the tax evasion crimes and a tax misdemeanor penalty is issued against a person as a result of the same act. For example, the tax evasion crimes can be committed intentionally because it is a crime. Misdemeanors can be committed both deliberately and negligently. The criminal court may acquit the perpetrator on the grounds that he did not deliberately commit the criminal act. The fact that the person acted negligently is not of any importance in terms of tax misdemeanors, so only this aspect will not result in the cancellation of the tax misdemeanor penalty. To give an example for the opposite situation, let's say that a criminal trial has been initiated for the tax evasion crimes and a tax misdemeanor penalty has been issued against a person for the same act. It can be decided that the misdemeanor penalty issued by the tax court about the person is not legally arranged in terms of authority (The decision of the Plenary Session of the Tax Law Chambers of of Council of State dated 10.10.2008 and numbered E. 2007/489, K. 2008/627). This situation will not affect the criminal proceedings, and the criminal court may also decide to convict this person. There may also be an error in the amount or rate of the misdemeanor penalty issued by the tax administration. In this case, the transaction will be canceled, but this result will not affect the criminal proceedings. The perpetrator, who wants to benefit from effective repentance provisions, must give up the right to subject the tax misdemeanor penalty to the trial. If there is a violation of the law that requires the cancellation of the tax delinquent penalty, it will not be subject to trial. In the event that the perpetrator is acquitted by the criminal court, he will have paid the tax base and misdemeanor penalty and ancillaries, which may result in economic destruction, since he could not file a lawsuit in the tax court in order to benefit from the effective repentance institution due to the possibility of possible punishment.

[18] For detailed information about the tax evasion, see Karakoç, 2019: 273-307; Batı, 2021: 315-361; Öncel, Kumrulu, Çağan and Göker, 2022: 237-240; Mutluer, 2011: 222-228; Kırbaş, 2015: 176-178; Şenyüz, Yüce and Gerçek, 2016: 251-252.

[19] According to the Article 11 of the *Establishment, Duties and Powers of Courts of First Instance and Regional Courts of Justice* (Law No. 5235, dated 26.09.2004), "With the exception of the cases mandated by law, cases

provisions regarding tax evasion crimes with an upper penalty limit of 8 years are also applied, there are cases where heavy penal courts will be in charge, since the maximum penalty will be 14 years.

The tax evasion crimes will not be punished for those who benefit from the institution of "Repentance and Improvement" regulated in Article 371 of Law No 213. If there is no tax levied as a result of the tax evasion crimes and the penalty imposed depending on the tax original, the penalty to be imposed will be reduced by half.

If tax evasion crimes are committed within the scope of the same crime decision within more than one calendar year or taxation period, the provisions of the *successive offence* (Law No. 5237, art. 43) will be applied. Implementation of successive offence provisions is possible within the scope of the same crime decision and if the same crime is committed more than once. From the concept of the same crime, the same type of crime should be understood. For example, the same type of crime cannot be said for the crimes regulated in the Articles 359/a-1 and 359/a-2 of Law No 213[21].

In Article 360 of Law No 213, the state of participating in the tax evasion crimes is regulated. With the regulation, it is foreseen that half of the punishment to be imposed will be reduced for those who do not have a benefit from those who participate in the tax evasion crimes.

In cases where a sentence of two years or less is imposed on the perpetrator, a decision of "*delaying the announcement of the judgment*" (Article 231/5-6 of Law No. 5271) or "*delaying the penalties*" (Article 51/1-2 of Law No. 5237) may be given. Suspension of penalties is applied for three years in terms of persons who did not turn eighteen years of age or who completed the age of 65 at the time they committed the action in the institution. Among the conditions stipulated for the deferment of the announcement of the verdict, it is regulated that the "*damage suffered by the victim or the public*" should be returned, restored to the previous state of the crime or compensated. If there is any damage to the public due to the tax evasion crimes, it must be remedied within the scope of this condition. In the institution of postponement of penalties, however, the remedy of the damage was not regulated as a strict condition, and the judge was given discretionary power.

VI. THE REGULATION REGARDING EFFECTIVE REPENTANCE IN PUNISHMENT OF TAX EVIDENCE CRIMES (The Article 359 and the Provisional Article 34 of Law No. 213)

In the Law No 213, there was no effective repentance institution regulated in terms of evasion crimes. As a result of the amendment made with Article 4 of Law No. 7394, Article 359 of Law No 213 states that "*Due to the detection of loss of tax due to the actions written in this article, the whole of the tax, default interest and late fee, and half of the fines imposed and the corresponding late fee; if paid during the investigation stage; the penalty to be imposed is reduced by half, and if paid until the verdict is given during the prosecution stage, the penalty to be imposed is reduced by one third. (…) In order to benefit from the penalty reduction stated in the paragraphs above: The following provision is added; "it is obligatory not to file a lawsuit in the tax court, to waive if filed, not to resort to legal remedies or to waive if an application has been made*".[22]

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and matters outside the duties of *Criminal Courts of Peace* and *Assize Courts* are handled by the *Criminal Courts of First Instance*."

[20] See, the Article 12 of Law No. 5235.

[21] "*The concept of the same crime should be considered as the same type of crime. For this reason, the same crime must exist in order for the successive crime provisions to be applied. For example, in the Article 359/b of Law No. 213, "Those who edit forged documents or use these documents" As in the sentence, both editing and using the forged document will be considered as the same crime and will be subject to the same successive crime provisions*." (Batı: *Vergi Suçlarında Zincirleme Suç*, 24.04.2022, https://t24.com.tr/yazarlar/murat-bati/vergi-suclarinda-zincirleme-suc-uygulamasi,35054, Accessed 27.10.2022).

[22] The justification of Article 4 of Law No. 7349 is as follows: "*On the other hand, in order for the perpetrator to benefit from effective repentance provisions, he must not file a lawsuit in the tax court, waive if he has filed, not apply to legal remedies or give up if he has applied. In the Law No. 213, there are different regulations that allow disputes regarding the taxes levied and the penalties imposed to be resolved at the administrative stage without being the subject of a lawsuit. The most important of these is the reconciliation institution regulated in Annex Articles 1 to 11 of the Law. Taxpayers can request reconciliation from the administration for taxes and penalties both before and after the assessment. In case of reconciliation, taxpayers can no longer file a lawsuit*

As it can be understood from the regulation of the article, benefiting from effective repentance is conditional upon payment of all of the tax and default interest and late fee levied, and half of the deducted tax misdemeanor penalties and late fee if there is a tax that has been lost. If the payment is made during the investigation stage, the penalty to be imposed will be reduced by half, and if the payment is made during the prosecution stage, the penalty to be imposed will be reduced by one third. Different discount rates have been arranged in terms of investigation and prosecution stages. In its current form, the regulation is similar to the effective repentance institutions stipulated in Article 168 of Law No 213 and Article 5 of *Property Law* (Law No. 634, dated 23.06.1965). In addition to the damage, in case of misdemeanor penalty, the payment of half of the penalty and the late fee is similar to the condition of reparation by the same amount stipulated in Articles 107 and 110 of *Capital Market Law* (Law No. 6362, dated 06.12.2012)[23]. The fact that the perpetrator made use of the institution of

for the agreed taxes and penalties. A similar regulation is also introduced in terms of the implementation of effective repentance provisions. It should be noted that the implementation of these institutions is not obligatory, but can be applied based on the taxpayers' own preferences. In this respect, taxpayers will be able to benefit from the discount opportunity by choosing the specified practices, not taking legal action or waiving them. Taxpayers who do not prefer these practices will not be able to benefit from the discount opportunity, but the right of these taxpayers to file a lawsuit in tax courts regarding the levied tax and fines will be reserved." In the justification of Article 4 of Law No. 7349 that established the article, the institution of effective repentance was evaluated as a similar arrangement with the reconciliation institution regulated in the Law No 213, and it was stated that the case of failure to file a lawsuit as a result of reconciliation was also regulated for effective repentance. In terms of the justification of the article, it is not possible to say that the reconciliation institution and the effective repentance institutions are similar in terms of their legal nature. Reconciliation Institution is a prescribed administrative solution for tax disputes. It is a solution process in which the tax administration has itself represented by the reconciliation commission and where mutual agreement is sought. As a matter of fact, within this process, the taxpayer may end up with an agreement in such a way that the tax base and/or penalty will not be removed completely. The provision or failure of reconciliation does not affect the criminal proceedings. In fact, in cases where the fault of tax loss occurs as a result of the crime of tax evasion, the reconciliation institution cannot be used. On the other hand, the institution of effective repentance is the personal state that is envisaged under the criminal law and that abolishes or reduces the penalty in terms of the perpetrator. It is not possible to change the financial expenses envisaged for benefiting by the public or the perpetrator, in favor of or against them. If an agreement is reached, the dispute is resolved. Effective repentance, on the other hand, is not of a nature to end the process, and the trial continues. If a settlement is reached in terms of a dispute that is not within the scope of the settlement institution, the consequences of the settlement do not disappear. It is not possible to talk about such a thing for the effective repentance institution (For an example decision, see the decision of the 3st Chamber of the Council of State, dated 27.05.1999 and numbered E. 1998/3766, K. 1999/2187). In these aspects, we do not agree with the similarity expressed by the legislator in the justification of the article.

[23] Considering the regulations examined, it is not possible to talk about a general and/or a uniform effective repentance institution. Even effective repentance institutions regulated under the same law may differ from each other in terms of their conditions: There are cases where the institution of effective repentance is regulated under the same article (e.g. Law No. 6362, art. 107) and under a different article (e.g. Law No. 634, art. 5); and there are even cases where it is regulated under a single article for more than one type of crime (e.g. Law No. 5237, art. 168). There are cases where an effective repentance institution is regulated to cover the crime for which it is envisaged (e.g. Law No. 5237, art. 221) and there are cases where it is not regulated to cover it completely (e.g. Law No. 634, art. 3/7). As a result of the effective repentance institution, there are different regulations that the perpetrator will not be sentenced (e.g. Law No. 5237, art. 221) or that the punishment to be given will be reduced (e.g. Law No. 5237, art. 110). A fixed rate (e.g. Law No. 6362, art. 110) regarding the discount rate to be applied in the effective repentance institution may be stipulated or the judge may have discretion in determining the rate (e.g. Law No. 5237, art. 221). In the investigation stage, during the prosecution stage (e.g. Law No. 5237, art. 168), there are effective repentance regulations that vary according to whether the discount rates are used before or after learning by the official authorities (e.g. Law No 5237, art. 192). In order to benefit from the effective repentance institution in terms of some crimes, an action is carried out by the perpetrator (e.g. Law No. 5237, art. 110), these are informing the official authorities (e.g. Law No. 5237, art. 221), partial or complete removal of the damage caused to the victim (e.g. Law No. 5237, art. 168), and such conditions may be sought to the benefit (e.g. Law No. 6362, art. 107). There may be a restriction on how many times the perpetrator can benefit from the institution of effective repentance (e.g. Law No. 5237, art. 221) or that repeaters or those who commit the crime within the framework of organizational activity cannot benefit (e.g. Law No. 634, art. 5).

effective repentance does not end the criminal procedure. As a result of the trial carried out, the perpetrator can be sentenced, as well as acquittal, non-punishment or dismissal may be decided.

In Article 359/8 of Law No 213, unlike the effective repentance institutions stipulated in our law, effective repentance in tax evasion crimes is conditional on "not filing a lawsuit in the tax court, waiving if filed, not resorting to legal remedies or abandoning if applied".

For those who are at the stage of *investigation, prosecution* or *execution*, as a *transitional provision*, Article 6 of Law No. 7394 and Provisional Article 34 of Law No 213 have been established. In any case, those who have been sentenced but are at the stage of execution and those who are at the stage of investigation or prosecution, must make payments to the Treasury within 1 year (until 15/04/2023) from the date of entry into force of the article (15/04/2022) in any case, until the judgment is rendered, if it meets the conditions, it will be able to benefit from the provisions of effective repentance. Files that are subject to an first-degree appeal or appeal legal remedies will be overturned for evaluation regarding the implementation of the provision in favor.

VII. THE EFFECTS AND POTENTIAL LEGAL PROBLEMS OF THE EFFECTIVE REPENTANCE REGULATION IN THE PUNISHMENT OF TAX EVASION CRIMES IN TERMS OF TURKISH TAX CRIMINAL LAW PRINCIPLES

In order to evaluate the effective repentance provisions in the punishment of tax evasion crimes in terms of tax criminal law principles, the effects of this regulation on the principles and the possible problems it will create will be examined. Tax criminal law principles consist of constitutional principles, principles of criminal law, and principles of taxation. For this reason, effective repentance provisions in the punishment of tax evasion crimes will be evaluated by making a distinction in terms of constitutional principles, criminal law principles, and taxation principles, and the regulation will be discussed in terms of these principles; and possible problems on these principles will be examined.

A. Evaluation in Terms of Constitutional Principles

The constitutional principles to be examined within the scope of tax criminal law in the provisions of effective repentance in the punishment of tax evasion crimes are rule of law state, equality, independence of the judiciary institutions, fair trial, freedom for seeking rights, protection of fundamental rights, basic features of crimes and punishments, and judicial remedy. It is not directly mentioned in the general principles of law in the Constitution, however, Article 138 of the Constitution implies that these principles could be used by the judge as a source of law (Özbudun, 2018: 135). The general principles of law are those that are known in the law and that, all civilized countries adopt and abide by (Özbudun, 2018: 135-136). As per Article 11 of the Constitution, the constitution is binding and superior.

The rule of law is the state's adherence to the law, the state's activities, transactions, and actions are subject to the rules of law and the violation of these rules are also subject to sanctions (Anayurt, 2018: 448). Law is not just regulation, it is rather a reasoning (Kaboğlu, 2012: 235). In this respect, the principle of the rule of law, first of all, refers to the execution of the state's operations in accordance with the law (Özbudun, 2018: 124). The separation of powers, which also expresses which processes will be carried out by which organs, and stand as the guarantee of rights and freedoms with the independence of the judiciary, constitute the basis of the state of law (Teziç, 2017: 162). In order for a state to have the qualifications of a state of law, it must fulfill the general and specific requirements of the state of law (Gözler, 2020: 82). While these conditions are general requirements such that the legislative, executive, and judicial organs need to be bound to the law; the administration must be subject to judicial review, the judges should remain independent, the administrative activities must be predictable, the principle of legal security needs to exist, and the administration should have financial responsibility (Gözler, 2020: 83). In this respect, the elements of the rule of law are accountability to the law, the supremacy of law, an independent and impartial judiciary, equality before the law, fairness in the application of the law, separation of powers, legal certainty, and procedural and legal transparency (Eren, 2021: 407). When it comes to the rule of law, the executive must be committed to the law and the executive operations must be under judicial control (Özbudun, 2018: 124). Another most important element of the rule of law is the independence of the judiciary

(Articles 2, 138 and 146 of the Constitution). Because, if the organs that will monitor the legality of the executive and legislative acts do not have full independence, judicial review may lack to a large extent (Özbudun, 2018: 133).

The Constitutional Court defines rule of law as "*As explained in some decisions of the Constitutional Court; state of law means a state that respects and protects human rights, establishes a fair legal order and considers itself responsible for maintaining it, and to take all actions in accordance with the rules of law and the Constitution; and of which the transactions and acts are subject to judicial review. In fact, the element of judicial review is the basic element that provides the assurance of the other elements of the rule of law state. Because, it is the power and authority of judicial review that deters an administration that does not respect human rights and does not comply with the law and the Constitution in its behavior and compels it to remain within the limits of legitimacy and legality.*"[24]. In another decision, the court stated*, "In a state of law, the law must have absolute dominance over all organs of the state, including the legislature, and the legislator must always adhere to the Constitution and the superior rules of law in legislative activities. It is also stated that: "Because, above the law, there are the basic principles of law and the Constitution, which the legislator cannot overturn, and if the legislator moves away from these, he will have made an illegal act. Laws that are not based on the main principles of law, incompatible with the purpose and existence of the state, and are enacted based on the power provided by a temporary majority that only come into existence at a certain moment, create negative reactions in the conscience of the society. Such a law does not represent the supremacy of law. It is not possible to consider the adoption and implementation of such a law as a state of law.*"[25]. As stated in the decisions of the Constitutional Court, the state of the law is the state that respects human rights, protects these rights, and subjects its actions and acts to judicial review. Limitations on the control of certain transactions and actions may be imposed by the legislator. In order for these restrictions to be lawful, they must have a legitimate aim and be proportionate[26]. Otherwise, there will be a law enacted by the legislator with a certain majority, but which does not comply with the requirements of being a state of law.

Tax crimes and penalties are regulated as a reflection of the rule of law. Because the rules that taxpayers have to follow about taxation are determined by the rules of law. In this context, illegal acts are accepted as tax offenses or misdemeanors. Punishment of tax evasion crimes and effective repentance regulation related to this punishment is carried out in a legal manner as a requirement of the rule of law.

According to Article 2 of the Constitution, *the social state* is the state responsible for ensuring social justice and social security and achieving a minimum level of life worthy of human dignity for everyone (Özbudun, 2018: 141). In this respect, the basic features of the social state can be determined as a minimum living standard worthy of human dignity, including social justice, social security, and planning (Eren, 2021: 419). Tax justice is a reflection of the social state principle (Özbudun, 2018: 148). The tax duty in Article 73 of the Constitution basically covers tax justice and expresses the determination of tax rates according to the taxpayer's financial power (Özbudun, 2018: 148). Taxpayers, who are obliged to pay taxes according to their financial power, give a part of their income, wealth, or expenditures to the government for the financing of public expenditures, depending on the laws. Tax evasion crimes are based on the punishment for violating acts determined in the law. It is envisaged to apply penalties that bind freedom in the punishment of tax evasion crimes. Effective repentance regulations have been deemed necessary in terms of providing social state, social justice, and social security in order to reduce this freedom-binding punishment.

[24] The decision of the Constitutional Court, dated 25.05.1976 and numbered E. 1976/1, K. 1976/28.
[25] The decision of the Constitutional Court, dated 11.10.1963 and numbered E. 1963/124, K. 1963/243.
[26] See, the decision of the Constitutional Court, dated 13.10.2022 and numbered E. 2021/84, K. 2022/117; the decision of the Constitutional Court, dated 28.09.2022 and numbered E. 2021/107, K. 2022/109; the decision of the Constitutional Court, dated 08.09.2022 and numbered E. 2022/67, K. 2022/103; the decision of the Constitutional Court, dated 08.09.2022 and numbered E. 2021/118, K. 2022/98; the decision of the Constitutional Court, dated 30.06.2022 and numbered E. 2021/20, K. 2022/84; the decision of the Constitutional Court, dated 01.06.2022 and numbered E. 2022/10, K. 2022/72; the decision of the Constitutional Court, dated 01.10.2020 and numbered E. 2020/ 21, K. 2020/53.

The principle of *equality* before the law is regulated in Article 10 of the Constitution. According to this, "*State organs and administrative authorities are obliged to act in accordance with the principle of equality before the law in all their transactions*." Equality, which is divided into two types, is the equal application of laws to everyone regardless of their personal and special situations as *absolute equality*, while *relative equality* is the same treatment of people in the same situation (Gözler, 2020: 99). *Formal equality* is the equal application of laws to all, and material equality is equality in rights, duties, benefits, obligations, powers, responsibilities, opportunities and services for those in the same situation (Özbudun, 2018: 155). The principle of *equality of people in terms of rights* makes everyone entitled, and equality excludes all forms of discrimination (Kaboğlu, 2012: 247). For this reason, equality is a general principle that must be followed for everyone, and a right for the individual (Eren, 2021: 427-428). Yet, in the punishment of tax evasion crimes, effective repentance provisions are suitable for horizontal equality for taxpayers who meet the conditions and are arranged in a way that everyone can benefit from. However, according to *Batı and İnci,* the fact that the reduction rate in the prosecution phase is less determined than in the execution phase, it is arguable in terms of the principle of equality before the law and considering the freedom to seek justice, which is regulated in the Constitution (Batı and İnce, 2022: 47). *Arslanpınar* is of the opinion that it is not fair, proportional, and proportionate to keep the 1/3 discount at the prosecution stage lower than the 1/2 reduction during the execution stage, as regulated in the effective repentance provisions, and this provision should be amended at least the same rate should be applied for the prosecution stage (Aslanpınar: *Vergi Kaçakçılığı Suçlarında Etkin Pişmanlık: Bedelli ve Şartlı Ceza İndirimi*, https://www.aslanpinar.com/yayinlarimiz/makaleler-ve-kose-yazilari/vergi-kacakciligi-suclarinda-etkin-pis manlik-bedelli-ve-sartli-ceza-indirimi?gdprAccept, Accessed 27.10.2022). We also agree with this view in the doctrine. Indeed, effective repentance provisions provide 1/2 reduction in the investigation and execution phases, while 1/3 reduction in the prosecution phase. Moreover, the conditions for benefiting from effective repentance are the same in terms of the investigation, prosecution, and execution phases, except for the payment period and method at the execution phase. Therefore, foreseeing different and fewer discounts at the prosecution stage constitutes a violation of the principle of equality. For this reason, if this provision is amended and the conditions for effective repentance are met during the prosecution phase, it would be appropriate to benefit from a discount of 1/2.

The right to a *fair trial* and the right to *seek rights* is specified in Articles 36 and 40 of the Constitution. According to Article 36 of the Constitution, "*Everyone has the right to a fair trial by claiming and defending before the judicial authorities by making use of legitimate means and methods*." Similarly, according to Article 6 of the European Convention on Human Rights entitled "Right to a Fair Trial", "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law… Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law*." Principles such as the right to a fair trial and the non-retroactivity of the penal code are procedural requirements specifically aimed at protecting the right to personal freedom and security, rather than being an independent right (Kaboğlu, 2012: 247). Likewise as per the Constitution Article 30 under the title "Protection of fundamental rights and freedoms", "*Everyone whose constitutional rights and freedoms have been violated has the right to request prompt access to the competent authorities. The State is obliged to indicate in its proceedings, the legal remedies and authorities the persons concerned should apply and time limits of the applications*." In order for a person to benefit from the provisions of the law and equality in the face of an illegal taxation process, there must be administrative and judicial recourse opportunities (Öncel, Kumrulu, Çağan and Göker, 2022: 58-59). The taxpayer, who has been subjected to an action contrary to the Constitution and the law, has the right to take this action to the judicial organs (Öncel, Kumrulu, Çağan and Göker, 2022: 59).

In order to benefit from effective repentance provisions in tax evasion crimes, the stipulation not to file a lawsuit in the tax court, if filed, to abandon, not to resort to legal remedies and to abandon if applied, was found to be contrary to the constitutional principles, which are mainly regulated in the Articles 2, 36 and 125 of the Constitution. According to *Özgenç,* the fact that effective repentance is dependent on the condition of not using a right or renouncing the use of a right raises the question of conformity with the Constitution, and this condition constitutes a violation of the right to seek rights

guaranteed by the Constitution (Art. 36/1) (Özgenç: *Vergi Kaçakçılığı Suçunda Etkin Pişmanlık*, p. 2-3, https://izzetozgenc.com/data/contents/vergi-kacakciligi-sucunda-etkin-pismanlik.pdf, Accessed 27. 10.2022). According to *Şen and Serdar,* the condition of not filing a lawsuit would be contrary to Article 125 of the Constitution titled judicial remedy and Article 36 titled freedom to seek justice, since erroneous assessments would be accepted without judicial review and individuals would be able to renounce their right to seek justice in order to benefit from effective repentance (Şen and Serdar: *7394 sayılı Kanunla Yapılan Vergi Usul Kanunu Değişiklikleri*, https://sen.av.tr/tr/makale/7394-sayili-kanunla-yapilan-vergi-usul-kanunudegisiklikleri, Accessed 27.10. 2022). According to *Candan,* the regulation stipulating the waiver of the administrative lawsuit in order to benefit from the reduction in the sentence is not suitable for the rule of law, as it does not allow the taxpayer (due to illegality in other elements) to have the legality of the imposition and fines procedures inspected (Candan: *Kaçakçılık Suçunda Ceza İndirimi/Soruşturma ve Kovuşturma Evrelerinde Etkin Pişmanlık*, https://turgutcandan.com/2022/03/29/kacakcilik-sucunda-ceza-indirimi-sorusturma-ve-kovusturmaev relerinde-etki n-pismanlik/, Accessed 27.10.2022). *Doğrusöz* has stated that the condition of not filing a lawsuit, which is necessary to benefit from effective repentance, will ensure that Articles 125 and 36 of the Constitution are violated in order to reduce the risk of receiving a high penalty, and he is of the opinion that it would be appropriate to remove this text from the regulation (Doğrusöz: *Vergi Suçlarında Etkin Pişmanlık ve Hukuk*, https://www.bumindogrusoz. com/article/verg-suclarinda-etkn-psmanlik-ve-hukuk, Accessed 27.10.2022); Doğrusöz: *Vergi Suçlarında Etkin Pişmanlığın Geriye Dönük Uygulaması*, https://www.bumindogrusoz.com/ article/verg-suclarinda-etkn-psmanligin-gerye-donuk-uygulamasi, Accessed 27.10.2022); Doğrusöz: *Etkin Pişmanlığın Koşulu AYM'de*, https://www.bumindogrusoz.com/article/etkn-psmanligin-kosulu-da-aymde, Accessed 27.10.2022). According to *Batı and İnci,* the condition of not filing a lawsuit is debatable within the scope of Article 125 of the Constitution, and due to the fact that many faulty assessments could not be resorted to, the action taken would be considered absolute in its erroneous form, which would violate the freedom of seeking rights (Batı and İnci, 2022: 47). According to *Şişman and Sarsıkoğlu,* due to the waiver of the right to file a lawsuit, which is one of the necessary conditions to benefit from the effective repentance regulation, the imposition and fines that occur with the unilateral will of the administration will be out of the control of the judiciary and therefore the regulation constitutes a violation of the rule of law (Şişman and Sarsıkoğlu, 2022: 1618). According to *Yılmaz Furtuna and Laloğlu,* the prohibition of filing a lawsuit in the tax court in order to benefit from the effective repentance provisions in tax evasion crime creates an obstacle to being a state of law by undermining the right of access to the court and the provision of the Constitution stating that the judicial remedy is open against all kinds of actions of the administration (Yılmaz Furtuna and Laloğlu, 2022: 368). We also agree with this view in the doctrine. Because, not filing a lawsuit in the tax court, which is required for benefiting from tax evasion crimes, waiving if filed or not resorting to legal action, and abandoning it if applied, constitutes a violation of the principles of the rule of law, fair trial, freedom of legal remedy and recourse to the judiciary. In a decision, the Constitutional Court evaluated Articles 36 and 2[27] of the Constitution as follows: "*In the first paragraph of Article 36 of the Constitution… the*

[27] For example, setting forth nonconformance to articles 2, 36, and 155 of the fourth sentence of the fourth paragraph of Article 8 of the Constitution that is amended together with the heading as per article 32 of Law 6645 dated 4/4/2015; regarding the Structure Auditing Law dated 29/6/2001 No. 4708, the annulement was requested. According to the regulation of the aforementioned article stated, *"The partners, inspector architects and engineers and other technical staff of the building inspection organization, who are partners or in charge of the building inspection organization, engaged in commercial activities related to other professional and construction works or are partners or take part in the laboratories, upon the proposal of the Provincial Building Inspection Commission, are subjected to an administrative fine of 10,000 Turkish liras by the Provincial Directorate of Urban Planning Administrative sanction is given by taking the defenses of the building inspection organization and the relevant persons, and notified in writing, following the determination of the act and situation requiring the punishment through the examinations and inspections carried out by the authorities. The administrative fine can be appealed to the competent administrative court within fifteen days. If no objection is made within this period, the administrative fine becomes final. In cases where there is no necessity, objections are examined on the document and resolved as soon as possible. The court decisions on the objection are final*." As a result of its evaluation, the Constitutional Court decided to annul the provision of this article. According to this, "*The actions that constitute the basis of administrative fines within the scope of the Law, in other words,*

right to claim, defense and fair trial are guaranteed… The principles of legal security and certainty are the prerequisites of the state of law, which is stated in Article 2 of the Constitution… The principle of legal security is the common value that requires the legal norms to be predictable, individuals should be able to trust the state in all their actions and transactions, and that the state must avoid methods that undermine this sense of trust in legal regulations. The principle of certainty, on the other hand, expresses not only certainty of law, but also legal certainty in a broader sense, and it means that individuals can know the rules of law in advance, and can confidently determine their attitudes and behaviors according to these rules."[28]

As a requirement of the state of law, individuals must have the right to seek their rights and to have the opportunity to apply to the judiciary against the actions and transactions of the administration. A limitation on these rights is only conditional on the condition that it is for a legitimate purpose and is proportionate. In the justification of the article, the legislator did not mention the existence of a legitimate aim regarding the condition of not filing a lawsuit in the tax court stipulated for the effective repentance institution. He merely referred to the resemblance to the reconciliation institution. Although it is assumed that the aim of the legislator with this regulation is to alleviate the judicial burden and to conclude the disputes in a short time, there is a disproportionate regulation. The freedom of individuals to seek rights is not a right that can be restricted for these purposes. Ultimately, in case the person facing the threat of criminal prosecution wants to benefit from the effective repentance institution due to the possibility of possible punishment, he/she should give up his right to file a lawsuit in the tax court. In the light of the rights guaranteed by the Constitution and the evaluations made in the decisions of the Constitutional Court regarding these rights, our opinion is that the condition of "*not filing a lawsuit in the tax court, waiving if filed, not resorting to legal remedies or waiving if applied" stipulated for the effective repentance institution* violates the principle of the rule of law as the freedom of seeking rights, the presumption of innocence and the principle of open judicial remedy against all actions and acts of the administration.

Likewise, it is also regulated and protected in the Constitution that it is possible to apply to the judiciary against the actions and transactions of the administration. According to Article the Constitution 125, "*Judicial remedy is open against all kinds of actions and transactions of the administration*." According to a decision of the Constitutional Court with Article 12 of the Constitution, "…*it is aimed to inform the relevant person about the content of the transaction and to protect his/her right to file a lawsuit against the transaction in this way*."[29] It is also a requirement of

that are attributed to the person, are in the nature of misdemeanor. Therefore, it can be said that these light accusations will not have heavy effects and consequences on the addressee in terms of his spiritual existence. It is clear that administrative fines, which can reach high amounts, are a heavy and serious sanction in terms of the effect they have on the financial situation of the person, therefore they have the nature of punishment. In this respect, the proceedings regarding the administrative fines in question are within the scope of criminal charges, and the importance of subjecting such provisions to audit, which may result in the person facing a very heavy financial penalty, cannot be denied. Undoubtedly, there is no aspect of the right to demand the inspection of the provision categorically as an obligation to be given the opportunity to request this inspection against the provisions given about all administrative fines within the scope of the Law. In this respect, the finality of the provisions regarding administrative fines, which can be considered as relatively low due to the economic impact it will create on the addressee, can be considered as a proportional limitation on the right to request the inspection of the provision. However, it cannot be said that all administrative fines within the scope of the contested rule are of low quality in this context. It is clear that not subjecting the provisions on such high administrative fines to inspection, even for the purpose of concluding the trial in a reasonable time and ensuring procedural economy, will impose an excessive burden on the person. Therefore, the burden imposed on the person by keeping the said provisions closed to inspection cannot be justified for the purposes of concluding the proceedings in a reasonable time and ensuring procedural economy. In other words, the individual benefit to be obtained by having the provisions of the specified nature audited cannot be sacrificed to the principle of the right to trial within a reasonable time and procedural economy principle. In this respect, it was decided to annul the provision of the article with the evaluation and justification that the rule in question imposes a disproportionate limitation on the right to request the inspection of the provision." (The decision of the Constitutional Court, dated 01.10.2020 and numbered E. 2020/21, K. 2020/53).

[28] The decision of the Constitutional Court, dated 04.11.2021 and numbered E. 2019/4, K. 2021/78.

[29] The decision of the Constitutional Court, dated 30.06.2022 and numbered E. 2021/20, K. 2022/84.

the state of law that the judicial remedy for the actions and transactions of the administration is open. Judicial review processes are one of the most important control tools in terms of whether the actions and transactions of the administration are carried out in accordance with the law. The exemption of administrative acts benefiting from the presumption of legality from judicial review will also allow arbitrary actions by the administration.

Principles regarding crimes and punishments are regulated in Article 38 of the Constitution. In other words, some important elements of the state of law regarding crimes and punishments are listed in Article 38 of the Constitution (Özbudun, 2018: 134). According to this, "*Nobody can be punished for an act that was not considered a crime by the law in force at the time he committed it… Nobody can be considered guilty until his guilt is proven by a verdict. Criminal liability is personal*." (the Constitution, art. 38). According to Article 7 of the European Convention on Human Rights entitled "No punishment without law", "*No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed*." In one of its decisions, the Constitutional Court considered the principle of jurisdiction and independence of the courts to be closely related to the presumption of innocence regulated by Article 38 of the Constitution. According to this, "*According to the presumption of innocence, which means that no one can be considered guilty until proven guilty by a verdict, in order for a person to be said to have been truly proven guilty, by removing sufficient doubt in the trial conducted by an independent court that exercises its jurisdiction freely and effectively and fulfilling the conditions of the right to a fair trial, it is clear that it is necessary to talk about a court judgment given by reaching the material truth*."[30] Effective repentance provisions in the punishment of tax evasion crimes are in accordance with the 38th article of the Constitution, which regulates the principles of crimes and penalties. Because; the regulation bears the basic features of crimes and penalties that constitute the basis of the rule of law. Tax evasion offenses are defined in the law. If these illegal acts are committed, tax evasion crimes are punished. Effective repentance has been brought to tax evasion crimes and is in effect. Punishment of tax evasion crime and effective repentance provisions have consequences for the persons concerned and therefore comply with the principle of individuality of penalties.

B. Evaluation in Terms of Criminal Law Principles

The principle of *legality* is an important principle that guarantees the compliance of the criminal law with the rule of law (Özgenç, 2014: 105; Demirbaş, 2021: 63; Özbek, Doğan, Bacaksız and Tepe, 2018: 71). According to Article 38 of the Constitution and Article 2 of the Law No. 5237 regulated in parallel with it; the result of the principle of legality is that a person cannot be punished for an act that the law does not explicitly consider a crime, a penalty other than what is written in the law cannot be imposed on the person, the provisions of the laws containing crime and punishment cannot be compared and these provisions cannot be broadly interpreted in a way that leads to comparison. This principle requires that the provisions involving crime and punishment be regulated clearly and distinctly, in accordance with the principle of certainty. The law should introduce regulations that leave no room for hesitation about which act constitutes a crime and which punishment will be given for that crime, and ambiguous concepts should not be used (Özbek, Doğan, Bacaksız and Tepe, 2018: 76; Hakeri, 2019: 17). The fulfillment of the security function of criminal law is only possible with the principle of certainty (Özgenç, 2014: 113).

The principle of legality imposes an obligation on the legislator not to make laws that violate human rights and constitutional rights, as well as that crimes and penalties cannot be unlawful (Centel, Zafer and Çakmut, 2020: 46; Zafer, 2019: 61). This principle limits the judge's authority to consider the act as a crime (Özbek, Doğan, Bacaksız and Tepe, 2018: 72) and prevents arbitrariness (Centel, Zafer and Çakmut, 2020: 47). The principle of legality and the prohibition of comparison are strictly enforced in terms of provisions involving crime and punishment. For this reason, while the provisions of effective repentance regulated in Article 359 of Law No. 213 can only be applied for evasion crimes; and effective repentance provisions cannot be applied in terms of violation of tax privacy

[30] The decision of the Constitutional Court, dated 31.03.2021 and numbered E. 2020/35, K. 2021/26.

(Law No. 213, art. 362) and crimes of doing private business of the taxpayer (Law No. 213, art. 363). Another consequence of the principle of legality is that no crime and punishment can be created by the regulatory actions of the administration.

It is important to determine the time when the crime was committed in terms of applying the provisions of substantive criminal law. Because, no one can be punished for an act that was not considered a crime according to the law in force at the time it was committed (Law No. 5237, art. 7/1). Likewise, if a criminal act committed by the person is not considered a crime according to the law that came into force later, the person cannot be punished for this act. In fact, if such a punishment is imposed on the person, the execution and legal consequences of this punishment are automatically eliminated (Law No. 5237, art. 7/1). The non-retroactivity of the unfavorable legal provision is also a result of the principle of legality. If the provisions of the law in force at the time the crime was committed and the laws that came into force later on are different, the law in favor of the perpetrator is applied and executed (Law No. 5237, art. 7/2). This favor is called the principle of retrospective law. While regulating effective repentance, Law No. 213 also envisaged a temporary provision in order to eliminate the problems that may arise in this regard. According to the relevant provision, *those who have been sentenced and whose case is under execution*, will be able to benefit from Article 359 of Law No. 213 (Law No. 213, prov. art. 34). For this, the conditions written in the provision must be fulfilled.

Criminal liability is personal; a person can only be held responsible for his/her own criminal act, no one can be held responsible for someone else's act (the Constitution, art. 38/7; Law No. 5237, art. 20). As a result of this principle, parents, who are responsible for compensation for the damages caused by their children, are not liable in terms of criminal law liability as long as they do not participate in the crime of their children (Hakeri, 2019: 37). The punishment given to the person should not affect other people (Özbek, Doğan, Bacaksız and Tepe, 2018: 82). *Collective responsibility* is not in line with criminal law (Zafer, 2019: 54). This principle, which is called the personality of criminal responsibility, is in question for real persons. *Legal entities* cannot commit crimes. According to Article 60 of Law No. 5237, *in the event of a conviction for intentional crimes committed for the benefit of the legal person, with the participation of the organs or representatives of the private law legal entity operating on the basis of the permission granted by a public institution, and by misuse of the authority granted by this permission,* only the security measures written in the law can be applied to the legal person. That is, it is possible for natural persons to commit crimes on behalf of legal entities. In this case, while the real person who commits the act is the subject of a criminal sanction, security measures specific to legal entities can be applied for legal entities within which a crime has been committed (Law No. 5237, art. 20/2)[31].

There has been a discussion in the doctrine that effective repentance provisions in the punishment of tax evasion crimes do not make a distinction in terms of "*arranging*" or "*using*" *false and misleading documents* in terms of their content, which constitute the crime of evasion within the scope of the *successive crime*. *Şen and Serdar,* consider that in terms of the principles of successive crime, tax evasion crimes committed by the perpetrator by using fake documents and issuing fake documents in different calendar years, will not be able to be evaluated under the scope of Article 43/1 of Law No. 5237 and it is of the opinion that it cannot be evaluated within the scope of the article and that separate criminal responsibility will arise for each crime (Şen and Serdar: *7394 sayılı Kanunla Yapılan Vergi Usul Kanunu Değişiklikleri*, https://sen.av.tr/tr/makale/7394-sayili-kanunla-yapilan-vergi-usul-kanunu-degisiklikleri, Accessed 27.10.2022). *Ozansoy* is of the opinion that the acts related to forged and misleading documents in terms of their content are generally separated as regulation and use, and with this regulation, the regulators have the opportunity to reduce the penalty by paying much less than the users in the implementation of the condition that the taxes and penalties to be levied are paid at certain rates (Ozansoy, 2022: 40-41). *Candan* means that for those who trade fake documents,

[31] According to *Ozansoy*, with the regulation of effective repentance in tax evasion provisions, it is possible to leave the use of effective repentance in the preparation or use of false documents by legal entities to the will of others, because in case the partnership or management of the real person with the company ends after the opinion or investigation stage, it may not be possible to make decisions about effective repentance conditions by the perpetrator real person (Ozansoy, 2022: 41).

there is no tax or penalty to be levied due to the regulation act, and in this case, those who issue fake documents and sell them for commission will benefit from a half penalty reduction in any case, without having to bear any financial burden (Candan: *Kaçakçılık Suçunda Ceza İndirimi/Soruşturma ve Kovuşturma Evrelerinde Etkin Pişmanlık*, https://turgutcandan.com/2022/03/29/kacakcilik-sucunda-ceza-indirimi-sorusturma-ve-kovusturma-evrelerinde-etkin-pismanlik/, Accessed 27.10.2022). *Doğrusöz* is of the opinion that it is unclear whether each act will be handled separately or as a whole in the implementation of the provisions of the successive crime in tax evasion crime, and it has not been determined whether the decision to use false documents or misleading documents or the decision to reduce the tax to be paid by using such documents will be taken as a basis (Doğrusöz: *Vergi Suçlarında Zincirleme Suç ve Olası Sorunları*, https://www.bumindogrusoz.com/article/verg-suclarinda-zncrleme-suc-ve-olasi-sorunlari, Accessed 27.10.2022). According to *Batı and İnci* it is not possible to evaluate the actions envisaged in subparagraphs (a), (b), (c) and (ç) of article 359 of Law No. 213 within the same crime concept and to apply the provisions of successive crimes (Batı and İnci, 2022: 38). We also agree with this view in the doctrine. According to Article 359 of the Law No. 213, *if the crimes regulated in this article are committed within the scope of the execution of the decision to commit the same crime within more than one calendar year or taxation period*, the provision of the Law No. 213 regarding the successive crime is applied. According to this; *in the event that the same offense is committed against a person more than once at different times within the scope of the execution of a decision to commit a crime, a penalty is imposed; however, this penalty is increased from one quarter to three quarters* (Law No. 5237, art. 43/1). However, when the perpetrator of the tax evasion crime commits the tax evasion crime for each company as the official of three separate companies, the successive crime provisions cannot be applied since the condition of "*decision to commit the same crime*" is not met. Because the legal entity being different requires the regulation to be evaluated separately for each taxpayer; in this case, it cannot be said that the decision to commit a crime is the same (Şen and Serdar: *7394 sayılı Kanunla Yapılan Vergi Usul Kanunu Değişiklikleri*, https://sen.av.tr/tr/makale/7394-sayili-kanunla-yapilan-vergi-usul-kanunu-degisiklikleri, Accessed 27.10.2022). Again, in the implementation of the provisions of effective repentance, no distinction was made in terms of issuing and using false and misleading documents in terms of their content. However, in practice, a penalty is imposed for crimes committed in the same taxation period and successive crime provisions are not applied for these crimes committed in different taxation periods[32]. The acts of *arranging and using misleading documents*, which constitute tax evasion crimes, should be considered as separate acts. However, these two acts were considered together in terms of the same taxation period in the provisions of effective repentance. Therefore, it is not appropriate to apply the successive provisions together for those who issue false and misleading documents due to their content and those who use these documents.

One of the basic principles of criminal law is the principle of *fault*. The principle of fault requires that the perpetrator be held accountable for her/his actions to the extent that s/he can be condemned (Demirbaş, 2021: 63). The person is responsible for his own act in proportion to his fault. Acting on the principle that the perpetrator can be held responsible in proportion to her/his fault, effective repentance provisions ensure that the perpetrator's punishment is reduced or not given.

C. Evaluation in Terms of Taxation Principles

Effective repentance provisions in the punishment of tax evasion crimes can also be examined in terms of taxation principles. The principles determined in terms of taxation should be considered as a reflection of *the rule of law* principle. According to a decision of the Constitutional Court, "*As per the principle of legal certainty, which is one of the basic elements of the rule of law, the legal regulations must be clear, certain, understandable, applicable and objective without any hesitation or doubt in terms of both individuals and the administration, as well as against arbitrary practices of public authorities; and must contain protective measures against arbitrary implementations of public authorities. These qualifications, which must be present in the law, are also mandatory in terms of ensuring legal security. Because the principle of legal security requires that legal norms be predictable, individuals can trust the state in all their actions and transactions, and the state should*

[32] The decision of the General Assembly of Criminal Chambers of the Court of Cassation, dated 05.03.3002 and numbered E. 2002/11-28, K. 2002/179.

avoid methods that undermine this sense of trust in its legal regulations."[33] It includes the principle of *legal security*, the principle of *certainty of taxation*, the principle of *prohibition of comparison*, and the principle of *non-retroactivity of tax* (Öncel, Kumrulu, Çağan and Göker, 2022: 53; Batı, 2021: 43).

The principle of *certainty in taxation* is that the tax amount, imposition, and collection times and forms are certain and definite both for the administration and for individuals (Öncel, Kumrulu, Çağan and Göker, 2022: 53). The tax penalty rule should be clear and understandable, and its limits should be clear (Karakoç, 2019: 79). The *prohibition of comparison* of tax is not being able to collect tax or grant tax exemption on subjects that cannot be clearly determined in the law, on the grounds that they are similar to these subjects (Bilici, 2020: 9; Batı, 2021: 44). It is not possible to apply the provisions containing tax crime, misdemeanor, penalty, and sanction by comparison (Karakoç, 2019: 79). The principle of *non-retroactivity of tax laws* is, as a rule, *tax laws do not apply to events that occurred in the past* (Öncel, Kumrulu, Çağan and Göker, 2022: 54; Batı, 2021: 45) In this respect, whatever legislation is in force on the date of the taxable incident, that legislation should be applied to this incident (Bilici, 2020: 10). In the doctrine, *Aslanpınar* stated that in tax evasion crimes, it was determined that the payment to the Treasury within 1 year was determined for the implementation of effective repentance provisions in terms of cases at the execution stage, but the time, how, and where the payment condition would be made in other cases was not regulated (Aslanpınar: *Vergi Kaçakçılığı Suçlarında Etkin Pişmanlık: Bedelli ve Şartlı Ceza İndirimi*, https://www.aslanpinar.com/yayinlarimiz/makaleler-ve-kose-yazilari/vergi-kacakciligi-suclarinda-etkin-pismanlik-bedelli-ve-sartli-ceza-indirimi?gdprAccept, Accessed 27.10. 2022). We also agree with this view. Indeed, in order to benefit from the effective repentance provisions during the execution phase, it was deemed necessary to pay all of the tax debt, interest, and increase, as well as the tax penalty and half of the increase, to the Treasury within 1 year. However, no regulation has been made regarding the time and procedure for this. This situation is clearly contrary to the principle of certainty explained above. Therefore, in order to benefit from effective repentance, it would be appropriate to clearly specify the time and procedure of the payments to be made during the execution phase and additionally during the investigation and prosecution phase, with a law article or regulation and communiqué to be added to the necessary provisions.

One of the legal instruments through which the *social state* principle can be realized is *tax justice* (Özbudun, 2018: 145, 148). Principles of taxation can be established based on the regulation titled "Duty to pay taxes" in Article 73 of the Constitution. According to this, "*Everyone is under obligation to pay taxes according to his financial resources, in order to meet public expenditure. 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*." From this point of view, taxation has the principle of *meeting public expenditures*. In accordance with the social state principle, some of the resources created in the private sector must be transferred to the state through taxes in order for the state to fulfill its duties (Kaneti, 1986/1987: 3). The state may limit various rights and freedoms of individuals while exercising its taxation authority (Öncel, Kumrulu, Çağan and Göker, 2022: 50). The principle of *proportionality of tax* means the proportional use of the taxation authority held by the state, which means interference with the right to property, based on Articles 2 and 35 of the Constitution (Bilici, 2020: 11). The principle of proportionality consists of convenience, necessity and proportionality and expresses the idea of optimization in a sense (Batı, 2021: 46). The principle of *taxation according to financial power* is the taxation of individuals by taking into account their economic and personal situations (Öncel, Kumrulu, Çağan and Göker, 2022: 62). Those with the same financial power have to pay equal taxes, and those with different financial power have to pay different taxes (Saban, 2021: 57). Effective repentance regulation in the punishment of tax evasion crimes is in question in cases where the tax debt determined according to the ability to pay is not paid. Because effective repentance can be applied in the punishment of tax evasion crime. In order to implement the effective repentance, an act that is considered as tax evasion in the law has occurred due to the non-payment of the tax debt.

As a requirement of the principle of *generality of tax*, tax is collected from everyone who meets the conditions written in the law. In the context of the rule of law, it can be considered together

[33] The decision of the Constitutional Court, dated 22.09.2021 and numbered E. 2021/37, K. 2021/63.

with the principle of generality in taxation and the principle of equality before the law (the Constitution, art. 10) (Öncel, Kumrulu, Çağan and Göker, 2022: 46-47). The regulation of effective repentance in tax criminal law is designed to be applied to all persons who commit tax evasion crimes and meet the conditions. Therefore, it can be said that effective repentance regulation in the punishment of tax evasion crimes complies with the principle of generality of tax.

The tax burden is distributed to everyone in a fair and balanced way, thus *equality in taxation* is ensured. The principle of generality and equality in taxation is the principles of tax justice (Öncel, Kumrulu, Çağan and Göker, 2022: 46). The principle of equality before tax laws is that those under similar conditions are subject to a similar tax burden (Kırbaş, 2015: 13). The principle of equality in taxation is both *horizontal* and *vertical equality*, that is, equal treatment of persons in similar situations necessitates different treatment of persons in different conditions to the extent of this difference (Öncel, Kumrulu, Çağan and Göker, 2022: 47; Bilici, 2020: 12; Batı, 2021: 58-59). While the measure of the same or difference is the legal situation, the measure of the different legal situation is the right cause (Saban, 2021: 55). Effective repentance provisions regulated in tax criminal law are suitable for horizontal equality of tax, but the same is not true for vertical equality. Because, with effective repentance, 1/2 discount is provided in the investigation and execution stages, while the punishment is reduced by 1/3 in the prosecution stage. For this reason, the punishment reduction rate at the prosecution stage should be brought to an equal ratio with the investigation and execution stages.

Tax is imposed, modified, and abolished by law. The principle of *legality of taxes* includes, on the one hand, the imposition of taxes through general objective regulatory acts, and on the other hand, individual subjective assessment; and collection transactions are carried out in accordance with tax laws (Öncel, Kumrulu, Çağan and Göker, 2022: 46). This principle allows the imposition of tax to be removed from arbitrariness and is made by the decision of the representatives of the people (Saban, 2021: 43). The meaning of the principle of legality of tax is that the legislature has the authority to tax within the framework of separation of powers or balance of powers in contemporary democratic countries (Kırbaş, 2015: 12). Pursuant to this principle, the basic principles, basis, and general framework of tax are determined by law (Bilici, 2020: 13). The principle of legality in tax criminal law means that tax crimes and misdemeanors, penalties, and sanctions are specified in the law and that they are amended or revoked by law (Karakoç, 2019: 77). In the doctrine, there is a discussion about the fact that *the condition of opinion* written in the law is not complied with in the implementation of the provisions of effective repentance in the punishment of tax evasion crimes. According to *Batı and İnci,* if it is later understood that the crime of tax evasion has been committed by another person or together with another person pursuant to the provision added to Article 367 of the Law No. 213 with the Law No. 7394, the condition of opinion will not be sought for this other person and a public lawsuit may be filed against him; and this may lead to the extension of the trial time and further to some unfair practices (Batı and İnci, 2022: 47). According to *Ozansoy*, as per Article 359 of Law No. 213, it is a prerequisite to obtain an opinion from the *Report Evaluation Commission* in order to carry out an investigation and prosecution; and it is stated that this situation would cause the members of the profession to be faced with the filing of a public lawsuit (Ozansoy, 2022: 42). We also agree with this view in the doctrine. Likewise according to the Article 367 of Law No. 213, "*Directly with the relevant report evaluation commission, by Tax Inspectors and Assistant Tax Inspectors, who determined that the crimes listed in Article 359 were committed during their investigation, or by other officials or by other authorized inspectors with the opinion of the relevant report evaluation commission, by the head of the tax office or the treasurer; it is obligatory to report the situation to the Office of the Chief Public Prosecutor*." Thereby, it is a legal requirement to construct an opinion in terms of tax evasion crimes. In the said regulation, the condition of opinion is not sought for acts that are determined to have been committed by someone else or together with another person. This situation clearly violates the principle of the legality of the tax. Consequently, it would be appropriate to regulate the construction of the opinion as a condition for effective repentance provisions.

As a requirement of the principle of legality, the provisions regulating crime, misdemeanor, punishment, and sanctions should have retroactive effect if they are *in favor*, and should not be applied retroactively if they are *unfavorable* (Karakoç, 2019: 79). According to *Batı and İnci*, the question of which court will make the evaluation and determination of the law in favor of the files that are at the appeal stage in the tax evasion crimes should be answered because, in the Provisional Article 34 of

Law No. 213, it was stated that a decision to reverse these files would be given, but it was not indicated to which authority the file would be sent (Batı and İnci, 2022: 44). Indeed, according to Prov. Article of Law No. 213, effective repentance provisions should be applied in the *first-degree appeal* and *appeal* stages related to tax evasion crimes. However, the procedure related to this is not included in the regulation. We are of the opinion that the general procedural regulations in the Law No. 5271 regarding first-degree appeal and appeal should be applied here. While the *regional courts of justice* implements the effective repentance provisions in the punishment of tax evasion crimes, it would be appropriate to act according to Article 280/g of Law No. 5271. Accordingly, if the regional court of justice decides that effective repentance should be applied at this stage, it should hold a *hearing* and evaluate the conditions of effective repentance and make the decision *itself* (Law No. 5271, art. 280/2). If effective repentance conditions in the punishment of tax evasion crimes come into question in a case at the stage of *appeal*, it would be appropriate to apply Article 302/2 of Law No. 5271 based on Article 304/2 of Law No. 5271. In this case, the *Court of Cassation* should give a decision of reversal "*due to unlawfulness that may affect the provision*", based on Article 302/2 of Law No. 5271, in order to implement the effective repentance provisions. In this case, the Court of Cassation, according to Article 304/2 of Law No. 5271, should send the overturned judgment to the regional court of justice for re-examination and adjudication.

On the other hand, effective repentance institution may cause some legal problems in terms of the Provis. Art. 34 of Law No. 213. According to this article, persons who are at the stage of execution of a sentence of imprisonment may benefit from the provisions of effective repentance if they fulfill the conditions stipulated in the article within one year from the effective date of this regulation. In order to benefit from the reduction of sentence specified in this provision, the person also must not have been sued in the tax court or waived if filed and not applying to legal remedies or waiving if applied. From the opposite meaning of this regulation, according to the Provis. Art. 34 of Law No. 213[34], it is concluded that the provisions of effective repentance will not be applied against the persons who have begun to be sentenced for tax evasion crimes, if a case has been filed in the tax court in addition to the criminal case, a judgment is rendered in this case and this judgment is finalized. In other words, the will of the legislator is not to apply effective repentance in this case, and this issue is open to criticism especially in terms of favorable decisions given by the tax court. In our opinion, while the sentence given by the criminal court is executed, if the lawsuit filed in the tax court is finalized in favor of it, the effective repentance provisions should be applicable to the relevant person.

VIII. REVIEW OF THE DECISIONS OF THE COURT OF CASSATION REGARDING EFFECTIVE REPENTANCE IN THE PUNISHMENT OF THE TAX EVASION CRIMES

Since the addition of the provisions regarding effective repentance in the punishment of tax evasion crimes to Article 359 of Law No. 213 (15.04.2022), the Court of Cassation has given various decisions regarding effective repentance in tax evasion crimes.

In one of its decisions, taking into account the provisions of effective repentance, the Court of Cassation decided to reverse the decision regarding *the crime of hiding books, records and documents* on the grounds that the legal situation of the accused should be re-evaluated[35]. In another decision of the Court of Cassation, the verdict was reversed on the ground that there was an obligation to re-evaluate the legal situation of the accused "because of the defendant's refusal to present the books and

[34] "*The first paragraph of the temporary article 34 added to the Tax Procedure Law dated 4/1/1961 and numbered 213 with the 6th article of the Law numbered 7394 dated 8/4/2022; A. That the second sentence is unconstitutional in terms of the phrase "…execution…" in the first sentence of the aforementioned paragraph and it is annulled,... B. The second sentence is unconstitutional in terms of the phrase "…prosecution…" in the second paragraph of the article, and annulment…, was decided by a majority on 28/9/2022*." (The decision of the Constitutional Court, dated 28.09.2022 and numbered E. 2022/59, K. 2022/111). According to the Constitutional Court, with the decision dated 28.9.2022 and numbered E. 2022/59, K. 2022/111, decided by majority of the votes that the phrases "execution" and "prosecution" in the first paragraph of the Provis. Article 34 of Law No. 213.

[35] The decision of the 11st Criminal Chamber of the Court of Cassation, dated 26.04.2022 and numbered E. 2021/37279, K. 2022/7392.

documents by arguing that he gave *power of attorney*"[36]. Moreover, in another decision, the Court of Cassation decided to reverse the verdict of "The defendant ... on the charge of *issuing misleading documents* in terms of its content in the calendar year 2009" on the grounds that there is an obligation to re-evaluate the legal situation of the accused according to the provisions of effective repentance[37]. In another decision of the Court of Cassation, it reversed the decision given "for *the crimes of forge a false invoice* in the calendar years 2010, 2011 and 2012" on the grounds that there is an obligation to re-evaluate the legal situation of the accused according to the provisions of effective repentance[38]. Furthermore, in another decision, the Court of Cassation decided to reverse the decision given due to "the crime of concealing books, records and documents ... *not submitting the books and documents that are obliged to keep them to the persons authorized for tax inspection*", as the legal situation of the accused should be re-evaluated according to the provisions of effective repentance[39]. Additionally in another decision, the Court of Cassation decided to reverse the decision on "the crime of hiding books, records and documents from the *Department of Taxation*, and the crime of *using a false invoice* in the calendar years 2008, 2009 and 2010" on the grounds that effective repentance provisions must be applied[40].

On the other hand, the Court of Cassation decided to reverse the decision that the defendant was sentenced to imprisonment for "*violation to the Tax Procedure Law*" in an another decision. As the justification for the decision, it was stated that after *the finalization of the conviction sentence* given according to Article 359/a of Law No. 213, regulations regarding effective repentance were added with Law No. 7394 to the article in which this crime was regulated, and these regulations would also cover the files in the *execution stage*[41].

As it can be seen, the 11st Criminal Chamber of the Court of Cassation has decided to reverse the decisions regarding tax evasion crimes, which are applied to the *appeal legal remedy*, on the grounds that the provision of Article 359/3 of Law No. 213 on effective repentance should be applied for those who meet the conditions in this article. The justification for the reversal decision of the Court of Cassation is generally "*according to the effective repentance provisions, there is an obligation to re-evaluate the legal situation of the defendant*".

IX. CONCLUSION

The effective repentance, which is a criminal law institution, has been brought to the punishment of tax evasion crimes with the regulations in Articles 4 and 6 of Law No. 7394. With this Law, the provisions regarding effective repentance have been added to the Article 359 and the Provisional Article 34 of Law No. 213. The effective repentance regulation in the punishment of tax evasion crimes has some effects on the tax criminal law principles and causes some potential problems in terms of these principles.

In order for effective repentance provisions to be applied in the punishment of tax evasion crimes, the conditions specified in the Article 359/3-6 and the Provisional Article 34 of Law No. 213 must be fulfilled. For this, in investigation or prosecution stage, it is necessary to pay the entire amount of the tax depending on the determination of *the loss of tax* due to the actions specified in Article 359 of Law No. 231, its *default interest* and its *late fee*. If it is in the execution stage, this tax debt, default interest and late fees must be paid by *April 15, 2023*. Moreover, the lawsuit must not

[36] The decision of the 11st Criminal Chamber of the Court of Cassation, dated 26.04.2022 and numbered E. 2020/2734, K. 2022/7393.
[37] The decision of the 11st Criminal Chamber of the Court of Cassation, dated 10.5.2022 and numbered E. 2017/13855, K. 2022/7910.
[38] The decision of the 11st Criminal Chamber of the Court of Cassation, dated 10.05.2022and numbered E. 2017/13146, K. 2022/7909.
[39] The decision of the 11st Criminal Chamber of the Court of Cassation, dated 10.5.2022 and numbered E. 2019/275, K. 2022/7911.
[40] The decision of the 11st Criminal Chamber of the Court of Cassation, dated 10.05.2022 and numbered E. 2018/603, K. 2022/7906.
[41] The decision of the 11st Criminal Chamber of the Court of Cassation, dated 05.12.2022 and numbered E. 2022/10335, K. 2022/20069.

have been filed in the tax court or waiving if it filed and legal remedies must not have been applied or abandoned if it applied.

With the fulfillment of these conditions, if the case is at the investigation or the execution stages, the punishment of imprisonment is reduced a half. And if the case is at the prosecution stage, the punishment of imprisonment is reduced one-third.

In the event that effective repentance provisions are used in the punishment of tax evasion crimes, the prison sentences to be imposed will be reduced. For this, effective repentance provides an advantage to the taxpayer in punishing the crime of tax evasion.

Effective repentance is also different from similar legal institutions. The penitence and rectification (Law No. 213, art. 371) provides the reduction and elimination of tax debt in terms of the penalty of loss of tax, and also prevents the prosecution in terms of tax evasion. Unlike that effective repentance reduces the prison sentence for tax evasion. In voluntary abandonment (Law No. 5237, art. 36), the perpetrator voluntarily gives up the enforcement actions or tries to prevent the result from happening. Here, the reason why the perpetrator does not complete his actions is not any external actor. But in effective repentance, the crime has been completed and if the person fulfills the conditions specified in the law with or without his own will, he will benefit from this. The reconciliation (Law No. 213, annex art. 1-12) is an alternative dispute resolution method to reduce the amount of tax debt and penalty by agreeing with the tax office at the pre or post assessment stages. Also the reconciliation is possible in taxes that can be levied upon the declaration of taxpayer. For this reason, it is not possible to apply the reconciliation in terms of tax evasion crimes in which effective repentance is regulated. Effective repentance is also different from the reconciliation institution regulated in the Article 253-255 of Law No. 5271. Because *reconciliation* is regulated in terms of crimes related to complaint (excluding crimes against sexual immunity) and other crimes that are considered within the scope of reconciliation in the law (Law No. 5271, art. 253-255). It is a mandatory reasoning procedure. In effective repentance, although it is regulated in terms of crimes specifically regulated in the law, its implementation is not obligatory. Just as while effective repentance is a protection that the perpetrator can benefit from unilaterally, reconciliation is based on the mutual agreements of the perpetrator and the victim.

The implementation of effective repentance provisions of tax evasion crimes in the Law No. 213 may also cause some legal problems. Article 2 of the Constitution regulates that the Republic of Turkey is a state of law. As a requirement of being a state of law, Article 36/1 of the Constitution states that "*Everyone has the right to a fair trial, by claiming and defending, before the judicial authorities by making use of legitimate means and methods"*. In Article 38/4 of the Constitution, it is regulated that "*No one can be considered guilty until his guilt is proven by a verdict"* and in 125/1, it is stated *"Judicial remedy is open against all kinds of actions and transactions of the administration.*" The cases of not filing a lawsuit in the tax court, waiving the lawsuit, not resorting to legal remedies or abandoning it if applied, which is regulated as a condition to benefit from the effective repentance provisions, may may constitute a violation of the provisions of the freedom of seeking rights (the Constitution, art. 36) and recourse to judicial review (the Constitution, art. 125) regulated in the constitution. Because, the conditions of not filing a lawsuit in the tax court or waiving it if filed, not resorting to legal remedies or waiving it if applied are clearly contrary to the principle of freedom of seeking rights and the principle of openness of judicial remedy against all kinds of actions and transactions of the administration.

In the effective repentance regulation, the discount rate was determined as 1/2 in the investigation and execution stages, while the discount rate was determined as 1/3 in the prosecution stage. This situation violates the principles of equality and proportionality. In our opinion, it would be appropriate to correct this situation and to equate the effective remorse discount rate in the prosecution stage with the discount rate in the investigation and execution stages.

In the provisions of effective repentance, the acts of arranging and using misleading documents in terms of their content were considered together in terms of punishment in the same taxation period and successive crime provisions were applied. In our opinion, these acts should be considered as separate acts. Because, in practice, those who issue and use these documents cannot benefit from the successive crime provisions in the same taxation period. This has been the view of the

Court of Cassation for a long time. Therefore, in terms of the implementation of the provisions of effective repentance, the acts of issuing and using misleading documents in terms of their content should be considered separately and should not be benefited from the provisions of the successive crime.

In the effective repentance regulation, it is stated that if it is revealed that the act was committed by or together with another person, the condition of opinion will not be sought for that person. In the effective repentance regulation, it is stated that if it is revealed that the act was committed by or together with another person, the condition of opinion will not be sought for that person. However, it is a legal requirement to make an opinion in terms of tax evasion crimes (Law No. 213, art. 367). Therefore, in our opinion, it would be appropriate to add a statement to this regulation stating that the condition of opinion will be applied in all case.

Effective repentance provisions in the punishment of tax evasion crimes should also be applied in the first-degree appeal and appeal stages. There is no clear regulation in the law regarding the procedure for this. In our opinion, in this case, it is necessary to apply the general provisions of the Law No. 5271. Accordingly, the regional administrative court should apply the law in favor of effective repentance in terms of files at the stage of first-degree appeal (Articles 280/2 and 280/1-g of Law No. 5271). At the appeal stage, a decision to reverse the file should be given and the file should be sent to the regional administrative court, where it should be re-examined and a decision should be made (Articles 304/2 and 302/2 of Law No. 5271).

There may be some problems in the implementation of the Provisional Article 34 of Law No. 213, which is one of the provisions regulating effective repentance in tax evasion crimes. Namely, in case of a decision given by the tax court about the persons whose prison sentence for tax evasion has started, effective repentance provisions will not be applicable. In this case, the decisions in favor of the tax court will not be enforced. Therefore, while the sentence given by the criminal court is being executed, it would be appropriate for this person to benefit from the effective repentance provisions when the lawsuit filed in the tax court is finalized in favor of it

Along with the provisions added to the Law No. 213 on 15.04.2022 for the punishment of tax evasion crime, it is seen that effective repentance provisions have started to be applied during the Court of Cassation review in terms of disputes related to tax evasion crime. In its examination on tax evasion, the 11st Criminal Chamber of the Court of Cassation made many decisions to reverse the previous decisions for the implementation of effective repentance provisions. The justification for the decisions was generally the necessity of re-evaluating the legal situation of the defendant according to the effective repentance provisions.

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