

SOURCES OF TURKISH TAX LAW

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ABSTRACT:

The written sources of Turkish Tax Law constitute the subject matter of this article. These written sources are:

- i. Constitution of Turkish Republic which take its validity from the referendum,
- ii. The codes, international tax treaties, decrees having force of law, ordinances, regulations, by-laws, decisions of Constitutional Court, which take their validity from the Constitution of Turkish Republic,
- iii. Unified decisions of Council of State, Communiques, obligatory expressions which take their validity from codes.

ÖZET

Bu makalenin konusunu, "geçerliliklerini nereden aldıkları" kriterine göre Türk Vergi Hukuku'nun yazılı nitelikteki kaynaklarının incelenmesi oluşturmaktadır.

Söz konusu yazılı nitelikteki kaynaklar;

- ii. Geçerliliğini halk oylamasından alan Türkiye Cumhuriyeti Anayasası,
- ii. Geçerliliğini Türkiye Cumhuriyeti Anayasası'ndan alan kanunlar, uluslararası vergi anlaşmaları, kanun hükmünde kararname, bakanlar kurulu kararları, tüzükler, yönetmelikler, anayasa mahkemesi kararları,
- iii. Geçerliliğini kanunlardan alan danıştay içtihadı birleştirme kararları, genel tebliğler ve özelgelerdir.

I. INTRODUCTION

It is possible to classify the sources of law using various criteria (See.BYLGE,1975:39).

There are classifications of the sources of law in the literature which take the organs (legislative, executive and judicial) into consideration as a criterion (See.KIRBAŞ 1996:33-51) or which take the obligation to comply with the positive law rules, as a criterion (See.ÖNCEL-KUMRULU-ÇAĞAN,1992:13-16).

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In this article, the sources of tax law are investigated, taking into consideration the criterion of where the positive law rules take their validity.

II. THE CONSTITUTION OF TURKISH REPUBLIC WHICH TAKE ITS VALIDITY FROM THE REFERENDUM

Constitutions explain "the foundation, operation, duties and authorities of the main organs which constitute the political structure of a nation, and the rules and principles that regulate the fundamental rights and freedoms granted to individuals" (DEMİR-KARATEPE,1989:17).

According to the 11st Article of the Constitution of Turkish Republic which take its validity from the referendum, "The provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other agencies and individuals" (See.GÖZÜBÜYÜK,1995:39). For this reason, hierarchically the first and the foremost positive law rules are the ones that take place in Constitutions.

While one aspect of taxation has the meaning of interference to the rights and freedoms and properties of persons, the other aspect of it is that taxation is an important and effective tool for the state to finance the democratic system, a tool for the political power to apply its economic and social policies (ÇAĞAN,1982:30; KIRBAŞ1996:35).

This is why in almost all contemporary constitutions there are provisions related to taxation authority. Also, in the Constitution of Turkish Republic there are provisions directly or indirectly related to tax and public revenues (See.ULUATAM,1995:36; KIRBAŞ1996:35,36). According to the 73rd Article of the Constitution of Turkish Republic, titled "Obligation to pay Taxes":

"Everyone is under the obligation to pay taxes according to his financial resources, in order to meet public expenditures.

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

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

The Council of Ministers may be empowered to amend the percentages of exemption, exceptions and reductions in taxes, fees, duties and other such financial impositions, within the minimum and maximum limits prescribed by law".

III. SOURCES WHICH TAKE THEIR VALIDITY FROM THE CONSTITUTION OF TURKISH REPUBLIC

The codes, international tax treaties, decrees having force of law, ordinances, regulations, by-laws, decisions of Constitutional Court take their validity from the Constitution of Turkish Republic.

A. CODES

A code is a positive law rule introduced and duly put into effect by authorized legislative organs (GÖRGÜN,1994:45).

The Council of Ministers and deputies are empowered to introduce laws. The President of the Republic shall promulgate the laws adopted by the Grand National Assembly of Turkey within fifteen days. He shall, within the same period, refer to the Grand National Assembly of Turkey for further consideration laws which he deems unsuitable for promulgation, together with a statement of his reasons. Budget laws shall not be subject to this provision. If the Grand National Assembly of Turkey adopts in its unchanged form the law referred back, the President of the Republic shall promulgate it; if the Assembly amends the law which was referred back, the President of the Republic may again refer back the amended law to the Assembly.

According to the 73rd Article of the Constitution of Turkish Republic, "Taxes, fees, duties, and other such financial impositions shall be imposed, amended, or revoked by law".

Codes related to taxation, after the Constitution, are the second most important source of Turkish Tax Law, binding upon legislative, executive and judicial organs and individuals.

Tax codes, like other codes, have general and abstract provisions. However, in terms of currency period, there is an important difference between tax codes and other codes. According to the 39th Article of General Accounting Law, a permission by budget law is needed to accumulate the public revenues. If this permission is not given by budget law, the tax codes do not lose their effect continuously, but the application of these codes stops for that year.

B. INTERNATIONAL TAX TREATIES

According to the 90th Article of the Constitution of Turkish Republic, "The ratification of treaties concluded with foreign states and international organisations on behalf of the Republic of Turkey, shall be subject to adoption by the Grand National Assembly of Turkey by a law approving the ratification. Agreements regulating

economic, commercial and technical relations, and covering a period of no more than one year, may be put into effect through promulgation, provided they do not entail any financial commitment by the State, and provided they do not infringe upon the status of individuals or upon the property rights of Turkish citizens abroad. In such cases, these agreements must be brought to the knowledge of the Grand National Assembly of Turkey within two months of their promulgation."

Governments make agreements with one another in order to hinder or lessen double taxation, to prevent international tax fraud and evasion, to increase the efficiency of tax administrations in assessment and collection, to develop information exchange, to harmonize the tax codes and to solve the tax conflicts, and the like (KIRBAŞ1996:39).

International agreements duly put into effect carry the force of law. No appeal to the Constitutional Court can be made with regard to these agreements, on the ground that they are unconstitutional. For this reason, international tax agreements (See.SOYDAN,1995) duly put into effect carry the force of tax law, however, unlike other tax codes, no appeal to the Constitutional Court can be made with regard to these tax agreements, on the ground that they are unconstitutional.

C. DECREES HAVING FORCE OF LAW

According to the 7th Article of the Constitution of Turkish Republic, "Legislative power is vested in the Grand National Assembly of Turkey on behalf of the Turkish Nation. This power cannot be delegated". But according to the 91st Article of the Constitution of Turkish Republic, "The Grand National Assembly of Turkey may empower the Council of Ministers to issue decrees having force of law. However, the fundamental rights, individual rights and duties included in the First and Second Chapter of the Second Part of the Constitution and the political rights and duties listed in the Fourth Chapter, cannot be regulated by decrees having force of law except during periods of martial law and states of emergency".

Hence, "obligation to pay taxes", considered under the heading of "Political Rights and Duties" in the Constitution of Turkish Republic, basically, cannot be introduced in the form of a decree having force of law. Decrees having force of law are not the sources of tax law, in principle (See.KIRBAŞ1984:38-46). On the other hand, because the executive organ can introduce decrees having force of law during periods of martial law and states of emergency, it can also introduce such decrees about tax duties during such periods.

In other words, decrees having force of law about tax duties, introduced during periods of martial law and states of emergency, are considered to be binding for tax law and they can be considered as basic sources of tax law.

There is no need for an empowering law for decrees having force of law about tax duties, introduced during periods of martial law and states of emergency and no appeal to the Constitutional Court can be made with regard to these decrees, on the ground that they are unconstitutional.

D. ORDINANCES

According to the 73rd Article of the Constitution of Turkish Republic, "The Council of Ministers may be empowered to amend the percentages of exemption, exceptions and reductions in taxes, fees, duties and other such financial impositions, within the minimum and maximum limits prescribed by law". This Article of the Constitution, gives a "binding" and "limited" taxation authority to the Council of Ministers (See.ÖZDEN,1990:282).

The Council of Ministers generally uses this authority by means of ordinances. Hence, ordinances take their validity from both the Constitution of Turkish Republic and from the codes which determines the upper and lower limits of the authority.

E. REGULATIONS

According to the 115th Article of the Constitution of Turkish Republic, "The Council of Ministers may issue regulations governing the mode of implementation of laws or designating matters ordered by law, provided that they do not conflict with existing laws and are examined by the Council of State".

So, the Council of Ministers may issue regulations governing the mode of implementation of tax laws or designating matters ordered by tax law, provided that they do not conflict with existing laws and are examined by the Council of State.

For tax codes, there is no need to give authority to the Council of Ministers to issue regulations. However, if a tax code orders that a subject to be introduced with a regulation, the Council of Ministers has to comply with this code (KIRBAŞ1996:43). Because they take their validity from both the Constitution and codes, these kinds of regulations are different from others in that they bring new provisions. Because, these types of regulations do not have just interpreting and explaining characteristics.

Regulations shall be signed by the President of the Republic and published officially in order to acquire currency.

F. BY-LAWS

According to the 124th Article of the Constitution of Turkish Republic, "The Prime Ministry, the ministries, and public corporate bodies may issue by-laws in order to ensure the application of laws and regulations relating to their particular fields of operation, provided that they are not contrary to these laws and regulations. The law shall designate which by-laws are to be published in the Official Gazette".

For this reason, Ministry of Finance may issue by-laws in order to ensure the application of tax laws and regulations, provided that they are not contrary to these laws and regulations, as well.

G. DECISIONS OF CONSTITUTIONAL COURT

According to the 148th Article of the Constitution of Turkish Republic, "The Constitutional Court shall examine the Constitutionality in respect of both form and substance of laws, decrees having force of law, and the rules of Procedure of the Grand National Assembly of Turkey".

On the other hand, according to the 153rd Article of the Constitution of Turkish Republic, "Decisions of Constitutional Court shall be binding on the legislative, executive, and judicial organs, on the administrative authorities, and on persons and corporate bodies" (See.YILDIRIM,1993:69-80).

In the course of annulling the whole or a provision of laws or decrees having force of law, the Constitutional Court shall not act as a law-maker and pass judgement leading to new implementation. For this reason, decisions of Constitutional Court is important because they cancel a basic source of tax law.

IV. SOURCES WHICH TAKE THEIR VALIDITY FROM CODES

Unified decisions of Council of State, Communiques, obligatory expressions take their validity from codes.

A. UNIFIED DECISIONS OF COUNCIL OF STATE AND OTHER COURT DECISIONS

According to the 39th Article of the Council of State Act, if there are disputes in the decisions of the different chambers of the Council of State or the decisions of the administrative and tax chambers are contrary to each other or if it is considered to be necessary to change some unified decisions, the Council of State can decide to unify or change the jurisprudences.

The 40th Article of the Council of State Act, is a provision stating that the tax administration and the judicial organs have to comply with the unified decisions of the Council of State related to tax law. For this reason, the unified decisions of the Council of State are one of the basic sources of tax law which have to be complied with.

All court decisions other than the unified decisions of the Council of State are auxiliary sources of tax law. The decisions bind only the tax-payer and the tax-collector as parties of a particular case on which the decision is made.

B. COMMUNIQUES

Communiques take their validity from tax codes or from interpretation authority of the Ministry of Finance.

Communiques, introduced based on the "authority" and "duty" given to the Ministry of Finance by the tax codes, are one of the basic sources of Turkish Tax Law. For these kinds of communiques bring new provisions, both the tax-payer and the tax-collector (administration) have to comply with them.

On the other side, communiques which take their validity from the interpretation authority of the Ministry of Finance, are the auxiliary sources of Turkish Tax Law, because they do not bring new provisions. These kinds of communiques suggest the opinions of the Ministry of Finance. For this reason, the tax-payers do not have to comply with these kinds of communiques.

C. OBLIGATORY EXPRESSIONS

Obligatory expressions are the answers of the tax-administration given to the tax-payers, upon their request, for complicated and hesitating issues about their own tax situations and tax applications. Tax-payers have a right to ask for an explanation from the tax-administration. This "asking for an explanation" right is introduced by the 413rd Article of Tax Procedure Law (See.ÖZDEN,1997:79-83). For this reason, obligatory expressions take their validity from the Tax Procedure Law.

Tax-payers do not have to comply with these obligatory expressions. However, if a tax-payer acts in the way notified to him\herself by such an obligatory expression, he\she will not be penalized, even if this act necessitates to be penalized. But in order for this result to rise, the obligatory expression has to be given to the tax-payer personally.

V.CONCLUSION

The first struggles for democracy in history commenced as a reaction to arbitrary taxation imposed upon people by the political power. The first authority gained by the

parliaments is the taxation authority. The basic sources of taxation authority, which can be defined as the legal and actual power of State to collect tax relying on its sovereignty upon its nation (ÖNCEL-KUMRULU-ÇAĞAN,1992:7,33), is the Constitutions.

According to the Constitution of Turkish Republic, it is made clear that which formal sources of positive law can be used for the taxation authority, that the taxation authority can be used basically by means of codes. However, within the limitations stated in the Constitution and codes, the executive organ can be given a limited discretionary power.

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