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ARAŞTIRMA MAKALESİ / RESEARCH ARTICLE

Witholding Tax Problems in Independent Personal Services Income of Persons Resident In Foreigin Countries – Example of United States of America – Turkey Double Taxation Agreement

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Abstract

"*Agreement Between The Government Of The United States Of America And The Government Of The Republic Of Turkey, The Agreement Of The Double Taxation And The Prevention Of The Fiscal Evasion*" sets out how and under what circumstances those persons who are resident in the United States but have Independent Personal Services Income in Turkey will be tax liable. In this article, these conditions will be examined and the illegality which may arise due to the present practice will be evaluated especially in cases where one should not be taxed in Turkey.

Keywords

Tax Law • Double Taxation Agreement • Witholding Tax

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Introduction

The basic regulation on how to tax people who are not resident in Turkey but who earn income in Turkey is in the Income Tax Law. According to paragraph 1 of Article 3 of the Income Tax Law No. 193, the real persons settled in Turkey are taxed on the whole of the profits and revenues they have gained both inside and outside of Turkey and also Article 6 of the Law specifies real persons who are not settled in Turkey are taxed only on the gains and revenues they have obtained in Turkey. However, with respect to the last paragraph of Article 90 of the Constitution of the Republic of Turkey; the provisions of international treaties shall prevail in disputes arising out of the international treaties on fundamental rights and freedoms in cases where the laws set forth different provisions on the same subject. For this reason, "*Agreement Between The Government Of The United States Of America And The Government Of The Republic Of Turkey, The Agreement Of The Double Taxation And The Prevention Of The Fiscal Evasion*" "*Agreement*" will be examined to determine how Independent Personal Services income will be taxed.

I. Assessment of the Applicability of the Agreement Provisions

There are basically two conditions for the agreement to be able to applied on the parties. One of them relates to the Residency, the other relates to the subject tax.

A. Concept and Condition of Residency

According to the Article 1 of the Agreement "*This Agreement shall apply to persons who are residents of one or both of the Contracting States, except as otherwise provided in the Agreement.*" the first condition for entry into the scope of the Agreement is "Residency". Resident of the state is defined in the Article 4 as below: "*means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation, or any other criterion of a similar nature, provided, however, that in the case of income derived or paid by a partnership or similar pass-through entity, estate, or trust, this term applies only to the extent that the income derived by such partnership, similar entity, estate, or trust is subject to tax in that State as the income of a resident, either in its hands or in the hands of its partners, beneficiaries, members, or grantors*"

However, since in some cases persons may be accepted as resident in two States due to their entry into both of the measures, a double-personality problem may arise. In this cases, real persons shall be deemed to be a resident of the State in which he has a permanent home available to him, if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer. If the residence can not be resolved in spite of these measures, then the nationality of the residence shall be regarded as the

measure for determining the residence of these persons and if the real person is in the nationality of both States, or in case none of them is in compliance, the problem is solved by mutual agreement between the parties.[2]

In order for this agreement to enter into force the person of the other country must obtain a certificate of residence from the competent authorities of the country in which they reside. Afterwards, they should submit a copy of Turkish translations of the documentary certified by notary public or the Turkish consulates in this country to the relevant tax office or tax payer.[3] Taxpayers will keep the relevant certificates of residence that they have received for to be presented to the competent authorities when necessary.[4]

B. Conditions Regarding Scopes of Tax

Article 2, paragraph 2 of the Agreement specifies the application area of the agreement in terms of taxation. Relevant article with the provision of *" The existing taxes to which the Agreement shall apply are, in particular: a) in the case of Turkey: i) the income tax (Gelir Vergisi); ii) the corporation tax (Kurumlar Vergisi); iii) the levy imposed on the income tax and the corporation tax (hereinafter referred to as "Turkish Tax*");" (Expect the taxes in the United States) Turkey's Corporate Tax and Income Tax is in the scope.

According to the last paragraph of the related article; "*The Agreement shall apply also to any identical or substantially similar taxes which are imposed after the date of signature of the Agreement in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes which have been made in their respective taxation laws*."

II. Implementation of the Agreement's Provisions

Once the Agreement is determined to be in terms of the parties, the second stage is to find out what kind of application area the agreement provisions will have.

In order to determine how the gains obtained in one of the Contracting States will be taxed, the nature of the income obtained under the contract must first be determined. Although the taxation of Personal Services Income is regulated in Article 14 of the Agreement, the definition of Personal Services Income is not negotiated. In such cases, according to the last paragraph of Article 3 of the Agreement, it should be

2 "If the real person is in the nationality of either State, or if none of them is in compliance, the problem is solved by mutual agreement between the parties." Revenue Administration Presidency, "Çifte Vergilendirmeyi Önleme Anlaşmaları Çerçevesinde Vergilendirme Esasları", http://www.gib.gov.tr/.

3 The Residence Document can also be arranged by the Taxpayers' Office of the High Taxpayer (Istanbul), limited only to its own taxpayer, as well as the Revenue Administration and Revenue Administration Presidency: Double Taxation Avoidance Circulars of Revenue Administration Presidency dated 13.02.2007 and No. 2008- 1/2007-1 /1

4 General Communiqué on the Avoidance of Double Taxation with Serial Number 4; Official newspaper date 26.09.2017.

examined what is the "Personal Services Income" in Turkey.

According to Article 65 of the Income Tax Law No. 193, Profits from any kind of personal services activities are personal services profits. According to the second paragraph of the article, personal services activity is based on personal or professional knowledge or specialization or profession and is not of a commercial nature shall be made on its own behalf and account under personal responsibility.

How taxation of self-employment income obtained by a resident in the contracting states is regulated under article 14 of the Agreement: "*Income derived by a resident of one of the Contracting States in respect of professional services or other activities of an independent character shall be taxable only in that State. However, such income may also be taxed in the other Contracting State if such services or activities are performed in that other State and if: a) the resident has a fixed base regularly available to him in that other State for the purpose of performing those services or activities; or b) the resident is present in that other State for the purpose of performing those services or activities for a period or periods exceeding in the aggregate 183 days in any continuous period of 12 months. In such circumstances, only so much of the income as is attributable to that fixed base or is derived from the services or activities performed during his presence in that other State, as the case may be, may be taxed in that other State.*"

In the second paragrapf of article 14, how taxation of Income derived by an enterprise of one of the Contracting States in respect of professional services or other activities of a similar character ise regulated. According to this article; "*Income derived by an enterprise of one of the Contracting States in respect of professional services or other activities of a similar character shall be taxable only in that State. However, such income may also be taxed in the other Contracting State if such services or activities are performed in that other State and if: a) the enterprise has a permanent establishment in that other State through which the services or activities are performed; or b) the period or periods during which the services or activities are performed exceed in the aggregate 183 days in any continuous period of 12 months. In such circumstances only so much of the income as is attributable to that permanent establishment or to the services or activities performed in that other State, as the case may be, may be taxed in that other State. In either case the Republic of Turkey may levy a withholding tax on such income. However, the recipient of such income, having been subjected to such a tax, may elect to be taxed on a net basis in respect of such income in accordance with the provisions of Article 7 (Business Profits) of this Agreement as if the income were attributable to a permanent establishment of the enterprise situated in that other State*."

As per this provision, in order to be taxed in Turkey, the establishment of the activity in Turkey should be taken into consideration by the resident of the other country, as well as the factors of *fixed base* or *a permanent establishment* or *duration*

of stay. If the activity is carried out in Turkey by means of a *fixed base* or *a permanent establishment*, taxation can be done in Turkey.

The provision of the agreement, which must be examined in order to determine whether the person has *a permanent establishment* in Turkey, is Article 5. According to this article "*permanent establishment*"[5] means a fixed place of business through which the business of an enterprise is wholly or partly carried on. "*permanent establishment* " is especially, a place of management, a branch, an office, a factory, a workshop, a mine, an oil or gas well, a quarry or any other place of extraction of natural resources; and a building site, a construction, assembly or installation project if such site, project, or activities continue for a period of more than six months.

Although the term "*fixed base*" is not defined in the agreement, this term is similar to the notion of " *a permanent establishment* " as defined in Article 5 of the Agreements. There are no qualitatively significant differences between the terms "*permanent establishment* " and "*fixed base*" used in the agreement. The term "*permanent establishment*" is used mainly for commercial and industrial activities, while the term "*fixed base*" is used for the place where Independent Personal Services Activities are carried out. In determining whether a "Fixed Base" has been established, it is not necessary to allocate only the relevant activity in accordance with the nature of the activity. If it is shared with another real or legal person or belongs to another person, this place will not change its quality of being "*permanent establishment* ".[6]

Apart from these conditions, another condition of taxation in Turkey is to stay in Turkey for a certain period of time; 183 days in any continuous period of 12 months

The days on which the person is physically present in Turkey for the purpose of self-employment activity shall be taken into account on the basis of the period of stay. The person should stay in Turkey for a total of 183 days or more; in one or more time within a period of 12 months.[7]

The day in Turkey that lasts less than 24 hours will be counted as full day. Also days such as holidays, days of departures, day of arrivals, Saturdays and Sundays, national holidays, short brakes because delay of training or materials, days of sickness and days when one of the family member is dead or sick will be included as days passed in Turkey.[8]

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5 In this context, the term " *permanent establishment* " is also distinguished in the concept of financial residence: the place of business is also a point of connection such as financial residence. But the distinction between the two docking points is that the financial residence is a personal tie-down point, while the workplace is a material tie-point: Billur Yaltı, **Elektronik Ticarette Vergilendirme**, Istanbul, Der, 2003, s. 142: Ege, Berber, **Vergi Hukukunda Mali İkametgah,** Unpublished Master Thesis, Istanbul Social Sciences Institute, 2012, s.6.

6 General Communiqué on the Avoidance of Double Taxation with Serial Number 4.

7 Some agreements are based on the "calendar year". Like Sweeden.

8 General Communiqué on the Avoidance of Double Taxation with Serial Number 4.

If it is "*enterprise*" and not the real person who is the resident, it will be possible to tax the revenue in Turkey if the duration or duration of the services or activities exceeds 183 days in any 12 month period. Previously this account was found with the number of staff sent and the number of days the service was performed together. For example, a USA resident in Turkey with 10 employees for 20 days was deemed to have performed 200 days in Turkey. However, now the number of days spent in Turkey is taken into account for the activity carried out without regard to the number of personnel.

Example: For a consultancy service to be provided by a real person with limited liability in Turkey:

3 people on 10.12.2018 for 30 days;

6 people on 12.04.2019 for 90 days;

4 people on 13.07.2019 for 45 days;

7 people on 25.12.2019 for 25 days; sent to Turkey.

Within 12 months from 10.12.2018; 183 day condition is not provided. In 12 months period (30 + 90 + 45 =) 165 days stayed in Turkey. Since people who have been sent to Turkey on 25.12.2019 are out of the 12-month period, they will not be taken into account in the calculation of the periods.

Another important point in the terms of calculation of days is that more than one self-employment activity in Turkey is carried out together in a time frame. In such a case, the overlapping days should be taken into consideration once.

Example:

The real person with limited liability come to Turkey on 01.08.2016 to perform two separate self-employment activities in Turkey and left Turkey on 31.12.2016. The periods of activity in Turkey are as follows:[9]

On the assumption that he stayed in Turkey;

1. 153 days between 01.08.2016 and 31.12.2016,

2. 91 days between 01.09.2016 and 30.11.2016, which is the operating period;

The number of days allocated by the self-employed taxpayer for two separate activities carried out in Turkey is (153 + 91 =) 244 days. (244-91 =) 153 days will be counted as the number of days because (91 days) will be considered only once. In this case, Turkey does not have the right to tax as a source state.

9 General Communiqué on the Avoidance of Double Taxation with Serial Number 4.

It should be noted that the Turkey's authority to tax does not let the taxation alone if the conditions of work or stay are met. In order to pay tax in Turkey, domestic law must have a ruling on this issue.

It should also be examined how Turkey uses this taxation authority. According to Article 30 of the Corporate Tax Code; 15 percent of taxes from the payments, pursuant to the principles in the Income Tax Law, entrepreneurs dealing with widespread construction and repair works in more than one calendar year are entitled to receive payments on progress payments made in connection with these works, self-employment profits, real estate capital gains, and payments under the seventh paragraph of Article 11 of the Tax Procedures Code; will be withheld.

In respect of real persons, the regulation is in Income Tax Law. In accordance with article 94 ITL, state agencies and public enterprises, public economic enterprises, other institutions, trading companies, joint ventures, associations, foundations, commercial enterprises of associations and foundations, cooperative, investment fund managers, tradesmen and self-employed individuals -who are obliged to state their real incomes-, farmers determining their incomes from agriculture based on the basis of balance sheet or on the basis of agricultural enterprise account are obliged to make withholding –to the account of income taxes of title holders- at the rate of 17% from the payments (excluding payments made to notary offices due to their independent business activities) made to the ones performing such works -due to the independent business affairs they perform which are within the scope of article 18- during the time of payment (including the ones paid in advance) in cash or by approximation, and the rate of 20% for the others.

Moreover, it is required to specify that, in accordance with article 86/2 of ITL, annual declaration is not submitted for fees, self-employment earnings, earnings from movable and immovable assets and for other earnings and incomes which are completely excised in Turkey through withholding under limited liability, and in case of submitting annual declaration for other incomes, such incomes are not included in the annual declaration. In accordance with article 30/9 of CTL, for the earnings and revenues whose taxes are being obtained through deduction as per article 30 –excluding the commercial earnings and incomes from agriculture submission of declaration is arbitrary as per articles 24 or 26 of CTL, or inclusion of the earnings and incomes in subject in the declarations to be submitted for the earnings and incomes which are not within the scope of article 30 is arbitrary.

III. Withholding Problem In Excising The Individuals And Enterprises Which Are Not Within The Scope Of Taxation Power Of Turkey

As it is mentioned above, if an individual is residing in USA, doesn't have a *a permanent establishment* in Turkey and is not providing element of staying, s/he will only be excised in USA, and will not have any taxational liability in Turkey.

Yet the tax administration, by specifying "*In case of performance of the activity in Turkey, the tax payers -who are obliged to make tax withholding over the self-employment payments they make- are required to make tax withholding over the payments in subject as at the time of arise of withholding liability they will not be able to know whether the title holder enterprise had stayed in Turkey for a period exceeding 183 days in total in a continuous period of 12 months for the performance of activity*." in a special notice[10] it had provided, is anticipating for relevant companies to make withholding as if they have a *a permanent establishment* in Turkey as the tax payers who are under the liability of making withholding will make payment in Turkey, and as it will not be possible for the company residing in USA to know where it will be excised in accordance with tax agreements. Therefore tax practice is progressing in this manner.

There is an arrangement in the General Communiqué of Double Taxation Prevention Agreement with serial no 4, which is very new, that this practice should be continued. According to this: "*Although the service is performed in Turkey, in accordance with the Double Taxation Treaty, the taxpayer will not make a tax withold in the case of clear determination that Turkey has no tax authority. In other words, according to the communiqué, it is stated that there will be no withholding only in cases where "the taxation authority is not clear*". However, there is no regulation of what "clear" situations are.

The individuals, who receive payments on which tax withholding had been made, will be able to apply to the relevant tax office in person or by proxy for the refund of taxes subjected to withholding in cases it is required for these payments not to be excised in Turkey within the frame of the provisions of the Agreement.

It is required to specify that this practice involves many problems. At this point, the first problem is relevant to the principle of lawfulness. As per paragraph 3 of article 73 of Constitution, "*Tax, dues, duties and similar financial liabilities are imposed, amended or annihilated by law.*" And a significant aspect of this, called as lawfulness of tax, is the principle of "*imposition of tax does not arise without law.*" As per this dimension of lawfulness of tax, tax will be able to be anticipated only by law in formal and material sense as a legal usage. [11]

And in cases being the subject of special notice, even beyond taxation of a case which is not anticipated by law, a case -which is being anticipated by an international agreement that it will not be excised- is being excised even if it is specified that it will be refunded later on. Such a practice is clearly against the lawfulness of tax principle. In tax law, as there is also the prohibition of comparison as a matter of lawfulness of tax principle, it will not be possible to allege that the relevant practice is being performed by comparison.[12]

10 Advance Ruling of Revenue Administration No: B.07.1.GİB.4.34.16.01-KVK 30-2285 and dated 22.12.2011.

11 Gülsen Güneş, **Verginin Yasallığı İlkesi,** On İki Levha, İstanbul, 2011, s.16.

12 Mualla Öncel, Ahmet Kumrulu, Nami Çağan, **Vergi Hukuku,** Turhan Kitapevi, Ankara, 2010, s. 29.

It is required to indicate that, in some agreements of prevention of double taxation, there are regulations regarding that Turkey may make withholding in similar cases and that the withheld amount will be refunded later on. Indeed, as published on the Official Gazette dated January 24, 2012, in "Agreement of Prevention of Double Taxation and Tax Evasion in Taxes Collected over Income in between Republic of Turkey and Federal Republic of Germany",[13] Article 27's provision of "*In case the taxes collected over the dividends, interests, intangible right amounts or other income elements -obtained in one of the contracting states by an individual being the resident of the other contracting state- are collected through deduction at source, the right of the state –where the income is obtained- to apply the deduction at source over the rate of its domestic legislation will not be affected from the provisions of this Agreement. In case the tax deducted at source is deducted or never collected in accordance with this Agreement, that tax will be refunded upon the application of the tax payer*." is permitting such a refund regulation. Still there is no such provision in the agreement in between Turkey and USA.

The sole problem in terms of lawfulness principle is not just regarding the imposition of supplementary tax burden. Besides the burden of supplementary tax, an additional procedure –which is not included in law- is also being imposed on the tax payer or tax responsible in order for her/him to be able to refund the tax. As also stated by the Constitutional Court in one of its decrees[14] it is said that "*Financial liabilities have various aspects such as basis and rates, imposition and accrual, methods of collection, sanctions, time limitation, upper and lower limits. Due to such aspects, if a financial liability is not sufficiently framed by law, it is possible for it to cause arbitrary practices which would affect the social and economic statuses, and even the fundamental rights of the individuals. In this respect, financial liabilities should be regulated by laws as defining their certain elements and as specifying their frames accurately.*" Indeed, due to tax duty, the relation in between the parties is not just a public borrowing and lending relationship. In other words, by the tax being determined and defined in law, the realization of the incident giving rise to tax will not be sufficient for the collection of tax, and other rules will also be required for it. Inclusion in the law some duties and methods that are realizing the tax and putting it into practice is being encountered as another requirement. Thus, the constitutive basic elements –determined in laws- will be able to find field of execution as being complemented with procedural provisions which will again be regulated in laws.[15] For instance, as in the method of deduction at source, formal liabilities –such as paying the taxes of third parties in their name, keeping books, providing notices, drawing up documents, maintaining books and documents- are also included within

13 For more information see: Tahir Erdem, "*Serbest Meslek Kazançları Üzerinden Kesilen Vergilerin Türkiye – Almanya Çifte Vergilendirmeyi Önleme Anlaşmasına İstinaden İadesinde Usul ve Esaslar*" **Vergi Sorunları,** October, 2015, S.325, s.28-33.

14 Decision of the Constitutional Court, E.1986 / 5, Dec.1987 / 7, dated 19.03.1987.

15 Güneş, **Verginin Yasallığı İlkesi,** s.144.

the scope of tax duty in a broad sense. For this reason, it is obligatory for these issues to also be regulated by the law-maker.[16], It is not possible to impose such a duty on the tax payer with the special notice.

Another problem in the relevant practice is regarding the right of property.[17] However, European Court of Human Rights is interpreting the concept of "Law" in a wide sense. According to the court, interference to right of property should definitely be performed by law which should be specific, clear. As per the related provision, interference to right of ownership should only be performed by law predictable and accessible.[18] In written or verbal law, and even in jurisdiction practices, it has been deemed that it is bearing the condition of "being accessible" if the method of interference to right of ownership is sufficiently determined. The basic reason of this is that "law" -in terms of contract- has been used in a wider sense as to also cover the Anglo-Saxon Law compared to the system of Continental Europe.[19]

When a practice is realized in the form specified in the special notice, how and when the withholding will be refunded is also uncertain. In tax laws, there is no provision relevant to the subject. But in the General Communiqué of Double Taxation Prevention Agreement with serial no 4, a regulation had been brought by the provision of "*The individuals, who receive payments on which tax withholding had been made, will be able to apply in person or by proxy within the correction time limitation –if there is no special regulation in the relevant agreement- to the relevant tax office / fiscal directorate for the refund of withheld taxes in cases when such payments shouldn't be excised in Turkey within the frame of the provisions of Double Taxation Prevention Agreement.*" But the relevant regulation is quite deficient due to not regulating the issues of whether interest will be applied or not to the refund to be provided, and if it is going to be applied, whether it will be over the rate of deferment interest or delay interest, the period of time in which it will be applied, and the period in which the refund is required to be provided.

In our opinion, if a refund will be provided, it should definitely be realized along with the interest calculated in the same period over the deferment interest rate

16 Bumin Doğrusöz, "Verginin Yasallığı İlkesi", http://www.referansgazetesi.com/haber.aspx?HBR_KOD=81815&ForArsiv=1. (Online): Last Access: 13.10.2017.

17 Protection of Property is governed by the Additional Protocol No. 1 of the European Convention on Human Rights. According to this provision: "*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*"

18 Billur Yaltı, "Mülkiyet Hakkı versus Vergilendirme Yetkisi: İnsan Hakları Avrupa Mahkemesine Göre Mülkiyet Hakkına Müdahalenin Sınırı", **Vergi Dünyası**, July, 2010, S.227, s.103-114, s.109-110. Cristina Mauro, "The Concept of Criminal Charges in the European Court of Human Rights Case Law" **Human Rights and Taxation in Europe and the World**, Edt: Georg Kofler, Miguel Poiares Maduro, Pasquale Pistone, IBFD, 2011 s.459-477; s.466; .Melvin R.T Pauwels:"Retroactive Tax Legislation in view of Article 1 First Protocol ECHR", **EC Tax Review**, 2013-6, S.268-281, s.272.

19 Sunday Times v. United Kingdom (6538/74), 26.04.1979, p.47: http://hudoc.echr.coe.int, 36/5000 (Online): Last Access: 13.10.2017.

determined as per Law with no 6183 for the period as from the date of collection of tax until the serving of the correction voucher to the tax payer in accordance with article 112 of Tax Procedure Law.

Yet our opinion is in the direction of putting into effect a system which will not require the performance of refund. The taxpayers declaration should be taken as basis and otherwise, ex officio tax assessment is required to be done.

Conclusion

According to the "*Agreement Between The Government Of The United States Of America And The Government Of The Republic Of Turkey, The Agreement Of The Double Taxation And The Prevention Of The Fiscal Evasion*" in order to be taxed in Turkey, the establishment of the activity in Turkey should be taken into consideration by the resident of the other country, as well as the factors of *fixed base* or *a permanent establishment* or *duration of stay*. If the activity is carried out in Turkey by means of a *fixed base* or *a permanent establishment*, taxation can be done in Turkey.

Unfortunately the tax administration is anticipating for relevant companies to make withholding as if they have *a permanent establishment* in Turkey as the tax payers who are under the liability of making withholding will make payment in Turkey, and as it will not be possible for the company residing in USA to know where it will be excised in accordance with tax agreements. And the tax practice is progressing in this manner.

However, this practice is contrary to the principle of legality of the tax. Similarly, it is not possible to impose a duty on the taxpayer that is not written in law. Also, how and when the withholding will be refunded is also uncertain.

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