COMPARISON OF THE APPROACHES OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE TURKISH CONSTITUTIONAL COURT TO THE NE BIS IN IDEM PRINCIPLE IN TAX CRIMINAL LAW

Vergi Ceza Hukukunda Ne bis in Idem İlkesine Avrupa İnsan Hakları Mahkemesi ve Türk Anayasa Mahkemesinin Bakış Açılarının Karşılaştırılması

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L&IR
Year: 13, Issue: 25
January 2023
pp.1-30

Article Information

Submitted	*:17.06.2022*
Revision Requested	*:31.08.2022*
Last Version Received	*:05.10.2022*
Accepted	*:21.12.2022*

Article Type

Research Article

ABSTRACT

In Turkish Tax Criminal Law, the establishment of the sanctions of some acts as both administrative and criminal and the regulations that the judgments made in this regard will not bind each other have been discussed within the framework of the ne bis in idem principle for a long time. Practices based on similar regulations existing in many countries were brought before the ECtHR on the grounds that they violated the "prohibition of more than one trial and punishment for the same crime". The same issue was brought before the Turkish Constitutional Court as an individual application and an annulment case; Finally, the regulation that criminal court decisions and tax court decisions do not bind each other was annulled on the grounds that it violated the prohibition of double trial. In the study, the decisions of the Turkish Constitutional Court and the European Court of Human Rights are examined and compared. In addition, by assessing the existing regulations, certain solutions were introduced that will not result in a violation of the principle in domestic law.

Key Words: Tax Law, Tax Criminal Law, Ne Bis in Idem, Tax Penalty, Tax Evasion

ÖZET

Türk Vergi Ceza hukukunda bazı fiillerin yaptırımlarının hem idari hem de cezai olarak belirlenmesi ve bu hususta yapılan yargılamaların birbirini bağlamayacağına yönelik düzenlemeler öteden beri ne bis in idem ilkesi çerçevesinde tartışılmaktadır. Birçok ülkede mevcut olan benzer düzenlemelere dayalı uygulamalar "aynı suç sebebiyle birden fazla yargılama ve cezalandırma yasağını" ihlal ettiği gerekçesi ile AİHM önüne götürülmüştür. Aynı husus Türk Anayasa Mahkemesi nezdinde de gerek bireysel başvuru gerek iptal davası olarak götürülmüş; nihayetinde ceza mahkemesi kararları ile vergi mahkemesi kararlarının birbirini bağlamayacağına ilişkin düzenleme çifte yargılanma yasağını ihlal ettiği gerekçesi ile iptal edilmiştir. Yapılan çalışmada konuya ilişkin Türk Anayasa

There is no requirement of Ethics Committee Approval for this study.

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Mahkemesi ve Avrupa İnsan Hakları Mahkemesi'nin vermiş olduğu kararlar irdelenerek, karşılaştırılmakta. Ayrıca mevcut düzenlemelere ilişkin bir değerlendirme yapılarak, iç hukukta ilkenin ihlali sonucunu doğurmayacak çözüm önerileri getirilmeye çalışılmaktadır.

Anahtar Kelimeler: Vergi Hukuku, Vergi Ceza Hukuku, Ne bis in Idem, Vergi Cezası, Vergi Kaçakçılığı

INTRODUCTION

In Turkish tax law, the sentence of imprisonment for the freedom of those who commit the crime of tax evasion does not prevent the tax penalty from being applied separately in case of tax loss due to the crime of evasion.

In cases where tax evasion is in question if the taxpayer files a lawsuit against the tax loss or irregularity penalties, two different judicial processes continue simultaneously. In the last paragraph of Article 367 of the Code of Tax Procedure, with stating: "Criminal court decisions are not effective on the transactions and decisions of the authorities that will apply the tax penalties written in the second part of the fourth book of this code as the decisions to be made by the authorities also do not bind the judges of criminal court.", it settles that these judicial decisions arising from the same act will not bind each other even if they contradict. This situation was criticized on the grounds that it undermined the final judicial authority of the courts and also the legal security of the taxpayer within the framework of the principle of ne bis in idem.

The principle of ne bis in idem, which is accepted as one of the main principles of judicature and criminal law, states that a person should not be tried more than once for an act, not be sanctioned, and only be subjected to criminal prosecution once for a crime. The accused who have been acquitted rests in confidence knowing that no further prosecution can be made on the same act. The principle of ne bis in idem prevents multiple lawsuits or judgments against the same person for the same act. This principle, as an extension of the principle of a fair trial, is a criminal law principle, which stipulates that it is not possible to prosecute or punish repeatedly due to the same act and the same subject.

In the study, initially, the legal precedent of the European Court of Human Rights on the subject is given and afterward continued with the decisions of the Turkish Judiciary and the views of its doctrine. Finally, the legal regulations on the subject are evaluated in terms of the principle of ne bis in idem and certain solutions are offered on the subject.

I. THE APPROACH OF THE EUROPEAN COURT OF HUMAN RIGHTS

A. General Description

'Ne bis in idem' as a provision was not included in the original text of the Convention, which was opened for signature in 1950, but was regulated

in Article 4 of the 7th Additional Protocol opened for signature in 1984[1]. According to this regulation; *"No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State".*

The term of "uniqueness in punishment and trial" in the article applies only to cases where a person has been tried and convicted twice for the same offense by the courts of the same State[2]. The concept of "criminal proceedings", which is necessary for the implementation of this principle, should be interpreted in the light of the general principles regarding the concepts of "criminal charge" and "penalty" in Articles 6 and 7 of the European Convention on Human Rights[3]. This classification is also important for tax misdemeanors.

For many countries, the use of autonomous interpretation by the European Court of Human Rights on "the concepts of crime and punishment" creates hesitation about whether to include administrative sanctions within the scope of punishment regarding this article. Thus, subjecting an act to both administrative and criminal sanctions is a practice that is seen not only in our country but also in many other countries. The European Court of Human Rights has determined three basic criteria, also known as the Engel criteria, for an act to be considered as a crime[4]. In accordance with these criteria, first of all, only as a starting point the classification of the alleged crime in domestic law will be considered, although it is not decisive. If national law considers an offense to be criminal in nature; Articles that the Convention may apply in the event of a crime find an area of application (art. 6, article 7, Article 4 of the Additional Protocol 7), and there will be no need an evaluation according to the other two criteria. The second criterion is the nature of the punishment. At this point, it is taken into consideration how the act in question is evaluated in other states,

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1 The Protocol was opened for signature on 22 November 1984 and entered into force on 1 November 1988. Turkey signed the Protocol on 14 March 1985. Assent Code dated 10 March 2016 and numbered 6684 was published in the Official Gazette dated 25 March 2016 and numbered 29664. The official Turkish translation of the Protocol was published in the Official Gazette dated 8 April 2016 and numbered 29678, with the Council of Ministers Decision dated 28 March 2016 and numbered 2016/8717, which decided to ratify Protocol No 7. The ratifications were deposited with the General Secretariat of the Council of Europe on 2 May 2016 and the Protocol entered into force on 1 August 2016 for Turkey. (https://www.mfa.gov.tr/the-european-convention-on-human-rights.en.mfa, 20.09.2022).

2 A. Şeref Gözübüyük and Feyyaz Gölcüklü, Avrupa İnsan Hakları Sözleşmesi ve Uygulaması (10. Bası, Turhan Kitabevi, Ankara 2016) 314.

3 See Burcu Demirbaş, *"Avrupa İnsan Hakları Sözleşmesi Açısından Vergilendirme Süreci"* (Unpublished Master Thesis, DEÜ Sosyal Bilimler Ensititüsü, İzmir 2012), 102-106; Oter, 152.

4 Engel and Others v. The Netherlands, App. no., 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECHR).

its jurisdiction and sanction procedure and whether it considered as a crime because of its scope or because of the purpose of public interest in general. In the last stage, an evaluation will be made by looking at the nature and severity of the punishment. The European Court of Human Rights established for the first time the criminal nature of tax misdemeanors by applying the Engel criteria in the Bendenoun Case[5].

In Janosevic decision, the criteria were applied collectively, and the possibility of reaching very large amounts in the fines applied as multiples of the tax loss was sufficient for the severity of the penalty; the fact that fines are not commuted to imprisonment if they are not paid were not considered as a factor that would affect the quality of the sentence[6]. The Jussila decision, it is stated that for the criminal character of tax penalties, it is not necessary to meet the quantitative weight criteria in addition to the qualitative criteria. In the decision, also emphasized that the selective application of the criteria is also valid for tax penalties[7].

When these decisions are considered together, it is clear that the sanctions for tax misdemeanors also have a criminal nature.

Under this heading, the main decisions of the European Court of Human Rights are examined and the opinion of the Court on the subject is presented.

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5 *"In the first place, the offences with which Mr Bendenoun was charged came under Article 1729 para. 1 of the General Tax Code (see paragraph 34 above). That provision covers all citizens in their capacity as taxpayers, and not a given group with a particular status. It lays down certain requirements, to which it attaches penalties in the event of non-compliance.*
Secondly, the tax surcharges are intended not as pecuniary compensation for damage but essentially as a punishment to deter reoffending.
Thirdly, they are imposed under a general rule, whose purpose is both deterrent and punitive.
Lastly, in the instant case the surcharges were very substantial, amounting to FRF 422,534 in respect of Mr Bendenoun personally and FRF 570,398 in respect of his company (see paragraph 13 above); and if he failed to pay, he was liable to be committed to prison by the criminal courts (see paragraph 35 above).
Having weighed the various aspects of the case, the Court notes the predominance of those which have a criminal connotation. None of them is decisive on its own, but taken together and cumulatively they made the "charge" in issue a "criminal" one within the meaning of Article 6 para. 1 (art. 6-1), which was therefore applicable" Bendenoun v. French, App no. 12547/86 (ECHR), (https://hudoc.echr.coe.int/eng?i=001-57863, 20.09.2022). As seen in the decision, it was also discussed whether the last two criteria should be fulfilled at the same time, and whether the fact that the act is subject to a light sanction changes the criminal nature of the act.

6 Janosevic v. Sweeden, App. no. 34619/97(ECHR), (https://hudoc.echr.coe.int/eng?i=001-60628, 20.09.2022).

7 Jussila v. Finland, App. no. 73053/01 (ECHR), (https://hudoc.echr.coe.int/eng?i=001-78135, 20.09.2022).

B. Approach of the European Court of Human Rights to the Subject Before the Bjarni Decision

By applying various criteria in many cases, the European Court of Human Rights points out that administrative sanctions and criminal sanctions tend to have different purposes. While the Court is evaluating whether the administrative sanctions resulting from tax misdemeanors and judicial crimes in the field of tax law and their sanctions carry the feature of punishing twice; it decides by looking at their legal qualifications, the scope of application, purpose, implementing authority, whether they are in different types of sanctions in terms of results and effects, that is, by looking at the elements of the crime.

In one of the decisions Ponsetti and Chesnel[8], the Court stated that the elements of the crimes arising from the act of not filing a declaration within the legal period are not exactly the same; while there is an intentional responsibility for tax evasion crime, it has come to the conclusion that the constituent elements of other financial crimes are different and therefore they do not regulate the same crime[9].

In the Manasson decision, the Court stated that it would examine whether the basic elements of the crimes were the same; emphasizing that the removal of the applicant's commercial business license is not a penal sanction, leaving this situation out of the investigation. It is said that the basis of the prison sentence given by the court is the violation of a general obligation to accurately record the information about the activity in the books, and the tax loss penalty applied as multiples of the tax lost by the administration is deliberately declaring false information in the tax returns; It was decided that the elements of the crime were different, and no violation decision was made[10].

In another decision, the court made an examination in terms of the purpose of the penalties and again decided that the purposes of the two sentences were different[11].

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8 Ponsetti and Chesnel v.French, App no 36855/97 and 41731/98 (ECHR), (http://echr.ketse.com/doc/36855.97-41731.98-en-19990914/view, 17.01.2022).

9 Ponsett and Chesnel v. French, para.5. isd. (ECHR), Rosenquist v. Sweden, App no 60619/00, (ECHR), (hudoc.echr.coe.int/webservices/content/pdf/001-66713, 17.01.2022). In the decision, intent or culpable negligence must be present for a prison sentence based on tax evasion, and these elements are not required in a fine; At the same time, it has been stated that the purpose of punishing tax crimes is not only the satisfaction of tax loss, but both sanctions serve a different purpose.

10 Manasson v. Sweden, App no 41265/98, (ECHR), http://hudoc.echr.coe.int/eng?i=001-23169, 18.01.2022. See for evalution, Mualla Buket Soygüt, "Avrupa İnsan Hakları Sözleşmesi ve Mahkemesi Kararlarında Mükellefin Suç ve Cezalara İlişkin Hakları" (2006/2) 10, İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi, 253-265, 262.

11 Rosenquist v. Sweden, App no 60619/00, (ECHR), http://hudoc.echr.coe.int/eng?i=001-66713, 18.01.2022. See for evalution, Soygüt, (n 6) 261.

In Zolotukhin's decision, which was also referred to in subsequent decisions, the Court stated that different criteria were used when evaluating whether there was a double trial and that these criteria (approach) differences violate the rights guaranteed in Article 4 of Protocol No. 7. According to the European Court of Human Rights, what is to be understood from Article 4 of Protocol No. 7 is to prohibit the prosecution or trial of a second "crime" arising from the same fact or facts that are essentially the same[12]. With the Zolotukhin decision, the court put forward a new view in terms of the concept of "same crime". According to this decision, in order to talk about the same crime concept, the events must be related to the same accused and the events must be inextricably linked in terms of place and time. In the later A. and B. - Norway decision, it was stated that the difference in Zolotukhin decision was that it adopted a fact base solution instead of "essential elements" to determine the content of the concept of "idem"[13].

In the Glantz decision[14], which was given after these decisions, it is stated that in the case of two proceedings arising from the same act, failure to conclude the second trial despite the conclusion of the first trial will result in a violation of the Convention. In this decision, the Court concludes that the Finnish system[15], in which there are two separate and independent proceedings in case of the existence of evasion, means double trials[16].

In the Lucky Dev decision, because the other tax investigations against Ms. Dev were not concluded despite the finalization of the criminal investigation against her, the Court concluded that Ms. Dev was double tried for a tax offense that she had already been acquitted of. The Court stated that "as a result, the trials and penalties of tax and financial crimes and the trials and penalties of the additional taxes basically resulted from the same series of facts" [17].

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12 Sergey Zolotukhin v. Russia, App no 14939/03, (ECHR), para. 81-82, https://hudoc.echr.coe.int/tur?i=001-91222; Boman v. Finland, App no 41604/11, para. 33, https://hudoc.echr.coe.int/tur?i=001-152247, 05.01.2022.

13 A and B v. Norway, para 108.

14 Glantz- Finland, App no 37394/11, (ECHR), 01.12.2021.

15 Following the aforementioned decision, a legal amendment was made in Finnish legislation that if the tax administration decides to impose a fine, it is not possible to file a criminal complaint to the police unless a newly revealed event or evidence is found. (Billur Yaltı, "İHAM'ın Glantz Kararının Ardından: Kaçakçılıkta Para Cezası ve Hapis Cezası Uygulamasının Non bis in idem İlkesine Aykırılığı Üzerine", (Şubat 2015) 317 Vergi Sorunları Dergisi, 85-92.

16 It has been expressed by the doctrine that this case should be reviewed in terms of Turkish law as well. See, Yaltı (n 10) 91-92; Ahmet Emrah Geçer, "İnsan Hakları Avrupa Mahkemesi'nin Vergi Cezalarında "Non bis in idem" İlkesine İlişkin A ve B v. Norveç Kararının Türk Vergi Hukuku Uygulamasına Etkileri" (2017) 40 Vergi Sorunları Dergisi 108-120, Geçer, A ve B v. Norveç (n 11) 120.

17 Lucky Dev v. Sweden, App no 7356/10 (ECHR). See for evaluation, Ayşe Nil Tosun, "Türk

In its later decision A and B[18], the Court concluded that the sanctions were part of an integrative plan and that these two punishments were not repetitive proceedings, but different and complementary proceedings, which were carried out by two different authorities, resulting in two different actions, imposing different sanctions. According to the decision *"(...) The competent national authorities found that the first applicant's reprehensible conduct called for two responses, an administrative penalty under chapter 10 on Tax Penalties of the Tax Assessment Act and a criminal one under chapter 12 on Punishment of the same Act (see paragraphs 15, 16 and 41-43 above), each pursuing different purposes. As the Supreme Court explained in its judgments of May 2002 (see paragraph 46 above), the administrative penalty of a tax surcharge served as a general deterrent, as a reaction to a taxpayer's having provided, perhaps innocently, incorrect or incomplete returns or information, and to compensate for the considerable work and costs incurred by the tax authorities on behalf of the community in carrying out checks and audits in order to identify such defective declarations; it was concerned that those costs should to a certain extent be borne by those who had provided incomplete or incorrect information. Tax assessment was a mass operation involving millions of citizens. For the Supreme Court, the purpose of ordinary tax penalties was first and foremost to enhance the effectiveness of the taxpayer's duty to provide complete and correct information and to secure the foundations of the national tax system, a precondition for a functioning State and thus a functioning society. Criminal conviction under chapter 12, on the other hand, so the Supreme Court stated, served not only as a deterrent but also had a punitive purpose in respect of the same anti-social omission, involving the additional element of the commission of culpable fraud".*

In the A and B Norway decision, the necessity of the following elements was determined[19]:

- tax jurisdiction and criminal jurisdiction, which are different jurisdictions, should have complementary purposes,

- bilateral proceedings must be foreseeable,

- there should be an interaction between the two proceedings regarding the collection and evaluation of evidence,

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Vergi Ceza Hukukunda Ne Bis In Idem İlkesi: Avrupa İnsan Hakları Mahkemesinin Verdiği Kararlardan Lucky Dev Davası", (2017) 7 (2) Hacettepe HFD., 95-104, 97-103.

18 A and B v. Norway, App no 24130/11 and 29758/11(ECHR), (http://hudoc.echr.coe.int/eng, 12.02.2022).

19 For elements see. Denizhan Horozgil, "AİHM ve Anayasa Mahkemesi Kararları Işığında Vergi Cezalarında "Non Bis In Idem" İlkesi", 2021 157 TBB Dergisi 255-294, 276-277. Barış Bahçeci, "İHAM İçtihadı Açısından Türkiye'de Vergi ve Ceza Yargılamalarının Etkileşimi Sorunu" (2022) 10(2) Ceza Hukuku ve Kriminolojisi Dergisi https://doi.org/10.26650/JPLC2022-1039688, 15.09.2022, Bahçeci, "Etkileşim" (n 17) 8-9.

- Before the second verdict, the first sanction should also be considered so that an unmeasurable result should not arise. With this decision, the connection between the two jurisdictions was also widened, and administrative processes were also considered in criminal proceedings. It was emphasized that the evidence collected by the administration during the administrative process should be taken into account in criminal proceedings[20].

In A. and B Norway Decision, it was concluded that the administrative and judicial procedures regarding tax loss penalty and imprisonment continue in parallel, complement each other, and therefore lead to predictable, fair and measured results. In addition, it has been determined that the material facts identified during the administrative process are used exactly in the criminal proceedings as well.

A. and B.- The Norway decision and the Glantz-Finland decisions are based on the same foundation, although they ultimately reach different conclusions. However, in the A. and B.- Norway decision, the case-law expressed in the Glantz-Finland decisions to terminate the second trial along with the first decision was reversed; The Court has accepted that if the sanctions foreseen for the same act form a whole, repetition will not occur[21].

C. Bjarni Decision

In the Bjarni-Ireland decision, which is the more recent decision of the Court, it has been decided that the Convention has been violated. The decision also mentions the differences between the Bjarni v. Ireland case and the A. and B. v. Norway case [22].

In the case subject to the decision, on 3 May 2011, the Directorate of Tax Investigations initiated an audit of the applicant's tax returns for the tax years 2007 and 2008. The audit was aimed at examining whether the applicant had failed to report his financial income, including income arising from forwarding contracts concluded with a bank. The applicant was questioned by the Directorate of Tax Investigations on 30 June and 30 November 2011. On 10 October 2011, the accountant who had prepared the applicant's tax returns was questioned. By a letter of 13 December 2011, the Directorate of Tax Investigations sent the applicant the report of the audit, dated 9 December 2011, and invited him to submit his comments. By a letter of 23 December 2011, the applicant raised certain objections. The Directorate of Tax Investigations thereafter prepared an amended report, dated 30 December 2011. The conclusion of that report was

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20 A. and B. v. Norway, para 146. Also see Bahçeci, "Etkileşim" (n 17) 9.

21 Barış Bahçeci "İHAM İçtihadında Vergi Cezalarında "Ne Bis in İdem", (2018) 67 (2) Ankara Üniversitesi Hukuk Fakültesi Dergisi, 275-276.

22 Bjarni Ármannsson v. Ice Land, App no 72098/14, (ECHR), (http://hudoc.echr.coe.int/eng?i=001-192202, 02.02.2022).

that the applicant had filed substantially incorrect tax returns for the tax years 2007 and 2008.

By a letter of 5 November 2012, the Directorate of Internal Revenue stated its intention to re-assess the applicant's taxes for the tax years 2007 and 2008 and to impose a 25% surcharge on the unreported tax base. The Directorate of Tax Investigation's report was attached to the letter.

By a letter of 22 November 2012, the applicant objected to the planned re-assessment. He also demanded that a 25% surcharge not be imposed, since he had had no intention of filing substantially incorrect tax returns. In the meantime, by a letter of 12 November 2012, the Directorate of Tax Investigations referred the applicant's case to the Office of the Special Prosecutor for investigation, forwarding its audit report concerning the applicant. On the same day, the applicant was informed by letter that his case had been referred to the Office of the Special Prosecutor.

On 11 April 2013, the applicant was interviewed by the Office of the Special Prosecutor ("the prosecutor"). The applicant was informed that the investigation concerned the offences that he was alleged by the Directorate of Tax Investigations to have committed. On 14 August 2013, the applicant was again interviewed by the prosecutor.

The applicant submitted that the two sets of proceedings against him had both constituted "criminal proceedings" for the purpose of Article 4 of Protocol No. 7 to the Convention and that both sets of proceedings had concerned the "same offence". Then The Government submitted that it was not necessary to determine whether and when the first set of proceedings had become final, as there had been a sufficient connection in time and substance between the two sets of proceedings as to avoid duplication. They submitted that the two sets of proceedings had constituted the foreseeable consequences of the applicant's conduct and that they had been initiated and conducted in accordance with the applicable legislation, which pursued separate and complementary objectives. Furthermore, the Government submitted that the applicant had enjoyed the guarantees afforded him in both sets of proceedings and that proportionality had been ensured.

Court stated that, *"Turning to the connection in time between the two sets of proceedings, the Court notes that the overall length of the proceedings was about four years and ten months. During that period, the proceedings in effect progressed in parallel only between 1 March 2012, when the Directorate of Tax Investigation reported the matter to the Special Prosecutor, and August 2012, when the Directorate of Internal Revenue's decision became final, that is for a period of little more than five months. Moreover, the applicant was indicted on 17 December 2012, seven months after the final decision was taken by the Directorate of Internal Revenue and about four months after it acquired*

legal force. The criminal proceedings then continued on their own for one year and five months: the District Court convicted the applicant on 28 June 2013, more than a year after the decision of the Internal Revenue, and the Supreme Court's judgment was not pronounced until almost one year later".

"57. Having regard to the above circumstances, in particular the lack of overlap in time and the largely independent collection and assessment of evidence, the Court cannot find that there was a sufficiently close connection in substance and in time between the tax proceedings and the criminal proceedings in the case for them to be compatible with the bis criterion in Article 4 of Protocol No. 7. It does not alter this conclusion that the Directorate of Tax Investigation accepted in November 2010 the applicant's request to postpone its decision on possible criminal proceedings until the Directorate of Internal Revenue had issued its notification letter on the reassessment of the applicant's taxes. It is incumbent on the member State to ensure that criminal proceedings fulfil the requirements of the ne bis in idem rule".

In the A. and B. Norway judgment, the Court observed that the administrative and criminal proceedings were carried out in parallel and were interlinked. The facts found in one of the cases were also relied on in the other, and the penalty given in the criminal proceedings was considered in the tax penalty. According to the court, although different punishments were applied by different authorities in different processes in that case, there was still a sufficiently close connection between them in terms of both actual meaning-reality and time. These sanctions were part of an overall sanctions plan implemented under Norwegian Law[23]. The Court stated that it reached different conclusions from the decisions of A. and B. Norway and Johanesson-Iceland, as both the proceedings in the Johannesson case were criminal in nature and were not sufficiently connected with each other[24]. According to the court; Additional protocol 7 article 4 of the European Convention on Human Rights does not exclude parallel criminal and administrative proceedings for the same offence, but there must be a sufficiently close connection between these proceedings so that it is not concluded that there is a double trial on account of the two proceedings[25].

In the Bjarni decision, the Court has given the reason for its violation decision that the criminal proceedings continue for 1 year and 5 months after the finalization of the administrative process and the decision of the Supreme Court is not announced for 1 year. Similarly, in Johannesson and others v.

[23] Bjarni Ármannsson- Ice Land, para. 48.
[24] Bjarni Ármannsson- Ice Land, para 49.
[25] Bjarni Ármannsson- Ice Land, para 49.

Iceland[26] and Gudmundur Kristjansson v. Iceland[27] cases, also, the criminal proceedings took more than two years after the administrative process had become final. The Court concluded that the principle had been violated in these cases as well. In general, in these decisions, it is seen that the total duration of the proceedings, the duration of the simultaneous execution of the criminal and tax proceedings, and the duration of the criminal proceedings after the conclusion of the tax proceedings are taken into account[28].

II. THE APPROACH OF THE TURKISH JUDICIARY AND DOCTRINE TO THE SUBJECT

A. General Description

As a basic principle, the principle of not being tried and punished twice for the same crime- ne bis in idem is not included as a principle in the Constitution. However, in the decisions of the Constitutional Court, the principle is considered as the norm supporting the general law principles[29].

In accordance with the Code of Tax Procedure (CTP), in the scenario where the acts that cause tax evasion and the crimes of doing the private business of the taxpayers also cause tax loss, the result is that there are both criminal sanctions due to these crimes and administrative sanctions due to the occurrence of tax loss misdemeanor. In fact, if tax loss occurs due to tax evasion, the administrative sanction to be applied is calculated as three times the tax lost. In other words, in the event that a tax evasion crime is committed, it is not possible to apply *conceptual aggregation*, which means that the person who causes more than one crime to occur with one of his acts is punished for the crime that requires the heaviest penalty. In addition, the proceedings against the tax penalty imposed by the relevant tax administration in accordance with the administrative law procedures regarding the tax loss arising from the act that constitutes the subject of the tax evasion crime are carried out before the tax courts in the administrative jurisdiction. The trial regarding the tax evasion crime is carried out by the criminal courts in the judicial branch. The decisions made by these authorities do not affect each other (CTP art. 367/5). These two mentioned issues have been discussed by both Turkish doctrine and judiciary for many years in terms of the principle of ne bis in idem, and in the legal precedents of the European Court of Human Rights.

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26 Johannesson and others v. Iceland, App. No. 22007/11 (ECHR), (https://hudoc.echr.coe.int/eng?i=001-173498, 20.09.2022).

27 Gudmundur Kristjansson v. Iceland, App. No. 12951/18 (ECHR), (https://hudoc.echr.coe.int/eng?i=001-211660, 20.09.2022).

28 See Bahçeci, "Etkileşim" (n 17) 13.

29 See the Turkish Constitutional Court 01.04.2010, F.N.2008/114, D.N.2010/53, O.J. 06.07.2010-27633.

Under this heading, the subject is evaluated primarily in terms of applying different penalties to the same acts, and then in terms of tax and criminal court decisions not affecting each other.

B. Application of Different Penalties Regarding the Same Acts

Article 15 of the Code of Misdemeanors No. 5326[30], which regulates the institution of conceptual aggregation of crimes and misdemeanors, states that in case of committing more than one misdemeanor with one act, the heaviest fine will be imposed if only an administrative fine is prescribed for these offenses, and if an act is defined as both a misdemeanor and a crime, only sanctions will be applied for the crime. In addition, in Article 3 of the Code of Misdemeanors states; "This law is applicable where;

a) Provisions regarding legal remedy against administrative sanction decisions, unless there is a contrary provision in other laws,

b) Its other general provisions are applicable to all acts that require an administrative fine or the sanction of transferring the property to the public." In this case, the problem arises between the provisions of the Tax Procedure Law and the Misdemeanors Law. This is essentially a problem that needs to be resolved according to the previous - subsequent law, special - general law[31] rules.

Although in cases where the previous law is special and the next law is general, it is accepted that the implementation of the special law will be given priority, in this case, the most appropriate act is to determine the will of the legislator[32]. In this respect, when the unique structure of the tax law and the necessity of the Code of Tax Procedure to be a special law are evaluated together, it is accepted that the provision of the Code of Tax Procedure should

30 O.J. 31.03.2005-25772.

31 In determining the special law rule-general law rule, it is accepted that the provision with a wider application area is the general and the narrower one is the special provision. When there was no provision of law in question, if another provision could be applied to that event, the second provision is general and the first provision is special. See. Kemal Gözler, Türk Anayasa Hukuku (Ekin 2018) 102. Regarding the special-general provision, see also. Tahir Çağa, "Özel Hüküm Genel Hükmü Daima Bertaraf Eder Mi?" (1991/3) TBB Dergisi, 369 ff.

32 Çağa (n 21) 368; Ahmet Emrah Geçer, "Vergi Ceza Hukukunda Non Bis in İdem İlkesi", (2016) 65 (2) Ankara Üniversitesi Hukuk Fakültesi Dergisi, 332. Although it is a controversial topic how the situation in question will be resolved, it is accepted that the previous special law was not repealed by the later general law. See. Gözler (n 21) 103-104; Muhammet Özekes, Temel Hukuk Bilgisi (11. Bası, On İki Levha 2021) 100. See Özekes (n 22) 100 that it is appropriate to apply the new general law in matters regulated by the new general law provision, and to apply the old law provision in matters that do not regulated by the new general law.

be applied to the issue of aggregation[33]. For this reason, due to the last paragraph of Article 359 of the CTP, the third paragraph of Article 15 of the Code of Misdemeanors does not find application in terms of tax misdemeanors. In terms of jurisdiction, tax courts are responsible for dealing with cases filed regarding tax misdemeanors and penalties applied to them, pursuant to the Additional Article 1 added to the Code of Misdemeanors with Article 5 of the Law No. 5348[34].

A 1991 decision of the Turkish Constitutional Court, regarding the application of both administrative and penal sanctions in accordance with the special aggregation provision in the Code of Tax Procedure, stated that the fines imposed by tax administrations are not technically penal, but rather an administrative disciplinary sanction and even a financial law enforcement measure[35].. Likewise, the Court underlined that the tax liability must be fulfilled on time and completely in order to perform public services, and the main purpose of the administrative punishment of violation of tax legislation is to eliminate the loss of income suffered by the public, also stating that the purpose of foreseeing and punishing this as a crime is to prevent disruption of public order and to punish acts that do so. In this context, it has been stated that

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33 For detailed information on the relationship between the Tax Procedure Law and the Misdemeanor Law, see. Karakoç, Vergi Ceza, 86-87. The conflict areas of the provisions of the Tax Procedure Law and the Misdemeanor Law should be determined, the Misdemeanor Law should be applied in the points where there is no conflict, and the Tax Procedure Law should be applied in the points where there is a conflict. Yılmazoğlu, 346; For the opinion that not only the provisions of the Misdemeanors Law regulating the issues not included in the Tax Procedure Law, but also the provisions that conflict with the Tax Procedure Law will find an area of application for tax misdemeanors see Funda Başaran Yavaşlar, *"Vergi Ceza Hukuku'ndaki Değişim Süreci ve Bu Sürecin Vergi Ceza Sistemine Etkileri"* (Şubat 2018) 233 Vergi Sorunları Dergisi, 72-93, 75. Also see. Simay Doğmuş, *"Türk Vergi Ceza Hukukunda Ne Bis İn İdem İlkesi"*, (2020) 17 (1) Yeditepe Üniversitesi Hukuk Fakültesi Dergisi, 79.

34 Law on Misdemeanors Additional Article 1- (Annex: 11/5/2005-5348/5 art.) (1) The provisions regarding the duties of tax courts in the Tax Procedure Law No. 213 dated 4.1.1961.

35 "In this case, the rule examined is not contrary to Article 38 of the Constitution, as considered it does not authorize the Ministry of Finance and Customs to establish a new crime type to prevent tax loss and evasion. In addition, considering the opinions that the fines given by the tax administrations are not technically penal, but administrative sanctions, the violation of the administrative regulations regarding the document order may not be considered a crime, but a disciplinary offense, even a kind of financial law enforcement measure. In this case, there can be no offense without law" (Turkish Constitutional Court, D. 15.10.1991, N.1990/29, 1991/37, O.J.05.02.1992-21133). *The decisions of the Council of State before this Constitutional Court decision were opposite. it was stated that the penalties applied against tax misdemeanors do not serve to compensation for damage but also serve to penalization.* See Unified Decisions of Council of State, 12.06.1980, F.1977/1, D.1980/2, *01.03.2022).*

although different legal values are protected this way in terms of administrative and judicial processes and different qualifications are made as misdemeanor and crime, the actions that cause these processes should be accepted as a whole because they are interconnected in terms of purpose, time and place, pointing out that the act is the same in the legal sense. The issue was brought before the Constitutional Court more than once.

In a case related to customs, due to the fact that some customs declarations regarding import transactions were filled incorrectly, both additional value-added tax (VAT) and penalty were accrued to a company due to the misdemeanor of tax loss. Then, criminal proceedings were initiated for the crime of tax evasion committed by using false invoices against company officials. Thereupon, the applicant company, pointing out the Article 15 of the Code of Misdemeanors, which states that "if an act is both a misdemeanor and a crime, a sanction can only be applied because of the crime" stated that both a penalty tax assessment was held and this assessment was accrued, and a criminal trial was held against their company officials, claiming that these proceedings were against the said article and the principle of ne bis in idem. At this point, the Constitutional Court has decided that the principle of ne bis in idem has not been violated, stating that the legal benefits protected by the regulation of tax delinquency for VAT not paid on time and the regulation of tax evasion for using false invoices are different, and the lawsuits regarding these misdemeanors and crimes belong to two different disciplines[36].

In Ünal Gökpınar's application, which is related to the crime of pos usury, in the incident subject to the application, in addition to the application of tax loss and special irregularity penalties due to the act of generating income by issuing false invoices in return for the commission, the conviction of tax evasion by using and issuing fake invoices were not found contrary to the principle of ne bis in idem by the Court due to the fact that the realization of different purposes and legal benefits as a result of administrative and judicial processes were desired[37]. Some authors in the doctrine do not agree with the

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36 Turkish Constitutional Court, ABP Gıda San. Tur. and Tic. Ltd. Şti., App. No. 2014/72, D. 25.03.2015.

37 *"... On the other hand, the fact that there are different legal values protected in terms of administrative and judicial processes or having different qualifications as misdemeanors and crime does not change the fact that the violated act is one. In the concrete case, both complained proceedings were conducted against the same person and the same taxation periods. Accordingly, the actions of the applicant that caused the criminal proceedings should be considered as the same act in the legal sense, since they form an integrity within themselves in terms of purpose, time and place. In other words, as a result, it is understood that in both proceedings in the concrete case, there is only one act based on the same facts in essence. However, when the concrete case is evaluated in the light of the above principles, there is nothing contrary to the principle of not being re-trial or punished for*

Constitutional Court on this issue. The opinions of the authors are that the penalty for loss of tax cannot be accepted as an administrative fine; because although there are penalties imposed by the administration, not by the courts, these penalties are not only for the purpose of redressing the damages arising from the violation; it is also based on the point that it tends towards the goal of deterrence[38]. Opinions to the contrary in the doctrine are based on the fact that similar to the legal precedent of the Constitutional Court, the sanctions of tax evasion crime and special irregularity misdemeanor tend to have different purposes and have different characteristics[39].

In its previous decisions, the European Court of Human Rights focuses on whether there is a similarity in terms of the elements and purposes of the crime. At this point, a point that needs to be discussed is whether there is a similarity in terms of the elements and purposes of tax loss misdemeanor and tax evasion crime. In order to impose a tax penalty, an act of failure to accrue the tax on time or incomplete accrual due to the taxpayer's failure to fulfill his/her duties related to taxation on time or incomplete fulfillment, regardless of whether there is an intentional element should cause the tax to be incompletely accrued and returned unjustly with false statements about personal, marital or family status and other reasons (CTP art. 341 and article 344/1). As a rule, the tax loss is mandatory for the penalization of this misdemeanor. However, tax loss may

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the same act by imposing tax penalties at the end of the administrative process and sentence to imprisonment at the end of the judicial process, in order to achieve different purposes and legal benefits. Therefore, in the circumstances of the concrete case, the right to a fair trial in the context of the principle of not being tried or punished again for the same act has not been violated." Turkish Constitutional Court, M. Ünal Gökpınar, App. No.2018/9115, D.27.03.2019. See for evaluation, Turgut Candan, https://turgutcandan.com/2019/05/25/bir-anayasa-mahkemesi-karari-vergi-cezalari-ve-non-bis-in-idem-kurali/, 12.02.2022; Begüm Dilemre Öden, *"Non Bis In Idem İlkesi Çerçevesinde 27/3/2019 Tarihli Türk Anayasa Mahkemesi Kararının Değerlendirilmesi"* (Nisan 2020) 5 (1) Çankaya Üniversitesi Hukuk Fakültesi Dergisi, 2437-2454, 2443 etc. About evaluation of "the same act" also see Şenol 210-211.

38 Şenol Kocaer, *"Artık Sahte Faturaya Hapis Cezası Yok! (AİHM'in Glantz/Finlandiya kararının tahlili)"*, (Mart 2015) 403 Vergi Dünyası Dergisi, 41-49, 46-47; Tuğçe Karaçoban Güneş, "Vergi Yaptırım Hukukunda Non Bis In Idem İlkesi" (2016) 15 (2) İKÜHFD, 85-106, 90-91 and 102; Geçer, Non bis in İdem (n 21) 344. The reason why the decision is contrary to the principle of ne bis in idem is that there were two different final judgments and two separate proceedings in the proceedings in the tax court and in the criminal court. Dilemre Öden (n 27) 2449-2450.

39 See. Yusuf Karakoç, "Evaluatıon of Tax Crımınal Law (Regulatıon-Practıce-Trıal)" 34.International Public Finance Conference / Turkey April 24-27, 2019, Antalya – Turkey, 577-582, www.maliyesempozyumu.org/wp-content/uploads/2019/11/34th-international-public-finance-conferenceturkey-proceedings-book.pdf, (Evaluation), 580. Also see. Hakan Üzeltürk, "Ne Bis İn İdem: Bir Anayasa Mahkemesi Kararı" (2019/2) YÜHFD XVI 229-231.

be caused intentionally or by negligence (Code of Misdemeanors. Art. 9)[40]. The crime of tax evasion, on the other hand, can occur only by performing one of the actions specified in Article 359 of the Code of Tax Procedure. With the completion of these actions, a crime occurs. Although many of the acts that constitute the crime of evasion in the article are suitable for causing tax loss, it is seen in the regulation that tax loss is not necessary for the crime to occur. However, since in some provisions of the article, the realization of tax loss is sought, the tax loss is also essential in terms of tax evasion crime in these regulations[41]. Since the crime of tax evasion is a crime in the sense of criminal law, the occurrence of the crime depends on the existence of intent (TCC. art. 21/2). In this case, it is evaluated that both the criminal prosecution in the criminal court and the verdict of a penalty that binds freedom along with the penalty of tax loss by the tax administration will not directly violate the principle of ne bis in idem - the right of uniqueness in the trial or penalty[42]. Because tax evasion crime can only be committed intentionally, the constituent elements of the crime differ from each other. In addition, although an element of consequence is sought in the tax loss misdemeanor, the fact that this element is not sought in terms of acts related to tax evasion, causes these acts to be not the same[43]. As can be understood from the decisions of the European Court of Human Rights cited above, the application of more than one sanction that is of different nature for the same action is not against the principle by itself. The absence of an integrity relationship between these sanctions is a violation of the principle.

After the Glantz decision of the European Court of Human Rights, it is stated that the imposition of a prison sentence for tax evasion and an administrative fine equal to three times the tax lost due to tax misdemeanor

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40 With this regulation in the Law on Misdemeanors, objective liability has been transferred to the principle of fault liability, and in this sense, in order to talk about the existence of tax delinquency, the existence of unlawful activity is not sufficient, but the act must be committed with negligence at least. See Funda Başaran Yavaşlar, *"İdari Nitelikli Vergi Suç ve Cezaları"* (https://www.fundabasaran.com/pdf/idari-nitelikli-vergi-suc-ve-cezalari.pdf, 18.10.2021, 131-178), (İdari), 152. Yılmazoğlu (n 64) 265-266, Şenol (n 36) 261.

41 Yusuf Karakoç, *Genel Vergi Hukuku* (7. Bası, Yetkin 2014) 519; Nihal Saban, *Vergi Hukuku* (9. Baskı, Beta Basım, İstanbul 2019) 519.

42 See. Burcu Demirbaş, *"Avrupa İnsan Hakları Sözleşmesi Açısından Vergilendirme Süreci"* (Unpublished Master Thesis, DEÜ Sosyal Bilimler Ensititüsü, İzmir 2012) 124; Aziz Taşdelen, *Vergi Usul Kanunu Yönünden Vergi Kabahatleri* (Turhan Kitabevi, Ankara 2010) 209; Tahir Erdem, Vergisel Kabahatler (Beta 2010), 69; Doğmuş (n 23) 111. Also see Candan, "Suçlar" (n 60) 607-608. For example, if the penalty is acquitted because there is no intent, this acquittal does not show that the penalty for tax loss is unlawful. However, it is thought that a single tax penalty should be applied here. Candan, "Suçlar" (n 60) 608 dn 893.

43 Taşdelen (n 32) 209.

violate the principle of ne bis in idem[44]. Accordingly, it is emphasized that the purpose of the penalty imposed due to tax loss penalty is punishment and deterrence rather than compensation, therefore there is no difference between the said violations. It is stated that there is no qualitative difference between the acts requiring fines and the crimes, but rather a quantitative difference, and that the quantitative difference that occurs in some cases is not a substantive difference but arises from the preference of the legislator[45].. On the other hand, it is also stated that after the Glantz decision, the crime of tax evasion due to the misdemeanor of tax loss is not against the principle of ne bis in idem in terms of identity. Emphasizing that the tax loss misdemeanor is committed at the moment when the resulting tax debt should be accrued, it is emphasized that there is a difference between the acts called tax evasion crimes and the tax loss in terms of the date that they occur[46].

There is a similarity between the tax evasion crime acts and the special irregularity misdemeanor acts, since they are linked to the result of a danger occurring, and in such a case, it is stated that the act should be subjected to the evaluation of the special norm-general norm principal and punished for only one of them[47]. However, in case of an identity occurring between the act causing the special irregularity offense and the acts constituting the crime of evasion, imposing a sanction for both evasion and special irregularity will result in a violation of the principle[48].

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44 Yaltı (n 10) 90; Nurettin Bilici and Funda Başaran Yavaşlar, *"Non Bis in İdem Kuralı ve Yasallık İlkesi"* Ed. Nevzat Saygılıoğlu in Prof. Dr. Şükrü Kızılot'a Armağan, (Ankara 2014), 49-72, 57-58 dn. 18; Karaçoban Güneş (n 28) 102. For the view that the application of a three-fold tax loss penalty in addition to the freedom-binding penalty may pose a problem in terms of the ne bis in idem principle, since it has a deterrent and punitive nature rather than a compensatory nature, see. Doğmuş (n 23) 112.

45 Kaneti, Ekmekçi, Güneş and Kaşıkçı (n 35) 339.

46 Bahçeci, "Uyum Sorunu", (n 3) 154. Candan emphasizes that the existence of these actions is not sufficient in order to impose a penalty for loss of tax, also tax loss must have arisen in the sense defined in Article 341 of the Tax Procedure Law. He states that the difference between the birth dates and elements of the crime of tax evasion and the tax loss misdemeanor clearly shows that there are two different situations that should be punished, therefore, there is no violation of the principle in this sense. See. Candan, https://turgutcandan.com/2019/05/25/bir-anayasa-mahkemesi-karari-vergi-cezalari-ve-non-bis-in-idem-kurali/, accessed on 12.02.2021. For the opposite view, see Tosun (n 12) 103.

47 Bahçeci, "Uyum Sorunu", (n 3) 158. For the opinion that imposing also an irregularity penalty on individuals who have been convicted for tax evasion would be contrary to the principle of ne bis in idem, see. Doğmuş (n 23) 113.

48 Candan, https://turgutcandan.com/2019/05/25/bir-anayasa-mahkemesi-karari-vergi-cezalari-ve-non-bis-in-idem-kurali/, 12.02.2021; Bahçeci, "Uyum Sorunu", (n 3) 158. In Bahçeci's study, the sameness between the words "Failure to give or receive documents like bills, vouchers or selfemployed invoices or to include amounts different from the real amount in these issued documents" (Article 353) with "issuing misleading documents" (article 359) is

In its newly dated decision, the Turkish Constitutional Court[49] bases the determination of whether there is more than one trial or punishment for the same act in a Court's decision to impose both administrative and judicial penalties for the same act, are based on five criteria. Accordingly, for it to be deemed that more than one trial has been held, there must be: a trial process related to the "Penalty", this said process being resulted in a final/conclusive conviction or acquittal, another trial process conducted regarding (re) "penalty", both trial processes being related to the same act and lastly it not being one of the exceptions to the ne bis in idem principle. In the evaluation within the framework of these criteria, the Court concluded that there was no violation of the principle of ne bis in idem. According to the court, "The rules that are the subject of the objection are basically stipulated that being punished with a prison sentence for the crime of evasion will not prevent the perpetrator from being punished with an administrative fine for tax misdemeanors, and that these penalties will not be combined according to the provisions of aggregation, therefore, the application of more than one penalty for the same act and not combining the penalties are regulated. The principle of "not being tried or punished more than once for the same act" does not exclude a dual trial/punishment process, and therefore the application of more than one punishment, provided that certain conditions are met is possible. If guarantees are provided for the interconnected execution of the processes as parts of a whole, the application of more than one penalty is at the discretion of the legislator. Accordingly, the rules that do not exclude the interconnected conduct of the criminal proceedings, but only apply more than one sentence and not allow them to be combined, do not contradict the principle of not being tried or punished more than once for the same act.

In our opinion, the application of both administrative and criminal sanctions against an act is a common situation, and the existence of this situation does not constitute a violation of the principle of ne bis in idem by itself. However, considering the weight of the total penalty, the legal regulation regarding the tax loss penalty, which should be tripled in case of loss of tax due to smuggling, needs to be reviewed. Otherwise, there will be a violation of the principle due to the disproportionateness of the total penalty[50].

given as example of this issue.

49 Turkish Constitutional Court, 04.11.2021, F. 2019/4, D. 2021/78, O.J. 09.03.2022-31773.

50 For criticism of the three folds of the tax penalty see Yıldırım Taylar, "Ölçülülük İlkesi Bağlamında Vergi Ziyaı Cezasının Anayasa'ya Uygunluk Sorunu" (2015) Ceza Hukuku Dergisi 28, 187-221; Candan (n 60) 615; Yılmazoğlu (n 64) 323.

C. The Matter That Criminal and Tax Court Decisions Are Not Binding Each Other's.

Pursuant to the last paragraph of Article 367of the Code of Tax Procedure, the decisions of the criminal court will not bind the decision of the tax administrations and the tax court, and the decisions to be made by these authority and authorities do not bind the criminal judge[51]. In accordance with the same article, it is obligatory to report the situation to the Chief Public Prosecutor's Office by the tax inspectorate or deputy tax inspectors who have determined that they have committed the offences in Article 359 of the Code of Tax Procedure directly with the opinion of the relevant report evaluation commission and by other officers authorized to examine the tax by the opinion of the relevant report evaluation commission. With the Tax Crime Report, the Public Prosecutor starts the investigation and files a public lawsuit if there is sufficient suspicion that the tax evasion crime has been committed. Otherwise, it is decided that there is no room for prosecution. The prosecutor is not bound by the opinion given by the administration and makes her/his own assessment of whether the action constitutes the crime of tax evasion[52]. The tax inspection report, which proposes the assessment of the tax incurred and the imposition of a 3-fold tax penalty, is sent to the tax office. Upon the notification of the tax penalty notice to the taxpayer and the filing of a lawsuit against the notice and the filing of a lawsuit by the Public Prosecutor, the simultaneous litigation process begins[53].In the face of the regulation that the decisions of the criminal court do not influence the decisions of the authorities that will apply the tax penalties; and the decisions of these authorities do not influence the decisions of the criminal court (Article 367 of the CTP), the processes are carried out independently from each other. In the reasoning of the Law No. 5728, which amends the said article, it is stated that the books and records kept in a commercial relationship reflect a real commercial relationship and the final provision of the criminal court, which has given an acquittal on the grounds that they are correct in terms of their contents, constitutes an obstacle to the imposition of a tax penalty as an administrative fine for causing tax loss due to the commercial relations subject to these documents[54]. In practice, it is stated that the criminal courts make the conclusion of the lawsuits filed in the tax court a pending issue considering the technical nature of tax crimes[55].

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51 For criticism of the provision, see Mustafa Akkaya, "Vergi Mahkemesi ve Ceza Mahkemesi Kararlarının Etkileşimi Üzerine Bir İnceleme" (2000) 49 Ankara Üniversitesi Hukuk Fakültesi Dergisi, 88 et al.; Geçer, Non bis in İdem (n 21) 334-335.

52 Bahçeci, "Etkileşim" (n 17) 19.

53 See. Kocaer (n 28) 44.

54 Law No. 5728 O.J. 08.02.2008-26781) For Law's preamble see. Kocaer (n 28) 44-45.

55 Kocaer (n 28) 45. For the same direction also cf. Akkaya (n 40) 92-93.

At this point, the matter of connection is essentially taken into consideration in the more recent decisions of the European Court of Human Rights. Although the processes for tax inspection and 3-fold tax loss penalty tax evasion process generally proceed simultaneously, they are carried out independently and independently. As a matter of fact, in terms of Turkish Law, the fact that the decisions of the tax court and the decisions of the criminal court may be in a different direction is criticized on the grounds that the definitive judgment authority of the courts and also the legal security of the addressee of the tax penalty are damaged[56]. Although the provision of the law expresses the opposite; in addition to the opinion that if the tax court, which is a specialized court, has reached the conclusion that tax evasion does not occur in one case and this decision is finalized, criminal sanctions should not be imposed on this case[57], it is also stated that the case should be dismissed due to the final verdict not to continue the trial in the other case after any of the verdicts given in one of these courts are finalized, regardless of whether it is in tax or criminal proceedings[58]. However, it is seen that these views were not adopted by the Court of Cassation. According to the jurisprudence of the Court of Cassation, the criminal courts will evaluate whether there is tax evasion or not, and whether there is an intention to evade tax. In a case brought before it, the Court of Cassation found it unlawful to grant an acquittal based on the tax court's decision, which was finalized after the Council of State's assessment that there was no need to apply a triple tax loss penalty because tax evasion did not occur[59]. Here, whether the perpetrator committed the act knowingly or not is discussed in the final decision after the examination of the Council of State. While there is a final judgment given by the Council of State, it is emphasized that the legal characterization of the same act again and the re-trial of the perpetrator constitute a violation of the principle of ne bis in idem[60].

Since tax loss is not required as a rule for the tax evasion crime to exist, the tax loss misdemeanor was not committed will not be made. In this case, if the Supreme Court decides that the act was committed intentionally and that the tax evasion crime was committed, there are two separate provisions, but this situation will not constitute a violation of the principle[61].

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56 See. Yusuf Karakoç, *"Türk Vergi Ceza Hukuku Üzerine Bir Değerlendirme"* (2010) 12 Prof. Dr. Burhan Ceyhan'a Armağan, Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, 3-26, 11-14; Karakoç, Genel Vergi (n 33) 502-503; Karakoç, Vergi Ceza (n 23) 186-187; Akkaya (n 40) 91-95; Bilici and Başaran Yavaşlar (n 34) 54; Yaltı (n 10) 90-91; Kocaer (n 28) 44-45; Geçer, Non bis in İdem (n 21) 334-335.

57 Erman, *"Ticari Ceza"* 88 (quoted. Akkaya (n 40) 88); Akkaya (n 40) 93.

58 See. Kocaer (n 28) 48-49.

59 SCPD., 16.10.2001 F.2001/11-213, D.2001/219, kazancı içtihat bankası, 01.03.2021.

60 Geçer, Non bis in İdem (n 21) 335.

61 See. Geçer, *"Non bis in İdem"* (n 21) 336-337.

In the criminal court, the acquittal decision made within the scope of "not being certain that the charged crime was committed by the defendant" (Article 223/2-b of the Code of Criminal Procedure) and based on the determination of veracity should be taken into consideration in the trial in the tax court. However, if the acquittal decision is given in the criminal court because the crime is certain, the intentional examination by the tax court will result in a repeated trial[62].

And also, it is not expected in every case that the result will be favorable or unfavorable in both criminal and tax proceedings for the perpetrator of the act subject to the proceedings. In contrast with the tax loss penalty was imposed on the real person representative of the legal entity on the grounds that he caused tax loss by using false documents by the tax administration, in the trial held by the criminal court, this person may be acquitted on the grounds that it cannot be proven that he is the person who committed the crime. The acquittal of the legal entity representative on the ground that "it is not proven that the offence was committed by the accused" is not sufficient to prove that there is no tax loss due to the false document used by the legal entity[63]. In addition, the European Court of Human Rights argues that the principle of ne bis in idem will not need to be applied in cases where the perpetrator of the misdemeanor of tax loss and the perpetrator of the tax evasion crime are not the same[64]. However, since taxation is based on the same material issue, it must be accepted that the principle of ne bis in idem is also in question in tax crimes of legal entities[65].

It may be possible for the judge of the criminal court to decide in a different direction not only in the case of legal entities committing a tax crime, but also in cases where the tax court accepts the case due to reasons such as the statute of limitations and unlawfulness of the notification without going into the merits of the case. In such cases, the principle of ne bis in idem cannot be justified necessity to decide in the same direction.

On the other hand, the acquittal decision of the criminal court by determining the real commercial relationship, existence of the act, the existence of the element of intent should also be taken into consideration by the tax

62 See. Bahçeci, *"Uyum Sorunu"* (n 3) 162-163; cf. Torun (n 60) 606.

63 Bahçeci, *"Etkileşim"* (n 17) 17-19. Also see Candan, "Suçlar" (n 60) 310, Yılmazoğlu (n 64) 300.

64 Manasson İsveç 20.07.2004 App. No. 41265/98. The Constitutional Court also has decisions in the same direction. See, the Turkish Constitutional Court Mehmet Turgay Özbekler, App. No: 2017/20779, 11/3/2020 Also see Torun (n 62) 572.

65 In a similar direction cf. Rençber and Özalp (n 63) 33-35. cf. Torun (n 60) 591; Yunus Emre Yılmazoğlu "Anayasa Mahkemesi'nin 213 sayılı Vergi Usul Kanunu'nun 367. Maddesinin Son Fıkrasının İptali Yönündeki Kararının Vergi Uyuşmazlığından Doğan İdari Davalara Etkileri" (Temmuz 2022) Ankara Barosu Dergisi 80, 267, 276. For evaluation about "idem factum" see. Şenol (n 36) 213-218.

court[66]. Also, if the judge of criminal court, for example, made an "intentional examination" in the judicial process, this issue should also be evaluated by the tax court judge. Likewise, if the tax court has made determinations regarding the material event in its decision, these issues should also be considered by the criminal court[67].

The fact that tax and criminal courts can give independent and different decisions does not comply with the criteria underlined by the European Court of Human Rights in its Glantz and Bjarni decisions[68]. When evaluated together with the final decisions, in accordance with the principle of ne bis in idem, in case of tax evasion crime and tax loss, both imprisonment and administrative fine are should not be applied[69]; it is emphasized that the application of one of the two sanctions should take place[70].

The last paragraph of Article 367, which was highly criticized by the doctrine to be contrary to this jurisprudence of the European Court of Human Rights, was annulled by the recent decision of the Constitutional Court[71]. In the court decision, the European Court of Human Rights emphasizes "the completely independent progress of the proceedings and their lack of integrity" in accordance with its jurisprudence. According to the Court, *"The right to a fair trial basically guarantees that the trial process and procedure are carried out in accordance with fairness, and for this reason, it is necessary to take into account the issues that may affect this process in the trial/punishment process. In this context, it may be necessary to ensure an adequate connection between the processes, otherwise consequences may arise that violate the guarantees of the right to a fair trial. The right to a reasoned judgment even if there is no sufficient connection between the prosecution/punishment processes related to tax evasion offences and tax offences committed in connection (see Mehmet Okyar, App. No: 2017/38342, 13/2/2020), decisions may be made in a way that is incompatible with the guarantees of the right to a fair trial such as the presumption of innocence.*

It cannot be argued that the decisions of different bodies, authorities, which deal with the acts of tax evasion offences and misdemeanors that can be

66 Candan, "Suçlar" (n 60) 609, Torun (n 60) 615, Yılmazoğlu (n 64) 268-270.

67 Candan, "Suçlar" (n 60) 613- 615. See for the opinion that the decisions not related to the detection and evaluation of the evidence in the criminal justice system do not need to be taken into account in the administrative jurisdiction, Candan, "Suçlar" (n 60) 614; Torun (n 60) 606. cf. Yılmazoğlu (n 64) 271.

68 In a similar direction see. Yaltı (n 10) 90-91; Geçer, A ve B v. Norveç (n 11) 118.

69 Bilici and Başaran Yavaşlar (n 34) 53; Karaçoban Güneş (n 28) 102.

70 Yaltı (n 10) 91; Geçer, Non bis in İdem (n 21) 338; Dilemre Öden (n 27) 2451. For the opinion that only imprisonment should be applied out of the two sanctions in question, see. Bilici and Başaran Yavaşlar (n 34) 53.

71 Constitutional Court 04.11.2021, F. 2019/4, D. 2021/78, (O.F. 09.03.2022-31773).

committed in connection with the provision of sufficient connection regarding procedural guarantees in different dimensions, and which characterize and evaluate them according to their own procedures and rules, should bind each other in all cases and conditions, nor is it possible to conclude that they should not bind each other under any circumstances. Therefore, it is understood that the rule that prevents the establishment of a connection between the tax evasion offence committed by related acts and the trial/punishment processes related to tax offences may constitute a violation of the guarantees within the scope of the right to a fair trial."

It is controversial what kind of practice it will be after the annulment of the Constitutional Court. At this point, it is thought that it is useful to remind the solution proposals before the annulment decision. It is rightly stated that the criminal court should decide that the crime has been determined in order to give three folds penalty to the taxpayer due to the occurrence of the crime of evasion[72]. Another solution proposal brought to ensure interaction in tax and criminal proceedings is that one makes the disposition of the other case a pending issue[73]. A proposed way to resolve this contradiction in two ways is by imposing a basic sentence on the basis of the review report and completing the sentence upon the finalization of the conviction of the criminal court[74]. And also, it is recommended that the prior decision made should affect the ongoing proceedings, even without making a pending issue[75].

The second way was to define the monetary penalty to be determined as the secondary penalty of the tax evasion if the court decides to convict the crime[76].

Another solution proposal is to find a solution by looking at the realization of the crime in the article regulating the tax evasion crime. It is suggested that the criminal court should make the decision of the tax court a pre-

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72 See. Özgür Biyan, *"Aynı Fiil Nedeniyle Vergi Ziyaı Cezası ve Hapis Cezasının Birlikte Uygulanması: Non Bis in İdem İlkesi"* (2016) 145 Lebib Yalkın Mevzuat Dergisi, 100-107, 105-106; Bahçeci, "Uyum Sorunu" (n 3) 163; Dilemre Öden (n 27) 2452; Burcu Demirbaş Aksüt, *Vergi Anlaşmazlıklarının Çözüm Yolu Olarak Uzlaşma* (On İki Levha 2021) 231.

73 Akkaya (n 40) 96; Horozgil (n 16) 289. The French Tax Code is given an example, see Candan, "Suçlar" (n 60) 617-618.

74 Karakoç, "Değerlendirme" (n 44) 13-14; Yusuf Karakoç, *"Vergi Ceza Hukukuna İlişkin Tesbit ve Öneriler"* (2020) Prof. Dr. Nami Çağan Anısına Armağan (Atılım Üniversitesi), 321-382, 336-340; Biyan (n 55) 105-106. Biyan adds that it is also possible to consider imposing this amount in the form of a judicial fine. Also see, Doğmuş (n 23) 112-113. For the opinion that the punishment for the crime of smuggling should be rearranged, see. Demirbaş Aksüt (n 55) 231.

75 Candan, "Suçlar" (n 60) 617.

76 Karakoç, "Değerlendirme" (n 44) 13-14; Karakoç, "Öneriler" (n 56) 336-340. On the other hand, it is also stated that it is not possible to implement these solution proposals if the penalty is imposed on a legal entity, Bahçeci, "Etkileşim" (n 17) 23. It is also recommended that the prison sentence be suspended in cases where public loss is remedied. Şenol (n 36) 301.

emptive matter for the actions which are regulated in Article 359 of the Tax Procedure Law and which require tax techniques to be prosecuted. According to this view, in this case the criminal court should be bound by "the intention examination" by the tax court. For other cases, it is stated that it would be more appropriate for the tax court to wait for the decision of the criminal court. It is also emphasized that this solution should not be provided by an amendment to the Tax Procedure Law, but by the case law to be established by the Court of Cassation and the Council of State[77].

EVALUATION AND CONCLUSION

When the jurisprudence of the European Court of Human Rights on the subject is examined, we can briefly summarize its approach as follows: The Court does not consider the imposition of two different sanctions due to the same act but the operation of two different enforcement processes as a violation of the double trial prohibition. At this point, it primarily looks at the nature of sanctions and whether they serve the same purpose. It then focuses on the relationship between the judgments made about them. If the proceedings proceed in the same process in connection with each other, then it is concluded that there is no contradiction to Article 4 of the additional 7th protocol regulating the prohibition of double proceedings. In the practice of many countries, including our country, it is seen that the crime of tax evasion is subject to both criminal and administrative sanctions, and these two regulations indeed serve different purposes. In terms of our country, what was thought to be contrary to the jurisprudence of the European Court of Human Rights and the principle of proportionality was that the proceedings related to these sanctions should be conducted separately from each other. As a matter of fact, when a taxpayer who is decided that he does not have an intention to commit a crime by a criminal court decision or that the documents that form the basis of the tax administration's decision by the tax court, which is a specialized court, were not found fake, the act of finding the taxpayer guilty in the other court harms the legal security of the taxpayer.

With its recent decision, the Constitutional Court annulled the provision that "the decisions of the criminal and tax courts will not bind each other" in accordance with the jurisprudence of the European Court of Human Rights. As a matter of fact, the fact that there was no connection between both judgments and that these judgments were not part of the same whole constituted a violation of the right to a fair trial and ne bis in idem principles. The question of what kind of practice will be after the annulment decision has not yet been answered.

[77] Bahçeci, "Etkileşim" (n 17) 23 and 30. Also see Tosun (n 60) 615.

In the current situation, in order not to violate the ne bis in idem principle whichever of the tax and criminal courts decide first, the other should take that decision into account at the stage of the proceedings. In order to comply with the principle, the existence of regulations- adhibitions that will ensure the simultaneous execution of the proceedings is necessary. The connection between the proceedings can be established by the information-document-evidence they will demand from each other while the proceedings continue between the tax and criminal courts. In the same way, whichever of the tax and criminal proceedings is finalized first, the other should proceed with his judgment by taking this decision into account.

Although it is not very common in practice, if the criminal trial ends first and the outcome of the trial is a conviction or acquittal decision based on the merits of the case, the tax court should consider and adhere to this decision. In this context, the tax court must establish a connection with the process in criminal proceedings (in terms of collection-evaluation of evidence and determination of facts) in making its decision. In the same way, in case the tax proceedings are concluded earlier, as is common in practice, the scope of the annulment or rejection decision given by the tax court should be considered. The criminal court has to make a decision in connection with the process of the tax case. For example, if the tax court gives an annulment decision for a procedural reason without depends on the merits of the case, this decision will not bind the criminal court judge. Thus, if the tax court as a specialized court, makes an examination of the tax technique report, the determinations made here have to be considered by the criminal judge.

As a result, it is necessary to establish a connection between the cases, to use the case material used by the first one and benefit from it while making a decision. In cases where a different decision is required due to the nature of the concrete case, the reason for making a different decision should be clearly stated. For example, an annulment decision due to the lapse of time or inadequacy of notice in the tax court may be a reason for a different decision for the judge of the criminal court. As a matter of fact, the tax court judge has not made a decision depending on the merits of the case. This situation does not constitute a violation of the ne bis in idem principle.

Considering the current judicial processes and durations, it is seen that tax proceedings are mostly concluded before the criminal proceedings. In this case, it would be in accordance with the ne bis in idem principle for the criminal court to make a decision by using the determinations in the tax proceedings and making a connection. It would already be more appropriate for criminal court to consider the decision of the tax court, for reasons such as the tax law requires special expertise and the tax examination report-tax technique report is the basis of the proceedings.

At this point, the question comes to mind whether it would be appropriate to make a regulation that the criminal court should wait for the decision of the tax court. In our opinion, considering the current regulations, this process should be carried out with the case law. As a matter of fact, a legal regulation to be made in this way will make the process compatible with the principle, but may also cause other problems in practice. A legal regulation or obligation does not always appear as a solution when different concrete events are evaluated. In exceptional cases, a determination made by the criminal court may be more important in the tax judgment process. Also, considering the weight of the total penalty, the legal regulation regarding the tax loss penalty, which should be tripled in case of loss of tax due to smuggling, needs to be reviewed. Otherwise, there will be a violation of the principle due to the disproportionateness of the total penalty.

Apart from the suggestions regarding the current situation, ultimately it is necessary to make changes in the regulations regarding the tax loss misdemeanor and the crime of tax evasion. In other words, legal regulations regarding tax evasion need radical change. First of all, the connection between the tax loss misdemeanor and the tax evasion crime should be abated. If tax loss has occurred without the suspicion of smuggling has arisen, the tax loss penalty should be imposed. The process- trial regarding this penalty should also be resolved in tax courts. In case of suspicion of tax evasion along with tax loss or only tax evasion, the file should be sent to the Prosecutor's Office without applying a tax loss penalty. In this case, the tax loss penalty should not be applied separately. At the stage of individualization of the punishment, in addition to the prison sentence by taking into consideration the tax loss an additional judicial fine should be imposed in an amount that will not be less than this tax loss. However, a case in this direction should be tried by the "Tax Criminal Courts", which also have technical expertise in the field of tax law. The Council of Judges and Prosecutors has also decided that some criminal courts of first instance will serve as specialized courts in the field of taxation in order to ensure this specialization (O.F. 30.11.2021-31675).

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