

# General Rule of Burden of Proof: Comparative Analysis of Turkish and German Tax Law<sup>1</sup>

Peer-Reviewed Article (Hakemli Makale)

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**ABSTRACT**

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The Turkish Tax Procedure Code, originating from the Reich Fiscal Code, following a different legal development, shows the background and an alternative version of the German General Tax Code. Regulating the burden of proof in Turkish tax law, Section 3 of Turkish Tax Procedure Code, represents economic perspective and despite the additions made in the legislation such as burden of proof in 1980, needs to be amended according to the developments of law and global necessities. The regulation is actual by a Reform Draft of Turkish Tax Procedure Code. In the Section 5 of the Draft, the rules about general anti abuse and burden of proof are redesigned. Since the regulation is actual, the rule of burden of proof should be discussed historically, theoretically and comparatively with the German General Tax Code. The subject corresponds with the general anti avoidance clause and interpretation rules and the concept of economic perspective in both tax systems. The rule of burden of proof is not only a rule of procedure but it is also related with the basic principles of tax law such as legal safety and ability to pay principles and taxpayer' rights.

**Keywords**

International Law, Tax Law, Human Rights Law, Legal System, Litigation Process

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**ÖZET**

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**Genel İspat Yükü Kuralı:  
Türk ve Alman Vergi Hukuku Bakımından Karşılaştırmalı Bir Analiz**

Alman Mali Krallık Kanunu esas alınarak hazırlanan ve Mevaz Kanun'dan farklı bir yasal gelişim izleyen Türk Vergi Usul Kanunu, Alman Genel Vergi Kanunu'nun alternatif bir versiyonunu ifade etmektedir. Türk vergi hukukunda genel ispat yükü kuralını düzenleyen Vergi Usul Kanunu'nun 3. maddesi, ekonomik yaklaşımı içermekle birlikte, 1980 yılında maddeye getirilen eklemelere karşın hukuktaki gelişmeler ve küresel gereklilikler çerçevesinde yeniden gözden geçirilmelidir. İlgili düzenleme, Vergi Usul Kanunu Tasarısı sebebiyle günceldir. Tasarının 5. maddesi ispat yüküne ve vergiden kaçınmaya ilişkin genel kuralı yeniden düzenlemektedir. Mevcut Vergi Usul Kanunu'nun ve Vergi Usul Kanunu Tasarısı'nın Alman Genel Vergi Kanunu ile tarihi ve teorik gelişimi bakımından karşılaştırılarak değerlendirilmesi faydalı olacaktır. Konu her iki hukuk sisteminde yorum kuralları, vergiden kaçınma ve ekonomik yaklaşım ilkesinin içeriği ile kesişmektedir. İspat yükü kuralı yalnızca bir usul kuralı değildir; aynı zamanda hukuki güvenlik ve mali güce göre vergilendirme gibi temel vergi hukuku kuralları ve yükümlü hakları ile yakından ilgilidir.

**Anahtar Kelimeler**

Uluslararası hukuk, vergi hukuku, insan hakları hukuku, yasal sistem, yasa yapım süreci

## Introduction

Turkish Tax Procedure Code (TTPC) is in operation since 1961, first version of which was mostly adapted from the German Reich Fiscal Code. As tax law is a branch of administrative law in Turkey, the general taxation matters are regulated in the TTPC.

Turkish Tax Procedure Code Sec. 3, regulates many important tax law subjects within, which are interpretation, a general anti abuse clause, proof in tax law and the general rule of burden of proof. This regulation has been criticised for being inefficient for the necessities of the global law while a Reform Draft about Turkish Tax Procedure Code is actual and being discussed in literature.

In line with the OECD's BEPS project, member states redesigned their general and special anti avoidance clauses. While Germany enlarged the Sec. 42 of General Tax Code (AO) with a rule of burden of proof; Turkey is still in the Draft process of amending its general anti-avoidance provision to strongly tackle tax avoidance strategies addressed throughout the action plans<sup>1</sup>.

In this article, the general rule of burden of proof in German and Turkish tax legislations is going to be analysed in a comparative study. Firstly, the historical backgrounds of the related legislations are going to be presented, then the theoretical and juristic approaches in both systems are going to be compared and lastly the current legislations and the rule of burden of proof in the Turkish Tax Procedure Draft Code are going to be discussed in means of taxpayer rights such as presumption of innocence and right to object and basic principles of tax law. Burden of proof is not only a rule of procedure, it is also related with taxpayer's rights and basic principles of tax law and mostly economic perspective. That is why the general rule of burden of proof should be read together with the rules of interpretation and anti abuse.

## 1. Comparative Historical Background

The German Reich Fiscal Code which was put into force in 1919, included the economic perspective (*wirtschaftliche Betrachtungsweise*), regulated in Sec. 4 as<sup>2</sup> "*when interpreting tax legislation, its purpose, its economic significance and developments are to be taken into account.*" Economic perspective is a principle specific for tax law, means taking real economic quality and content as the base for establishing taxable events and the interpretation of acts beyond legal forms<sup>3</sup>.

1 Leyla ATEŞ: "Summary", International Fiscal Association Rio de Janeiro Congress, Volume 102, A: Assessing BEPS: Origins, Standards and Responses, Rio de Janeiro 2017, p. 766.

2 Marcus SEILER, GAARs and the Judicial Anti-Avoidance in Germany, the UK and the EU, Linde Verlag, 2016, p. 12.

3 Mustafa AKKAYA, Vergi Hukukunda Ekonomik Yaklaşım, Turhan Kitabevi, Ankara 2002, p. 267; Hakan UZELTÜRK, "National Report of Turkey", The Burden of Proof in Tax Law, ed. By Gerard Meussen, EATLP Conference, Uppsala June 2011, p. 269. Also see AKÇAOĞLU, Ertuğrul: "ABD Vergi Hukukunda Özün Şekle Üstünlüğü İlkesi", Ankara Barosu Dergisi, 2012/2 for the implementation of this principle in American tax law.

The general anti-avoidance rule (GAAR) was maintained in Sec. 5, while the meaning of an abuse was given in the first paragraph<sup>4</sup>: *“where tax legislation is circumvented by abusing legal options, taxes are to be levied in such a way as if the economic situation had been brought about in its appropriate legal structure.”*

The conditions of abuse of law were explained in the second part of Sec. 5 as<sup>5</sup>, *“in cases, where the law subjects economic activities, facts and measures in their appropriate legal structuring to a tax, though for tax avoidance an inappropriate, unusual legal form has been chosen or legal arrangements have been carried out ...”*

In 1934 Fiscal Adjustment Act was put into force, changing the interpretation rule in German tax law with the first paragraph of Sec. 1, stating that tax legislation shall be interpreted with the official ideology, which was accepted as the *“the basis for an excessive and unlimited interpretation”* of taxing statutes in literature<sup>6</sup>. The second paragraph continued with the provision that *“the people’s view, the fiscal legislation’s purpose, economic significance and the developments in circumstances are to be taken into account”*<sup>7</sup>.

Fiscal Adjustment Act also transformed the GAAR and the perception of economic perspective with its Sec. 6, presenting that *“the tax liability cannot be avoided or reduced by abusing forms or legal options offered by private law”* and *“in case of abuse, taxes have to be levied in accordance with a legal arrangement appropriate to the economic activities, facts and measures.”*<sup>8</sup>

After the Second World War, The Federal Republic of Germany was found and German General Constitution (Grundgesetz) was accepted in 1949. As taxation is the first sign of sovereignty, this foundation effected the tax norms very soon. While Sec. 1 (1) of the Fiscal Adjustment Act was deleted, the Sec. 1 (2) kept its presence as the interpretation rule in German tax law.

The development of German tax law in this period is explained by the Pfennig cases in 1935 and 1948, the changing attitude of the Fiscal Court in line with the amendment in the law<sup>9</sup>.

At this time of legal transformation of German tax law, Turkey was having its own tax reforms. One of these was the adaption of Turkish Tax Procedure Code from the

4 SEILER, 13.

5 SEILER, 15.

6 Bernd RÜTHERS, *Die Unbegrenzte Auslegung: zum Wandel der Privatrechtsordnung im Nationalsozialismus*, Mohr Siebeck, 7. Unveränderte um ein neues Nachwort erweiterte Auflage 2012, p. 101; SEILER, 17.

7 SEILER, 17.

8 SEILER, 17.

9 SEILER, 17-19: *“The Pfennig Case of 1935 was about an employee who agreed with his employer to reduce his monthly wage by RM 0,01 so he would receive RM 499,99 instead of RM 500,00 to save a duty of the employee ... The Reich Fiscal Court decided that self interest of a single person was incompatible with the statute (RFH 22.5.1935 VI A 467/34 RFHE 38, 44).*

*In the second Pfennig Case, again an employer reduced an employee’s wage by RM 0,10 so that the employee would pay less tax ... The court declared that the taxpayer can reduce his tax as long as he respects the limits of Sec. 5 and 6 (RFH 9.3.1948, III 26/47 RFHE 54, 231)”.*

German Reich Fiscal Code. In the first version (no. 5432, TTPC of 1949) and in the second version (no. 213, TTPC of 1961) of TTPC there was not an interpretation rule or an anti abuse rule; only the definition of the tax code was in Sec. 3.

In 1980, some important amendments were made in the TTPC Sec. 3 under the title "Practise of Tax Laws and Proof". Firstly, the interpretation rule was maintained in the Sec. 3/A-2; as "*Tax acts are effectual with their literal and spiritual construction. When letters of act are not clear, tax law decrees will be enforced according to the aim they were prepared for, their place in the structure of law and their connection with other articles*".

Secondly, the instruments of proof, rules of proof system and the general rule for burden of proof was added in the Sec. 3 as paragraph (B). According to the paragraph, "*In taxing, the situation that causes the tax and actual nature of the proceedings related to the situation are fundamental ... Burden of proof is on the party who claims it when object at issue is not suitable to economical, commercial or technical requirements or when it is not usual or common.*"

The first paragraph of TTGC Sec. 3/B is accepted as the legal basis where the economic perspective derives from in Turkish tax law.

The last paragraph of Sec. 3/B regulates the burden of proof in Turkish tax law. The "unusual legal form" which was counted as one of the conditions of abuse in the first version of GRFC, maintains the place of burden of proof in actual Turkish tax system; one who claims the object of issue is unusual, has the burden of proof. So the burden of proof can be either on the administration or the taxpayer. But the concept of "unusuality" is maintained with the case law, according to the interpretation of judges, a limited interpretation by the principle of legality and comparison ban in tax law.

In Germany, there was a major tax reform in 1977, when the German General Tax Code was put into force. This tax reform also changed Sec. 5 of the Reich Fiscal Code -that included the general anti avoidance rule- into Sec. 42 of the German General Tax Code as "*The tax code must not be circumvented by way of abuse of legal planning opportunities. In case of an abuse, the tax liability is created as if the tax planning followed sound business reasons.*"<sup>10</sup> This amendment of law is called "the readaption of economic perspective" in literature<sup>11</sup>. GGTC Sec. 42, provides that the tax claim will be based on the legal form of the transaction that is appropriate to the legal factual situation, when abuse of a legal construction is established<sup>12</sup>.

However the provision was still criticised for not explaining the concept of abuse within the Section clearly<sup>13</sup>. Bundesfinanzhof explained the meaning of the "abuse" by

10 KESSLER W. & EICKE. R., "Germany`s New GAAR- Generally Accepted Anti Abuse Rule?", Tax Notes International Vol. 49, No.2, Jan 14, 2008, 151-153.

11 SEILER, 21.

12 Frans VANISTENDAEL, "Legal Framework for Taxation" in Tax Law and Design vol. 1, ed. by Victor Thuronyi, IMF, USA 1996, p. 51.

13 See Ulrich PALM, "Germany", A Comparative Look At Regulation of Corporate Tax Avoidance, ed. By Karen Brown, Springer, Washington 2012, p. 167.

case law. The Große Senate of the Bundesfinanzhof declared<sup>14</sup> that a motive to reduce tax is not an inappropriate act itself<sup>15</sup>, tax planning can be considered as tax avoidance “when the taxpayer chooses a legal construction which was inappropriate in view of the objective pursued, it involved a lower tax cost and could not be justified on the basis of business or other considerable nontax reasons”<sup>16</sup>.

The German legislator described the concept of abuse as, “a tax benefit deriving from the choice of an unusual legal form used for non-tax related reasons that the taxpayer cannot prove”<sup>17</sup> and in 2008, changed Sec. 42 of GGTC enlarging by a second paragraph in line with the perspective of Bundesfinanzhof<sup>18</sup>:

*“(1) It shall not be possible to circumvent tax legislation by abusing legal options for tax planning schemes. Where the element of an individual tax law’s provision to prevent circumventions of tax has been fulfilled, the legal consequences shall be determined pursuant to that provision. Where this is not the case, the tax claim shall in the event of an abuse within the meaning of subsection (2) below arise in the same manner as it arises through the use of legal options appropriate to the economic transactions concerned.*

*(2) An abuse shall be deemed to exist where an inappropriate legal option is selected which, in comparison with an appropriate option, leads to tax advantages unintended by law for the taxpayer or a third party. This shall not apply where the taxpayer provides evidence of non-tax reasons for the selected option which are relevant when viewed from an overall perspective.”*

This amendment is accepted to bring a two steps of proof system<sup>19</sup>: “At the first step the tax administration has to substantiate that the taxpayer’s legal arrangement is inappropriate. If the tax authority sustains the inappropriateness, in a second step the burden of proof will be shifted on the side of the taxpayer”. This new formulation was criticised in literature for shifting the burden of proof on the taxpayer<sup>20</sup> and not defining what “inappropriate” means<sup>21</sup>.

14 PALM, supra note 152: “BFH Aug. 27, 2007, 219 Sammlung der Entscheidungen des Bundesfinanzhofs (BFHE) 32; BFH Dec. 17, 2003, 205 (BFHE) 70; BFH Jan. 16, 1996, 179 (BFHE) 400”.

15 See BFH Mar. 20, 2002, 198 Sammlung der Entscheidungen des Bundesfinanzhofs (BFHE) 506 (F.R.G.).

16 PALM, 167.

17 BT Drucks 16/6290 at 24, 25: “Durch Missbrauch von Gestaltungsmöglichkeiten des Rechts kann das Steuergesetz nicht umgangen werden. Ein Missbrauch liegt vor, wenn eine zu einem Steuervorteil führende ungewöhnliche rechtliche Gestaltung gewählt wird, für die keine beachtlichen außersteuerlichen Gründe durch den Steuerpflichtigen nachgewiesen werden. Ungewöhnlich ist eine Gestaltung, die nicht der Gestaltung entspricht, die vom Gesetzgeber in Übereinstimmung mit der Verkehrsanschauung zum Erreichen bestimmter wirtschaftlicher Ziele vorausgesetzt wurde. Liegt ein Missbrauch vor, entsteht der Steueranspruch wie bei einer gewöhnlichen rechtlichen Gestaltung.”

18 SEILER, 22.

19 Roman SEER, “National Report of Germany”, The Burden of Proof in Tax Law, ed. by Gerard Meussen, EATLP Conference, Uppsala June 2011, p.11.

20 SEILER, 26, 27.

21 KESSLER & EICKE, 152.

## 2. Allocation of Burden of Proof in German Tax Law

The implementation of burden of proof in German tax law derives from both theory and jurisdiction<sup>22</sup>. The general burden of proof rule in German law is based on the Rosenberg's norm theory (Normenbegünstigungstheorie) in civil process law, in which each party must prove the facts underlying a rule favorable to its position<sup>23</sup>. German administrative tribunals have applied this theory, when uncertainties concerning facts on which a party has based its claims must be proved by such party unless the norm itself provides otherwise<sup>24</sup>. While judges are obliged to investigate and to present evidence on their own (Untersuchungsgrundsatz), parties have the burden of persuasion (objektiv Beweislast) rather than burden of production (subjektiv Beweislast)<sup>25</sup>.

### 2.1. Obligation of Cooperation

The relationship between the tax administration and the taxpayer in German tax law is established on the basis of cooperation. In GGFC Sec. 90, the obligation of participants to cooperate is regulated: "*Participants shall be obliged to cooperate with the authorities in establishing the facts of the case*". This obligation for taxpayers is supplementary for the administration's ex officio examination authority; the tax administration and the taxpayer share the responsibility in establishing the facts<sup>26</sup>.

In German tax law, distribution of burden of proof is maintained by the measure of proof. The obligation of cooperation creates a balance between the risk of evidence for the tax administration and the taxpayer. The general level of proof in Germany is convincing proof (which is in line with objektive Beweislast), however the level of burden of proof is reduced to a mere likelihood standard in discretionary tax decisions by the jurisprudence deriving from the Sec. 96 (1) of GGTC<sup>27</sup>: "*The court decides on its free conviction reached from the result of the process*". When the taxpayer does not accomplish his duty to inform or share the requested evidences, he breaches the obligation of cooperation, which changes the balance on behalf of the tax administration. According to the jurisdiction<sup>28</sup>, the breach of the obligation of cooperation by the taxpayer, reduces the level of proof which the tax administration has to accomplish<sup>29</sup>.

22 BFH, 25.7.2000, IX R 93/97, Bundessteuerblatt (II) 2001, p. 9

23 Leo ROSENBERG, Zivilprozessrecht, 5th edition, Munich 1965, p. 99: "Jede Partei hat die Voraussetzungen der ihr günstigen Norm zu behaupten und zu beweisen".

24 Julianne KOKOTT, The Burden of Proof in Comparative and International Human Rights Law, Kluwer Law International, Netherlands 1998, p. 12.

25 KOKOTT, 9.

26 Funda BAŞARAN YAVAŞLAR, Vergi Ödevi İlişkinin Tarafları Üzerinden Alman Vergilendirme Usulü (Hukuk Devleti Bakış Açısıyla), Seckin Yayıncılık, İstanbul 2013, p. 239.

27 SEER, "National Report of Germany", 130.

28 BFH, 10.5.2001, NV 2002, 957; BFH 17.10.2001, NV 2002, 134.

29 BAŞARAN YAVAŞLAR, 245.

## 2.2. Sphere Theory

If the tax administration cannot be certain about a fact despite of a reduced level of proof and if discretionary taxation is not possible<sup>30</sup>, the rule for objective burden of proof (negative burden of proof) is in application<sup>31</sup>. Then the tax administration has to prove the taxable income and the taxpayer has to prove the deductible expense, in line with the Rosenberg's norm theory in which each party must prove the facts underlying a rule favorable to its position.

This rule of burden of proof in civil law which is also called as the basic rule of the burden of proof in German tax law<sup>32</sup> and has been completed by a sphere theory (sphärenorientierte Beweisrisikoverteilung)<sup>33</sup> placing the burden of proof according to the income-side and cost-side facts:

According to sphere theory, if there is a lack of evidence because of the lack of cooperation of the taxpayer, the burden of proof is on the taxpayer when tax assessment is possible in a reduced level on the income side relevant facts or when tax assessment prerequisites convincing evidence on the cost side of facts. If there is not a lack of evidence because of the lack of cooperation of the taxpayer, the burden of proof is on the taxpayer when tax assessment is possible in a reduced level of mere likelihood of the cost side relevant facts or tax assessment prerequisites convincing evidence on the income side relevant facts.

Sphere theory considering both the obligation to cooperate and the measure of proof, distributes the burden of proof between the taxpayer and the tax authority. The tax authority must provide evidence regarding facts that give rise to the tax liability and that taxpayers must provide evidence regarding facts that reduce the tax liability<sup>34</sup>.

## 2.3. Current Legislation

After the Sec. 42 of GGTC was enlarged in 2008 by a second paragraph, the burden of proof in German tax law has a statutory character<sup>35</sup>: *"An abuse shall be deemed to exist where an inappropriate legal option is selected which, in comparison with an appropriate option, leads to tax advantages unintended by law for the taxpayer or a third party. This shall not apply where the taxpayer provides evidence of non-tax reasons for the selected option which are relevant when viewed from an overall perspective."*

First of all, this legislation does not oppose the sphere theory, it completes the theory with economic perspective. The burden of proof is explained by the concept of

30 BFH, 21.03.2002, BStBl II 2002, 417.

31 BAŞARAN YAVAŞLAR, 247.

32 SEER, "National Report of Germany", 128.

33 Roman SEER, Seer, R., Verständigungen in Steuerverfahren, Cologne 1996, p. 191 et seq.

34 SEER, R. & GABERT, I., "European and International Tax Cooperation: Legal Basis, Practice, Burden of Proof, Legal Protection and Requirements", *Bulletin for International Taxation*, February 2011, p. 95, 96.

35 See Wilhelm FISCHER, in *Hübschmann/Hepp/Spitaler, AO/FGO, Lieferung 09.2017, § 42 AO* 244: "The German government's first proposal to include a feature "unusual design" in the law has not passed the parliamentary hurdles."



abuse and the general rule of anti-abuse. When the burden of proof is shifted to the taxpayer, it is his responsibility to provide evidence for an economic substance test; a proof that a legal arrangement was made not only based on tax related reasons<sup>36</sup>. The first sentence brings a rebuttable presumption that an inappropriate legal option leads to tax advantages unintended by law is an abuse of law. However, what is "inappropriate" is left to be defined by the jurisprudence. The Bundesfinanzhof describes "inappropriate" as "any legal structure that two unrelated and reasonable parties would not have chosen to achieve a specific business goal"<sup>37</sup>.

As German legislator defined the concept of abuse by the term "unusual" in the BT Drucks 16/6290 before the amendment in 2008, the concept of "inappropriate" can be understood as "unusual" at least, following the tradition of economic perspective in the German Reich Fiscal Code, placing substance over form; but more comprehensive than that, "a misuse of a legal form not intended by the law". So, what defines the appropriateness is the legislator's meaning in the legislation itself, depending on the concrete tax matter, demanding historical interpretation<sup>38</sup>. So Sec. 42 of GGTC is combining two interpretation methods, historical interpretation detecting the "appropriateness" and economic perspective detecting the "anti avoidance".

### 3. Allocation of Burden of Proof in Turkish Tax Law

The rule for burden of proof in Turkish civil law is regulated in Sec. 6 of Turkish Civil Code as "Each of the parties concerned must prove their claims unless law orders otherwise"<sup>39</sup>. The party who claims an exceptionally contrary situation has to prove their claim<sup>40</sup>. This rule is in line with the rule of burden of proof in Turkish tax law.

#### 3.1. General Rule of Burden of Proof

**In Turkish tax law, the general rule of burden of proof is based on statutory law, regulated in the Art. 3 of the Turkish Tax Procedure Code as "burden of proof is on the party who claims it when object at issue is not suitable to economical, commercial or technical requirements or when it is not normal or usual."<sup>41</sup> The "unusual legal form" which was counted as one of the conditions of abuse in the first version of GRFC, maintains the place of burden of proof in actual Turkish tax system. This rule is in line with the rule of splitting the burden of proof between taxpayers and tax administration in German General Tax Code.**

36 SEER, "National Report of Germany", 132.

37 KESSLER & EICKE, 152.

38 FISCHER, 244.

39 UZELTÜRK, 265.

40 UZELTÜRK, 265.

41 UZELTÜRK, 269.

The rule of burden of proof in Turkish tax law states a presumption of usual course of events. The usual course of events, flow naturally from the existence of the primary fact, so that there is such a strong rational connection between the two that is unnecessary to require evidence of the presumed fact in the absence of unusual circumstances<sup>42</sup>.

German Federal Supreme Court (Bundesgerichtshof), in cases about prima facie evidence (Anscheinsbeweis)<sup>43</sup>, has used the concept of "usual course of events" to establish the relationship between common life experiences and proof. According to the Supreme Court, the usual course of events can be explained with "general experiences, especially the judge`s experiences"<sup>44</sup>.

Turkish legislator has taken the "unusual legal form" case of the GRFC while adapting the TTPC from Germany and transformed it into a presumption of abuse which sets the general burden of proof in Turkish tax law. If the object of taxation is not suitable to economical, commercial or technical requirements, or it is unusual, it is against the usual course of events so it needs to be proved.

The general rule for burden of proof in Turkish tax law is not contrary with the Rosenberg`s theory in German tax law<sup>45</sup>; taxpayer has to prove the unusual events subject to taxation which also will diminish his/her tax obligation. Unlike German tax law, the measure of proof is not a method used in Turkish tax law to present the burden of proof so the rule generally works in favour of the tax administration.

### 3.2. Case of Sua Sponte Assessment

In Turkish tax law, all proceedings about taxes must be kept and presented by the taxpayer when the tax inspectors need to examine the taxpayer`s records (TTPC. Sec. 148, Sec. 247 Dupl. Entry). Accomplishing this duty, taxpayer is under protection of a presumption for the correctness of his/her books and records. This presumption is also regulated in German tax law as "die Vermutung für die Richtigkeit von Buchführung und Aufzeichnungen" in GGTC Sec. 158<sup>46</sup>.

If the taxpayer has not accomplished his/her duty to keep the records, documents and books obliged by the TTPC, the tax administration has the burden to prove otherwise. If the taxpayer has not accomplished his/her duty to keep the records correctly, documents and books obliged by the TTPC, tax administration has the authority for sua sponte assessment (TTPC Sec. 30) which demands discretionary taxation. In this case, the burden of proof will stay on the taxpayer as not keeping the records, documents and books partly, completely or correctly, is not only a breach of obligation, but also

42 Richard GLOVER, *Murphy on Evidence*, 15th Edition, Oxford University Press, UK 2017.

43 Michael SCHMIDT, *Die Problematik der objektiven Beweislast im Steuerrecht*, Schriften zum Steuerrecht Band 59, Dunckner&Humboldt, Berlin 1998, p. 302, 303.

44 Ecehan YESİLOVA, "CMR-Taşıma Senedinin İspat Kuvveti", *Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi*, 7 (1), 2005.

45 Eda Özdiler Küçük, *Vergi Hukukunda Karineler*, Adalet Yayınevi, Ankara 2011, p. 30.

46 Dieter BIRK, *Steuerrecht*, 12. Auflage, C.F. Müller, Heidelberg 2009, p. 147.

damages the reliability of the taxpayer's tax declaration. If the taxpayer objects the sua sponte assessment, he/she has to prove that the factual backgrounds are in accordance with tax regulations. Claiming a taxable income not corresponding with his/her represented records is "claiming an object at issue which is not normal or usual" according to the general rule for burden of proof, so the burden of proof is on the taxpayer<sup>47</sup>.

This application on Turkish tax law is in line with the sphere theory in German tax law, but without considering the measure of proof. Lack of cooperation for an obligation sets the burden of proof on the taxpayer, whether the assessment is income side or cost side.

In Turkish tax law, all proceedings about taxes must be kept and presented by the taxpayer when the tax inspectors need to examine the taxpayer's records. "Not presenting" these records or books are accepted as "hiding" them and this action is regulated as a crime of tax evasion. In literature, it was widely discussed that if this regulation breaches the presumption of innocence<sup>48</sup>. The Constitutional Court has ended these discussions deciding that "keeping the proceedings about taxes and presenting by the taxpayer when the tax inspectors need to examine the taxpayer's records is an obligation and cannot be considered as presenting proof against the taxpayer himself/herself so it is not against the presumption of innocence which is regulated in the Art. 38 of the Constitution"<sup>49</sup>.

### 3.3. The Actual Draft of Tax Procedure Code

As the general rule for burden of proof was maintained within the Code in 1980 in Turkey, the concept of "unusual" was not described in the legislation or in the literature with a theory. The jurisdiction explained it by case law, not presenting a precise definition but on the examples of concrete cases; such as:

"Invoices are issued according to a certain line so if an invoice is used, the previous is deemed to be used"<sup>50</sup>.

"Taxpayers have the duty to keep their books and documents maintained by the TTPC. Claiming that the books and documents were lost or stolen is not appropriate with the usual flow of life"<sup>51</sup>

"According to the economic circumstances, without a relationship of business or being relatives, lending money without interest is against the economic requirements."<sup>52</sup>.

Although the Council of State's efforts to maintain a pattern for the definition of what is "unusual", a precise description was not available. The actual developments of

47 Yusuf KARAKOÇ, Genel Vergi Hukuku, Ders Kitabı, Yetkin Yayınları, Ankara 2017, p. 678; Neslihan KARA-TAŞ DURMUŞ, Gazi Üniversitesi Hukuk Fakültesi Dergisi, C. XVIII, S. 3-4, 2014, p. 515, 516; Özgür BİYAN, Türk Vergi Hukukunda İspat-Delil, Adalet yayınevi, Ankara 2012.

48 Billur YALTI, Yüklümlü Hakları, Beta Basım Yayım, İstanbul 2006.

49 Constitutional Court, E. 2004/31, K. 2007/11, k.t. 31.1.2007, R.G. 18.5.2007- 26526.

50 Tax Division of the Council of State, E. 2001/10, K. 2001/146, 6.4.2001.

51 Council of State, 7. Circuit, E. 2000/8771, K. 2004/812, 5.4.2004.

52 Council of State, 7. Circuit, E. 1998/441, K. 1999/3596, 3.11.1999.

global law required a more developed general anti avoidance rule and hence the revision of rules of burden of proof. That is why a Reform Draft of Tax Procedure Act was presented, which was widely discussed in the literature.

Sec. 3 of the Draft Code maintains the new GAAR as it announces, "*taxpayer's planning of his tax liability in favour of himself*" as an abuse; therefore, also calls tax planning an abuse. This rule can be criticized for leaving economic approach. Remembering the history of economic approach in German tax law, in the Pfennig Case, an employer had reduced an employee's wage by RM 0,10 so that the employee would pay less tax. The court had declared that the taxpayer can reduce his tax as long as he respects the limits of the law<sup>53</sup>. Tax planning in the framework of the law is a right of taxpayer that keeps the balance between the civil law and tax law. Understanding of such a wide concept of abuse and accepting all legal arrangements that diminish taxes as abuse of law is stepping out of the tax law zone into the civil law zone.

The new general rule for burden of proof in the Draft Code is "*if the taxpayer claims that the object at issue is not suitable to economical, commercial or technical requirements or when it is not normal or usual, the burden of proof is on the taxpayer.*"

The present rule which puts the the burden of proof on the party that has the claim of unusuality, is changed into a presumption of correctness of the tax assessment. In the previous rule, the burden of proof could be on the taxpayer or the tax administration according to the claim of the party; whereas in the Draft, the burden of proof is fixed on the taxpayer. This provision on the Draft Code violates the EU Law; remembering the ECJ emphasizing on "transactions having the primary aim of tax avoidance or tax evasion have to be proven by the tax administration on a case-by-case basis" in Leur-Bloem case (ECJ 17 July 1997, case C-28/95) based on the Art. 11 of the Merger Directive.

The new general rule for burden of proof in the Draft Code can also be criticized for violating the presumption of innocence. If the taxpayer is accused of a tax crime, he/she has to prove that he/she is innocent. This is a violation of Turkish Constitution Art. 38 and the Art. 6 of European Convention of Human Rights which Turkey has accepted as a part of its law.

The true concept of economic perspective is very related with the burden of proof in tax law. Placing the burden of proof on the taxpayer without considering the presumption of innocence is far from taxing the "real" concept of tax base and economic perspective. Violating presumption of innocence is also a breach of the principle of legal safety.

The original draft version of the amendment of GGTC Sec. 42 was also discussed in the Federal Council (Bundesrat). The original draft version defined an abuse to exist where an "unusual legal arrangement" was chosen and was not giving the taxpayer the possibility to justify a legal arrangement on the grounds of sound business relations<sup>54</sup> (Englisch, 2013: 204), so the Federal Council recommended an alternative version which resulted with the current legislation (Seiler, 2016).

53 RFH III 26/47 RFHE 54, 231, 9.3.1948.

54 Joachim ENGLISCH, in Tipke, K. & Lang, J., Steuerrecht, 21. Auflage, Verlag Dr. Otto Schmidt, Köln 2013.

The actual draft of TTPC is also discussed in literature and the common view is an alternative version is necessary (Doğrusöz, 2016: 15-17).

## Conclusion

Turkey has been implementing the tax procedure based on the German General Tax Code since the adaption in 1949. Both German and Turkish tax procedure system is established of the principles of law state, equality and legal safety.

Germany has made an amendment in the rule for burden of proof in GGTC in 2008, by giving a definition of abuse, Sec. 42 served as a codification of previously decided cases by the Federal Fiscal Court and the ECJ<sup>55</sup>.

Turkey has an actual reform draft of TTPC which is redesigning the rules of interpretation, general anti abuse and burden of proof. In this process, German tax procedure law is a guide to be watched, because of the historical background and the similarity of the principles and institutions.

The German Constitutional Court has considered the procedural law and the substantive law together and concluded that a deficiency in procedural law damages the substantive law<sup>56</sup>. If a regulation of substantive law is not applicable because of an absence in the procedural law, the substantive rule is against the constitution as it cannot be applied equally<sup>57</sup>. If the economic perspective principle is not maintained in a tax system, the tax assessment will be different than it should be, and this will violate the principle of equality. Burden of proof is a rule which is related with the interpretation and general anti avoidance rules. These three rules are a part of a chain that is linked with the principles of legality, equality and fair trial and taxpayer rights.

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