The Evaluation of Tax Reconciliation in Turkish Tax Law ın Terms of The Basic Principles of The Constitution and The Rule of Law

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Abstract
There are various ways to solve tax disputes in tax law systems. The practice of tax reconciliation is one of the improved administrative solutions to solve tax disputes. In Turkish Tax Procedure Law, it is issued in two parts as "pre-assessment reconciliation" and "post-assessment reconciliation". The benefits of tax reconciliation application can only be reached if the reconciliation commissions act objectively and reasonably by considering the legitimacy of the tax. Tax reconciliation is an administrative solution mechanism and for this reason, area of usage has to be defined for concept of "administrative discretion" which is implementing in administrative process and activities. This study deals with the practice of reconciliation and evaluates its current situation in terms of the basic principles of the constitution and the rule of law.

Keywords: Tax Reconciliation, Administrative Discretion, Tax Procedure Law, Constitution, the Rule of Law
JEL Classification Codes: K34, K39, K40, K41

1. Introduction

The application of tax reconciliation is a mode of solving of the disputes between the tax administration and tax payers without resorting to judicial mechanisms by reducing amount of fine or tax (Bilici, 2012: 115). In Turkish Tax Procedure Law, it's stood in two parts as "pre-assessment reconciliation" and "post-assessment reconciliation". "Post-assessment reconciliation" has been in force since 1963 and "pre-assessment reconciliation" since 1986 (Hepaksaz, 2015: 712).

This study deals with the practice of reconciliation and evaluates its current situation in terms of the basic principles of the constitution and the rule of law

2. Pre-Assessment Reconciliation

The reconciliation before assessment can be applied about (i) the taxes will be levied on the basis of the tax inspection and (ii) fines associated with it (fines for loss of tax revenue, fines for non-compliance and special non-compliance). Both pre-assessment reconciliation and post-assessment reconciliation are considered as general administrative dispute settlement methods. In terms of fines, reconciliation before assessment is of general character whereas the conciliation after assessment is of a special administrative dispute settlement method involving the fine of loss of tax revenue (Kaplan, 2013: 139).

3. Post-Assessment Reconciliation

The conciliation after assessment can be applied about (a) taxes assessed by the administration, (b) the fine of loss of tax revenue.

To employ the reconciliation option, (i) the loss of tax should be associated with inability to apprehend the provisions of the relevant legislation, (ii) or caused by the misinterpretations underlined in article 369 of the law on taxation, (iii) attributed to the tax errors referred to in articles 116, 117 and 118 and there should be difference between judicial

decision and the stance of the political administration on the same dispute [*TPL, aa.1]* (Hepaksaz, 2015: 713).

In the reconciliation process, part of the tax and the accrued fines are canceled by the administration. On the other hand, this allows the administration to collect tax and fines without a judicial method. Under the practice, the taxpayer gives up on his or her right to file a lawsuit. In return, he or she would pay fewer amounts of tax or fines and become exempted from judicial expenses (Ercan, 2009: 227).

The outcomes and results of the reconciliation process and practice reveal that it is used as a dispute settlement method in tax law. It is also seen that conciliation is used as alternative method to the judicial methods. For instance, the taxpayers are not allowed to benefit from reduction from fines when they benefit from the application of reconciliation. In other words, only one of the advantages can be used in this option. In case reconciliation is attained, it is not possible to resort to a judicial method. Lawsuit can be filed only if reconciliation is not attained (Hepaksaz, 2015: 721).

4. The Evaluation of Tax Reconciliation

Tax reconciliation in Turkish tax law can be studied in three parts; (a) in terms of the use of the administrative discretion in tax law, (b) in Terms of the Fundamental Principles of the Supremacy of Law and the Rule of the Law, and (c) in Terms of the Principle of the Economic Approach.

a. In Terms of the Use of the Administrative Discretion in Tax Law

The administrative power in administrative law can be studied in two parts as non-discretionary power and administrative discretion. Within the scope of non-discretionary power, the methods and procedures are previously identified by a legal rule. In this area, the administration has no option or choice in its decisions (Üstün, 2007: 16). On the other hand, in the administrative discretion, the administration has option or choice to make a preference.

However, by virtue of the supremacy of law, the rule of law and the principle of legal administration, the administrative discretion need to be used within the legal boundaries. From this perspective, the administrative discretion does not mean arbitrary decision and is identified by legal boundaries. The administration needs to act on certain principles and rules. Judicial inspection in this respect plays an important role here (Sancakdar, 2014: 380).

Discretion is used frequently in the administrative law, but rarely in tax law because of the legality principle in taxation as specified in the constitution. This indicates that introduction, change or abolishment of a tax is only possible through laws. To talk about a taxation law, that law should include principal elements (subject, payer, source, tariff and rate, exemption, declaration and times of payment). What matters in tax law is the introduction of tax laws, their change and abolishment by the legislative body. Thus, it can be said, that the tax administration generally and usually acts in the scope of non-discretionary areas (Hepaksaz, 2015: 717).

The tax procedure law does not include any specific practice on the administrative discretion applicable to the content of the talks of reconciliation, the conditions and the amount. This raises a question as to whether the tax procedure law is ambiguous on this matter (Başaran, 2010: 167).

In respect to "pre-assessment reconciliation", the procedural tax law states that the finance ministry ***may allow*** for reconciliation before assessment in the ***fines*** and ***taxes*** to be assessed based on a tax inspection [*TPL aa. 11*]. In respect to post-assessment reconciliation", the same law states that it is ***possible to have a conciliation with the taxpayers*** by reference to the provisions in that section "on the additional assessment", "arbitrary assessment" and "on the taxes assessed by the administration" before and on the amount of the fines to be issued based on this assessment [*TPL aa. 1*].

A plain reading of the tax procedure law reveals that the finance ministry and the tax administration have full discretion on a reconciliation about the tax and fine (Başaran, 2010: 169). However, it should be noted that whether or not this refers to a administrative discretion remains disputable. A review of the provisions reveals that the scope of the discretion is limited to (1) taxes and (2) fines. On the other hand, there is no provision on the amount of reduction in the fines or taxes. This means that different reduction rates may be observed in different instances of conciliation. And the outcomes of the commission works on reconciliations may also generally be different. In this case, the reconciliation practice as underlined in the tax procedure law can be seen as a unique authority (sui generis) without upper and lower limits recognized to the finance ministry and the administration. In addition, even such limits had been identified, the legislative body, not the executive body, is responsible and empowered in the suspension of the taxes and fines (Hepaksaz, 2015: 718-719).

b. In Terms of the Fundamental Principles of the Supremacy of Law and the Rule of the Law

b1. The Principle of Legality

According to the Turkish Constitution from 1982, the abolishment of the taxes and the fines can only be done by the legislative body under the constitution. Articles 73 and 38 of the constitution clearly specify that introduction and abolishment of a tax is possible only through law-making. In addition, the constitution also recalls that the supremacy of the constitution should be considered in the legal process and in the government as well. Articles 8 and 11 are clear on this matter. Article 8 reads as follows: “Executive power and function shall be exercised and carried out by the President of the Republic and the Council of Ministers in conformity with the Constitution and laws.” And article 11 is as follows: “The provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals.” Article 123 of

the constitution also notes that administration is an integrated whole governed by the laws. In recognition of the principle that the laws cannot be in violation of the constitution, article 150 also regulates application for annulment of the laws with the constitutional court.

Constitution states that amount of taxes and fines are identified by law alone. Both introduction and abolishment of the taxes can be made through law. The principal reason for requirement of a law in the taxation process is because it is relevant to fundamental rights and freedoms. This principle is invented to avoid arbitrary practices and decisions (Üstün, 2007: 51).

On the other hand, article 38 of the constitution also notes that both crimes and punishments need to be prescribed in the law; for this reason, crimes and punishments ascribed to taxation frauds and offenses can be enforced under a relevant law. But the constitution makes an exception in the field of taxation; under this exception, the committee of ministers is allowed to introduce changes within the specified limits by the law on exceptions, exemptions and reductions in tax rates and amount of fines. The cabinet cannot transfer this power to another body; and it is also not possible to delegate this power by law to another institution. Use of this power by another state organ is in violation of the constitution (Üstün, 2007: 62).

However, the taxation procedure law recognizes a power to the finance ministry and the administration in lifting or substantially reducing the fine. This power, not recognized to the committee of minister, is attributed to the commission of conciliation holding the power of representing the administration (Yılmaz, 2009: 338-339).

As such, the practice of conciliation is in violation of the supremacy of constitution and other major principles of the constitution. Thus, the practices and decisions of the finance

ministry and the administration in this matter go beyond the limits of the discretionary power. (Hepaksaz, 2015: 719).

b2. The Principles of Generality and Equality

In its current standing, the practice of conciliation is working against the principle suggesting that taxes and fines should be prescribed by law and the principle of supremacy of the constitution. The outcomes of the practice are also in violation of the principle of equality which is guaranteed under the constitution. The taxpayers who are equals before the law are subjected to different treatments; the taxpayers who observe their payments are punished by the practice of conciliation whereas those who fail to pay them in time are rewarded under this practice. For this reason, overall, the practice violates the principle of equality (Adibeş and Akkurt, 2014: 58-59).

The practice, as it stands, leads to inequality between different taxpayers; and even in cases where taxpayers ask for conciliation, the practice does not employ established rules or methods (Üstün, 2007: 259). The conciliation, not based on concrete and objective criteria, leads to different taxation practices and impositions among different taxpayers (Başaran, 2010: 166).

c. In Terms of the Principle of the Economic Approach

However, it should be noted that in a democratic state governed by the rule of law where the principle of separation of powers is strongly implemented, the judicial organs are the venues to settle the disputes. Even though the court-load is heavy and that number of judicial cases is growing fast, it will not be proper to believe that the disputes should be settled by administrative methods and means. In addition, involvement of the judicial bodies in the disputes ensures judicial review and inspection of the case and identification of any matter that can be considered illegal. This is also appropriate in terms of the economic

approach principle as underlined in the taxation procedure law which seeks to unveil the material fact in the taxation process.

For instance, when the taxpayer resorts to the judicial review and wins the case, he or she will not bear the relevant cost; and in case he or she proves that he or she is right, the taxpayer will not have to pay the tax or the fine. The same also applies to the administration. If the judicial process reveals that the administration is right in its claim, the whole amount of tax or fine will be collected and avoid any loss in the taxation. I believe that this method is more appropriate than the administrative review and is in line with the principle of supremacy of law.

5. Conclusion

The practice of reconciliation is designed as "pre-assessment reconciliation" and "post-assessment reconciliation" in the tax procedure law. It is possible to observe that the practice of reconciliation takes a unique character in terms of implementation (sui generis). The relevant statistics on the reconciliation talks may shed light on this matter. For instance, in 2013, 15.71 pct. reduction was adopted at the "pre-assessment reconciliation commission", 24.43 pct. at the "post-assessment reconciliation commission", and 39.69 pct. in the coordination reconciliation commission. However, the rate of the reduction in the "central reconciliation commission" was 87.01 pct. In respect to fines, the rate of the reduction at the "pre-assessment reconciliation commission "was 93.94 pct.; it was 94.13 pct. at the "post-assessment reconciliation commission". It was 99 in the "central reconciliation commission" and 96.92 pct. in the "coordination reconciliation commission". These figures reveal that the practice of reconciliation is now working to omit almost the entire fine and to reduce the original amount of tax.

The administration is generally and usually bound by the non-discretionary power in terms of the principle of legality. In this area, the administration has no option or choice in its

decisions. However, there are also a few exceptions in the field of tax law where the administration can rely on administrative discretion as well. However, the principle of legality specified in the constitution in the field of tax law narrowed the use of the administrative discretion and made it an exception.

There should be legal limits to the administrative discretion and it don't refer to arbitrary action by the administration. These limits are based on the principle of separation of powers, the supremacy of law and the rule of law. It should be noted that the practice of reconciliation in the Turkish tax law fails to meet the requirements of the democratic principles and the principle of supremacy of law.

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