

Constitutional Court Finds Additional Tax Regulation Not Contrary to the Constitution.

Development

In order to address the wounds caused by the earthquake disaster that occurred on February 6, 2023, in Kahramanmaraş and affected many surrounding provinces, the Turkish Grand National Assembly enacted Law No. 7440 dated March 9, 2023, on the Restructuring of Some Receivables and Amendments to Some Laws. The 27th paragraph of Article 10 of the said regulation ("**Law**") introduced an additional tax obligation for corporate income taxpayers benefiting from tax reductions. Many taxpayers objected to the additional tax levied under the Law, paid it under reservation, and filed lawsuits seeking the cancellation of the additional tax, also alleging its inconsistency with the Constitution.

Indeed, in a lawsuit filed with the Istanbul 1st Tax Court ("**Court**") seeking the annulment of the additional tax, the Court referred the issue of the alleged unconstitutionality of the Law to the Constitutional Court ("**CC**"). CC, in its decision numbered 2023/169 E. and 2024/82 K. dated March 14, 2024 ("**Decision**"), unanimously rejected the said objection. The Decision was published in the Official Gazette with the number 32522 dated April 19, 2024.

Constitutional Court Decision

The full text of the Law, subject to annulment on the grounds of unconstitutionality in the lawsuit, is as follows:

“(27) Corporate income taxpayers are subject to an additional tax of 10% on the exemption and deduction amounts from the corporate income specified in the Corporate Tax Law No. 5520 and other laws, as well as on the discounted corporate income subject to tax under Article 32/A of the same Law, without being related to the period income, and 5% on the exemption income obtained from abroad, which is subject to tax at a rate of at least 15% and proven, and this tax is calculated, and the first installment of this tax is paid within the payment period of the corporate income tax, and the second installment is paid in the fourth month following this period. This tax is not considered

as an expense or deduction and cannot be offset against any tax. Provided that exemptions under the (d), (i), (j), and (k) clauses of Article 5 of Law No. 5520, discounts within the scope of the first paragraph of Article 10 of the same Law, investment exemptions subject to withholding under temporary Article 14 of the same Law, donations and aids deductible from corporate income in accordance with the relevant laws, and gains subject to exemption and deduction from micro and small enterprises defined within the scope of Article 407 of the Presidential Decree No. 1 dated 10/7/2018 on the Presidential Organization and obtained from technology development zones and R&D and design centers are exempt from this tax. Corporate income taxpayers in Adana, Adıyaman, Diyarbakır, Elazığ, Gaziantep, Hatay, Kahramanmaraş, Kilis, Malatya, Osmaniye, and Şanlıurfa provinces and the Gürün District of Sivas Province as of 6/2/2023 are exempt from the additional tax. The collected additional tax is recorded as general budget revenue and is not taken into account in the calculation of shares to be given to local administrations according to Law No. 5779 and other laws. The procedures and principles regarding the application of this tax are determined by the Ministry of Treasury and Finance."

In summary, the Law stipulates that corporate income taxpayers benefiting from "certain" tax deductions under Law No. 5520 on Corporate Income Tax will be subject to the said additional tax.

Within the scope of the constitutional challenge raised by the application, the Law was alleged to be contrary to Articles 13, 35, and 73 of the Constitution based on the following summarized main reasons:

- The additional tax obligation imposed does not encompass all corporate income taxpayers and taxation is based solely on the amounts declared in the tax returns, thus violating the principles of "applicability for all taxpayers" and "equality in taxation" and the principle of "taxation according to ability to pay".
- The introduction of the additional tax regulation after the occurrence of the taxable event violates the principle of non-retroactivity of laws, which is one of the fundamental legal principles.

In the Decision, the CC first acknowledged the violation of the principle of non-retroactivity of laws in conjunction with the concrete additional tax regulation. However, by referring to its decisions dated March 28, 2001, and October 7, 2003 (CC, E.1999/51,

K.2001/63, 28/3/2001; E.2003/73, K.2003/86, 7/10/2003), the CC adopted the reasoning that *"although it can be said that the rule is retroactively applied, it should be accepted that laws can be applied retroactively through legal regulations due to unforeseen natural disasters, war and mobilization, political, economic, and social crises that can fundamentally disrupt society."* Therefore, the CC concluded that the Law did not constitute a violation of the Constitution in terms of the principle of non-retroactivity of laws due to the special circumstances created by the earthquakes on February 6.

In the Decision, regarding the allegation that the Law violated the right to property stipulated in Article 35 of the Constitution, the CC first elaborated on the procedure for limiting fundamental rights and freedoms through legislative organs based on Article 13 of the Constitution, emphasizing that such limitations must be made in accordance with the principles of legality and proportionality as required by the said procedure. In the evaluation made by the CC within the framework of these principles, it was stated that the Law clearly and unambiguously regulated the exemption amounts and the method of calculating the tax, and thus, it was concluded that the rule was specific and accessible and fulfilled the requirement of legality.

Furthermore, examining the compliance of the Law with the principle of proportionality, the CC stated in the Decision that *"it is possible to impose an additional tax obligation for the purpose of remedying the losses caused by extraordinary events such as earthquakes and ensuring social solidarity; it cannot be said that there is no legitimate aim in introducing an additional tax in this regard."* Thus, the CC affirmed that the additional tax introduced to alleviate the destructive effects of the February 6 earthquakes was conducive to achieving this legitimate aim. Regarding the necessity element, which is another part of the principle of proportionality, the CC, relying on the wide discretion of the legislator in the matter, did not make any comments on whether there was a less restrictive regulation that could achieve the same effect.

The CC, in the Decision, concluded that the limitation in the Law met the criterion of "proportionality" in terms of the limitation of fundamental rights by law, affirming with the following statements:

"According to paragraph (27) of Article 10 of Law No. 7440, an additional tax of 10% will be calculated on the amounts subject to exemption from corporate income under Article 10 of Law No. 5520, and this amount will be paid in two installments, one

within the payment period of corporate income tax and the other in the fourth month following this period. Moreover, it is clear that the legislator taxes the amounts to be deducted from the income with a rate much lower than the current corporate income tax rate using this tool within the scope of its discretion. Furthermore, the additional tax is temporary and is levied only once. Therefore, it is concluded that the individuals subject to the additional tax are not burdened excessively, there is no unreasonable imbalance between the benefits to be obtained as a result of remedying the losses caused by the earthquakes and the burden to be borne, and therefore, the limitation is proportionate."

Continuing with the Decision, the CC examined whether the Law constituted a violation of the principles of applicability for all taxpayers, equality in taxation and taxation according to ability to pay stipulated in Article 73 of the Constitution, and in this regard, it rejected the allegation of unconstitutionality based on the special situation created by the destructive effects of the February 6 earthquakes. The CC, in support of its adopted view, mentioned similar regulations in the Law No. 4481 dated November 26, 1999, enacted after the earthquake disaster commonly referred to by the public as the "99 Earthquake" affecting the Marmara Region, and stated that the applications for annulment were also made at that time, but were rejected by the CC with similar reasons in its precedent decision (CC, E.1999/51, K.2001/63, 28/3/2001 T.).

Finally, mentioning similar evaluations made in appeals against the additional motor vehicle tax regulation introduced in 2023, the CC (CC, E.2023/131, K.2023/160, 28/9/2023, § 25) presented similar decisions made in similar cases as precedents and stated, "According to the Decisions, it is understood that the CC ruled that introducing additional taxes, subject to - within the limits of proportionality - compensate for the economic losses caused by extraordinary events such as earthquakes, does not contradict the principles of taxation according to ability to pay and fair distribution of the tax burden." Therefore, the CC, continuing the understanding that the Law was necessitated by the February 6 earthquakes, ruled that it was not contrary to the Constitution.

Conclusion

In conclusion, the CC signed a decision stating that some fundamental principles of Constitutional Law may not be exceptionally applicable for the purpose of public interest,

and ruled that the additional tax regulation enacted was not contrary to the Constitution, thus rejecting the substantive objection of the Court.

You can access the full Turkish text of the Decision from [here](#).

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