

English Translation

ANNULMENT OF THE PROVISION CONCERNING THE CALCULATION OF THE PENALTY FOR THE LOSS OF TAX BY THE CONSTITUTIONAL COURT AND ITS CONSEQUENCES

Today, although the concept of the state of law is perceived to be the protection of the persons' rights against the activities of the executive authority and the subjectivity of any actions and activities of the administration to maintain this protection to the judicial review; the concept at issue actually consists of another important protection method. This method is related to the protection of the persons' rights against the legislative body. With the realization of such a necessity, the conformity of the laws passed by the parliaments formed by the representatives of the public as from 18th century with the Constitutions by which personal rights are guaranteed have gained importance and auditing the constitutionality of the legislative activities has emerged as a concept.

In our legal system it has been adopted that while any acts and activities of the administration shall be subjected to judicial review, conformity of the laws passed in the Turkish Grand National Assembly with the Constitution shall be controlled by the Constitutional Court. The compliance audit which is performed upon the filing of the President of the Republic, Parliament groups of government and main opposition party or at least one-fifth of the members of the Turkish Grand National Assembly in the Constitutional Court who are authorized to file a lawsuit in our Constitution when there are no concrete suit or instance where the law concerning the compliance audit applies is called abstract norm control; whereas the compliance audit which is performed through filing a lawcase in the Constitutional Court in the event that a provision of the law to be applied in a lawcase discussed in a court is observed to be against the Constitution or the claim of one of the parties on that it is against Constitution is found to be serious is called concrete norm control.

In our Constitution, after the control mechanisms, the detailed provisions concerning the features and consequences of the decision made by the Constitutional Court within this scope are also specified. For example, in Article 153 of our Constitution and Article 53 of the Law on the Establishment and Proceedings of the Constitutional Court, it has been concluded that the decisions of the Constitutional Court having binding effect on legislative, executive and judicial bodies, administrative authorities, real or legal persons are final, decisions of annulment cannot be made public without a written statement of reasons, in the course of annulling the whole, or a provision, of laws or decrees having the force of law, the Constitutional Court shall not act as a law-maker and pass judgment leading to new implementation, Laws, decrees having the force of law, or the Rules of Procedure of the Turkish Grand National Assembly or provisions thereof, shall cease to have effect from the date of publication in the Official Gazette of the annulment decision; where necessary, in order to fill the legal void arising from the annulment decision in the area it is concerned and to prevent ambiguity and confusion that this



annulment shall result in, the Constitutional Court may also decide on the date on which the annulment decision shall come into effect on the condition that this date shall not be more than one year with priority on the draft bill or law proposal, designed to fill the legal void arising from the annulment decision and annulment decisions cannot be applied retroactively.

As an instance of the compliance audit of the Laws in terms of the Constitution, a decision of the Constitutional Court concerning an issue passed on to itself by a local court with the claim that it was against Constitution was published in the Official Gazette in October (20.05.2005).

The Constitutional Court deemed proper the Ordu Tax Court's request of annulment of the part of the clause 2 of the Article 344 of the Tax Procedures Code that "*...this fine is found by adding to one hundred percent of the loss of tax fifty percent of the default fine calculated based on the amount of the loss of tax pursuant to Article 112 of this law for the period starting from the normal period of payment until the date of issue of the notice served for the fine,*" claiming that it is contrary to the Articles 2, 7, 10, 11, 38 and 73 of the Constitution and annulled the provision mentioned to take effect six months after the date of 20.10.2005 when the annulment decision was published in the Official Gazette.

As it can be understood from the statements above, the provision annulled by the Supreme Court is the calculation method of this fine, not the application of loss of tax. To render it more clearly, the Constitutional Court decided that this method is contrary to some provisions of the Constitution on the grounds we state below. The statement that "*a fine shall be imposed on those who commit the act giving rise to loss of tax*" is included in the article. However, due the annulment of the provision concerning the calculation method, there is no possibility for the fine of loss of tax to be applied in practice. This condition is fully valid for the evasion fine in calculation of which the calculation method of fine of loss of tax is indirectly used.

As it could be remembered, with the Law with No. 4369 passed in 1998 radical changes were introduced in the related provisions of the Tax Procedures Code concerning tax penalties and faults, gross faults and evasion fines applied of those causing loss of tax and determined on the basis of the tax amount lost up until that time were combined under the name of loss of tax in the Article 344 of the Law. In the Article mentioned, while it was concluded that fine of loss of tax would be imposed on loss of tax offences, in the Article 341 of the same Law, offence of loss of tax was defined as the situation the tax to be paid could not be accrued in time or accrued deficiently. In Article 344 it was decided that the fine amount of loss of tax would be found by adding to one hundred percent of the loss of tax fifty percent of the default fine calculated based on the amount of the loss of tax pursuant to Article 112 of this law for the period starting from the normal period of payment until the date of issue of the notice served for the fine.

The Constitutional Court based its decision of annulment on the grounds that "in the formula foreseen for the determination of the fine amount of loss of tax, the deferred tax used referring to the Article 112 of the same Law and the Article 51 of the Law on the Collection Procedure of

the Public Receivables is a rate determined by the Council of Ministers and the date when the deferred interest rate to be taken as the basis in calculation of the fine to be added to one hundred percent of the loss of tax shall be determined by the Council of Ministers is not known and this situation shall lead to an ambiguity in the fine amount to be foreseen in the end and this is contrary to the provision of the Article 38 that the penalties, and security measures in lieu of penalties, shall be prescribed only by law and also to the principles of state of law in Article 2 of the Constitution.”

In the Article 38 of our Constitution referred to in the grounds of the Court decision, it has been stated that no one shall be punished for any act which does not constitute a criminal offence under the law in force at the time committed and it has been concluded that penalties, and security measures in lieu of penalties, shall be prescribed only by law. This principle called “legality of penalties” is one of the principles that the international law greatly emphasize and this principle is based upon the fact that the persons know the penalty they will be imposed in return for the activities against the law beforehand. The prerequisite of maintaining this with no doubt is that the rules concerning the crimes and penalties are stated in the laws clearly, explicitly and conclusively.

The Supreme Court found the application of the deferred tax rate of which is determined by the Council of Ministers in the calculation of the loss of tax dealt in its decision contrary to the principle of legality of penalties on the grounds that the its date to be determined by the Council of Ministers is not known and thus it results in ambiguity and prevents the persons to know the penalty beforehand; decided to annul the provision. As it can be remembered, deferred interest is an additional payment specified in Article 112 of Tax Procedures Code and calculated at the rate of default fine determined in Article 51 of the Law with No. 6183 for the deferred tax assets not accrued on time. In Article 52 of the Law with No. 6183, the lawmaker determined the default fine rate as 4% for each month severally; however, the Council of Ministers is entitled to decrease the default fine rates down to 10% by months as a group or severally for each month and increase default fine are and its minimum amount by two fold. This situation is found to be contrary to the principle of legality of the penalties by the Supreme Court.

Although the application of the deferred interest in calculation of the penalty of loss of tax has been shown in the reasons for annulment of the court, in order to prevent the possible ambiguities that could emerge, it was deemed appropriate to annul whole provision concerning the calculation method. To put it more clearly, the provision which is annulled is not only the part of “...adding fifty percent of the default fine calculated based on the amount of the loss of tax pursuant to Article 112 of this law for the period starting from the normal period of payment until the date of issue of the notice served for the fine,” but is the whole provision, “...this fine is found by adding to one hundred percent of the loss of tax fifty percent of the default fine calculated based on the amount of the loss of tax pursuant to Article 112 of this law for the period starting from the normal period of payment until the date of issue of the notice served for the fine.” Therefore, on the basis of the court reasons, it is not possible to calculate penalty of loss of tax as a one hundred percent of the loss of tax.

As for the consequences of the annulment decision;

1) Since by annulling the part concerning the calculation method of penalty of loss of tax included in the second clause of Article 344 of Tax Procedures Code that “...*this fine is found by adding to one hundred percent of the loss of tax fifty percent of the default fine calculated based on the amount of the loss of tax pursuant to Article 112 of this law for the period starting from the normal period of payment until the date of issue of the notice served for the fine*”, although the statement that “a fine shall be imposed on those who commit the act giving rise to loss of tax” remained in the article, State Council also annulled the provision concerning the calculation method of the penalty, and thus made it inapplicable to practice both the penalty of loss of tax and the evasion penalty determined as three fold of the penalty of loss of tax.

2) As it has been stated in the decision of the Constitutional Court, the provisions concerning the calculation of the penalty of loss of tax shall enter into force six months after its publishing date (20.04.2006) in the Official Gazette. It has been stated in the Decision that the reason for the determining the effective day in this way is the opinion that the legal void arising from the annulment decision breaches the common good. It has been foreseen that within this period of six month the lawmaker shall make a new regulation. In the calculation of the penalties to be levied for the penalties offences of loss of tax and evasion committed within this period, the provisions annulled may be used. As a matter of fact, the Ministry of Finance, with its explanation made through the Tax Procedures Code Circular with No. 22 dated 10.11.2005 published on www.gelirler.gov.tr, reminding that a portion of the second paragraph of Article 344 of Tax Procedures Code was annulled by the Constitutional Court, stated in sum that the annulment decision of Constitutional Court shall enter into force six months after its publishing date (20.04.2006) in the Official Gazette, therefore the provisions annulled shall be in effect until the end of this six-month-period, thus practices of penalty of loss of tax shall be performed according to the provisions of this article until the end of this six-month-period, in other words, both for the taxes in assessment and taxes to be assessed after this date shall be processed in line with the present provisions of Article 344 of Tax Procedures Code.

3) We should note that the annulment decision of the Constitutional Court cannot be applied for the penalties of loss of tax given, finalized and paid up until now. That is, a fine of loss of tax paid before on the grounds of this annulment decision shall not be accepted. This is a requirement of the provision of Article 153 of our Constitution. In the Article mentioned it has been stated that the annulment decision taken by the Constitutional Court cannot be applied retroactively. However, this provision should not be considered as an absolute non-retroactivity. It has been emphasized that not only in principle but also in administrative legal jurisdictions, the principle of “non-retroactivity” should be dealt with an interpretation method which is reasonable, directed to purpose, and in compliance with the Constitution, according to the features of each incidence in terms of general legal principles such as common good, public order, stability, acquired rights, equality, equity and justice. Therefore, from the retroactivity of the annulment decision of the Constitutional Court concerning the calculation of the penalty of loss of tax, it should be understood that the penalties of loss of tax finalized on the effective date of the decision and applied cannot be made an object in controversy again. This is a requirement of

the Principle of the Legal Security, which we can define as the protection of the operations performed on the basis of a Law passed in compliance with the rule of law.

However, the collection the fines of loss of tax which are not paid by the taxpayer or the person in charge on the effective date of the annulment decision although has become definite shall not be possible since the provision it is based is annulled. Otherwise, this shall be against the justice and the general principles of the criminal law.

4) As required by the provision of the Article 153 of our Constitution, since the decisions of the Constitutional Court are binding for legislative, executive and judicial bodies, administrative authorities and real and legal persons, the annulment decision in question shall have effect on the court suits to be issued for the operations filing dates of which are not overdue and for the ongoing lawsuits for which a decision has not been taken yet. To put it more clearly, while the administrative courts are taking their decisions, they shall take into account that the provision concerning the penalty of loss of tax has been annulled by the Constitutional Court.

There are different opinions regarding whether or not the annulment decision shall be taken into consideration in the event that the ongoing lawsuits in the administrative courts are finalized until the date of 20.04.2006 when the annulment decision of the Constitutional Court takes effect. Those who state that it should be taken into consideration claim that taking into consideration the annulment decision before it takes effect is against the power of the Constitutional Court to delay the effective date of the decision for six months whereas those who defend that it should, bring up that the application of a provision determined to be contrary to Constitution on the grounds that it has not taken effect shall lead to injustice for persons. Both of the reasons should be taken into consideration. Some Constitutional lawyers claim that the only way to resolve this issue is the adjournment of the closing the ongoing lawsuits until the effective date of the annulment decision of the Constitutional Court.

5) Constitutional Court postponed the effective date of the annulment decision taking into consideration the common good and on its authority granted with Article 153 of our Constitution to six months later. However, due to the reasons emerging from our tax legislation, a retroactive void has emerged in the application of penalty of tax.

As it is already known, our tax legislation grants the administration the authority to review the taxpayers' accounts and operations and assess additional tax for five years beginning as of the beginning of the year. The issues leading to loss of tax determined in these reviews are evaluated according to the provisions in effect as of the date when the activity has emerged by the inspectors and penalized according to the provisions effective on that date. Since the provisions which are one of those mentioned and related to the calculation method of the penalty of loss of tax applied on the taxpayers causing loss of tax are annulled by the Constitutional Court, in the tax inspections concerning the previous periods, penalty of loss of tax and evasion penalty calculated on the basis of this penalty amount shall not be applied.

In summary, since the provision concerning the calculation method of the penalty of loss of tax has been annulled by the Constitutional Court, penalty of loss of tax shall not be applied for the offences loss of tax which are included in the period from the date when the provision is introduced in the law to the effective date of the annulment decision and committed within the fiscal period statutory period of limitation of which is not overdue although it has been determined by the inspectors.

NEW INVENTORY STANDARD IN NEW YEAR

Turkish Accounting Standards Board published the Communiqué with No 3 on the Accounting Standard concerning Inventories with No 2 to take effect in the accounting periods beginning as of 31.12.2005 with a view to maintain unity of application in accounting operations concerning inventories and to illuminate confusing issues.

In the Communiqué mentioned particularly two definitions stand in the front: Net Realizable Value and Original Purchase Value.

Net realizable value is the amount emerging after the total of estimated completion cost and estimated sale expenses required for sale is deducted from estimated sale costs in the normal flow of business.

Original purchase value is the amount expected to emerge in the event that an asset changes hands between the informed and willing groups in the mutual bargaining environment or a debt is paid.

Another important issue mentioned in the Communiqué is related to the appreciation of inventories. Inventories shall be appraised by the lower one between the cost and net realizable value.

In Article 10 of the Communiqué the scope of the inventory costs is specified. Inventory costs include all purchase costs, conversion costs and other costs incurred to establish the current state and status of the inventories. Since purchase cost is clear, it is worth describing the conversion costs. Conversion costs of inventories consists amounts distributed systematically from the fixed and variable general production expenses incurred in the conversion of costs directly related to production and inventories to finished goods just as the direct labor costs. Distribution of the fixed general production expenses over the conversion costs is based on the assumption that the production costs shall be in their normal capacities. In case of idle capacity or low capacity, undistributed general production expenses are recorded expense in the financial statements of the related period. Thus unit costs are prevented to increase nominally higher. Variable production expenses are allocated to production units in proportion to their share of use.

Examples for the expenses which are excluded in costs of inventories and considered as expenses of the period they emerged are presented below:

- a) Costs of first goods and materials (waste and losses), labor and other costs realizing higher than the normal
- b) Storage expenses other than the obligatory for the next production stage
- c) General administration expenses which have not contributed in the formation of the current state and status of the inventories and
- d) Purchase expenses.

Techniques related to Cost Measurement

In the enterprises where flow of production and distribution is not complicated, standard cost method may be used in the measurement of inventory cost. In the calculation of standard cost, usual levels of the use of first goods and materials, labor, efficiency and capacity are taken into consideration. Standard costs are reviewed regularly and if necessary restated in accordance with the present conditions.

Retail method is used by the enterprises rendering retail purchases in the appreciation of the inventories with similar profit margins and numerous items rapidly changing where it is not practical to use other cost methods. In this method, costs of inventories are calculated through deducting an appropriate gross profit margin from purchase value of the inventories. In the determination of the percentage rate to be used, the inventories priced below the real purchase price are taken into consideration. Mostly, for each retail purchase portion, an average percentage is used.

Calculation Methods of Inventory Costs

Special cost method, which is also called "real consignment cost method", is used in the production facilities where determination of the inventories which cannot be substituted for one another and of the product cost for each consignment is more practical and beneficial. In this method, it is necessary that the cost can be determined for each inventory item.

Costs of the inventories except those specified above is determined using the methods (formulas) of either first in first out (FIFO) or weighted average method. An enterprise employs the same cost calculation method for all the inventories with similar features and uses. Different cost calculation methods may be used for the inventories different in terms of kind and area of use.

Recording the Inventory Costs as Expense

Inventory costs may be recorded as expense only after the inventories are sold and the earning is transferred to the financial statements. Provisions of inventory value decrease reducing the inventories to their net realizable values and losses concerning the inventories can be recorded in the entries as expense in the period when reduction and losses emerge.

The inventories used for the assets produced and built to be used in the enterprises are converted to expense in the service period of the assets after they are added to the costs of these assets.

Conclusion

The main purpose of all these arrangements, as stated in the Communiqué mentioned, is to provide the domestic enterprises with an accounting system and balance that can be compared internationally and thus to attract foreign investment to our country.